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PREFACE

Reflections on the Rise of Judicial Power

Assertions of judicial power and controversies about its proper exercise are nothing new. Still, constitutional law and practice are not static and the scope of judicial power in any particular jurisdiction may wax or wane over time. The common law world has long shared a particular tradition of adjudication and legislation, although a tradition that has splintered, not least into distinct British and American models of constitutional government. In many of the jurisdictions that cluster around the former, not least the United Kingdom itself, the relative power of courts appears to have been expanding. This special issue reflects on this (apparent) phenomenon in various common law jurisdictions, asking why, whether and to what extent judicial power is on the march – and what to think about it.

In December 2016, we agreed to convene a special issue of this journal considering these questions. Somewhat over a year earlier, we had jointly set in motion the work of Policy Exchange's Judicial Power Project, an initiative aiming to examine critically and publicly the rise of judicial power in the United Kingdom, but with a view to this expansion likely forming part of a wider common law trend. This special issue, like that initiative, seemed a good fit with the interests each of us has in constitutional law and legal philosophy more generally. And it seemed a good opportunity, moreover, to invite colleagues to reflect on the changing separation of powers, whether in relation to their own jurisdiction or more widely.

It is no secret that we are sceptical about the expansion of judicial power, that we take it to put in doubt the balance of the Westminster constitution. The other contributors to this special issue, who work in Australia, Canada, Ireland, and the United Kingdom, are not united behind this, or any other, thesis. Some share our concerns; others do not. Some have written for the Judicial Power Project in the past, others are public critics of its work, and some have written for and are critical of it at least in part – none (apart from us) are responsible for it as a whole.

The issue opens with Grégoire Webber's article on the idea of judicial responsibility, which proceeds partly in conversation with John Finnis, a leading student of the common law constitutional tradition and frequent contributor to the Judicial Power Project. The next three articles consider: how and why Australia has largely contained the risk of over-mighty courts (Nicholas Aroney and Benjamin B. Saunders), how and why Canadian courts are increasingly undisciplined in some of their private law reasoning (Dwight Newman), and, in the Irish context, the risks that excessive judicial restraint may pose to constitutional government (Maria Cahill and Seán Ó Conaill). The remaining articles focus directly on (or on developments in EU law highly relevant to) the United Kingdom, in which much constitutional change has taken place and much controversy too. Mark Elliott, Britain's leading public law commentator, considers some fractures in recent constitutional law adjudication, including the high-profile *Miller* Brexit litigation. Judicial power in the context of the territorial constitution, and devolution to Scotland in particular, is the focus of the next article by Aileen McHarg, Chris McCorkindale and Paul Scott, with the article that follows by Gavin Phillipson returning to *Miller* and exploring its connections to legal and political constitutionalism. Gunnar Beck's article examines critically the work of the Court of Justice of the EU, which is not a common law court but has been and remains vitally important in the United Kingdom. The penultimate article, by Paul Craig, is a forceful critique of the Judicial Power Project, to which our own article replies in part, while

recalling the virtues of the common law tradition, tracing the reasons for its qualification, and charting a path for its restoration.

We thank all of the contributors for joining us in reflecting on the rise of judicial power and for their patience with our editorial efforts. Likewise, we are grateful to the journal's General Editor, James Allan, for extending to us responsibility for this special issue and for supporting it throughout with efficiency and good humour.

Richard Ekins, St John's College, Oxford
Graham Gee, University of Sheffield

JUDICIAL POWER AND JUDICIAL RESPONSIBILITY

GRÉGOIRE WEBBER*

I POWER AND RESPONSIBILITY

Not every act of adjudication by a court is an exercise of judicial responsibility. Some exercises of judicial power are not grounded in the reasons favouring judicial responsibility. Those exercises of power by judges invite reflections on the constitutional role of the judiciary, a role interrogated by thinking through the reasons why communities of persons would seek to regulate their affairs by awarding to a person or body of persons authority over disputes. The judiciary's role is appreciated by reflecting on the constitutional role of the legislature, a role itself interrogated by thinking through the reasons why communities of persons would seek to regulate their affairs by awarding to a person or body of persons authority to make law. These reflections on adjudication and legislation help identify the reasons for aligning the power to legislate with the legislature and the power to adjudicate with the court. In turn, they help identify how and why certain exercises of power by judges (judicial power) are not aligned with judicial responsibility and, thus, why responsible communities of persons should give pause before conferring certain powers on courts and why judges tasked with the exercise of such powers should give pause before exercising them too confidently.

Taking inspiration from H.L.A. Hart's insights into the reasons favouring constitutional rules that empower a person or body to perform the acts of legislating and adjudicating, I reflect on how institutions can be designed to exercise legislative and adjudicative powers *well*, that is, with the necessary capacities to fulfil their constitutional roles (Part II). These reflections point to the foundations of legislative and adjudicative responsibility and to a basic division in orientation.¹ I argue that the responsibility of the person or body exercising the power to change the law is to care for the community's *future*, a future to be directed by guiding and coordinating human behaviour by setting out rights and responsibilities (Part III). By contrast, the power to adjudicate conclusively on the requirements of the law in a dispute discloses a responsibility of a different orientation, a responsibility to relate to the *present* dispute the law as it was at that time *past* when the violation of the law is alleged to have occurred (Part IV). This basic division of responsibility—for the community's future; for relating the community's past acts to present disputes—is a division informed by the need to remedy different defects in human communities. (I leave aside the responsibility of the executive to carry out the community's legal commitments by administering the law in the present.)

With this division in view, I turn to the conferral of judicial power under charters of rights, with a special focus on open-ended charters of rights that leave the resolution of rights-disputes to a later day. The exercise of judicial power in such circumstances

* Canada Research Chair in Public Law and Philosophy of Law, Queen's University, and Visiting Senior Fellow, London School of Economics. For comments on a previous draft, I thank Richard Ekins and Graham Gee. My argument here tracks aspects of the argument developed in 'Past, Present, and Justice in the Exercise of Judicial Responsibility' in Grégoire Webber, Rosalind Dixon, and Geoffrey Sigalet (eds.) *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, forthcoming).

¹ My thinking on these matters was greatly influenced by John Finnis's Gray's Inn Hall Lecture for Policy Exchange's Judicial Power Project, 'Judicial Power: Past, Present and Future' (20 October 2016), published in John Finnis, *Judicial Power and the Balance of Our Constitution*, Richard Ekins (ed.) (London: Policy Exchange, 2017).

is, I argue, partially unmoored from the past and open to the future (Part V). In adjudicating whether a change in the law complies with the open-ended requirements of a charter of rights, a court is invited to choose between different possible understandings of those requirements and, in so doing, is invited to chart a path for the community's future. It is a role for which the court is institutionally ill-designed, as revealed by a series of court-led reforms to the judicial forum. Those reforms disclose judicial concern for the misalignment between the conferral of judicial power and settled understandings about judicial responsibility and its significance in a community governed by the Rule of Law (Part VI).

II REASONS FOR INSTITUTIONAL DESIGN

Hart's account of the reasons favouring constitutional rules that empower a person or body to perform the acts of legislating and adjudicating did not address the question of institutional design, but his explanatory method of identifying defects in need of remedy assists one in thinking through answers to the questions: 'What is a legislature?' and 'What is a court?'. By identifying the purpose (objective, goal, end) of the Rule of Change (to 'deliberately adapt' the primary rules of obligation to 'changing circumstances, either by eliminating old rules or introducing new ones')² and the purpose of the Rule of Adjudication ('to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken'),³ Hart's methodology begins to chart a path for understanding the nature of the legislature and the nature of the court, even if it is a path he did not pursue.⁴ It is a path charted before him by Aristotle and repeated by Aquinas that ties together the nature of something and its reasons for being: 'the *nature* of *X* is understood by understanding *X*'s *capacities* or capabilities, those capacities or capabilities are understood by understanding their activations or *acts*, and those activations or acts are understood by understanding their *objects*', their objectives, purposes, reasons.⁵

Following this methodological path, we may explore the nature of the legislature by understanding the capacity of the legislature, a capacity understood by reference to legislative action, an action itself understood by interrogating the reasons for legislating. For the Rule of Change to perform its remedial purpose, it must empower a person or body not only to make changes, but to make *good* changes, changes that are soundly responsive to the defect of more or less static primary rules, changes that do not themselves beget yet more defects in need of remedy. As Hart's account shows in outline, the responsibility that accompanies the Rule of Change is to 'deliberately adapt' the law to 'changing circumstances', that is: to change the law when there are sound reasons to do so.⁶

So, too, with the nature of the court: it is explored by understanding the capacity of the court, a capacity understood by reference to judicial action, action itself

² H L A Hart *The Concept of Law* (Oxford University Press, 3rd edn, 2012) 92.

³ Ibid 96.

⁴ I do not claim that H L A Hart charted this path or is best read as having done so. I argue only that it is a path invited by his method, even if it is a method that Hart distanced himself from in the Postscript to *The Concept of Law*. On different readings of *The Concept of Law*'s celebrated ch. V, see John Gardner, 'Why Law Might Emerge: Hart's Problematic Fable' in Luis Duarte D'Almeida, James Edwards, and Andrea Dolcetti (eds.) *Reading HLA Hart's The Concept of Law* (Hart, 2013).

⁵ *De Anima* II, 4: 415a16-21; *ST* I q 87, a 3c. The quotation is from John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998) 29.

⁶ Hart, above n 2, 92-93. See also Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 127 and, generally, ch. 5.

understood by interrogating the reasons for adjudicating. For the Rule of Adjudication to perform its remedial purpose, it must empower an adjudicator to rule not on the basis of the flip of a coin (which would be more efficient) or on the basis of what the law should have been either in the past when the alleged rule violation occurred or today when the matter is set for resolution; rather, the Rule of Adjudication must empower a person or body to settle disputes fairly on the basis that a law has been violated; that is, to resolve disputes by ‘determin[ing] authoritatively the fact of violation of the rules’.⁷

In thinking through the capacities that an institution will require in order to perform well its remedial function, one may query whether the capacities that are necessary in order to change the law well are the same as the capacities necessary in order to adjudicate well. If one concludes, as do sections 3 and 4, that the capacities needed for good law-making differ in their fundamentals from the capacities needed for good adjudicating, then the division of legislative and adjudicative responsibilities can be justified on the grounds that each responsibility will be better performed if legislative and adjudicative powers are awarded to different institutions. And, as subsequent sections will aim to demonstrate, the design features that award an institution the capacity to adjudicate well will frustrate that same institution’s ability to legislate well. These considerations, I argue, invite reflections on the merits of certain conferrals of judicial power.

III RESPONSIBILITY FOR THE FUTURE

To legislate — to change the law — is to take responsibility for the community’s future by determining that the set of inter-personal relationships governed by the law should be this way rather than that. It is to determine what, as a matter of law, is to be prohibited, permitted, and required for the good and rights of the community’s members. The power to make this determination and to act on it is in contrast with the defective state of affairs that led Hart to identify the need for a Rule of Change: the ‘slow process of growth’ with unofficial primary rules, ‘whereby courses of conduct once thought optional become first habitual or usual, and then obligatory’ only then to be followed, perhaps, by ‘the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed’.⁸ To remedy this defect of the more or less static character of primary rules, there is a need for a power to ‘deliberately adapt’ the primary rules of obligation to ‘changing circumstances, either by eliminating old rules or introducing new ones’.⁹

Hart’s Rule of Change is introduced to empower a person or body to change the law deliberately (with resolve, for reasons) in response to a change in circumstances. Though left underexplored by Hart, those circumstances are far-reaching and include changes both to *factual premises* (confirmation or contradiction of factual predictions, technological advances, changes in membership and environment, etc) and to *normative premises* (evaluations of right and wrong, good and bad, benefits and burdens, etc). Some premises will be informed by expertise on which there is broad consensus, others will be arrived at tentatively due to the burdens of judgment. Though identified by Rawls as sources of reasonable disagreement *between* persons, the burdens of judgment are here intended to encompass the challenges each *one* of us will encounter in making sound judgments. Among those challenges will be difficulties in assessing and evaluating conflicting and complex evidence, difficulties in identifying

⁷ Hart, above n 2, 93-94.

⁸ Ibid 92-93.

⁹ Ibid 92.

the relevant considerations and in determining their weight, difficulties in making overall assessments given incommensurabilities, and difficulties in ranking alternative courses of action.¹⁰ All premises will be debated between persons in the circumstances of politics.¹¹

Factual and normative premises are *reasons* favouring (or not) a change in the law. Any change in relationships governed by law will be intended to achieve good ends and may have unintended, but accepted side-effects, all held in view in choosing whether to change the law. That choice will be made by evaluating the fairness and justice of the status quo against this or that proposal for change, evaluations that deny easy answers and for which it is reasonable to anticipate that reasonable persons will disagree. The reasonableness of that disagreement turns not only on the burdens of judgment that surround the making of decisions where moral truth cannot be demonstrated without contest and where predictions of future behaviour will be imperfect, but also on the open-ended nature of choice when confronted with reasonable alternatives each supported by reason but left unranked by it.

These realities speak to the design of a good law-making body and the institutional capacities that will facilitate the responsible exercise of its law-making power. Consider membership. Because the community's future concerns each one of its members and because those members will take a view regarding the status quo and alternatives to it, in principle every member should be invited to participate in the law-making activity: *quod omnes tangit ab omnibus decidentur* (what touches/affects all should be decided by all).¹² That principle may be qualified in keeping with the institution's responsibility, which is to act deliberately when there are reasons to change the law. Too large a membership will frustrate the ability of an institution to reason and to act well.¹³ When the legislature's membership is qualified in number, as it will be in any community that does not satisfy Hart's conditions for a simple form of social life, the membership *within* the institution should be related to the membership *outside* the institution by a principle of representation, so that those who look upon the law-making institution can understand its activity as their activity, its members as their members, and its debates as their debates. This principle of representation, which requires that the legislature's membership be selected by the community's members, promotes the accountability of the law-makers to the community they serve. From time to time, the community ought to be afforded the opportunity to substitute the membership of the legislature with a new group of members who propose different commitments for the community's future or who make claim to implement existing commitments with greater competence and resolve.

So as to legislate well, the institution should have the capacity to inform itself of empirical premises by commissioning studies and receiving expert witnesses and their reports. So too should the institution have the capacity to ensure that it is well seized of the competing normative premises central to the exercise of its responsibility. To this end, its law-making process should be designed to emphasise deliberation, where the reasons for and against a proposal may be freely debated, with a view to identifying a full range of the normative premises bearing on the proposal's merits. Identifying a full range of reasons will be facilitated if the process invites the contributions of persons

¹⁰ John Rawls, *Political Liberalism* (Columbia University Press, expanded edn, 2005) 54-8, esp. 56-7.

¹¹ Jeremy Waldron, *Law & Disagreement* (Oxford University Press, 1999) 101-3.

¹² I leave aside debates in political theory on the different principles of inclusion or participation suggested by the Latin *tangere* (touch). For discussion, see Robert E Goodin, 'Enfranchising all affected interests, and its alternatives' (2007) 35 *Philosophy & Public Affairs* 40 and Arash Abizadeh, 'On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem' (2012) 106 *American Political Science Review* 874.

¹³ Ekins, *Nature of Legislative Intent*, above n 6, 149.

who are not members of the assembly, but who may make known their views, either directly as witnesses and by submitting briefs or indirectly by contributing to wider public debates known to members within the legislature.¹⁴

The good law-making institution will evaluate the ends of the proposal, the merits of the proposed and alternative measures to secure those ends, its anticipated impact on the overall scheme of benefits and burdens shared by members of the community, and the proposal's relationship to the rights of each member of the community. It will be mindful of the existing state of the law and the disruption caused by fundamental change. The resulting choice — to change the law this way or that or not at all — will, in many instances, be *free*, in the sense that reason, having eliminated countless options as unavailable because unreasonable or outranked in all respects by other superior options, will leave the law-makers with a decision to make as between two or more reasonable alternatives, so that nothing but the choosing itself will determine what is to be done.¹⁵ That resulting choice will be whether the community's future is to continue on its present path or to proceed on the new path charted in the law-making proposal.

Given the need to remedy the defect of *stasis* and to keep all law under ready review, the good legislature requires the capacity to initiate, of its own motion, changes to the law. The importance of this capacity is affirmed by the need for self-correction, so that the law-maker is empowered to reverse previous choices for the community's future when they prove to be misdirected, as some inevitably will be given the many imperfections in predicting the course of human affairs.

These reflections on the good law-maker's *capacities* to exercise law-making powers responsibly are all informed by the *reasons* favouring a power to legislate: a power to change the law in response to reasons, including a change in the factual or moral premises informing the community's current legal commitments. In turn, these reflections on capacity inform an understanding of the legislature's *acts*. The morally significant law-making choices for the community's future can be carried out responsibly by employing a sort of technique to guide human conduct. It is a technique that requires a firm, even if necessarily imperfect, demarcation between the open-ended deliberation on the merits of a change in the law that precedes a legislative enactment and deliberation according to the law.

For the law to be changed with a view to directing human conduct for the good and rights of the community's members, there is a need for 'the law's distinctive devices: defining terms, and specifying rules, with sufficient and necessary artificial clarity and definiteness to establish the "bright lines" which make so many real-life legal questions *easy questions*' under law, even as they remain otherwise *hard questions* in moral inquiry.¹⁶ These technical devices aim to achieve what moral reasoning will often leave unsettled: unanimity on the law's settlement on the direction of the community's future, in the absence of unanimity on what that settlement should have been or should now be. This unanimity is made possible by the law's ability to settle patterns of rights, duties, liberties, powers, immunities, and so forth, such that even those who disagree on the merits of such patterns can agree on the fact that they are the community's selected patterns. This agreement aligns with a principle of continuity in the community's legal affairs: the legislature's *past* decision settled then

¹⁴ In Grégoire Webber, *The Negotiable Constitution: On the limitation of rights* (Cambridge University Press, 2009) 150-5, I capture some of these thoughts by referring to the legislature as 'a forum of justification'.

¹⁵ John Finnis, *Fundamentals of Ethics* (Georgetown University Press, 1983) 137. See further 138-40.

¹⁶ John Finnis, 'Legal Reasoning as Practical Reasoning' in *Reason in Action, Collected Essays vol. I* (Oxford University Press, 2011) 220. This is not to deny that there will be value in indeterminacy for some legislative enactments.

and settles *now* how the community is to be governed into the *future* and will continue to do so until a new legislative decision is taken for a different future.

IV CONTINUITY BETWEEN PAST AND PRESENT

As a remedy for the defect of interminable disputes over whether ‘an admitted rule has or has not been violated’,¹⁷ the power conferred on an adjudicator is not simply the power to resolve disputes; it is a power to resolve disputes according to — on the basis of — law, the admitted rules: ‘to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken’.¹⁸ The power to make this determination and to act on it is in contrast with the defective state of affairs that lead Hart to identify the need for a Rule of Adjudication: disputes over whether a primary rule has been violated may ‘continue interminably’, in addition to which there will be ‘waste of time involved in the group’s unorganized efforts to catch and punish offenders’, not to mention the standing risk of ‘smouldering vendettas’ that may result from ‘self-help’.¹⁹ To this defect labelled by Hart *inefficiency* — but which his own brief account expands to include the defects of violence and injustice — is proposed a power to adjudicate conclusively on the disputed question whether a primary rule has been violated.²⁰

The responsibility of the adjudicator to the parties in dispute, captured by the legal tradition’s commitment to do ‘justice according to law’, participates in the principle of continuity of bringing the past (the law that pre-dates and governs the dispute) to bear on the present (the dispute). In the special context of adjudication, that principle manifests itself as the distinctively judicial responsibility to adjudicate between parties in dispute over their legal rights and duties by applying to facts the law that defined those rights and duties at that time past when the matter in dispute arose.²¹ This responsibility is to bring the past to bear on the present, such that the resolution of the dispute, though issued *now*, by *this judge*, is attributable to the *community’s law*, then settled.

To design an institution that can adjudicate well is to recall how law and legal reasoning are, in important measures, technique and technical reasoning. The technique that constrains the scope of moral reasoning when reasoning according to law is not an obstacle to justice or fairness, but is in its service. Contrary to the idea that there is an inevitable trade-off in legal reasoning between legalistic Rule of Law values and substantive values of justice and fairness, the artificial reason and judgment of the law is in the service of law’s pursuit of justice and fairness, including the justice and fairness of human self-direction. The alternative is to break the continuity between past legal decisions and present dispute resolution, substituting for the law as it was and is now and which will have guided subjects in planning their affairs with what the judge thinks should now be or should have been the case all along. But more than this, the technique that informs legal reasoning is necessary for sound adjudication. Adjudicating without legal direction confronts any number of outcome-related and intrinsic problems, problems that recall Fuller’s allegory of the well-intentioned, but

¹⁷ Hart, above n 2, 93.

¹⁸ Ibid 96.

¹⁹ Ibid 93.

²⁰ Ibid 93. I interpret the defect of ‘injustice’ by reference to Hart’s discussion of the ‘standing danger’ that the fair-minded community members who do their part will ‘risk going to the wall’ if there is no ‘special organization for ... detection and punishment’: ibid 197-8.

²¹ Finnis, ‘Judicial Power’, above n 1, 29-30.

hapless law reformer King Rex.²² None of this denies that, in determining what choice was made for the community in the law-making act, the good judge may need to retrace the legislature's chain of unconstrained moral reasoning so as properly to interpret the law-maker's choice. That task is an exercise in unconstrained moral reasoning, but it is an exercise oriented to understanding the choices and decisions of the legislature, rather than one oriented to making choices and decisions oneself. In this way, the technical reason of the law contains within it an appeal to a principle of fairness, a principle that is at the heart of a community's commitment to the Rule of Law: that one should be treated impartially by the law, in the sense that one is to be as nearly as possible 'treated by each judge as [one] would be treated by every other judge'.²³ These realities speak to the design of a good law-making body and the institutional capacities that will facilitate the responsible exercise of its law-making power.

All this informs the design of a good law-applying body and the institutional capacities that will facilitate the responsible exercise of a power to adjudicate according to law. Given the ambitions of adjudication according to law, the institution responsible for resolving disputes should have a membership with expertise in the law and legal reasoning. The good court will have as members (judges) persons learned in the law, with demonstrated skill in legal reasoning. The capacity of the judge to understand the law and its relationship to the facts will be assisted by awarding those before the court the right to be heard by the court, so that they — through counsel learned in law — may present to the judge their best understanding of the dispute's just resolution according to law.

The capacity of the judge to decide disputes according to law is promoted by removing fear and favour from the judicial office, so that nothing risks deflecting the judge's commitment to resolve the dispute according to the community's legal commitments. The judge participates in the community's legal order by affirming the parties' rights and entitlements and duties and debts as determined by the law properly applicable at the time of the matter in dispute. This end of doing justice according to law is promoted by granting judges security of tenure and a salary of sufficient value to render unattractive gifts from parties seeking to deflect the bearing of the law in their case. It is an end promoted by disallowing a judge from presiding over disputes in which the judge has (or reasonably appears to have) a connection to the parties or an interest in the dispute's resolution. And it is strengthened by granting judicial office holders immunity from liability for their judgments and, more generally, by making them unanswerable for their decisions save through the legal reasons they give in support of them.

In speaking law to power, judges are to be lions,²⁴ fearless in resolving disputes according to law. The judge's independence — from litigants and others — is all in service of the judicial duty to resolve disputes according to law. By imputing their decisions to the law, judges are empowered to challenge those in authority or with high

²² See Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017), ch. 7 and Lon L Fuller, *The Morality of Law* (Yale University Press, rev edn, 1969) ch. II. Urbina's discussion includes the parable of Judge Berta, a lay adjudicator unguided by the law in the resolution of disputes. The parable powerfully tracks the lessons of Fuller's parable of King Rex, albeit squarely in the context of adjudication. See also Paul Yowell, 'Legislation, Common Law and the Virtue of Clarity' in Richard Ekins (ed.), *Modern Challenges to the Rule of Law* (LexisNexis, 2011).

²³ Finnis, 'Legal Reasoning as Practical Reason', above n 16, 228-229. Cf. Jeremy Waldron, 'Lucky in Your Judge' (2008) 9 *Theoretical Inquiries in Law* 185.

²⁴ The thought is Francis Bacon's from his essay, 'Of Judicature' (c. 1601): 'let them [judges] be lions, but yet lions under the throne', available online: <www.ebooks.adelaide.edu.au/b/bacon/francis/b12e/essay56.html>.

standing in the community. In the judicial act of rendering judgment, the court brings the community's past commitments to bear on the resolution of the dispute by concluding that the law, as it was *then* established, bears on *today's* dispute between the parties in this rather than that way. Although the minimal requirement for the Rule of Adjudication is the judge's conclusion itself — 'an admitted rule has or has not been violated' — the reason for the Rule favours accompanying that conclusion with legal reasons that demonstrate how that conclusion was reached.

These reflections on the *capacity* of the court and its judicial *acts* all point to the *nature* of adjudication as bringing the community's past commitments to bear on the present dispute. The Rule of Adjudication gives expression to a principle of continuity, whereby the law enacted by the legislature (or incrementally developed by the common law) legally directs what is to be done by the judge when tasked to resolve a dispute. This focus on the judicial disposition to look back to the law as it was at the time of the disputed action suggests that it is a violation of judicial office for a judge to depart from the law in resolving a dispute. The idea that judges 'make law', that they look not to the past but to the future, strains the judicial vocation. And yet it is known that, in the common law, judges do sometimes depart from the law as judicially approved in the past and on the basis of which a community's members will have acted. Is there no way to make sense of these judicial (common law) acts — even when explicitly said to be acts of overruling precedent — save by denying their judicial quality? There is, and it is a sense that maintains the judicial commitment to bring the past to bear on the present.

The idea of the law's integrity can be understood by situating a rule of law not only within 'particular doctrines here and there', but also within 'the whole structure of law'.²⁵ The choice of a judge to depart from *this* rule of law and thus to make this change in this law may be motivated by the evaluation that the rule now changed is 'out of line with principles, policies and standards acknowledged (now, and when the dispute arose) in comparable parts of our law', parts that are *already in existence* and *already* shape our community's future.²⁶ The common law rule now changed in the wake of adjudication is changed because it is concluded to have been a mistake, understood not only on its substantive merits, but principally on account of its fit with the other parts of the community's law. That conclusion is supported not only by the dimension of justification, but also by the dimension of fit: the judicial development of the law differs from a true act of taking responsibility for the community's future precisely because the change in the law is brought about by *looking back* to the whole of the law as it stands. That judicial act of change differs from legislating insofar as it is not taken by *looking forward* to what would be, all things considered, 'a better pattern of inter-relationships', even if unmoored from the past.²⁷

In this way, some changes in the common law can be said to be true to the common law's claim to 'declare' and not 'make' the law, because 'though new in relation to the subject-matter and area of law directly in issue between the parties', the new rule is nevertheless '*not a novelty* or act of legislation (taking our law as a whole), and can fairly be applied to the parties and dispute before the court'.²⁸ Of course, in one sense, the thought that this new rule, like the rule it replaces, is 'declared' is falsified by the fact that it, like much of the history of the common law, is a change in the law. However, when evaluated in the light of the judicial responsibility to relate the past to the present, this change in the law can be said to be a declaration of the state of the law rather than a new legal proposition, because of the method by which the

²⁵ Ronald Dworkin, *Justice in Robes* (Belknap Press, 2006) 250.

²⁶ Finnis, 'Judicial Power', above n 1, 31.

²⁷ Ibid 5-6.

²⁸ Ibid 5 (emphasis added).

change in the law is brought, a method that speaks to ‘the duty of judges to differentiate their authority and responsibility, and thus their practical reasoning, from that of legislatures’.²⁹ Indeed, common law courts — even at the apex of the judicial system — have sometimes lamented a long line of common law precedent as having ‘taken a wrong turn’ and being worthy of change, but declined to make that change themselves. They have declined on the basis that some aspects of the common law are so established, and the line of precedents so deep, that ‘until there is legislative change, the courts must live with them and any judicial developments must take them into account’.³⁰ The thought is that some changes to the law cannot be declared, but can only be made, and thus only be made by the legislature.

V ADJUDICATING FOR THE FUTURE

The accounts of the good legislature and the good court outlined above track the design of the modern legislature and the modern common law court. They do so not because they take these modern institutions as their starting point, but rather because these institutions, like these accounts, track the reasons that favour empowering a person or body with the responsibility to change the law and the reasons that favour empowering a person or body to make conclusive determinations whether a rule of law has been violated by the act or omission of one or more persons. Those reasons point to the acts that the legislature and adjudicator need to perform (legislation; judgment), which in turn point to the design of the capacities that the legislature and court are to be equipped with, which in turn point to the nature of each institution. The nature of the legislature and the court is thus informed by an investigation into the reasons favouring each institution in a community of persons.

We turn, now, to interrogate the rise of judicial power under charters of rights. Is this at one with the judicial responsibility to bring the community’s past legal settlements to resolve disputes? On its face, the exercise of judicial power under a charter of rights is at one with the judicial responsibility to relate past to present. Australian courts review legislation further to the past decision to confer them this power under Victoria’s Charter of Human Rights and Responsibilities 2006; Canadian courts review legislation further to the past decision to confer them this power under the Canadian Charter 1982; the Strasbourg Court reviews member state legislation further to the past decision to confer it this power under the European Convention on Human Rights; British courts review legislation further to the past decision to confer them this power under the Human Rights Act 1998. On its face: past to present.

On further inspection, however, the analysis breaks down insofar as the open-ended formulation of many charters of rights stands in contrast to other parts of the law, where the formulation of rights and duties is of sufficient precision as to be legally directive in adjudication. The decisions captured in the Charters, Convention, and like instruments are incomplete attempts to settle what is permitted, required, or forbidden in the name of rights. Charters of rights standardly identify one class of persons

²⁹ John Finnis, ‘The Fairy Tale’s Moral’ (1999) 115 *Law Quarterly Review* 170, 173, reprinted as ‘Adjudication and Legal Change’ in John Finnis, *Philosophy of Law: Collected Essays, volume IV* (Oxford University Press, 2011) 397-403. It is a claim that, albeit with different motivations, is defended by Ronald Dworkin in *Taking Rights Seriously* (Duckworth, 1997) 81: ‘It remains the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively’. For a review of the evolution of Dworkin’s thought on this matter, see Paul Yowell, ‘Dworkin, interpretation and legal change’ in Simone Glanert and Fabien Girard (eds.), *Law’s Hermeneutics: Other Investigations* (Routledge, 2017).

³⁰ *White and Others v Chief Constable of South Yorkshire and Others* [1998] UKHL 45, [1999] 2 AC 455, 504 (Lord Hoffman).

(‘Everyone’, ‘Every citizen’, ‘Every accused person’) and one subject matter (‘life’, ‘liberty’, ‘expression’) and unite them by declaring that a class of persons has a *right to* a subject matter. But what is it for everyone to have a right to life, or to liberty, or to expression? The answers are not settled in the charters of rights themselves. Those responsible for these instruments choose to leave it to others to determine how that *past* inchoate commitment to justice and rights will, henceforth and into the *future*, secure a pattern of inter-relationships that will give to each his and her rights. The formulation of rights in charters of rights like the Convention and Charters is open-ended in the sense that the requirements of justice and rights are open to the future. The determination of what the guarantee of rights requires, prohibits, and allows is left ‘to a *later day*’.³¹

This invitation under charters of rights for the courts to take responsibility for the community’s future has been declined by at least one judge as being inconsistent with the judicial office. Justice Heydon, dissenting in the first case under the Charter of Human Rights and Responsibilities (Victoria) to reach the High Court of Australia, concluded that the Charter ‘contemplates the making of laws by the judiciary’, a task inconsistent, on his view, with the judicial power under the Australian Constitution.³² His reasons pay special attention to the Victorian Charter’s general limitation clause, which provides that a ‘human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.³³ The determination of what constitutes a ‘reasonable limit’ based on the open-ended standards of dignity, equality, and freedom, themselves all evaluated against the open-ended standard of a ‘free and democratic society’, requires, in Justice Heydon’s view, ‘giving a meaning to a particular “human right”’.³⁴ That task is one ‘which the legislature failed to carry out’ insofar as the choices and decisions required in order to give that meaning to the right were not made by the legislature in the Charter itself. Making those choices and decisions *now* would require one to make choices and decisions respecting the community’s future. The Charter’s invitation to the courts to make these choices and decisions, on Justice Heydon’s view, constitutes a delegation of law-making authority from a law-making institution to a law-applying institution, a delegation said to be ‘not possible under the Australian Constitution’, even if, as Justice Heydon recognised, it ‘may be possible under some [other] constitutions’.³⁵

And indeed it is possible under other constitutions. Under many constitutions, courts take responsibility for the future in the wake of adjudication under open-ended charters of rights. They do so by concluding that this or that legislative attempt to take responsibility for the future should be denied because it is contrary to the charter of rights. The charter of rights is incompletely formulated, such that it is open to the court to give meaning to the rights in a manner that charts the community on a course for the future, a future in which hate speech may (or may not) be criminalised; assisted suicide may (or may not) be prohibited; campaign financing may (or may not) be strictly

³¹ Webber, *The Negotiable Constitution*, above n 15, 7 (emphasis in original). See also Rosalind Dixon and Tom Ginsburg, ‘Deciding not to decide: Deferral in constitutional design’ (2011) 9 *International Journal of Constitutional Law* 636.

³² *Momcilovic v The Queen* [2011] HCA 34 [431].

³³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 7(2). The provision continues with ‘and taking into account all relevant factors, including —’, followed by five factors inspired by the South African Bill of Rights, s 36.

³⁴ *Momcilovic*, above n 32, [434].

³⁵ *Ibid* [434]. For further insights into Justice Heydon’s constitutional thought, see J D Heydon ‘Are bills of rights necessary in common law systems?’ (2014) 130 *Law Quarterly Review* 392. See also Richard Ekins, ‘Human Rights and the Separation of Powers’ (2015) 34 *University of Queensland Law Journal* 217, esp. 224-8.

regulated; religious accommodations may (or may not or must) be provided for; and so on. The open-ended language of constitutional rights guarantees is described by Dworkin as ‘very broad and abstract’ and formulated with ‘exceedingly abstract moral language’, capturing a commitment by the constitutional drafters to a ‘general principle’.³⁶ The interpretation of those principles should, even on Dworkin’s account of a moral reading of the law, be true to ‘language, precedent, and practice’ — in short, it must *fit* ‘the broad story of [the community’s] historical record’.³⁷ Even with this discipline, however, ‘[v]ery different, even contrary, conceptions of a constitutional principle’ will often be open to a judge, so that nothing but the judge’s *choosing* from among different futures for the community will settle which future direction shall be pursued in the community.³⁸ The judge has a choice to make and the community’s future will be directed by it.

This is a fundamentally different judicial power. It is not one that aligns with settled understandings of judicial responsibility, understandings that informed the design of the judicial forum. Indeed, many features of adjudication — features that allow a court to adjudicate well when looking to the past to resolve a present dispute between parties — will frustrate the ability of a judge to undertake sound evaluations of the just requirements of the community’s future. An institution designed in order to *adjudicate well* will not be designed — will not have the capacities — to *legislate well*. I here review seven features that highlight the mis-alignment between this judicial power and judicial responsibility.³⁹ As we will see below (Part VI), courts have been mindful to address the failings of these features for their new power under charters of rights.

First, the commitment to legal reasoning. As reviewed above, legal reasoning is in the service of the judicial responsibility to resolve disputes according to law. By the standards not of philosophical inquiry but of legal adjudication, this commitment to legal reasoning is sound. It participates in the principle of fairness and facilitates good adjudication, all the while empowering judges to speak law to power. However, when the judicial task is repurposed to evaluate the overall justice or rights-compliance of legislation under charters of rights, legal reasoning may read as ‘technical, at best, and flawed and heteronomous, at worst’.⁴⁰ It is a distraction to think that the answers to hard moral questions turn on answers to the principle emerging from a line of precedents or to statutory interpretation. As Waldron has rightly argued, ‘[w]e may use the phrase “freedom of speech” to pick out the sort of concerns we have in mind in invoking a particular right; but that is not the same as saying that the *word* ‘speech’ (as opposed to ‘expression’ or ‘communication’ etc) is the key to our concerns in the area’.⁴¹ And yet, the commitment to legal reasoning directs some to think that evaluations of constitutionality are to proceed by asking whether pornography is speech or flag burning is speech or racial abuse is speech, and so forth. The constraints of legal reasoning are not fit for purpose when the question is not one of determining

³⁶ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) 2, 7, 9. Dworkin is here referring to the US Bill of Rights, but his evaluations are applicable more generally.

³⁷ Ibid 11.

³⁸ Ibid 11.

³⁹ The features that follow overlap in important respects with those outlined in Abram Chayes ‘The Role of the Judge in Public Law Litigation’ (1976) 89 *Harvard Law Review* 1281, 1282-1283. Chayes referred to the ‘traditional conception of adjudication’ as ‘central to our understanding and our analysis of the legal system’.

⁴⁰ Jeremy Waldron, ‘Judges as moral reasoners’ (2009) 7 *International Journal of Constitutional Law* 2, 13.

⁴¹ Jeremy Waldron, ‘A rights-based critique of constitutional rights’ (1993) 13 *Oxford Journal of Legal Studies* 18, 26.

which commitments *were* made, but rather of determining which commitments should *now* be made.

Second, the requirement that facts be established on a balance of probabilities. This requirement is sound in an *inter partes* adversarial setting when ‘adjudicative facts’ are in dispute, facts about ‘what the parties did, what the circumstances were, what the background conditions were’.⁴² It is well suited to the adversarial context of common law courts, where one or the other party will be held to be in the right and the other in the wrong as a matter of law. The evidentiary standard is too exacting, however, when the available factual premises informing choices for the community’s future are a contest between imperfect predictions affecting the whole community. The facts here are, as Kenneth Culp Davis aptly puts it, ‘legislative facts’, facts about economic, social, political, and other matters that ‘inform ... legislative judgment’.⁴³ They are not about who did what, when, where, and why, but are rather concerned with conflicting and complex empirical and scientific evidence that will be imperfectly assessed and evaluated.

Third, the absence of capacity for commissioning research. The struggle with legislative facts is compounded by the absence of capacity for the court to seek the assistance of non-parties in understanding and being exposed to a range of legislative fact-finding. The court is reliant on the parties to submit evidence in support of the positions they wish to advance. Evidence that may provide a more complete picture of legislation and its impact on the community’s future is not otherwise available to the court.

Fourth, the adversarial contest between *two* parties, each with *one* position (I win, the other party loses). This feature of adjudication is justified in response to the resolution of disputes between two disputants on whether an admitted rule has been breached by one of the parties. When making decisions for the future of the community and *all* of its members, however, this feature denies a voice to those who want and in fairness are entitled to it.

Fifth, the insistence that a decision by a court may not, subject to appeal, be revisited by the parties (*res judicata*, the matter is judged) nor, subject to exceptional circumstances, questioned by a subsequent court in another dispute (*stare decisis et non quieta movere*, stand by things decided and do not disturb what is settled). Both of these features of adjudication are justified for the purposes of providing authoritative rulings on whether an admitted rule has been violated at some time past, but they impede the ability of the community to *revisit* the court’s direction for the community’s future if that path proves unwelcome or if some of its premises — factual or normative — prove defective after the passage of time.

Sixth and relatedly, a court may not initiate a dispute by its own motion. If, after ruling that the community’s future is to be charted this rather than that way, the court concludes that the ruling was made in error, it must await another dispute before being afforded the opportunity to overturn or reorient its decision. Given the reasons why the Rule of Adjudication is needed as a remedy for the resolution of disputes, the court’s passive reception of disputes is sound. However, when the court’s function shifts from bringing the past to bear on present disputes to making choices for the community’s future, its inability to revisit those choices in the light of changes in factual premises and changes in evaluations of moral premises can frustrate a community’s ability to chart a responsible future.

⁴² This is the account of ‘adjudicative facts’ provided by Kenneth Culp Davis in his classical essay which introduced the key terms ‘adjudicative facts’ and ‘legislative facts’: ‘An Approach to Problems of Evidence in the Administrative Process’ (1942) 55 *Harvard Law Review* 364, 402.

⁴³ *Ibid* (emphasis added).

Seventh, concessions by counsel on a point of law or of fact. Such concessions are quite proper for narrowing the points in dispute in the normal course of adjudication between two parties, but in evaluations about the community's future, concessions may close off from consideration matters that no responsible legislature would allow to be removed from view.⁴⁴ Indeed, courts have sometimes openly criticised an Attorney General for concessions that shield from view consideration of the issues. In a 1992 decision respecting the right to equality and its relationship to legislative measures providing different parental benefits to natural parents and adoptive parents, the Chief Justice of Canada 'register[ed] the Court's dissatisfaction with the state in which' the case came before the Court. The Attorney General of Canada had conceded that the equality right was violated, which precluded the Supreme Court from examining the equality issue 'on its merits' and left the Court without argument on 'the legislative objective' and in 'a factual vacuum with respect to the nature and extent of the [conceded] violation'.⁴⁵

The range of features of adjudication that frustrate the responsible exercise of the new power conferred on courts under charters of rights is significant. That range points to a lack of alignment between judicial power and the distinctive judicial responsibility.

VI JUDICIAL REFORMS

Responsible courts have not been blind to these imperfections of the adjudicative process for taking responsibility for the community's future. Many courts have sought, within the confines of the judicial role, to effect changes to the adjudicative process so as to allow the judicial forum better to assume its responsibilities for the community's future.

In relation to the first feature of adjudication (legal reasoning), some courts have sought to relax the technical aspect of legal reasoning by recourse to the doctrines of proportionality and balancing. Evaluations of proportionality and overall balance invite open-ended moral reasoning unconstrained by the traditional confines of legal doctrine and precedent.⁴⁶ The doctrines invite courts to evaluate the importance of a legislative objective, the relationship between that objective and the means employed to pursue it, the availability and merits of alternative but unselected means to achieve the legislative objective with comparable success, and the all-things-considered overall balance of benefits and burdens realised by the legislative scheme. The scholarly consensus is that the open-ended structure of reasoning under proportionality and balancing calls upon court and counsel to engage in 'an exercise of general practical reasoning, without many of the constraining features that otherwise characterise legal reasoning'.⁴⁷ Legal learning and expertise in legal reasoning — the hallmarks of adjudicating *well* under the Rule of Adjudication — offer little assistance, given that 'arguments relating to legal authorities — text, history, precedence, etc — have a relatively modest role to play'.⁴⁸

⁴⁴ Finnis, 'Judicial Power', above n 1, 41-49.

⁴⁵ *Schatcher v Canada* [1992] 2 SCR 679.

⁴⁶ For discussion and criticism, see Grégoire Webber, 'Rights and the Rule of Law in the Balance' (2013) 129 *Law Quarterly Review* 399.

⁴⁷ Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart, 2007) 131, 139. See also Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012); Urbina, above n 20, ch 6.

⁴⁸ Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 142, 144.

In relation to the second feature of adjudication (standard of proof), some courts have relaxed or substituted the standard of proof in charters of rights cases, maintaining that ‘reason, logic or simply common sense’ may be relied upon to make findings of legislative fact.⁴⁹ Where there is ‘very little quantitative or empirical evidence either way’ to assist the court in evaluating the justice and rights-compliance of legislation, some courts will look beyond the materials known to legal learning to ‘the analysis of human motivation, the determination of values, and the understanding of underlying social or political philosophies’.⁵⁰ These standards for evaluating factual premises are better suited to receive legislative facts.

In relation to this and the third feature of adjudication (research), some courts will invite, and able counsel will know to prepare and submit, ‘Brandeis briefs’, in which social science and other evidence is compiled and presented on the justice and rights-compliance of the measure in dispute.⁵¹ Good counsel will know that proportionality analysis invites evaluations of the necessity of measures and the comparable efficacy of unchosen alternative measures, as well as evaluations of benefits and burdens in determinations of overall balance.

In relation to the fourth feature of adjudication (two parties), some courts have relaxed the rules for intervention by persons and groups not party to the immediate dispute. Although this attempt falls short of the principle *quod omnes tangit ab omnibus decidentur* (what touches/affects all should be decided by all), it nonetheless recognises the importance of hearing voices beyond those of the parties to the dispute, the resolution of which will directly impact not only them but many others. Intervenors will be invited to speak on the application of law to facts, but they will be invited, too, to speak more generally about the requirements of justice and rights for the community’s future.

In relation to the fifth feature of adjudication (*res judicata*, *stare decisis*), some courts have sought to relax the force of *stare decisis* where circumstances have changed, especially when social science evidence is in play. The Supreme Court of Canada has been especially transparent in this regard: the doctrine of precedent, so central to the artificial reason of the law and the relationship of past to present, provides no bar — not even against a trial court confronting ‘settled rulings of higher courts’ — if ‘there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate”’.⁵² The alternative, in the Court’s view (with echoes of Hart’s discussion on the need for a Rule of Change), would be to ‘condemn the law to stasis’.⁵³ The case law of even an apex court under open-ended charters of rights is therefore less controlling under *stare decisis* than is the case law in other areas of law.

The changes courts have introduced to the adjudicative process are the result of evaluations that many features of adjudication are unsuited to taking responsibility for the community’s future. Judicial capacities assume a judicial function unlike the one called for under open-ended charters of rights. Confronted with an institution designed

⁴⁹ *RJR-Macdonald v Canada* [1995] 3 SCR 199 [184]; see also [137]. But cf. *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791 [150]: ‘The task of the courts ... is to evaluate the issue in the light, not just of common sense or theory, but of the evidence’.

⁵⁰ *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 [90].

⁵¹ Such briefs are named after Louis Brandeis, who, before his appointment to the US Supreme Court, argued *Muller v Oregon*, 208 U.S. 412 (1908) before that very court. For discussion, see Paul Yowell, ‘Proportionality in United States Constitutional Law’ in Liora Lazarus, Christopher McCrudden, Nigel Bowles (eds.), *Reasoning Rights: Comparative Judicial Engagement* (Hart, 2014) 110-1.

⁵² *Carter v Canada (Attorney General)* [2016] 1 SCR 13 [44]; *Canada v Bedford* [2013] 3 SCR 1101 [42].

⁵³ *Carter*, *ibid* [44]: ‘*stare decisis* is not a straitjacket that condemns the law to stasis’.

to relate the community's past commitments as embodied in law to present disputes, courts have fashioned changes in order to re-orient the exercise of judicial power. Not every problematic feature of adjudication has been modified and some important features persist — the sixth (passive jurisdiction) and seventh (concessions by counsel) have proved harder to reform. And yet, the wide-ranging changes to the capacities of the court suggest that the judicial acts are no longer the same, which in turn affirm that the nature of the judicial task has changed. The court is no longer exercising a judicial responsibility; the judicial power under charters of rights is *judicial* only insofar as it is a power exercised by *judges*. When evaluated against the reasons that favour instituting a court to adjudicate disputes, the power conferred on judges under open-ended charters of rights is *non-judicial*. That conclusion is re-affirmed by recognising that the power to make choices for the direction of the community's future is a distinctively *legislative* power.

Even if every imperfect feature of adjudication could be addressed with more wholesale reforms to facilitate the exercise of judicial power under charters of rights, it remains that nothing can eliminate the risk that judges will make choices for the community's future that are misdirected and in need of correction. Part of that risk is the common standing risk of injustice that afflicts all exercises of public power. But the greater part of the risk is with the exercise of *judicial* power — a power distinguished for its capacity to *adjudicate well* — for determining the course of the community's future. The imperfect changes to the judicial process are like renovations made to repurpose an existing edifice — no matter the merits of the reforms, they remain reforms to an institution designed for another purpose, a purpose that it continues to serve on a very regular basis when not confronted with a case challenging legislation under the charter of rights. Constitutional drafters who set out to design an institution to supervise the justice and rights-compliance of legislation would be unlikely to take the judicial forum — even as refashioned — as a model. The increased use of Brandeis briefs, for example, assists in putting more information before the court, but does not equip the court with the resources necessary for the sound interpretation and assessment of legislative facts or address the dependence of the court on parties or intervenors for the presentation of such facts. A more wholesale reform would be to redesign the court so that it has a dedicated research service.⁵⁴ Similarly, the doctrines of proportionality and balancing allow judges to escape the confines of legal reasoning, but precisely because there is 'nothing particularly *legal*' about these doctrines, the professional qualifications of a lawyer do not make one 'more qualified to apply a balancing test' than someone without legal training.⁵⁵ Judges have expertise in the law, but not necessarily in the great many other fields of factual and moral inquiry that will be required in order to arrive at sound evaluations of legislation's conformity with open-ended charters of rights. The changes to the judicial forum are the changes that, short of significant constitutional reform, are within the realm of the possible.

A wholesale, *tabula rasa* design of an institution to supervise the justice and rights-compliance of legislation would likely include capacities to commission studies, to consult experts, to initiate reviews of its own motion, to revisit previous decisions on its own motion, to have a diversified membership with expertise in a range of empirical and moral matters, etc. It would be designed on the basis that there is *reason* to favour awarding to an institution a role to supervise the rights-compliance of legislation. The *acts* of the institution would be to affirm or deny the compliance of legislation with an open-ended charter of rights and perhaps empowered to issue

⁵⁴ For discussion, see K C Davies, 'Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court' (1986) 71 *Minnesota Law Review* 1.

⁵⁵ Paul Yowell, *Constitutional Rights and Constitutional Design* (Hart, forthcoming 2018) 155-6.

advice short of declaration a violation of rights. The *capacities* necessary to do so would include the ones noted. And so the *nature* of the institution would approximate something closer to a 'Council of Revision' rather than a court. Indeed, a made-for-purpose institution would likely resemble a legislature, not a court.⁵⁶ This, in turn, suggests that the nature of the power that such an institution would exercise would not properly be called 'judicial'.

VII CONCLUSION

Not every exercise of a power by a judge is the exercise of a *judicial* power. True instances of judicial power exercise the court's distinctive judicial responsibility to bring the community's past legal commitments to bear on the resolution of present disputes. The conferral of a power on courts to evaluate legislation in the light of open-ended charters of rights strains the responsibilities of the judicial office, as some judges have said explicitly and as many courts have communicated in reforms brought to the judicial forum. The rise of judicial power under charters of rights is a shift away from the distinctive judicial responsibility to bring the past to bear on the present. It is not a power contemplated by the institutional design of courts. It is not a power conferred on an institution with the capacity to exercise it well.

⁵⁶ For discussion, see Yowell, *ibid* ch 7. Yowell's argument concludes (at 163): 'the argument for *judicial* review of legislation is better thought of as an argument for review by a quasi-legislative body that resembles a legislature in all important respects but one: crucially, it is not elected'.

ON JUDICIAL RASCALS AND SELF-APPOINTED MONARCHS: THE RISE OF JUDICIAL POWER IN AUSTRALIA¹

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I INTRODUCTION

Do we live in an age of judicial hegemony? It is a commonplace observation that there has been a rise in judicial power around the globe. Aharon Barak, former President of the Supreme Court of Israel, once said that ‘nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable’.² Scholars have described this phenomenon as a ‘judicialisation of politics’: a growing intrusion of the judiciary into realms once the preserve of the executive and legislative and a corresponding transfer of power to the courts.³ Policy decisions that were once the exclusive preserve of democratic institutions are now ultimately resolved by judges, often in the guise of determinations about rights. This judicialisation has expanded to include matters of the utmost political significance that define whole polities.⁴ No less than the identity of the United States President was determined in 2000 by the Supreme Court.⁵ Further, legalistic methods of analysis are rapidly colonising routine decision-making within parliamentary committees and administrative agencies.

This article examines the extent to which there has been a rise in judicial power in Australia. Has the control and influence of Australian courts increased relative to the power exercised by the legislative and executive branches? Do courts routinely have the final say on contested policy questions? Has there been a ‘judicialisation of politics’ in Australia? Such questions invite both comparative and historical evaluations. To what extent have Australian courts participated in the worldwide rise in judicial power? To what extent are Australian courts more powerful than they were, say, 50 years ago?

These questions are relevant to several central concerns of contemporary public law. One is the proper role of the courts and their ability to perform their central rule of law function. Traditionally, judicial independence has been thought to rely on an

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¹ These epithets have been adapted from Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2004) 10 *Otago Law Review* 493, 507 (‘Judicial rascals are not to be thrown out. Political rascals can be’) and Michael Kirby, ‘Attacks on Judges: A Universal Phenomenon’ (1998) 72 *Australian Law Journal* 599, 601 (referring to a criticism of the High Court as a ‘pathetic ... self-appointed [group of] Kings and Queens’).

² Linda White et al (eds.), *The Comparative Turn in Canadian Political Science* (UBC Press, 2008) 89.

³ Ran Hirschl, ‘The Judicialization of Politics’ in Robert E Goodlin (ed.), *The Oxford Handbook of Political Science* (Oxford University Press, 2009).

⁴ Ran Hirschl, ‘The Judicialization of Mega-Politics and the Rise of Political Courts’ (2008) 11 *Annual Review of Political Science* 93.

⁵ *Bush v Gore*, 531 US 98 (2000).

apolitical judiciary. While the ‘fairy tale’ that judges do not make law may have long been exploded,⁶ there remain standards against which judicial reasoning can be assessed,⁷ which gives rise to questions of whether the courts have overstepped the mark. In particular, does the courts’ entry into partisan decision-making call into question their legitimacy more generally? Another issue is the ‘central obsession’ of American public law theory, the counter-majoritarian difficulty — the concern that unelected judges have power to overturn the decisions of democratically elected institutions.⁸ The more the courts extend into the policy realm, the more acute this dilemma becomes. And another concerns the desire to ensure that contemporary democratic regimes properly protect human rights, and the extent to which this should be the province of the courts or the democratic branches.⁹

In this article we argue that there has been a modest rise of judicial power in Australia. This rise in power is attributable to the development by the High Court of a handful of important constitutional doctrines which involve an incursion into democratic decision-making, and there has been a significant expansion of the grounds on which executive action can be held unlawful. Apart from this, however, in few areas of policy or political decision-making can it be said that the High Court has the final say. Even in many of the High Court’s most ambitious and controversial moments, the political branches retain substantial latitude in implementing their policies.

If this is so, it raises a deeper question. Why has Australia largely resisted a powerful and sweeping trend that has characterised most other comparable countries? We argue that while several factors are at play, the prime reason for this is the absence of a national bill of rights, both statutory and constitutional. Australia is very nearly unique in the world in this respect. Bills of rights give litigants an opportunity to involve courts in the review of administrative and legislative decisions in virtually any field of policy-making. When bills of rights are constitutional, they also give the courts a final say over the balance to be struck between competing rights and public goods. Bills of rights transfer very significant decision-making power to the courts. If the judges make use of these powers, they become accustomed to playing a much more overt policy-making role and this mindset has a tendency to tip over into the exercise by courts of their adjudicative functions more generally, particularly in constitutionally or politically significant cases. The resulting judicialisation of politics extends beyond ‘ordinary’ rights jurisprudence into the determination of what Ran Hirschl has called ‘the most pertinent and polemical political controversies a democratic polity can contemplate’.¹⁰ Against these trends, judicial and political culture in Australia have

⁶ Lord Reid, ‘The Judge as Lawmaker’ (1972) 12 *Journal of the Society of Public Teachers of Law* 22.

⁷ Jeffrey Goldsworthy, ‘Realism About the High Court’ (1988) 18 *Federal Law Review* 27.

⁸ Ilya Somin, ‘Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the “Central Obsession” of Constitutional Theory’ (2004) 89 *Iowa Law Review* 1287.

⁹ See, eg, Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.), *Protecting Human Rights: Institutions and Instruments* (Oxford University Press, 2003).

¹⁰ Hirschl, above n 3, 254. Hirschl offers as examples of such controversies the outcome of US and Mexican presidential elections, the war in Chechnya, the Pervez Musharraf-led military coup d’état in Pakistan, Germany’s place in the EU, restorative justice dilemmas in post-authoritarian Latin America, post-Communist Europe, or post-apartheid South Africa, the secular nature of Turkey’s political system, Israel’s fundamental definition as a ‘Jewish and Democratic State’, and the political future of Quebec and the Canadian federation.

been relatively resistant to the courts playing a more overt policy-making role. The courts have tended to preserve a firm distinction between law and politics, leaving the policy merits of a particular law for the legislature to determine, and in administrative law they have maintained that their role is to adjudicate on the legality of a decision, with the merits being a matter for the decision maker. A robust political culture dominated by a disciplined party system, which is not slow to criticise the courts where they step outside their perceived legitimate role, reinforces this judicial 'reticence'.

II THE RISE OF JUDICIAL POWER WORLDWIDE

There is a well-developed comparative literature documenting a worldwide expansion of the role of the courts. This expansion of judicial power is often treated as synonymous with a kind of 'juristocracy',¹¹ namely an increasing intrusion of judicial and legalistic decision-making into the political realm. Two features of this judicialisation of politics have been identified. The first is the increasing determination by courts and judges of decisions and policies that were previously within the province of the other government branches, the legislature and the executive.¹² When judges come to have the final say on policies, the political branches find it difficult or impossible to overrule their determinations. A second feature is the increasing adoption of judicial-like decision-making methods outside the courts, especially through the adoption of legalistic rules and methods of reasoning by administrative decision-makers and parliamentary committees, the former in response to the threat of judicial review,¹³ the latter sometimes as a result of legislative requirements.¹⁴ When either or both of these kinds of judicialisation exist in a jurisdiction, there can be said to be a rise in judicial power. They are, however, distinct trends that need to be assessed independently of each other.

Dramatic and controversial examples abound from around the globe. The United States Supreme Court held in 2015 that the Fourteenth Amendment to the United States Constitution requires States to license marriages between two people of the same sex and to recognize marriages between two people of the same sex which were lawfully performed out of State.¹⁵ In 1973 the Indian Supreme Court ruled that not even a formal constitutional amendment could legally abrogate from certain fundamental elements of the 'basic structure' of the Constitution.¹⁶ In 1995 the Hungarian Constitutional Court struck down as unconstitutional various elements of

¹¹ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

¹² Torbjörn Vallinder, 'When the Courts go Marching In', in C Neal Tate and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York University Press, 1995), 13; C Neal Tate, 'Why the Expansion of Judicial Power?', in Tate and Vallinder (eds.), *The Global Expansion of Judicial Power*, 28.

¹³ Ibid.

¹⁴ Eg, *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Legislative Standards Act 1992* (Qld).

¹⁵ *Obergefell v Hodges*, 576 US ____ (2015).

¹⁶ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461, discussed in Nicholas Aroney, 'Fundamental Law and Constitutional Rights in India and Australia' (2003) 29 *Indian Socio-Legal Journal* 89.

the austerity measures introduced by the Hungarian government designed to ward off bankruptcy.¹⁷ The South Korean Constitutional Court in 2004 overturned the impeachment of President Roh Moo Hyun by the National Assembly and reinstated him to office.¹⁸ In 2001 the Fijian Court of Appeal held that the 1997 Constitution¹⁹ remained in force notwithstanding its purported overthrow by the Commander of Fiji's Military Forces.²⁰ It has been argued that the judges of the Turkish Constitutional Court have become 'co-legislators', overturning constitutional amendments for substantive reasons under the guise of enforcing the principle of secularism.²¹

Various reasons for the judicialisation of politics have been proposed. One scholar has suggested that a separation of powers, a 'politics of rights', interest group litigation, ineffective majoritarian institutions and wilful delegation by governments are all conditions which may facilitate a rise in judicial power.²² Other institutional features are also significant, such as who has standing to bring constitutional cases, and whether non-parties are permitted to make submissions as *amicus curiae*. However, the most common explanation for the global increase of judicial power is the prevalence of rights instruments which have been adopted by many countries. While the extent of the increase of judicial power is debated, it is typically acknowledged that the introduction of constitutional bills of rights and statutory human rights enactments has increased the power of the judiciary.²³ In the absence of such rights instruments, the scope for judicial review is much more limited, being based primarily on matters of procedure and legality.²⁴

III IDENTIFYING THE RISE IN JUDICIAL POWER

How is a rise in judicial power to be identified, explained and assessed? The comparative literature generally focusses on the balance of power exercised by the legislature, the executive and the judiciary respectively, and assesses the extent to which there has been an increase in judicial power at the expense of the power

¹⁷ Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, 2000) 92-3.

¹⁸ Youngjae Lee, 'Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective' (2005) 53 *American Journal of Comparative Law* 403.

¹⁹ *Constitution Amendment Act 1997* (Fiji Islands).

²⁰ *Republic of Fiji v Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001). The decree was the *Interim Military Government Decree No 1, Fiji Constitution Revocation Decree 2000*. For analysis see Anne Twomey, 'The Fijian Coup Cases — the Constitution, Reserve Powers and the Doctrine of Necessity' (2009) 83(5) *Australian Law Journal* 319.

²¹ Abdurrahman Saygil, 'What is Behind the Headscarf Ruling of the Turkish Constitutional Court?' (2010) 11 *Turkish Studies* 127, 136.

²² Tate, 'Why the Expansion of Judicial Power?', above n 12, 28-32.

²³ Eg Frederick Vaughan, 'Judicial politics in Canada: patterns and trends', in Paul Howe and Peter H Russell (eds.), *Judicial Power and Canadian Democracy* (McGill-Queen's University Press, 2001), 15, 23; Erin F Delaney, 'Judiciary Rising: Constitutional Change in the United Kingdom' (2014) 108 *Northwestern University Law Review* 543. James Allan has also argued this point on numerous occasions: see, eg, James Allan, 'Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990' (2000) 9 *Otago Law Review* 613.

²⁴ Hirschl, above n 3, 263.

exercised by the non-judicial branches.²⁵ According to this approach, the mere fact that more cases are brought before the courts, or that courts overturn more government decisions or legislation than previously, is not necessarily indicative of a rise in judicial power; it could be that these are merely an inevitable consequence of an increasing number of governmental decisions being made. The relative increase in the power of courts is what matters, not an increase in the power exercised by all three branches of government taken as a whole.

In our view, an increase in judicial power can also occur through an overall increase in the power of government, in which the judiciary partakes, but without a corresponding diminution of the powers exercised by the non-judicial branches. In Australia, as in many other countries, there has been a sustained growth in the quantity and complexity of primary and secondary legislation over many decades,²⁶ accompanied by a marked, but less sustained, long term growth in the size of government relative to the private sector.²⁷ Alongside these trends has been a corresponding growth in the functions and powers exercised by tribunals and courts — deliberately conferred upon them by legislation. There is no doubt that there has been a very significant rise of judicial power in this sense in Australia. Legislation is frequently enacted conferring new powers on courts and tribunals. Some notorious examples include the powers conferred in the fight against organised crime and international terrorism, such as control orders, declarations against criminal organisations and anti-fortification orders.²⁸ But the trend is more widespread than high profile examples such as these.²⁹ In our view, these developments raise significant concerns not only for their potential interference with individual civil and political rights,³⁰ but also for the incursion of state institutions and legalistic modes of regulation into fields occupied by institutions of civil society,³¹ juridifying and bureaucratising them in a manner that can hinder their ability to contribute to the common good.³²

²⁵ Tate and Vallinder (eds.), *The Global Expansion of Judicial Power*, above n 12.

²⁶ Chris Berg, 'Policy without Parliament: The Growth of Regulation in Australia' (2007) 19(3) *IPA Background* 1, 4.

²⁷ Julie Novak, 'Economic Consequences of the Size of Government in Australia' (PhD Thesis, RMIT University, 2013).

²⁸ The many examples include the *Fortification Removal Act 2013* (Vic) s 11; *Criminal Organisations Control Act 2012* (Vic) ss 19, 43.

²⁹ This article is not the place to try to catalogue these powers. Their existence and growth is a notorious fact.

³⁰ See, eg, Andrew Lynch, Nicola McGarrity and George Williams (eds.), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010); George Williams and Svetlana Tyulkina, 'Preventative Detention Orders in Australia' (2015) 38 *University of New South Wales Law Journal* 738; Nicola McGarrity, Lisa Burton and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) *Melbourne University Law Review* 415.

³¹ Robert Nisbet, *The Quest for Community: A Study in the Ethics of Order and Freedom* (ISI Books, 2010), ch 5.

³² See, eg, Matthew Turnour, *Beyond Charity: Outlines of a Jurisprudence for Civil Society* (PhD Thesis, Queensland University of Technology, 2009); Nicholas Aroney and Matthew Turnour, 'Charities Are the New Constitutional Law Frontier' (2017) 41 *Melbourne University Law Review* (forthcoming).

While we think that state displacement of roles formerly played by the 'intermediate' institutions of civil society is a serious problem, we do not consider further in this article the rise of judicial and governmental power in this general sense. Rather, in line with the comparative literature, we consider the rise in judicial power in Australia in terms of the balance between the branches of government and the extent to which there has been a transfer of power from the other branches to the courts. In our view, the primary way that an increase in judicial power has the potential to occur in Australia is through unrestrained and expansive approaches to constitutional interpretation and the interpretation of statutes that are accorded a quasi-constitutional status, such as statutory charters of rights. Novel advances in the common law effected by the judiciary may be overturned by legislation, and unwelcome interpretations of legislation can also be 'corrected' by subsequent legislation, but this does not apply to constitutions and politically unamendable statutes. For this reason, we focus on constitutional and quasi-constitutional jurisprudence in this sense.

Measuring a relative rise in judicial power is not a simple exercise. Two scholars recently wrote that 'there is no consensus on the concept or the measure of judicial power'.³³ In a recent paper, Stephen Gardbaum has proposed that the best measure of judicial power is not simply the number, frequency or proportion of cases in which courts use the power of judicial review to strike down legislation or administrative action, but a more rounded assessment of how consequential court decisions are in terms of affecting the outcomes of important constitutional and political issues and their impact on political and social life.³⁴ Gardbaum argues that the consequential power of the courts is a function of three broad factors: (1) formal legal rules and powers, (2) legal and judicial practice, and (3) the immediate political and electoral context.³⁵ Prime among the formal legal factors, Gardbaum says, is the existence of a justiciable written constitution, or a bill of rights with constitutional status. At this most basic level, Australia has a written constitution, but unlike many other countries, does not have a constitutional bill of rights, let alone a statutory one. According to Gardbaum, these factors are highly significant, but they are not the whole story. It is also relevant to consider the exact terms and scope of the constitution as well as the extent of the powers and jurisdiction available to the courts.³⁶ Of the particular measures that Gardbaum discusses, it is especially relevant to observe that the provisions of the Australian Constitution are largely restricted in their scope to defining the institutions of the Commonwealth and conferring powers upon them.³⁷ The Australian Constitution is not deliberately 'transformative'; it does not seek to bring about fundamental social or political change, except in the sense that its central purpose was to unite six Australian self-governing colonies into a federal

³³ Daniel M Brinks and Abby Blass, 'Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice' (2017) 15 *International Journal of Constitutional Law* 296, 321.

³⁴ Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts?' (Paper presented at the International Society of Public Law Annual Conference, Copenhagen, 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050169> 5.

³⁵ *Ibid* 8.

³⁶ *Ibid* 10-12.

³⁷ Nicholas Aroney, Peter Gerangelos, James Stellios and Sarah Murray, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 42-44, 101-104, 202-204, 282-7.

commonwealth.³⁸ In relation to the High Court in particular, it is relevant to note that the judicial power of the Commonwealth is constitutionally vested in the High Court, other federal courts and State courts exercising federal jurisdiction³⁹ and that the power of judicial review, although not expressly stated, has always been understood to be intrinsic to the Constitution's design and purpose.⁴⁰ The High Court has jurisdiction to issue various constitutional writs and make binding declarations of invalidity, but it does not issue advisory opinions.⁴¹ Unlike some constitutional courts, the High Court does not have authority to rule on constitutional amendments,⁴² but it may be practically difficult for political actors to secure constitutional amendments in order to reverse court decisions.⁴³ Individuals and politicians can initiate constitutional proceedings before the courts, but the rules of locus standi in Australia are stricter than in other countries.⁴⁴ Judges are appointed by governments, no legislative approval for their appointment is required and no judges are popularly elected in Australia; federal judges have tenure to age 70 and are therefore institutionally independent.

As Gardbaum argues, however, constitutional formalities are not the whole story. It is also important to consider legal and judicial practice.⁴⁵ Courts may have substantial powers, but whether they actually exercise those powers, and the manner in which they exercise them, can vary. Here, it is pertinent to observe that Australian courts, and especially the High Court, frequently hold that legislation is unconstitutional and administrative action unlawful even when such decisions run contrary to the policies, preferences or expectations of governments, and they do so confident that their decisions will be obeyed, even if they are also occasionally publicly criticised, sometimes sharply.

Lastly, Gardbaum proposes that the consequential power actually exercised by courts depends on the immediate political, electoral and (we might add) social context in which the courts operate.⁴⁶ Countries that are totalitarian, autocratic or authoritarian usually have very weak courts that are subjected to significant political influence or control, notwithstanding the formal powers that a written constitution may appear to confer upon them. Even in democratic countries a single party may play an enduring or dominating role in the political scene and therefore be in a position to make highly politicised judicial appointments and otherwise leverage or manipulate the courts. In other democratic countries, however, it may be very rare for single parties to form governments in their own right, with the result that consensus judicial appointments acceptable to all partners in the governing coalition must be sought. Against these

³⁸ Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).

³⁹ *Constitution*, s 71.

⁴⁰ Nicholas Aroney, 'The Justification of Judicial Review: Text, Structure, History and Principle' in Rosalind Dixon (ed.), *Australian Constitutional Values* (Hart Publishing, forthcoming 2018).

⁴¹ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

⁴² *Australian Constitution*, s 128. For the position in other jurisdictions see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017).

⁴³ George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

⁴⁴ Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010) 4, 27–31.

⁴⁵ Gardbaum, above n 34, 13–17.

⁴⁶ *Ibid* 17–19.

possibilities, as before, Australia falls somewhere in the middle: it is a genuine democracy in which electoral results periodically oscillate from one side of politics to another, but in which a single party, or a tightly-disciplined standing coalition of parties, is usually able to form government and therefore control judicial appointments. Although political orientations do sometimes play a role, Australian courts are not routinely packed, and appointees are not appointed for overtly partisan reasons.⁴⁷ Persons appointed to judicial office are almost always relevantly qualified and highly experienced. There is no discernible practice of systematically appointing very young lawyers as judges in order to influence the direction of the courts over the long term, or appointing lawyers who are close to retirement in order to destabilise the courts, as happens in some countries. While Australian judges are generally well-respected, they are nonetheless conscious that the goodwill of the public and the support of the political class depends on the non-partisan manner in which they exercise their powers.

IV THE RISE OF JUDICIAL POWER IN AUSTRALIA

Based on the factors discussed in the previous section, we would expect Australian courts to be moderately powerful within the basic parameters set by the Australian constitutional system. There are, throughout the history of the High Court, numerous examples of both majoritarian decisions — those which have upheld the validity of the actions of the legislative or executive branches — as well as counter-majoritarian decisions. As discussed above, however, the power of the judicial branch cannot be reduced to a single metric, but must be assessed relative to the overall patterns of decision-making within the constitutional system. The exercise of judicial power in Australia is best explained both thematically and chronologically. Considered thematically, key topics concern the High Court's jurisprudence on federalism, express rights, implied rights, the separation of powers and the principle of legality. When considered chronologically, the High Court's jurisprudence on these and other topics has undergone significant change and development.

A *Thematic overview*

For much of its history, the High Court has exercised a strong federalism-based judicial review, and has invalidated many Commonwealth and State laws on federal or federal-related grounds. The early High Court's doctrinal approach was broadly pro-states, having developed a jurisprudence designed to protect the nature of the federal compact, in particular the doctrine of implied immunities and reserved powers.⁴⁸ The Court's later doctrinal approach has been much more favourable to Commonwealth power, as illustrated by its approach to the interpretation of federal heads of power, characterisation of federal laws, approach to application of s 109 inconsistency, the

⁴⁷ See generally Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295.

⁴⁸ John M Williams, 'The Griffith Court', in Rosalind Dixon and George Williams (eds.), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 88–91. These doctrines are assessed in Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly Is Wrong with the Reserved Powers Doctrine?' (2008) 32(1) *Melbourne University Law Review* 1.

approach to Commonwealth taxation powers and the grants power under s 96.⁴⁹ While this illustrates the point that doctrinal choices by the High Court can have significant consequences for the federal balance of power, it is difficult to characterise this as a rise in judicial power relative to the other branches. For the most part, these doctrinal and constructional choices relate to the constitutional distribution of power between the Commonwealth and the States and therefore a power denied to one level of government would often be available to the other level.⁵⁰ That said, it must be acknowledged that many decisions have certainly prevented federal governments from implementing their wishes. Whether this represents an exertion of judicial power over the legislature and executive depends, in part, on whether the High Court has been faithfully applying the Constitution in such cases. Here it might be said that the Court has been too deferential to the elected branches.⁵¹

Australia, as is well known, has no constitutionally entrenched bill of rights, and its Constitution contains few rights, because the framers trusted the institutions of parliamentary responsible government to provide sufficient safeguards.⁵² The rights that are contained in the Constitution have typically been given a relatively narrow construction. Section 41 has been interpreted as a transitional provision with no current legal effect.⁵³ A narrow purposive interpretation has been given to the ‘establishment’ and ‘free exercise of religion’ protections in section 116.⁵⁴ It has been argued that the Court’s interpretation of s 80 has rendered it an ‘illusory’ protection, because it leaves it open to Parliament to determine which offences are indictable.⁵⁵ Other rights provisions have been given somewhat wider interpretations: the scope of section 117 was expanded in *Street*,⁵⁶ and s 51(xxxi) has been used to strike down a considerable

⁴⁹ Nicholas Aroney, ‘The High Court of Australia: Textual Unitarism Vs Structural Federalism’ in Nicholas Aroney and John Kincaid (eds.), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press, 2017).

⁵⁰ Compare Adrienne Stone, ‘Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review’ (2008) 28 *Oxford Journal of Legal Studies* 1; José Casanova, ‘Private and Public Religions’ (1992) 59(1) *Social Research* 17; Nicholas Aroney, ‘Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism’ (2008) 27 *University of Queensland Law Journal* 129.

⁵¹ For critique, see James Allan and Nicholas Aroney, ‘An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism’ (2008) 30 *Sydney Law Review* 245.

⁵² Owen Dixon, *Jesting Pilate* (Law Book Company) 101–2. For critique see John M Williams, ‘The Emergence of the Commonwealth Constitution’, in H P Lee and George Winterton (eds.), *Australian Constitutional Landmarks* (Cambridge University Press, 2003), 22–7.

⁵³ *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254; Jonathan Crowe and Peta Stephenson, ‘An Express Constitutional Right to Vote? The Case for Reviving Section 41’ (2014) 36 *Sydney Law Review* 205; Anne Twomey, ‘The Federal Constitutional Right to Vote in Australia’ (2000) 28 *Federal Law Review* 125.

⁵⁴ See *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559, 579, 598–9, 616, 653. As one commentator put it: ‘[f]or the early High Court, religion began and ended at the church door’: Joshua Puls, ‘The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees’ (1998) 26 *Federal Law Review* 83, 142. See also Clifford L Pannam, ‘Travelling Section 116 with a US Road Map’ (1963) 4 *Melbourne University Law Review* 41, 68.

⁵⁵ George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 357.

⁵⁶ *Street v Queensland Bar Association* (1989) 168 CLR 461.

array of laws,⁵⁷ including the Chifley Government's bank nationalisation scheme,⁵⁸ although many more challenged laws, some of them politically very significant, have been upheld.⁵⁹ The prohibition on laws interfering with freedom of interstate trade, commerce and intercourse in section 92 of the Constitution has also been used by the Court, particularly under its 'individual rights' interpretation of the provision, to strike down legislation regulating trade and commerce of that description.⁶⁰ However, the Court's decision in *Cole v Whitfield* in 1988 considerably reduced the scope and effect of the provision, and the invalidation of laws has become less frequent.⁶¹

Perhaps ironically, the Court has been more adventurous in the development of implied rights, particularly an implied freedom of political communication which the Court found in 1992 imposes constraints on the ability of the Commonwealth Parliament to make laws limiting freedom to discuss political matters.⁶² To this has since been added a constitutionally entrenched guarantee of universal adult suffrage (subject to reasonable and proportionate limitations)⁶³ and what has been called a guarantee of '[e]quality of opportunity to participate in the exercise of political sovereignty'.⁶⁴ Numerous laws, many of high political significance, have been struck down on these grounds,⁶⁵ while other laws have been read down so as to comply with the implied freedom,⁶⁶ and the common law of defamation has also been adjusted as a result.⁶⁷

⁵⁷ Eg, *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513.

⁵⁸ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

⁵⁹ Eg, *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480; *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; *JT International SA v Commonwealth* (2012) 250 CLR 1.

⁶⁰ Eg, *R v Smithers; Ex parte Benson* (1912) 16 CLR 99; *W & A McArthur v Queensland* (1920) 28 CLR 530; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

⁶¹ *Cole v Whitfield* (1988) 165 CLR 360; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182; *Betfair Pty Ltd v New South Wales* (2012) 249 CLR 217. However, see *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

⁶² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁶³ *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

⁶⁴ *McCloy v New South Wales* (2015) 89 ALJR 857, 870 [45] (French CJ, Kiefel, Bell and Keane JJ).

⁶⁵ In addition to the cases cited above, see *Unions NSW v New South Wales* (2013) 252 CLR 530; *Brown v Tasmania* (2017) 91 ALJR 1089.

⁶⁶ Eg, *Coleman v Power* (2004) 220 CLR 1; *Monis v The Queen* (2013) 249 CLR 92.

⁶⁷ *Theophanous v The Herald & Weekly Times Limited* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; moderated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

The Court's decisions in these cases generated considerable controversy.⁶⁸ Some defended them on the ground that freedom of political speech is an essential element of a properly functioning democratic system, and that the decisions therefore enhanced Australian democracy rather than diminished it.⁶⁹ Others questioned their legitimacy on the ground that all of the evidence suggests that no such intention or understanding existed when the Constitution was drafted, popularly approved and enacted into law.⁷⁰ While each step in the reasoning may have seemed plausible, when the cumulative effect of the reasoning is considered, not only was the result far-removed from the text of the Constitution, but it involved a significant transfer of power to the courts to make determinations about the proper political balance to be struck in relation to the legal regulation of elections and political speech. While the framers of the Constitution intended to establish a system of representative and responsible government, it did not follow that they, or the voters who ratified the Constitution, intended that unelected judges should have the authority to determine whether laws enacted by a democratically elected Parliament are constitutional on this ground.⁷¹

Also noteworthy is the High Court's separation of powers jurisprudence. The High Court has jealously guarded the institutional independence of the federal judiciary, imposing limitations on the functions that may be conferred on federal courts and judges. Perhaps ironically, this doctrine limits the ability of the courts from playing a more active role under statutory human rights enactments, but it also limits the capacity of the Parliament to determine what the powers and functions of the courts should be. In its highly significant decision in *Momcilovic v The Queen* the Court held that the power to issue declarations of inconsistent interpretation under s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was not an exercise of judicial power, and therefore could not be conferred on courts exercising federal jurisdiction.⁷²

The Victorian Charter and the ACT *Human Rights Act 2004* require parliamentary committees to scrutinise legislation for its consistency with human rights norms and require public authorities to act compatibly with human rights and give proper consideration to human rights in making decisions,⁷³ contributing to a juridification of the way in which parliaments enact legislation and public authorities administer the law in those jurisdictions. These enactments also authorise courts to interpret legislation in a way that is compatible with human rights, but only where it is

⁶⁸ See, eg, the articles in the special editions of (1994) 16 *Sydney Law Review* and (2011) 30 *University of Queensland Law Journal*.

⁶⁹ Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133.

⁷⁰ See Jeffrey Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 32 *Monash University Law Review* 362.

⁷¹ George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1; Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249.

⁷² *Momcilovic v The Queen* (2011) 245 CLR 1, [80], [89] (French CJ), [172]–[189] (Gummow J), [280] (Hayne J), [457] (Heydon J), [584] (Crennan and Kiefel JJ), [661] (Bell J).

⁷³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 30, 38; *Human Rights Act 2004* (ACT) ss 38, 40B.

possible to do so consistently with the purpose of the law.⁷⁴ Under corresponding legislative provisions in the United Kingdom and New Zealand, the courts have been willing to depart from the unambiguously clear intentions of the Parliament by ‘read[ing] in words which change the meaning of the enacted legislation’ so as to make it compliant with the court’s interpretation of human rights norms.⁷⁵ Despite their tighter language, the Victorian and ACT Charters could arguably have been applied by Australian courts in a similarly expansive way,⁷⁶ but in *Momcilovic* a majority of the High Court adopted a narrower approach to the reading down provision in the Victorian Charter, thereby securing its constitutional validity. Central to this finding of validity was the proposition that s 32(1) preserved ‘the traditional role of the courts in interpreting legislation’ and did not confer on the courts what might amount to a ‘law-making function’.⁷⁷ Unlike the national human rights regimes of the United Kingdom, Canada, South Africa, New Zealand and Hong Kong, the Victorian Charter is subject to a written federal Constitution which, as interpreted by the High Court, requires that courts exercising federal jurisdiction may only be invested with ‘judicial power’.⁷⁸ An amendment to the Australian Constitution — such as the incorporation of a Bill of Rights — would be necessary to change this.

Momcilovic has thus had the consequence of effectively preventing Australian legislators from fully implementing a ‘dialogue’ model of human rights protection.⁷⁹ Rather, consistently with the reasoning in *Momcilovic*, it has been the principle of legality that has played a more significant role in Australian jurisprudence. This principle requires courts to interpret statutes ‘where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law’.⁸⁰ Prompted, it has been said, by the rise of human rights ‘as a core concern of the international legal order’ in the aftermath of World War II, the principle of legality has

⁷⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; *Human Rights Act 2004* (ACT) s 30.

⁷⁵ *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, 571–2 (Lord Nicholls).

⁷⁶ James Allan, ‘The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism’ (2006) 30 *Melbourne University Law Review* 906; Julie Debeljak, ‘Who Is Sovereign Now? The Momcilovic Court Hands Back Power over Human Rights That Parliament Intended It to Have’ (2011) 22 *Public Law Review* 15.

⁷⁷ *Momcilovic v The Queen* (2011) 245 CLR 1, 47–50 [46]–[51] (French CJ), 84 [146](vi), 92–3 [171] (Gummow J), 123 [280] (Hayne J), 217 [566] (Crennan and Kiefel JJ), 250 [684] (Bell J). In his dissenting judgment on this point, Heydon J found that the reading down provision was unconstitutional precisely because he considered it *did* confer on the courts an essentially legislative function which, when intertwined with their judicial functions, would ‘alter the nature of the those judicial functions and the character of the court as an institution’: *Momcilovic v The Queen* (2011) 245 CLR 1, 164 [409], 172 [431], 174–5 [436]–[439], 184 [454] (Heydon J, dissenting). His Honour’s reasoning was based on the view that the reading down provision of the Victorian Charter (s 32(1)) required the courts to consider whether a human right can justifiably be limited (pursuant to s 7(2)).

⁷⁸ See *Momcilovic v The Queen* (2011) 245 CLR 1, 83 [146](i), 87–90 [148]–[161] (Gummow J).

⁷⁹ Will Bateman and James Stellios, ‘Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights’ (2012) 36 *Melbourne University Law Review* 1.

⁸⁰ *Momcilovic v The Queen* (2011) 245 CLR 1, 46 (French CJ); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ agreeing). See also Chief Justice J J Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 774–5, 780–1.

been applied with increasing vigour in Australia.⁸¹ Indeed, this has occurred to such an extent that it can be said that the courts have developed ‘a common law bill of rights, freedoms and principles that is strongly resistant to legislative encroachment’ under the guise of the principle of legality.⁸² Chief Justice French described the principle of legality ‘as “constitutional” in character’ and ‘that common law freedoms are more than merely residual’.⁸³ Under the doctrine of legality, Parliament retains the power to override common law rights and freedoms, but it must do so unambiguously.

B Chronological development

For much of its history, the High Court has been cautious of judicial law-making, developing the law in an incremental way, and aspiring to maintain predictable and stable outcomes by adhering to precedent.⁸⁴ The predominant approach to constitutional interpretation has been characterised as ‘literalism’ (namely, that ‘constitutional words are to be given their full, natural or literal meaning as understood in their textual and historical context’) or ‘legalism’ (namely that ‘constitutional issues can and should be resolved only by reference to norms and values within the “four corners” of the Constitution’).⁸⁵ However, no one ‘modality’ of constitutional interpretation dominates. As Gummow J once put it, questions of interpretation of the Constitution ‘are not to be answered by the adoption and application of any particular all-embracing and revelatory theory or doctrine of interpretation’.⁸⁶ Judges routinely justify their interpretations by reference to the modalities of text, structure, history, ethics, prudence and doctrine.⁸⁷ Nevertheless, the key focus remains the text of the Constitution. Justice Brad Selway argued that ‘all Australian High Court judges are likely to be viewed as being fundamentally “textualists”’, regarding the text as the primary interpretative tool’.⁸⁸

The members of the early High Court under Chief Justice Griffith had all been delegates at the federation debates in the 1890s, and read the Constitution in light of

⁸¹ Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449, 453–6; Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006) 25–8.

⁸² Dan Meagher, ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36 *Sydney Law Review* 413, 415. See also James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008).

⁸³ Robert French, ‘Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons’ (Speech delivered at the Anglo-Australasian Law Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012) 22 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf>.

⁸⁴ Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) ch 3.

⁸⁵ Jeremy Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323, 324.

⁸⁶ *SGH Ltd v Commissioner of Taxation* (2001) 210 CLR 51, [42].

⁸⁷ Nicholas Aroney, ‘Originalism and Explanatory Power’ in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds.), *Festschrift in Honour of Jeffrey Goldsworthy* (Hart Publishing, forthcoming 2018).

⁸⁸ Justice B M Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234, 239.

this political context. The Court was divided by the competing approaches of Griffith, Barton and O'Connor, on the one hand, and Isaacs and Higgins, on the other, and this division continued the pre-federation debates about the 'true' nature of the federal compact.⁸⁹ With its landmark decision in the *Engineers Case*,⁹⁰ the Knox Court (1919–1930) saw a significant shift in constitutional interpretation, rejecting the reserved powers and implied intergovernmental immunities doctrines which had been such a prominent feature of the Griffith era, and emphasising the text of the Constitution, albeit in a way that endorsed a deliberately nationalistic understanding of the federation.⁹¹ During this period the Constitution, it has been said, 'ceased to be a political document and became a legal document'.⁹² Commentators have suggested that in the ensuing decades, the Court sometimes displayed a considerable degree of deference to the legislature and executive, leaving political and policy matters to be dealt with by the political branches of government, and at other times showed itself willing to overturn executive and legislative action.⁹³

The Mason Court (1987–1995) is frequently said to have unashamedly embraced a more politicised and 'activist' role, introducing significant developments in numerous areas of law, several of which have been mentioned. Two studies of the Court during this time have concluded that the High Court self-consciously sought to redefine itself, considering that active law-making and policy-informed adjudication was an indispensable part of the judicial function.⁹⁴ The Mason Court excited considerable controversy, being responsible for some of the most well-known judgments in the High Court's history, including extending the common law to recognise native title,⁹⁵ discerning an implied freedom of political communication,⁹⁶ holding an amendment to a company's articles of association to expropriate minority shareholders to be invalid,⁹⁷ and holding that courts should order a stay of a criminal

⁸⁹ Williams, 'The Griffith Court', above n 48, 95.

⁹⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁹¹ *Ibid* 160, 162.

⁹² Anne Twomey, 'The Knox Court', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48, 98.

⁹³ See Gabrielle Appleby, 'The Gavan Duffy Court' and Fiona Wheeler, 'The Latham Court: Law, War and Politics', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48.

⁹⁴ Pierce, *Inside the Mason Court Revolution*, above n 84; Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000).

⁹⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1. The Court subsequently held in *Wik Peoples v Queensland* (1996) 187 CLR 1 that the grant of a pastoral lease did not necessarily extinguish native title. See Margaret Stephenson and Suri Ratnapala, *Mabo: A Judicial Revolution* (University of Queensland Press, 1993).

⁹⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. See H P Lee, 'The Implied Freedom of Political Communication', in H P Lee and George Winterton (eds.), *Australian Constitutional Landmarks* (Cambridge University Press, 2003).

⁹⁷ *Gambotto v WCP Ltd* (1995) 182 CLR 432. The *Australian Financial Review* referred to the High Court decision as having 'radically altered the balance of power within corporate Australia' and appeared 'to have turned Australia into a greenmailer's paradise': *Australian Financial Review*, 9 March 1995. For analysis see Ian M Ramsay and Benjamin B Saunders, 'What Do You Do with a High Court Decision You Don't Like? Legislative, Judicial and Academic Responses to *Gambotto v WCP Limited*' (2011) 25 *Australian Journal of Corporate Law* 112.

trial where an accused charged with a serious offence is unable to obtain legal representation and an unfair trial would result.⁹⁸ The Court was widely criticised for these (and other) decisions.⁹⁹

The extent to which the Mason era represented a radical change has been debated. Some have argued that the Court 'did not revolutionize the basic judicial techniques' and characterised the Mason Court's approach as 'a restrained activism that paid due deference to the limits of the judicial function'.¹⁰⁰ Others consider the Mason Court to have engaged in 'opportunistic judicial activism',¹⁰¹ while yet others have characterised the Court as a wholly 'unfaithful servant' of the Constitution.¹⁰² Mason himself argued that the new approach was more 'honest' than earlier ones because it made explicit the policy values that were disguised by legalism.¹⁰³ Serious doubts remain, however, about whether the new techniques do enable the judges to explain the real grounds of their decisions.¹⁰⁴ What seems clear is that the Mason Court's approach was significantly different from its predecessors¹⁰⁵ and undeniably effected significant changes in legal doctrine, going beyond what was previously considered the legitimate role of the Court.

Since the Mason era, the High Court is often said to have retreated from the 'activist' conception of the judicial role.¹⁰⁶ Some commentators have noted a relatively cautious approach to constitutional interpretation during the Gleeson era (1998–2008), confirming or recasting existing lines of authority rather than 'striking out in bold new directions'.¹⁰⁷ However, under Chief Justice Robert French, the Court is considered to

⁹⁸ *Dietrich v The Queen* (1992) 177 CLR 292.

⁹⁹ Some of the most colourful criticisms are collected in Kirby, above n 1.

¹⁰⁰ Fiona Wheeler and John Williams, 'Restrained Activism' in the High Court of Australia', in Brice Dickson (ed.), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007), 19–21, 55.

¹⁰¹ Tom Campbell, 'Judicial Activism — Justice or Treason?' (2003) 10 *Otago Law Review* 307, 320.

¹⁰² Greg Craven, 'The High Court and the Founders: an Unfaithful Servant' in Kathleen Dermody and K Walsh (eds.), *The Constitution Makers: Papers on Parliament No 30* (Department of the Senate, 1997) 63. See also Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22 *University of New South Wales Law Journal* 216.

¹⁰³ Anthony Mason, 'The Centenary of the High Court of Australia' (2003) 5 *Constitutional Law and Policy Review* 41, 45.

¹⁰⁴ For criticism, see Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases' (2008) 31(1) *University of New South Wales Law Journal* 107.

¹⁰⁵ Paul Kildea and George Williams, 'The Mason Court', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48, 246.

¹⁰⁶ Rosalind Dixon and Sean Lau, 'The Gleeson Court and the Howard Era: A Tale of Two Conservatives (and isms)', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48; B M Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 324; Haig Patapan, 'High Court Review 2001: Politics, Legalism, and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241. Not all agree with this assessment: see, eg, Patrick Emerton and Jeffrey Goldsworthy, 'The Brennan Court', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21.

¹⁰⁷ Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2008 Statistics' (2009) 32 *University of New South Wales Law Journal* 181, 193.

have again become more adventurous,¹⁰⁸ having introduced important developments in constitutional doctrine such as constraints upon Commonwealth executive power to contract and spend,¹⁰⁹ and reinvigorating and extending the *Kable* principle.¹¹⁰ It may be too early to form a view about the Kiefel Court, but the willingness of members of the Court to use a balancing test for the implied freedom of political communication will continue to be an important indicator of the extent to which the Court may be ‘overstepping the boundaries of its supervisory role’ and thereby ‘undermining the very system of representative government which it is charged with protecting’.¹¹¹

Even if a relatively more cautious approach has characterised the Court since the mid-1990s, the judicial role has continued to expand. Arguing that there has been ‘a remarkable expansion of judicial power at the expense of the legislative and executive powers of elected parliaments and governments’ since the 1990s,¹¹² former Federal Court judge Ronald Sackville has identified three areas of jurisprudence which evidenced this trend. The first is the entrenchment of judicial review of executive action at both the federal and State levels,¹¹³ with the result that Australian Parliaments cannot remove the ability of courts to review decisions of executive bodies.¹¹⁴ At the same time, the courts dramatically expanded the grounds on which such review may be undertaken.¹¹⁵ According to Sackville, the High Court’s assertion of power to correct jurisdictional error has profoundly altered the balance of power between the courts and elected governments and parliaments.¹¹⁶ The second component is the increasing protectiveness of the institutional integrity of Australian courts by means of the *Kable* doctrine and its extension in recent cases.¹¹⁷ The development of this constitutional implication limits the functions that may be conferred on State courts, requiring that State courts remain independent and impartial in the exercise of their powers, that their proceedings are fair, that they must give reasons for their decisions and must adhere to the open court principle.¹¹⁸ Sackville’s third illustration is the implied freedom of

¹⁰⁸ Harry Hobbs, Andrew Lynch and George Williams, ‘The High Court under Chief Justice Robert French’ (2017) 91 *Australian Law Journal* 53; Anika Gauja and Katharine Gelber, ‘The French Court’, in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48.

¹⁰⁹ *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156.

¹¹⁰ *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Wainohu v New South Wales* (2011) 243 CLR 181; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *A-G (NT) v Emmerson* (2014) 253 CLR 393; *Kuczborski v Queensland* (2014) 254 CLR 51; *Pollentine v Bleijie* (2014) 253 CLR 629; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569.

¹¹¹ *Brown v Tasmania* (2017) 91 ALJR 1089, [434] (Gordon J), see also [290] (Nettle J).

¹¹² Ronald Sackville, ‘An Age of Judicial Hegemony’ (2013) 87 *Australian Law Journal* 105, 105.

¹¹³ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

¹¹⁴ Sackville, ‘An Age of Judicial Hegemony’, above n 112, 109–113.

¹¹⁵ See, eg, John McMillan, ‘Natural Justice — Too Much, Too Little Or Just Right?’ (2008) 58 *ALAL Forum* 33.

¹¹⁶ Sackville, ‘An Age of Judicial Hegemony’, above n 112, 113.

¹¹⁷ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

¹¹⁸ *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Wainohu v New South Wales* (2011) 243 CLR 181; *Hogan v Hinch* (2011) 243 CLR 506.

political communication, the significance of which has been discussed. As a constitutional limitation, the implied freedom undoubtedly increases judicial power at the expense of the legislature and executive.¹¹⁹ On Sackville's analysis these three areas represent a considerable transfer of power to the judiciary, with potential for 'further anti-majoritarian intrusions into areas hitherto the province of parliaments and executive governments'.¹²⁰ Other commentators have offered additional examples.¹²¹

C *Shifts in the Balance of Power*

The three areas of jurisprudence noted in the previous section undoubtedly amount to a rise in judicial power. But to what degree? While the Court is undoubtedly reviewing administrative action and striking down laws on grounds that were not available in previous times, the question for our purposes is: to what extent has this altered the balance of power between the different branches of government? Compared to the situation prevailing prior to the Mason Court, the overall balance has shifted towards the judiciary. However, when compared to the rise of judicial hegemony in other jurisdictions, the change has not been nearly so great. This can be shown by considering Sackville's three examples.

The first example given by Sackville is judicial review of executive action. It is certainly true that the courts have shown increased willingness to assert jurisdiction to review executive action, and in many cases to overturn executive decisions. However, key features of administrative law moderate the extent to which this involves a relative increase in judicial power, particularly in relation to the legislature. The first and most obvious reason for this is that the courts continue to preserve a firm distinction between merits and legality, with the courts' function confined to reviewing 'the manner in which the decision was made', and not the substantive merits of a decision.¹²² In judicial review 'the court is not concerned with the merits or correctness of the administrative decision'.¹²³ That said, the distinction between merits and method may sometimes be elusive;¹²⁴ and some grounds of review clearly consider substance. As such, the precise boundary between merits and legality is yet to be satisfactorily articulated.¹²⁵ It is nevertheless true that there is a distinction between merits and legality, with the merits of administrative action being, as Brennan J put it, 'for the repository of the relevant power and, subject to political control, for the repository

¹¹⁹ Sackville, 'An Age of Judicial Hegemony', above n 112, 116.

¹²⁰ Sackville, 'An Age of Judicial Hegemony', above n 112, 119.

¹²¹ James Allan, *Democracy in Decline: Steps in the Wrong Direction* (McGill-Queen's University Press, 2014) 36; Brian Galligan, 'Judicial Intrusion into the Australian Cabinet', in Tate and Vallinder (eds.), *The Global Expansion of Judicial Power*, above n 12.

¹²² *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, 155, quoted in, among other Australian cases, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, [23] (Gleeson CJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [105] (McHugh and Gummow JJ); *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J).

¹²³ *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, [23] (Gleeson CJ).

¹²⁴ *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J).

¹²⁵ Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2012) 40.

alone'.¹²⁶ The courts will, likewise, not adjudicate on the merits of a policy adopted by an administrative body.¹²⁷ This distinction operates as an inbuilt limit on the ability of the courts to encroach on executive decision-making.

A second feature of administrative law is that the courts' role is largely limited to ensuring that executive bodies who make decisions under parliamentary enactments do so in accordance with applicable legal limits. The underlying policy of the statute, its purpose, provisions and powers are entirely up to the legislature: assuming constitutional validity, the legislature can determine what powers to confer on the executive and what conditions trigger the exercise of those powers. The courts will not generally inquire into the wisdom or desirability of those powers, but they will seek to ensure that the executive branch does not exceed the limits placed on its powers by the legislature. John McMillan has written that natural justice does not:

impede the government administration from implementing statutory purposes and objectives. An unyielding principle is that natural justice is merely a doctrine of procedural fairness. It does not speak to the merits of an administrative decision. Natural justice has been likened to a last meal before the hanging, but even so it affirms a fundamental principle that procedural integrity is important, whatever the substantive outcome.¹²⁸

This is not to deny that the power of the judiciary has increased or that judge-made doctrines have become more onerous. Clearly, they have.¹²⁹ The judicial function nevertheless remains a relatively narrow one and substantial freedom remains, especially to the legislative branch. By contrast, American courts, for example, appear to undertake a much more intrusive review function in relation to executive action, including executive rulemaking.¹³⁰

Similar observations can be made in relation to the High Court's application of judicial separation principles to State courts in the *Kable Case*. The doctrine in *Kable*, once lamented as the 'constitutional guard dog' that only barked once,¹³¹ has in recent times been asserted with increasing vigour, and extended to include additional defining characteristics which cannot be removed without impairing the institutional integrity of the courts.¹³² In assessing the impact of *Kable* on the balance of power between the branches of government, it is important to bear in mind that the doctrine has the effect of preventing State legislatures from conferring powers on their courts (or otherwise legislating) in such a way as to impede their institutional integrity. It does not confer

¹²⁶ *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6.

¹²⁷ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; (1979) 24 ALR 577.

¹²⁸ John McMillan, 'Natural Justice — Too Much, Too Little Or Just Right?' (2008) 58 *AIAL Forum* 33, 33.

¹²⁹ John McMillan, 'The Role of Judicial Review in Australian Administrative Law' (2001) 30 *AIAL Forum* 47.

¹³⁰ See, eg, Todd Garvey, 'A Brief Overview of Rulemaking and Judicial Review' (Congressional Research Service, 2017).

¹³¹ *Baker v The Queen* (2004) 223 CLR 513, [54] (Kirby J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, [134] (Kirby J).

¹³² Gabrielle Appleby, 'The High Court and *Kable*: A study in federalism and rights protection' (2014) 40 *Monash University Law Review* 673, 683–4.

substantive rights on individuals,¹³³ or have any application to the powers or functions that may be conferred on non-judicial bodies.

As such, the *Kable* doctrine does not limit the substantive policy choices of State legislatures, except insofar as it prevents them from conferring certain functions on courts. Where, under the *Kable* principle, it is not permissible to confer a particular power on the courts, the legislature will often still be able to implement its policy, but will have to adopt a means of doing so that meets with court approval, for example by conferring the power on an executive body, or changing the process to ensure that it is procedurally fair. *Kable* is certainly a limitation on legislative power, and one that did not exist prior to 1996. It therefore represents an increase in judicial power. It has also led to further centralisation of judicial power within the Australian federal system.¹³⁴ However, when placed in comparative perspective, the *Kable* doctrine is less radical than constitutional doctrines developed in other jurisdictions.

The United States Supreme Court has developed very far-reaching implications for criminal procedure, for example, from the due process clause.¹³⁵ The Canadian Supreme Court, comparably, has imposed substantive constitutional limitations on criminal laws and held that the withholding of evidence from non-citizen detainees when issuing security certificates violated the Charter.¹³⁶ In the absence of corresponding rights provisions in the Australian Constitution,¹³⁷ the High Court has been much more circumspect in this field.

Of the three examples relied upon by Sackville, the implied freedom of political communication is the most significant. As noted, it constituted a revolutionary development in Australian constitutional law. As reformulated in *Lange*,¹³⁸ the implied freedom will invalidate any law or executive action which burdens political communication and which is not reasonably appropriate and adapted to advance a legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.¹³⁹ The second limb of the *Lange* test, it has been argued, necessarily involves the courts in making political value judgments which judges are not competent to do.¹⁴⁰ As

¹³³ For an argument that such rights should be implied from Chapter III of the Constitution, see Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (Federation Press, 2016).

¹³⁴ James Stellios, 'The Centralisation of Judicial Power within the Australian Federal System' (2014) 42 *Federal Law Review* 357; Stephen Mcleish, 'The Nationalisation of the State Court System' (2013) 24 *Public Law Review* 252.

¹³⁵ See, eg, E Thomas Sullivan and Toni M Massaro, *The Arc of Due Process in American Constitutional Law* (Oxford University Press, 2013).

¹³⁶ Kent Roach, 'Judicial Activism in the Supreme Court of Canada', in Dickson (ed.), *Judicial Activism in Common Law Supreme Courts*, above n 100, 81, 89.

¹³⁷ The much more narrowly drafted section 117 of the Australian Constitution, unlike the Fourteenth Amendment to the United States Constitution, offers relatively little textual basis upon which the Court can develop corresponding doctrines. On the interpretation of s 117, see *Street v Queensland Bar Association* (1989) 168 CLR 461; *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.

¹³⁸ And further modified in *Coleman v Power* (2004) 220 CLR 1.

¹³⁹ *McCloy v New South Wales* (2015) 257 CLR 178, 194.

¹⁴⁰ Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years on' (2011) 30 *University of Queensland Law Journal* 59, 76.

Sackville put it, the implied freedom ‘almost inevitably invites courts to make value judgments, without the benefit of clear guidance from settled principles’.¹⁴¹

The elaboration and development of the second limb in recent decisions lends further weight to these concerns, by introducing significant uncertainty in the application of the tests.¹⁴² In *McCloy* a majority of the High Court extended the second limb of *Lange*, arguing that ‘a more structured, and therefore more transparent, approach’ is required.¹⁴³ It was held that the proportionality test — namely, whether the law was reasonably appropriate and adapted to advance the identified legitimate object — should be evaluated according to whether the law is ‘suitable, necessary and adequate in its balance’,¹⁴⁴ where *suitable* means ‘having a rational connection to the purpose of the provision’, *necessary* means that ‘there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom’ and *adequate in its balance* means the ‘balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom’.¹⁴⁵

While perhaps not increasing the scope for judicial value-judgment, for that was already an unavoidable consequence of the need to apply the implied freedom to politically contentious issues, the judgment unashamedly acknowledges that the ‘adequate in its balance’ criterion necessarily involves a value judgment, essentially inviting the judges to substitute their own views of the matter for those of the legislature.¹⁴⁶ For a time, members of the High Court tried to quarantine the effect of the implied freedom by adopting a test that directed attention to the constitutionally prescribed system of representative and responsible government.¹⁴⁷ However, the recent embrace by a majority of the Court of a balancing test effectively abandons this project, allowing the Court free reign in the balancing of what are essentially incommensurable values that can only be weighed in a manner that is ‘largely intuitive and subjective’.¹⁴⁸

¹⁴¹ Sackville, ‘An Age of Judicial Hegemony’, above n 112, 118.

¹⁴² James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6th ed, 2015), 596.

¹⁴³ *McCloy v New South Wales* (2015) 257 CLR 178, 201 (French CJ, Kiefel, Bell and Keane JJ).

¹⁴⁴ This draws on comparative formulations of proportionality: Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012), 3.

¹⁴⁵ *McCloy v New South Wales* (2015) 257 CLR 178, 195 (French CJ, Kiefel, Bell and Keane JJ). See also *Tajjour v New South Wales* (2014) 254 CLR 508, 570–5 (Crennan, Kiefel and Bell JJ). This test does not enjoy universal support on the Court: see, eg, *Brown v Tasmania* (2017) 91 ALJR 1089, [157]–[166] (Gageler J), [428]–[438], [473]–[479] (Gordon J) and it may not be applicable in all cases: *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1039 [37] (French CJ and Bell J).

¹⁴⁶ Caroline Henckels, ‘Proportionality and the Separation of Powers in Constitutional Review’ (2017) 45 *Federal Law Review* 181, 182.

¹⁴⁷ Nicholas Aroney, ‘Justice Mchugh, Representative Government and the Elimination of Balancing’ (2006) 28 *Sydney Law Review* 505

¹⁴⁸ Anthony Mason, ‘The Use of Proportionality in Australian Constitutional Law’ (2016) 27 *Public Law Review* 109, 121. Note, however, continuing resistance to this among a minority of justices. See, eg, *Brown v Tasmania* (2017) 91 ALJR 1089, [157]–[166] (Gageler J), [428]–[438], [473]–[479] (Gordon J).

V EXPLAINING THE RISE OF JUDICIAL POWER IN AUSTRALIA

If there has been a significant, although comparatively moderate, increase in judicial power in Australia, what accounts for this? Why has Australia not followed trends in comparable countries such as the United States, Canada, the United Kingdom and India, where the growth in judicial power has been much more extensive? As noted earlier, Stephen Gardbaum has suggested three broad explanatory factors to be considered when asking such questions, namely: (1) deliberate constitutional design choices, (2) legal culture, and (3) general political context.¹⁴⁹

The kinds of deliberate constitutional design choices Gardbaum has in mind correspond generally to the formal features of the Constitution discussed in the previous section, except that the focus here is on the intentions of the Constitution's framers regarding how powerful a court they wished to create and the design features they included in the Constitution in order to achieve that objective. Here, as noted, the framers of the Australian Constitution fully expected Australian courts, and especially the High Court, to exercise substantial powers of adjudication, including the power of constitutional judicial review.¹⁵⁰ However, closely associated with this intention was the central purpose of the Australian Constitution, which was to establish a federation of states in which the courts would exercise judicial review especially for the purpose of maintaining the federal distribution of powers set out in the Constitution.¹⁵¹ Consistent with this intention, the High Court certainly has exercised judicial review in many significant federalism-related disputes, on occasion overturning government policies of great moment, such as the Bank Nationalisation scheme of the Chifley Government.

To enable the High Court to fulfil its judicial functions, the framers of the Constitution made provision for its independence from the executive government, particularly through guarantees of tenure and salary during office, guarantees that were also enjoyed by the courts of the existing colonies although these latter guarantees were not constitutionally entrenched.¹⁵² This reinforced a political context in which judges were generally respected and enjoyed considerable independence, knowing that their rulings will usually be obeyed, particularly by political actors and agencies.

The Australian Constitution is not regarded as 'sacred',¹⁵³ but nor is it treated as dispensable,¹⁵⁴ and this 'rule of law' value contributes to the respect that is generally

¹⁴⁹ Gardbaum, above n 34, 20-31. Ran Hirschl has proposed a similar set of conditions: institutional features, judicial behaviour, political determinants: Hirschl, above n 3, 263. Neal Tate has suggested five more specific factors: separation of powers, a 'politics of rights', interest group litigation, ineffective majoritarian institutions and wilful delegation by governments: Tate, 'Why the Expansion of Judicial Power?', above n 12, 28-32.

¹⁵⁰ Aroney, above n 40.

¹⁵¹ Brian Galligan, 'Judicial Review in the Australian Federal System: Its Origin and Function' (1979) 10 *Federal Law Review* 367.

¹⁵² See *McCawley v The King* (1918) 26 CLR 9 and *McCawley v The King* (1920) 28 CLR 106, discussed in Nicholas Aroney, 'Politics, Law and the Constitution in McCawley's Case' (2006) 30(3) *Melbourne University Law Review* 605.

¹⁵³ Pauline Maier, *American Scripture: Making the Declaration of Independence* (Knopf, 1st ed., 1997).

¹⁵⁴ Nicholas Aroney and Jeniffer Corrin, 'Endemic Revolution: H L A Hart, Custom and the Constitution of the Fiji Islands' [2013] *Journal of Legal Pluralism and Unofficial Law* 26.

accorded to decisions of the High Court, provided its decisions are seen as genuine attempts to interpret and apply the Constitution, even when this means that government policies are thereby controlled or even thwarted. Australia's political system means that no single party is in a position to mount effectively a sustained and prolonged attack upon the courts, primarily because different parties usually hold office in different States and territories, and so no party has the ability to dominate Australian politics for long periods. Thus, the federal nature of the political system enables a kind of partisan federalism to exist in which a government of a particular political persuasion in one jurisdiction may use litigation to attack the legislation or policies of the government of another jurisdiction, with the High Court's decision in such cases determining the outcome. This entails a significant exercise of power by the Court, but it is at the instigation of one or more democratically elected governments.

While the federal design of the Constitution involved a significant qualification on A. V. Dicey's doctrine of parliamentary sovereignty insofar as it involved a distribution of power among federal and state parliaments,¹⁵⁵ the framers of the Constitution did not seek to add many additional constraints on the powers of the parliaments other than those entailed by the establishment of the federal system.¹⁵⁶ Even the scattered limitations and freedoms that were included in the Constitution were deliberately shaped by federal considerations in one way or another.¹⁵⁷ The framers considered that the maintenance of a healthy political system depended very substantially on the practices of parliamentary responsible government, and they did not for this reason think it necessary to include a Bill of Rights in the Constitution — deliberately departing from the American model in this respect. The consequences of this design feature of the Constitution have proven to be highly significant.

The United States and Canada possess Constitutions that are very similar to Australia's Constitution in several very important respects, except for the existence of a Bill or Charter of Rights. A 'rights culture' has arguably long characterised American politics, a theme especially prominent in American politics since the 1960s.¹⁵⁸ Similarly, since the entrenchment of the Canadian Charter of Rights in 1982, the consequential power of the Canadian Supreme Court has grown very substantially. Nothing of the same magnitude has occurred in Australia. The fields in which the High Court has increased its power have been much more limited and the increase in its power relative to the other branches has been relatively modest. It is only in areas where the High Court has mimicked the effect of a Bill of Rights, in its development of its separation of judicial power jurisprudence and the implied freedom of political communication that a growth in judicial power comparable to what has occurred in Canada and the United States is evident.

That said, the existence or absence of a Bill of Rights in a country is not of itself a sufficient explanatory factor because there are countries, such as Japan, with constitutional rights provisions that have not seen significant growth in judicial

¹⁵⁵ Aroney, above n 38, 92-96.

¹⁵⁶ W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910), 331.

¹⁵⁷ Owen Dixon, 'Two Constitutions Compared' in *Jesting Pilate and Other Papers and Addresses* (Law Book Company, 1965) 102.

¹⁵⁸ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press/Macmillan, 1991).

power.¹⁵⁹ Even where favourable conditions exist for the judicialisation of politics, this will only occur where judges are willing and able to take on such an enlarged role.¹⁶⁰ A degree of willingness characterised the High Court under the chief justiceship of Sir Anthony Mason,¹⁶¹ but the opportunity to do so was limited by the absence of a Bill of Rights. As Mason CJ himself acknowledged, acceptance by the framers of the Constitution that citizen's rights were best protected by the common law and parliamentary institutions meant that it was —

difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens.¹⁶²

Australian judicial culture is marked by a strong sense of the distinction between politics and law. As Justice Keane has written:

there have always been marked differences between judicial and administrative decision-making. Administrative decision-making takes place in an overtly political context. Administrative decision-makers serve a representative function which judges do not: subject to the Constitution, the rights of individuals are affected in accordance with the program of the political party which controls the legislature. Administrative decision-makers are expected to bring to bear their own expertise in their particular field; and the sheer volume of decision-making required makes the Rolls Royce of judicial rigour unaffordable in terms of money and time.¹⁶³

Justice McHugh has argued that, in order to minimise conflict between the executive and judicial branches, courts should 'remind themselves in judicial review cases that their task is to review the legality and not the merits of administrative decisions'.¹⁶⁴ While it is no longer possible to say that there have been no 'deliberate innovators' on the Court,¹⁶⁵ for the most part the High Court has operated within the

¹⁵⁹ Gardbaum, above n 34, 38-42; David S Law, 'The Anatomy of a Conservative Court: Judicial Review in Japan' (2009) 87 *Texas Law Review* 1545.

¹⁶⁰ Tate, 'Why the Expansion of Judicial Power?', above n 12, 33; Martin Shapiro, 'The United States', in Tate and Vallinder (eds.), *The Global Expansion of Judicial Power*, above n 12, 44.

¹⁶¹ Eg, John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review* 158.

¹⁶² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136. See also Anthony Mason, 'The Role of a Constitutional Court in a Federation' (1986) 16 *Federal Law Review* 1.

¹⁶³ P A Keane, 'Legality and Merits in Administrative Law: An Historical Perspective' (2009) 1 *Northern Territory Law Journal* 117, 138.

¹⁶⁴ M H McHugh, 'Tensions between the Executive and the Judiciary' (2002) 76 *Australian Law Journal* 567, 579-80.

¹⁶⁵ Paul Bickovskii, 'No Deliberate Innovators: Mr. Justice Murphy and the Australian Constitution' (1976-1977) 8 *Federal Law Review* 460; Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24(1) *Melbourne University Law Review* 1.

context of a legal and political culture which has expected it to play a constitutionally significant, but circumscribed role.

The Australian political context has reinforced that culture and that expectation. On the one hand, politics is highly contested in Australia and no one particular political party has been in a position to shape and control the High Court in the way that has occurred in Japan for example. The Court is both constitutionally and politically independent of the elected branches. This has enabled it to exercise its powers of judicial review in a robust and autonomous manner. However, on the other hand, Australian political parties are not so weak that they are unable to offer stable and effective governance or to enact their policy commitments. Australian political institutions possess many faults, but ineffectiveness is not usually among them. The Australian political system is dominated by political parties with high levels of discipline and cohesion.¹⁶⁶ The executive for the most part controls the proceedings of Parliament, especially the lower house,¹⁶⁷ and governments are usually able to secure passage of supply and their policy commitments.¹⁶⁸ It is not the case that chronic weaknesses of the elected branches of government have created a policy vacuum into which the courts must step in order to remedy glaring and widespread injustices.¹⁶⁹

Nor are there flagrant failures of the democratic process that require judicial intervention. The High Court has been very circumspect, for example, when asked to intervene, for example, into electoral districting decisions — in sharp distinction from the United States Supreme Court. One important part of the explanation for this divergence appears to be the establishment of independent electoral commissions in Australia — in contrast to the United States, where such decisions are ultimately in the hands of the legislature and therefore especially prone to gerrymandering.¹⁷⁰

In Australia, governments are generally very jealous of their powers and are not readily minded to delegate politically unpalatable decisions to the courts.¹⁷¹ While they may be tempted, on occasion, to hold referendums to gauge public opinion and thereby

¹⁶⁶ John Warhurst, 'Conscience Voting in the Australian Federal Parliament' (2008) 54 *Australian Journal of Politics and History* 579; Alan J Ward, *Parliamentary Government in Australia* (Australian Scholarly Publishing, 2012), 186.

¹⁶⁷ L F Crisp, *Australian National Government* (Longman Cheshire, 5th ed, 1983), 267; Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice* (Department of the Senate, Parliament of Australia, 2003) 242–3; John Summers, 'Parliament and Responsible Government', in Dennis Woodward, Andrew Parkin and John Summers (eds.), *Government, Politics, Power and Policy in Australia* (Pearson, 9th ed, 2010), 76; G S Reid, 'Australia's Commonwealth Parliament and the 'Westminster Model'' (1964) 2 *Journal of Commonwealth Political Studies* 89, 93; Campbell Sharman, 'Reforming Executive Power' in George Winterton (ed.), *We the People: Australian Republican Government* (Allen and Unwin, 1994), 113; John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (Melbourne University Publishing, 2007), 2–4.

¹⁶⁸ This is not always the case, of course, particularly when governments face oppositional upper houses. For general discussion, see Nicholas Aroney, Scott Prasser and John Nethercote (eds.), *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press, 2008).

¹⁶⁹ Cf Tate, 'Why the Expansion of Judicial Power?', above n 12, 31; Shapiro, 'The United States', above n 160, 47.

¹⁷⁰ For a comparison of the three countries, see Nicholas Aroney, 'Democracy, Community and Federalism in Electoral Apportionment Cases: The United States, Canada and Australia in Comparative Perspective' (2008) 58(4) *University of Toronto Law Journal* 421.

¹⁷¹ Tate, 'Why the Expansion of Judicial Power?', above n 12, 32.

avoid responsibility for a difficult or controversial decision, as occurred in the recent same sex marriage plebiscite, on the whole Australian politicians are assiduously protective of their right to decide controversial political matters, and are not shy of criticising the courts for overstepping what is perceived to be their legitimate role.¹⁷²

Scholars have often noted a kind of 'exceptionalism' in Australian public law.¹⁷³ As in many comparable federations, Australian courts exercise constitutional judicial review in a manner that is robust and independent. Decisions of the High Court have often prevented elected governments from implementing their policies, but the grounds on which this has happened have usually had something to do with the federal structure of the Constitution. The High Court has come to exercise more political power than once was the case, but this has largely been through the development of constitutional implications, principally as regards the separation of judicial power and freedom of political communication. However, compared with global trends, the growth in judicial power in Australia has been relatively moderate. The prime reason for this is the absence of a constitutional bill of rights and the maintenance of a prevailing political and judicial culture that calls for a degree of restraint on the part of judges.

¹⁷² See, eg, Kirby, above n 1, 600–1; Pierce, *Inside the Mason Court Revolution*, above n 84, 262–7.

¹⁷³ Michael Taggart, 'Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1; Brian Galligan and F L Morton, 'Australian Exceptionalism: Rights Protection Without a Bill of Rights', in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds.), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, 2006).

JUDICIAL POWER, LIVING TREE-ISM, AND ALTERATIONS OF PRIVATE RIGHTS BY UNCONSTRAINED PUBLIC LAW REASONING

DWIGHT NEWMAN*

I INTRODUCTION

The term ‘judicial power’ can refer to multiple different concepts. In a proper, ideal sense, it refers to the orderly exercise of judicial office, constrained appropriately by the nature of the judicial role and the range of duties applicable within it.¹ However, ‘judicial power’ is perhaps more commonly understood to refer precisely to something verging on the opposite of this proper usage. Many speak of ‘judicial power’ specifically when the issue at hand is the misuse of judicial power, particularly in the sense of the *de facto* powers of judges being used in an unconstrained manner not in keeping with the nature or traditions of judicial office. The concern is with what is effectively a novel assertion of power rather than a properly ordered exercise of power.

Canadian constitutional case law of recent decades — particularly since Canada’s 1982 constitutional patriation and adoption of a written bill of rights — has tended to manifest a judicial eschewing of constraints on the power of judges. In this article, I consider this Canadian example and seek to show how certain fundamental choices about judicial methodology in constitutional interpretation have had farther-reaching manifestations in several domains in which private rights are put at risk of alteration by unconstrained public law reasoning and exercises of judicial power. In particular, Canadian judges’ strong embrace of a ‘living tree’ constitutionalism that empowers the judges themselves has set the stage for the interpretation of Canada’s Indigenous rights clause pursuant to shifting judicial policy aspirations, the alteration of Canada’s freedom of association clause to follow certain judicially preferred international models entrenching significant union rights, and a more general shift away from *stare decisis* towards unconstrained judicial policy choices. In each instance, I will suggest as well that there have been significant negative effects on private rights, which have come to be a lesser concern for judges thinking principally of public law reasoning.

Although this article can detail only a few strands of Canadian constitutionalism, my suggestion is that it reflects more general patterns, and I will argue that Canada’s recent constitutional history thus serves as a warning to other states in several ways I draw together in the conclusion. This narrative, to be clear, runs counter to a significant tendency of Canadian legal academics to be much more laudatory of the Supreme Court of Canada than is the case in other jurisdictions, with that tendency arguably part of a broader phenomenon of a relatively unified elite ideology. A challenge to judicial power in Canada runs against the grain of a certain received pattern of elite thought and thus must also end up in a challenge to significant parts of

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¹ Cf John Finnis, ‘Judicial Power: Past, Present, and Future’, Judicial Power Project Lecture (Gray’s Inn Hall 20 October 2015) << [>>.](http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf)

Canadian legal academia, with the conclusion reflecting as well on some implications of this.

II JUDICIAL SELF-EMPOWERMENT THROUGH THE ‘LIVING TREE’ METAPHOR

The interpretation of Canada’s constitution, especially the *Canadian Charter of Rights and Freedoms* in the *Constitution Act 1982*,² has come to be subject to an official methodology of purposive interpretation. I describe this as ‘official’ because it has become increasingly recognized that there are surprising counterexamples within Canadian constitutional interpretation where courts have put more reliance on originalist-oriented interpretation than might have been thought to be the case.³ However, the still-received methodology is a form of purposive interpretation, officially grounded in a principle increasingly embraced in the post-1982 constitutional context that Canada’s constitution is a ‘living tree’.⁴

That ‘living tree’ principle is cited continually to the famous 1929 ‘Persons Case’, *Edwards v Canada (Attorney General)*, in which the Judicial Committee of the Privy Council had to interpret whether women were ‘persons’ for the purpose of being eligible for appointment to Canada’s Senate.⁵ There, Viscount Sankey expressed the famous ‘living tree’ metaphor, which has been taken as permitting judges to develop evolving interpretations of Canadian constitutional provisions in light of what they consider most suitable in light of their interpretation of the provisions’ purposes and useful applications. Judges like Canada’s long-standing Chief Justice McLachlin were ready to seize upon the implications, citing Viscount Sankey’s dictum in suggesting that judges would be ready to change the interpretation of particular rights in future even in cases where they were not yet ready to exercise their discretion to do so.⁶

This post-1982 adoption and embrace of the living tree metaphor was as much judicial self-empowerment as anything else. Contrary to the mythology, the living tree concept took up one particular line that did not reflect the full set of reasons in *Edwards*, which actually involved much more traditional forms of textual interpretation.⁷ However, in their post-1982 constitutional case law, the justices of the Supreme Court of Canada kept citing directly or indirectly to *Edwards* as an alleged precedential support for their contemporary exercise of significant powers to interpret the purposes of the *Charter* as they saw fit.

² The *Canadian Charter of Rights and Freedoms* consists of ss 1-34 of the *Constitution Act, 1982* (Canada).

³ See generally Leonid Sirota and Benjamin J Oliphant, ‘Originalist Reasoning in Canadian Constitutional Interpretation’ (2017) 50 *University of British Columbia Law Review* 505. On the complexities of what ‘purposive interpretation’ itself means, see the discussion on this point in Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution* (2nd edn, LexisNexis, 2017).

⁴ On the post-1982 nature of the embrace of this principle, see Bradley Miller, ‘Origin Myth: The Persons Case, the Living Tree, and the New Originalism’, in Grant Huscroft and Bradley Miller (eds) *The Challenge of Originalism* (Cambridge University Press, 2011). See also Bradley W Miller, ‘Beguiled by Metaphors: The “Living Tree” and Originalist Constitutional Interpretation in Canada’ (2009) 22 *Canadian Journal of Law and Jurisprudence* 331.

⁵ *Edwards v Canada (Attorney General)* 1929 UKPC 86, [1930] AC 124.

⁶ See eg *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 [82]-[83] and discussion in Grant Huscroft, ‘The Trouble with Living Tree Interpretation’ (2006) 25 *University of Queensland Law Journal* 3, 17.

⁷ For excellent explanation on this, see Miller, above n 4.

The living tree line from *Edwards* featured as a key precedent in the justices' early adoption of their approach to 'purposive interpretation' in their 1984 decision in *Hunter v. Southam*.⁸ And that decision grounded the 1985 decision in *BC Motor Vehicle Reference*, in which the Supreme Court decided that the intentions of the constitutional drafters had no bearing on the meaning of the text where those intentions were not consistent with the Court's purposive interpretation of the text — with this decision rendered just three years after the negotiated adoption of the text.⁹ Later cases cite regularly to both *Hunter v. Southam* and to *Edwards* itself, thus reflecting the ongoing influence of their concepts: counting lower court decisions, the 'living tree' metaphor appears explicitly in hundreds of judgments, with its indirect influence through 'purposive interpretation' appearing in a thousand more.¹⁰

However, the influence was not from the actual reasoning in *Edwards*, which the justices may not have even read.¹¹ Rather, the ongoing usage of the one line from *Edwards* offering the 'living tree' metaphor serves as an alleged precedential support for their contemporary exercise of significant powers of retrospective choice on what was constitutionalized. Their reasoning has effectively been built upon a foundational mythology to claim heightened judicial power. And this fateful choice has set up the Supreme Court to be a leading policy-maker in Canada today.¹² Its implications play out in various contexts such as I shall now discuss. Ranging across several areas, they are not disconnected vignettes but expressions of an underlying decision of judicial self-empowerment.

III JUDICIAL INDIGENOUS POLICY

The Supreme Court of Canada's ascendancy to a policy-making role extends beyond the context of the *Canadian Charter of Rights and Freedoms* and is perhaps even more strongly present in its role in interpreting s 35 of the *Constitution Act 1982*, to which it also set out to apply a 'purposive interpretation'.¹³ This section, by which 'existing' Aboriginal and treaty rights were 'recognized and affirmed', contains 15 words that have generated 1500 pages of Supreme Court of Canada jurisprudence since 1990.

Section 35 operates as a constitutional provision under which the courts have taken up immense policy-making power in the context of a complex set of relationships between Canada and its Indigenous communities. Some of the doctrines developed in the Court's s 35 Indigenous rights jurisprudence have had massive impacts. For example, one might mention the 'duty to consult' doctrine. This doctrine requires governments to consult with Indigenous communities in certain

⁸ *Hunter v Southam Inc.* [1984] 2 SCR 145.

⁹ *Re B.C. Motor Vehicle Act* [1985] 2 SCR 486.

¹⁰ The numbers are readily available from CanLII searches of the terms (the two searches being ("living tree" & Charter') and ("purposive interpretation" & Charter') so as to remove extraneous results not related to the *Charter*, such as a surprising number of actual horticultural references in case law).

¹¹ For one former Supreme Court of Canada justice's reflection that he had never read *Edwards* before retiring from the Court, see Hon Marshall Rothstein, 'Checks and Balances in Constitutional Interpretation' (2016) 79 *Saskatchewan Law Review* 1, 1.

¹² The Court was actually named 2014's 'Policy-Maker of the Year' by the Macdonald-Laurier Institute: Sean Fine, 'Think tank names Supreme Court of Canada "policy-maker of the year"' *Globe and Mail* (Toronto), 27 November 2014.

¹³ *Constitution Act 1982*, s 35 (Canada). On purposive interpretation of s 35, see eg *R v Sparrow* [1990] 1 SCR 1075.

circumstances. Developed in its modern form in the *Haida* decision of 2004 and subsequent case law, the duty to consult is ‘triggered’ when a contemplated administrative decision has a potential adverse impact on an asserted Aboriginal or treaty right of which the government has actual or constructive knowledge.¹⁴ The impact of this doctrine is enormous. It is estimated to be triggered hundreds of thousands of times per year.¹⁵

The negotiated text of s 35 recognized and affirmed ‘existing’ Aboriginal and treaty rights. That text might have been thought to refer to rights, then, that existed already in 1982. Perhaps unsurprisingly in the context of the Court’s larger post-1982 view of its role, its section 35 jurisprudence has not focused on rights that were ‘existing’ in 1982. Rather, the Court’s approach has been framed around the idea of developing the purposes or goals it sees as promoted by s 35, which it characterizes increasingly in terms of the goal of ‘reconciliation’.¹⁶ In a recent decision in a modern treaty case, for example, while also saying that ‘[r]econciliation often demands judicial forbearance’, the judgment of Karakatsanis J suggests that the Court develops its rules on various s 35 issues so as to ‘advance reconciliation’.¹⁷

In assuming the power to take the steps it saw as suitable in promoting the policy goal of reconciliation, the Court must be understood — somewhat ironically — as promoting its own vision of Indigenous relations. In doing so, it does not seek to develop the guarantee of ‘existing’ rights. Thus, it does not necessarily even promote the prior rights or entitlements that had been held by Canada’s Indigenous communities before the adoption of s 35.

Perhaps the clearest example of this point is the Court’s reinterpretation of a property right through the application of a framework of public law reasoning to a previously private law concept of Aboriginal title.¹⁸ In the Canadian context, which has some differences from Australia, ‘Aboriginal title’ always refers to a right consisting of exclusive ownership of land; ‘Aboriginal rights’ may encompass entitlements to activities. The pre-1982 decision of *Calder* had recognized in principle that communities who had occupied lands from time immemorial that they had not surrendered through treaties had to be recognized as holding property rights in the land under the common law doctrine of Aboriginal title.¹⁹ This doctrine focused on recognizing within the common law the continuing property rights of communities that had long been present in what would become Canada.

However, the first post-1982 Aboriginal title decision, the 1997 *Delgamuukw* decision,²⁰ saw the Court take a different approach not focussed on the continuity of property rights in the same manner. Rather, the Court opined in *Delgamuukw* that the Aboriginal title test must be an application — modified as necessary in certain ways including the past moment in time determining the scope of the right — of the general

¹⁴ *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511.

¹⁵ Dwight Newman, ‘The Section 35 Duty to Consult’, in Peter Oliver, Patrick Macklem and Nathalie des Rosiers (eds.) *Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017).

¹⁶ The concept now appears centrally in much of the Court’s s 35 case law. See: *R v Van der Peet* [1996] 2 SCR 507 (with the main Aboriginal rights test based on the concept of reconciliation); *Mikisew Cree First Nation v Canada* 2005 SCC 69, [2005] 3 SCR 388, [1] (Binnie J stating that ‘[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples’).

¹⁷ *First Nation of Nacho Nyak Dun v Yukon* 2017 SCC 58 [4], [38].

¹⁸ Cf Dwight Newman, ‘The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study’ (2016) 95 *Nebraska Law Review* 432.

¹⁹ *Calder v British Columbia (Attorney General)* [1973] SCR 313.

²⁰ *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

Aboriginal rights test it had developed for s 35 rights in the *Van der Peet* decision of the prior year based on the broad purpose of reconciliation.²¹

This decision shifted the analysis of Aboriginal title away from its existing scope under a common law doctrine to that implied by an application of public law reasoning about the policy goals the Court could find in s 35. The result was to alter private rights of Indigenous communities in a manner that actually reduced those rights relative to what they otherwise would have seemed to be under the common law doctrine.

The general Aboriginal rights test in *Van der Peet* had focussed on rights framed from culturally distinctive practices, traditions, and customs showing a continuity with the period of time prior to European contact. It has been subject to academic critiques for its inherent cultural essentialism.²² In applying and adapting this test to the Aboriginal title context, the Court ended up adopting new aspects to the Aboriginal title test that add a cultural dimension to the test that would not seem to have been present in the common law property doctrine that applied before 1982.

In *Delgamuukw*, these aspects appeared in the form of an unprecedented ‘inherent limit’ on the scope of Aboriginal title — not present in the pre-1982 case law like *Calder* — such that land owned by a community in Aboriginal title could not be used in ways inconsistent with the evidential bases utilized for the establishment of title rights over particular tracts of land.²³ For no apparent reason, the Court offered some rather singular examples, suggesting that communities that proved title rights through showing that particular lands were hunting grounds or culturally significant sites could not make contemporary uses of the corresponding Aboriginal title lands for strip mining or the construction of parking lots.²⁴

In a later Aboriginal title case, the 2014 *Tsilhqot’in Nation* decision,²⁵ the Court restated much of the law of Aboriginal title based on the *Delgamuukw* test. However, on the inherent limit issue, the Court now stated a new limitation on the scope of Aboriginal title without explaining whether this new limit replaced or supplemented the *Delgamuukw* inherent limit. In particular, it ended up saying that land held in Aboriginal title could not be used in ways that diminished its value for future generations — and that it would explain what this limitation meant in any particular circumstances when the circumstances arose.²⁶ Such a restriction diminishes the value of Aboriginal title lands for Indigenous communities themselves by casting a pall of uncertainty over the ways in which communities may use their own lands. The application of public law reasoning has diminished a private right previously held by Indigenous communities.

This example of Canadian adjudication on constitutionalized Indigenous land rights makes broader points about exercises of judicial power in contexts where public law adjudication has significant private law implications. My claim in some respects is that such adjudicative contexts take on distinctive characteristics that accentuate and further problematize exercises of judicial power. The standard criteria that would apply to the adjudication of private law disputes within the common law, focused on providing a reasonable degree of guidance from the law, do not apply here in the same

²¹ *R v Van der Peet* [1996] 2 SCR 507.

²² See eg Avigail Eisenberg, ‘Reasoning About Identity: Canada’s Distinctive Culture Test’, in Avigail Eisenberg (ed.) *Diversity and Equality* (University of British Columbia Press, 2006).

²³ *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [111], [125]ff.

²⁴ *Ibid* [128].

²⁵ *Tsilhqot’in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257.

²⁶ *Ibid* [15], [74].

way. Moreover, the litigation incentives that normally lead the common law to attain efficient outcomes do not exist in the same ways as in other contexts.²⁷

Within the policy-making role it has taken up, the desire to provide a neat public law test for Aboriginal rights on a general basis thus drives the Court away from enforcing the private rights of key parties. I would suggest that this is neither coincidental nor a mere feature of particular policy choices that the Court has made. Rather, it flows from the exercise of judicial power being based in a concept of developing the constitutional order in ways reflecting the Court's assessment of the goals it embodies.

Assuming that a legal order has purposive goals in such a manner assumes a centralized knowledge concerning what those goals are and how to implement them through particular doctrines. That is to say, the very assumption of having centralized purposive goals is antithetical to some degree to the standard background of individuals and communities holding private rights that they may choose to use in ways that may or may not advance those goals. That the Court's implementation of centralized goals undermines private rights of Indigenous communities is neither coincidental nor surprising. The assumption of a centralized goal of reconciliation, implemented through an exercise of judicial power, implies a restriction on aspects of private rights that could lead to a misfit with the centralized goal.²⁸

IV JUDICIAL IMPOSITION OF CONSTITUTIONALISED LABOUR RIGHTS

Apart from its relationship to private rights, the Court's s 35 jurisprudence has thus far shown an impermeability to international law argumentation on the scope of Indigenous rights, perhaps in line with the aspiration of interpreting s 35 in light of a goal of reconciliation within the state. It is not impossible that the Court might one day alter that goal. In the meantime, though, other areas of its constitutional case law have seen it rush to embrace comparative and international law norms, sometimes even at the expense of factual accuracy. An area of case law that stands out in this regard is the Court's decision over the last ten years to reverse its early *Charter* jurisprudence on the relationship between the *Charter* s 2(d) freedom of association and conclusions as to constitutionalized labour rights. The older case law had rejected claims as to labour rights in s 2(d), partly on the basis that the negotiation and drafting process leading up to the 1982 constitutional amendments had seen an explicit rejection of the idea of including labour rights.²⁹

In a line of cases commencing with its 2007 decision in the *British Columbia Health Services* case,³⁰ the Court has now moved to entrench various labour rights into the *Charter*, including rights to collective bargaining and rights to strike. Many aspects of these decisions have been explained with reference to claimed comparative or international law norms on labour rights. This trend commenced in the *British Columbia Health Services* decision itself.³¹ But it has continued in even larger ways in

²⁷ See generally Newman, above n 15.

²⁸ This argument of course builds on Sir Roger Scruton's combination of traditional common law concepts and Hayekian understandings of law. See eg the discussion of common law in Sir Roger Scruton, *England: An Elegy* (Bloomsbury, 2000) and Sir Roger Scruton, *Conservatism: Ideas in Profile* (Profile Books, 2017).

²⁹ See generally Brian Langille, 'The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It' (2009) 54 *McGill Law Journal* 177.

³⁰ *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia* 2007 SCC 27, [2007] 2 SCR 391.

³¹ *Ibid* [20], [39], [69]ff.

later cases, perhaps most notably in the 2015 *Saskatchewan Federation of Labour* decision entrenching a right to strike.³²

In *Saskatchewan Federation of Labour*, Abella J's opening paragraphs for the majority reflect a role for the Court in making decisions that shift through and shape history, putting her main conclusion in dramatic terms not particularly suggestive of any sort of modesty in the judicial role: 'The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction'.³³

To the extent that Abella J considers that any reasoning is necessary in the course of what she appears to describe in terms of a discretionary decision to offer 'constitutional benediction', much of her reasoning is based on claims about comparative and international law. Indeed, at a formal level, shifts in attitudes to international law are part of what she suggests manifest a change in the law warranting reversal of the Court's past decisions against a constitutional right to strike, although her argument purports to be based on a broader 'historical, international, and jurisprudential landscape'.³⁴ This latter phrase is telling as to the array of materials contained within the judgment, with no detailed reasoning on why that particular array of materials actually changes a conclusion about what constitutional rights exist in Canada, other than that they offer a 'landscape', an 'emerging international consensus', or 'persuasive weight' for a conclusion that 's 2(d) has arrived at the destination' that includes a right to strike.³⁵

The use of comparative and international law materials is always fraught with challenges, particularly in the context of tendencies by courts to cherry-pick pieces of law for persuasive weight rather than to understand living norms from other legal systems within the full context of how they operate and contribute in those systems.³⁶ These challenges, amongst others, find expression in Abella J's use of comparative and international law in *Saskatchewan Federation of Labour*, sometimes in even more shocking ways in terms of the failure to engage with what the cherry-picked pieces mean as living norms in their original contexts.

For example, in at least one instance, she actually cites as if it were persuasive comparative legal material a piece of a constitution of a foreign state that is no longer its constitution.³⁷ Thus, in this instance, she cites to dead law rather than living law as allegedly showing the 'landscape' and 'international consensus'. In another, one actually highlighted by the dissent of Rothstein and Wagner JJ but which she nonetheless continues to use in the lead judgment, she cites as persuasive a 'decision' that is not actually a judicial decision and that did not receive support from the actual decision-making body higher up the chain that did not reach the same opinion.³⁸

This latter example is fascinating. Justice Abella's opinion states: 'Although *Convention No. 87* does not explicitly refer to the right to strike, the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized

³² *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4, [2015] 1 SCR 245.

³³ Ibid [3].

³⁴ Ibid [62]-[63], [74].

³⁵ Ibid [69], [71], [75].

³⁶ See eg Dwight Newman 'Theorizing Duress and Necessity in International Criminal Law', in Francois Tanguay-Renaud and James Stribopoulos (eds.) *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Canadian, Domestic, and International Criminal Law* (Hart, 2012).

³⁷ See *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4, [2015] 1 SCR 245, [74] (citing the 1946 French Constitution rather than the 1958 Constitution that replaced it).

³⁸ See ibid [153].

the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention'.³⁹ The dissent of Rothstein and Wagner JJ replies: 'However, these bodies do not perform judicial functions and do not enforce obligations under ILO conventions — the CFA is an investigative body and the COE, the first stage of the ILO supervisory process, simply provides observations [...]. The Conference Committee on the Application of Standards is the second stage of the ILO supervisory process. This tripartite committee consisting of government, employer, and worker representatives has not reached a consensus on whether freedom of association includes the right to strike [...]'.⁴⁰ It is frankly astonishing that the judgment of Abella J does not even acknowledge these complexities that might have had implications for the persuasiveness of this material.

These difficulties, of course, might be thought of by some as examples solely of a particularly overly ambitious judgment rather than speaking to difficulties in an area of *Charter* jurisprudence *per se*. But the entire shift in Canada's section 2(d) jurisprudence in recent years reflects ultimately a decision by the Court to alter the negotiated content of the section in light of the Court's assessments of its purposes, thus precisely setting the context in which Abella J could opine on how 'the arc bends increasingly toward workplace justice'.⁴¹

The choice of one policy goal for a constitutional section is of course conceptually neatening for judicial decision-making. But such an approach does not reflect the inherent messiness of the policy-making needed in the real world, one of competing and conflicting interests and values. The approach to a right that orients it to one value alone effectively overrides a variety of other incommensurable interests in the service of the one goal at issue. And 'workplace justice', laudable though it may sound, is problematic as a goal in a constitutionalized labour rights context. It assumes that justice is on one side of the workplace rather than recognizing the complex interplays of economic factors and private interests of various parties. The approach of Abella J orients matters again too much in the context of a centralized vision that assumes the ability of the court to make better decisions than could arise from some more decentralized process. It also ends up making a centralized decision to implement a particular model of workplace relations on all contexts to which the Court's judgment applies.

Once it is open to the Court to construct policy goals that it pursues through litigation on various constitutional sections with a full awareness that it is pursuing goals rejected during the negotiation of the legal text, nothing particularly constrains these policy goals, and it is open to any given judge to set out to establish 'workplace justice' as best she sees it. The living tree can bend in any particular direction, as the underlying concept is one of flexibility in the application of judicial power.

V JUDICIAL SELF-LIBERATION FROM *STARE DECISIS*

That said, part of what enables the Supreme Court of Canada in *Saskatchewan Federation of Labour* and cases of similar ilk to depart from past law is also a decision by the Court effectively to liberate itself — and the courts generally — rather significantly from the weight of *stare decisis*. Along with the contents of legal texts and the law itself, *stare decisis* might traditionally have been thought of as an important constraint enabling the exercise of judicial power within the proper bounds

³⁹ Ibid [67].

⁴⁰ Ibid [153].

⁴¹ Ibid [1].

of a judicial office. While the Supreme Court of Canada continues to acknowledge *stare decisis* in principle, McLachlin CJC has also now established an entire strand of case law that effectively says that the Court may disregard *stare decisis* when it disagrees with its implications.

That strand of case law permitting the discarding of *stare decisis* is part of the reasoning of Abella J in *Saskatchewan Federation of Labour*.⁴² This new approach to *stare decisis* was adopted in the *Bedford* decision that reversed past precedents on the constitutionality of Canada's prostitution laws and the *Carter* decision that reversed a past case and declared that assisted suicide procedures must be made available in Canada.⁴³ In its articulation of this new approach, the Court rejects both horizontal and vertical precedent. Chief Justice McLachlin's pronouncement of the new rule on *stare decisis* in *Bedford* has no extended reasoning behind it and ultimately cites no authority other than, in effect, the view of McLachlin CJC herself:

In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.⁴⁴

While other parts of the case have lines that speak to the Court's recognition of the value of *stare decisis*,⁴⁵ the *Bedford* rule on precedent nonetheless liberates the Court from both *stare decisis* and having to offer any real explanation for departures from *stare decisis*. In many constitutional contexts, 'legislative facts' concerning broad social contextual factors partly shape the outcomes, and many such considerations go into the proportionality analysis determining the limits on rights. Because the evidentiary record going into the determination of such legislative facts can never encompass everything that could bear on them, the possibility of a change in 'evidence' on such legislative facts thus effectively liberates the courts to retry almost any constitutional issues at any point on the basis of a new record.

Saying as much does not imply that the courts must be committed to a rigid and unalterable *stare decisis*. In some of the s 2(d) labour rights case law of recent years, in light of established transnational principles on *stare decisis* within the Anglo-American common law system, Rothstein J actually attempted to develop a framework of factors that justified a court altering its own past decisions and that it might properly contemplate while exercising the traditional judicial role.⁴⁶ The *Bedford* case utterly failed to engage with his judgment in this regard or even with any similar sorts of factors.

The idea that there were actual factors to consider was not Rothstein J's innovation. His judgment drew upon past Canadian cases that had discussed factors such as the presence of actual developments in the law undermining the validity of a past precedent, recognition that a precedent generates uncertainty in a manner contrary to the very values of *stare decisis*, recognition that a precedent was inconsistent with

⁴² Ibid.

⁴³ *Canada (Attorney General) v Bedford* 2013 SCC 73, [2013] 3 SCR 1101; *Carter v Canada (Attorney General)* 2015 SCC 5, [2015] 1 SCR 331.

⁴⁴ *Canada (Attorney General) v Bedford* 2013 SCC 73, [2013] 3 SCR 1101, [42].

⁴⁵ See eg, *ibid* [38].

⁴⁶ See notably his separate opinion in *Ontario (Attorney General) v Fraser* 2011 SCC 20, [2011] 2 SCR 3, [129]-[139].

prior precedents, or recognition of clear problems with a precedent in terms of unworkability, inconsistency with principle, or unfairness in operation.⁴⁷ He also referenced well-known international sources that have commented on these issues, notably the United States Supreme Court decision in *Casey*, whose factors include intolerable unworkability of the rule, reliance on the rule, legal developments that have effectively left the rule a remnant, or changes in facts that have undermined all justification for the old rule.⁴⁸ Finally, he referenced scholarly writing that had set out a number of different factors.⁴⁹ Admittedly, Rothstein J does not necessarily synthesize all of these factors. But his judgment contains reference to them in a way that McLachlin CJC's *Bedford* judgment does not, even in the context of actually effecting a dramatic change to the doctrine of *stare decisis* in Canada.

The effects of this partial negation of a fundamental principle of common law reasoning have implications beyond the public law context in which the *Bedford* decision was enunciated. Those private parties relying on settled principles of law in other areas, including those as far afield as mainstream commercial law fields, have a new risk generated for them in a heightened possibility that the courts will not stand by established precedents.⁵⁰ Again, courts applying public law reasoning in a manner associated with heightened judicial power impose real costs on private parties whose private interests are put at risk.

Although not explicitly tied to the idea of the 'living tree' within this line of case law itself, the *Bedford* doctrine on *stare decisis* is wholly consistent with its spirit of enabling assertions of judicial power to advance policy goals as judges see them. It is a concomitant augmentation of judicial power, and one that highlights clearly how far Chief Justice McLachlin's Court has departed from traditional principle and constraints on the judicial role.

VI CONCLUSION

Focusing on this critique, of what the living tree approach adopted in recent Canadian constitutional interpretation means, highlights significant issues related to the rise of judicial power. The adoption of a written bill of rights in 1982 was taken by the Supreme Court of Canada as an invitation and opportunity to exercise much greater judicial power and policy-making functions than it ever previously assumed. In adopting a particular principle on constitutional interpretation, that of the so-called 'living tree', it has opened endless possibilities for judicial policy-making and the exercise of judicial power in the negative sense of the concept.

Examples across various areas of law bear out this concern. To take one example, the Court has taken on a major role in Indigenous policy in Canada, with a very different path playing out under a constitutionalized Indigenous rights clause as compared to that in states like Australia that have not constitutionalized that area of

⁴⁷ Ibid [134]-[135], citing *R v Bernard* [1988] 2 SCR 833, *R v Chaulk* [1990] 3 SCR 1303, and *R v Henry* 2005 SCC 76, [2005] 3 SCR 609.

⁴⁸ *Ontario (Attorney General) v Fraser* 2011 SCC 20, [2011] 2 SCR 3, [136], citing *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 US 833.

⁴⁹ *Ontario (Attorney General) v Fraser* 2011 SCC 20, [2011] 2 SCR 3, [137], citing Bruce V Harris, 'Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle' (2002) 118 *Law Quarterly Review* 408.

⁵⁰ See eg, Michael Schneer, 'Stare Decisis or a License to Disturb Settled Matters? The Impact of the Decision in *Carter v Canada* on Commercial Litigation' (2016) *Commercial and Business Litigation Review*, <www.canadianinstitute.com/wp-content/uploads/2017/02/Commercial-business-Litigation-Aug2016_Part2.pdf>.

policy-making. But the particular type of Indigenous policy developed by the Court flows from its decision to orient Indigenous rights around a particular goal applied to the area by the Court itself, marking a centralized approach to a complex area of policy-making. To take a second example, also from what would be a complex area of policy-making, the Court has applied rather more simplistic goals once again to the labour rights arm of the s 2(d) freedom of association clause. In doing so, it has been ready to impose a particular model of workplace relations in a constitutionalized form, while neglecting more complex aspects of the area. Going beyond very specific areas, a third example relates to a general principle of judicial methodology, the application of the principle of *stare decisis*, where the Canadian approach has departed far from the traditional common law. Each of these assertions of judicial power has involved the application of public law reasoning in ways that have diminished private rights, thus illustrating a further danger of the rise of judicial power. To paraphrase an old trope, courts powerful enough to give you all that you want are powerful enough to take away all that you have.

The lessons of this development thus point to the need for vigilance in respect of basic foundational principles on the role of courts and their adherence to traditional principles of interpretation and judicial methodology. Once those are gone, the horse may well be out of the barn, as it were. It may become very challenging to turn back the application of judicial power once judges have taken certain steps to empower themselves and to liberate themselves from traditional constraints. Canada's track record of recent decades, particularly in the era of Chief Justice McLachlin, has more critical lessons to be learned from it than are often realized, particularly in the context of a Canadian legal academy that has been surprisingly reluctant to be critical. The latter may well be a related phenomenon to the key danger this track record identifies. Once it is accepted that courts may apply much power on a relatively discretionary basis, not subject to traditional constraints from the law on which legal scholars have expertise, it becomes increasingly difficult to critique further applications of judicial power other than on policy grounds on which legal scholars may well not have any special expertise. The augmentation of judicial power takes a whole constitutional order down a dangerous path. The rise of judicial power calls for vigilance in stopping it sufficiently early.

JUDICIAL RESTRAINT CAN ALSO UNDERMINE CONSTITUTIONAL PRINCIPLES: AN IRISH CAUTION

MARIA CAHILL AND SEÁN Ó CONAILL*

I INTRODUCTION

The chief problem with judicial activism is that it mandates judges operating beyond the boundaries of their limited constitutional mandate, thereby undermining the constitutional order. The corollary advantage of judicial restraint should be that it corrals the judiciary within the proper scope of its constitutional function and thereby upholds the constitutional order. In fact, as the example of Ireland demonstrates, judicial restraint can also damage the constitutional order.

This article is divided into an introduction and two main parts: Part II discusses the mandate for activism, setting the scene by outlining in Part IIA the legal framework within which judicial review takes place in Ireland and charting in Part IIB the emergence, development and demise of the activist unenumerated rights doctrine which ultimately gives way to a very tempered approach to fundamental rights adjudication which is ultimately permeated by an instinct towards restraint. Part III then discusses the machinery of restraint, revealing the paradox that although the judiciary adopts an attitude of judicial restraint out of respect for democracy and the constitutional separation of powers, in fact that very attitude has significantly undermined the separation of powers, the quality of parliamentary and plebiscitary democracy and the supremacy of the Constitution. Part IIIA discusses how judicial restraint has damaged parliamentary democracy by becoming complicit in the erosion of Parliament's exclusive legislative function, while Part IIIB reveals how judicial restraint has compromised popular democracy by becoming complicit in the erosion of the reverence for the role of the people in the referendum process.

II THE MANDATE FOR ACTIVISM

The 1937 *Constitution of Ireland* established a system of government that was in many ways styled on that of her erstwhile imperial ruler, Great Britain. There is one notable discrepancy — the Constitution explicitly authorises judicial review of legislation. Article 15 declares that the Irish Parliament¹ is given the 'sole and exclusive power of making laws for the State' subject only to one limitation that it 'shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof'.² Despite its constitutional mandate to review legislation to establish repugnancy, the judiciary has proceeded with caution, conscious always that, whatever errors Parliament may commit will not be atoned for by the judiciary transgressing the boundaries of its own function. In particular, the Supreme Court has underscored that: '[t]he usurpation by the judiciary of an exclusively legislative function is no less unconstitutional than the usurpation by the legislature of an exclusively judicial function'.³ At the same time, the Constitution explicitly endorses the idea that the rights which inhere in the person are

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¹ Referred to in the Constitution as the Oireachtas, and comprising two chambers: Dáil Éireann and Seanad Éireann.

² Articles 15.2.1 and 15.4.1.

³ *Maher v Attorney General* [1973] IR 140, 147.

‘inalienable and imprescriptible ..., antecedent and superior to all positive law’,⁴ which natural law mandate proved to be the basis for a flirtation with judicial activism through the development of the unenumerated rights doctrine between the 1960s and 1990s but which ultimately yielded to an approach characterised by deference to Parliament, even in the vindication of fundamental rights.

A *Judicial Review: The Legal Framework*

There are three constitutional mechanisms by which the judiciary may review legislation passed by Parliament to ensure that it does not contradict the Constitution. The first is the abstract review procedure, mandated by Article 26 of the Constitution, which applies to legislative bills, other than those promulgated using the expedited procedure and those concerning taxation and public expenditure, which have been passed by both Houses of Parliament and not yet signed into law by the President.⁵ The President may refer such a bill to the Supreme Court for review of its constitutional validity *ex ante*, and the judges hear arguments defending the legislation from the Attorney General acting on behalf of the State and from counsel assigned to argue for repugnancy. If a piece of legislation survives a challenge under Article 26, it can never again be challenged before the courts, even if the basis for such a challenge is a point of law which had not been considered during the course of the Article 26 hearing.⁶ The second is the concrete review procedure, mandated by Articles 15.4.2 and 34.3.2 of the Constitution, which, respectively, declare that laws enacted by Parliament which are repugnant to the Constitution ‘shall, but to the extent only of such repugnancy, be invalid’ and confirm that the jurisdiction of the superior courts includes the power to examine the question of invalidity. The third is a further concrete review procedure laid down in Article 50.1, which applies to legislation which was already in force in Ireland prior to the entry into force of the Constitution, and which the courts are to examine for consistency rather than validity.

B *Inchoate Activism*

Judicial interpretation and development of fundamental rights under the Irish Constitution have provided what is probably the most cited example of judicial activism in Ireland. The nature of fundamental rights discourse in a common law jurisdiction with a written constitution naturally lends itself to an inherent degree of judicial flexibility and innovation in order to determine the scope of rights which are superior to positive law enactments. Cases concerning rights have demonstrated two distinct lines of judicial thought: sometimes the courts are either active to a certain limited degree and at other times the courts will pause and examine the lack of legislative intervention rather than scoping the full extent of constitutional rights.

Articles 40 to 44 of the Irish Constitution are entitled ‘Fundamental Rights’, and the tone and language of these provisions is very much rooted in the natural law tradition, with rights described as being ‘inalienable and imprescriptible ..., antecedent and superior to all positive law’,⁷ as being ‘natural and imprescriptible’⁸ and as inhering in

⁴ Article 41.1.1.

⁵ Article 26. Cf. Articles 22, 24.

⁶ Article 34.3.3.

⁷ Article 41.1.1.

⁸ Article 42A.1.

man ‘in virtue of his rational being’.⁹ These provisions have been the basis for many seminal pronouncements of the Courts and the gradual evolution of rights discourse. However, Articles 40 to 44 are not the sole source of Irish Constitutional rights and many other provisions of the Constitution have been successfully invoked to ground and assert rights.¹⁰ Moreover, the judiciary has acknowledged the existence of rights which are not expressly written in the constitutional text, through the evolution of a doctrine of unenumerated rights based initially on natural law considerations, which opened the door to a restrained form of judicial activism. The doctrine owes its existence to the wording of Article 40.3.2 which prescribes that:

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

The judicial inference was that the phrase ‘in particular’ denoted the existence of rights other than those which were written down, among which those listed in Article 40.3.2 were to be given special attention within the hierarchy of rights.

This articulation of the unenumerated rights doctrine took place in the 1963 case of *Ryan v Attorney General*,¹¹ in which the plaintiff, who was opposed to the fluoridation of drinking water, sought to assert an unenumerated constitutional right to bodily integrity in order to have the enabling statute declared unconstitutional. Although she succeeded in having her right to bodily integrity recognised by the court, she was ultimately unsuccessful in obtaining the relief that she sought based on the facts of the case. Based on Article 40.3.2, as noted above, the High Court, in the first instance, and the Supreme Court on appeal, held that the rights protected by the Irish Constitution included the enumerated rights prescribed in the constitutional text ‘and other personal rights of the citizen which have to be formulated and devised by the High Court’.¹² The judgment relied heavily upon natural law theory, and referenced a Papal Encyclical in an effort to justify the natural law intervention. It is noteworthy that, perhaps in an attempt to pre-empt some of the criticism which would later be directed toward the unenumerated rights doctrine, Kenny J in the High Court sounded a note of caution to his fellow judges, urging that the doctrine bestowed on the courts ‘a jurisdiction to be exercised with caution’.¹³ The very fact that the first manifestation of unenumerated rights doctrine, itself a product of judicial activism, was tied to an instant delimitation of that same activism out of deference to an act of the legislature speaks volumes about the particular brand of activism the Irish courts were to embrace.

The newly recognised doctrine was given a more solid footing in *McGee v Attorney General*.¹⁴ The plaintiff, a married mother of four children, was advised that a future pregnancy could pose a serious risk to her life. The sale and importation of contraceptives were prohibited in Ireland by the *Custom Consolidation Act 1876* as amended by the *Criminal Law (Amendment) Act 1935*. The plaintiff sought to have an unenumerated constitutional right to marital privacy recognised and to have the

⁹ Article 43.1.

¹⁰ For example, Articles 8 (language rights), 34.1 (right of access to the courts), 38.1 (right to fair trial, right to silence, etc.). See further, Gerry Whyte and Gerard Hogan *J M Kelly, The Irish Constitution* (Butterworths, 2003), 386.

¹¹ *Ryan v Attorney General* [1965] IR 294.

¹² *Ibid* 311.

¹³ *Ibid*.

¹⁴ *McGee v Attorney General* [1974] IR 284.

offending legislation deemed unconstitutional by reference to that unenumerated right. The Supreme Court ruled in her favour, holding that by virtue of her rights as a human person, she did enjoy a constitutionally protected right to marital privacy, which included a right to use contraception. The legislation in question, being pre-independence legislation, had not survived the adoption of the 1937 Constitution. (In thus resolving the dispute, of course, the Supreme Court was purporting to use a natural law argument to reach a conclusion that was contra-indicated by the teachings of the Catholic Church.) Like the *Ryan* decision, this appears *prima facie* to be an example of judicial activism, but closer analysis of the detail in the case shows that the trend of legislative deference continues even in the midst of activism. For example, Griffin J noted that:

In my view, in any ordered society the protection of morals through the deterrence of fornication and promiscuity is a *legitimate legislative aim* and a matter not of private but of public morality. For the purpose of this action, it is only necessary to deal with the plaintiff as a married woman in the light of her particular circumstances.¹⁵

He thus underscored the limits of the decision and the shadow cast over attempts at judicial activism by the judiciary's instinctive deference towards the legislature.

Until very recently, it seemed clear that the doctrine of unenumerated rights had run its course, because the enthusiasm with which the Irish courts had embraced the doctrine seemed to have evaporated, especially during the 1970s and 1980s. For example, it was held by the High Court in the case of *Duffy v Clare County Council*¹⁶ that there was no unenumerated right to clean swimming water, in a judgment that showed strong support for legislative provisions that sought to protect the environment. However, the 2017 case of *NVH v Minister for Justice and Equality*¹⁷ seems potentially to resurrect the doctrine: the Supreme Court held that non-citizens could, in virtue of Article 40.1, 'rely on the constitutional rights, where those rights ... relate to their status as human persons'.¹⁸ The case concerned a legislative provision which absolutely prohibited asylum seekers from employment within the state, and the Supreme Court decided that there was an unenumerated 'right to work at least in the sense of a freedom to work or seek employment' which was deemed to be 'part of the human personality', with the implication that 'the Article 40.1 requirement that individuals as human persons are required to be held equal before the law means that those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens'.¹⁹ However, the activist approach to constitutional interpretation is once again tempered by a reticence to interfere in the province of the legislature: the court strongly indicated that the legislature could seriously delimit the right to work of an asylum seeker and also put a stay on its order for six months to allow the legislature to bring forward legislation to deal with the matter. Whilst the doctrine of unenumerated rights clearly had certain benefits, its inherent ambiguity inevitably led to significant uncertainty around rights discourse particularly when the judiciary were periodically finding new personal rights to which they attached constitutional status. Furthermore, the contrast between the boldness with which the judiciary re-wrote the terms of the Constitution and the reticence with which they struck down — or refused to strike down — provisions of

¹⁵ Ibid (emphasis added).

¹⁶ *Duffy v Clare County Council* [2013] IEHC 51.

¹⁷ *NVH v Minister for Justice and Equality* [2017] IESC 35.

¹⁸ Ibid para. 11. Article 40.1 states that 'All citizens shall, as human persons, be held equal before the law.'

¹⁹ *NVH v Minister for Justice and Equality* [2017] IESC 35, para. 17.

legislation meant that the unenumerated rights doctrine is perhaps best remembered as a form of inchoate activism.

More recently, the courts have been even more explicit in their attention and deference to the legislature in the context of fundamental rights adjudication. This is plainly apparent in the context of the (strictly limited) incorporation of the *European Convention on Human Rights* by means of the *European Convention on Human Rights Act 2003*. Since the Convention was incorporated without a constitutional amendment, its place in the legal system is entirely governed by constitutional principles. Simply stated, the Act prescribes that the organs of government and state agencies must continue to observe Irish law and should also, if it is possible, act in a manner compatible with Convention obligations. When it comes to interpreting Irish legislation, then, the judiciary should follow the usual rules of statutory interpretation but if it is possible, within those rules, also to find a Convention-compatible interpretation, they should do so.²⁰ The provisions of the act are unambiguous and yet a surprising number of cases have been taken by litigants arguing, for example, that the Convention is directly effective in Irish law or that the judiciary could strike down Irish legislation for incompatibility with the Convention. Decisions of the Supreme Court deny these claims and in the process re-affirm the terms of the 2003 Act, the legislative authority of the Parliament and the supremacy of the constitutional order.²¹

Moreover, in the case of *Roche v Roche*,²² the superior courts repeatedly bemoaned the lack of legislative guidance in terms of the manner in which the term ‘unborn’ should be understood for the purposes of Article 40.3.3 of the Constitution, which requires the State to vindicate ‘the right to life of the unborn, with due regard to the equal right to life of the mother’. Ultimately, the Supreme Court decided that the embryo did not qualify as ‘unborn’ for the purposes of Article 40.3.3 but would clearly have preferred to have received greater direction from the legislature. Similarly, in *Zappone v Revenue Commissioners*²³ the plaintiffs, two women, sought to have their Canadian marriage recognised in Ireland. The Court upheld the definition of marriage as being between a man and a woman and allowed itself to be guided to that conclusion by legislative enactments (which the Court took to be an indication of popular will) which defined marriage in this way. Relatedly, the courts have also shown a marked deference to Parliament when granting remedies for breaches of constitutional rights. In general, they demonstrate considerable reluctance to offer mandatory relief and a preference for declaratory relief.²⁴ This trend is confirmed by the recent case of *NVH v Minister for Justice and Equality* in which the Supreme Court, acknowledging that the regulation of the conditions under which asylum seekers could engage in employment was ‘first and foremost a matter for executive and legislative judgement, ... [adjourned] consideration of the order the Court should make for a period of six months and [invited] the parties to make submissions on the form of the order in the light of circumstances then

²⁰ Section 2 of the *European Convention on Human Rights Act 2003* states: ‘In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions’.

²¹ See, for example, *J McD v PL* [2010] 2 IR 199. See generally, Maria Cahill, ‘The Rule of Law or the Rule of Rights? Five ECHR Misconceptions the Courts Convincingly Refute’ in Eoin Carolan (ed.) *Judicial Power in Ireland* (Institute of Public Administration, 2017, forthcoming).

²² *Roche v Roche* [2010] 2 IR 321.

²³ *Zappone v Revenue Commissioners* [2008] 2 IR 417.

²⁴ Cf. *Doherty v Government of Ireland* [2010] IEHC 369, in which the High Court granted only declaratory relief in relation to the protected failure, over a number of years, to call a by-election in order to fill vacant seats in the national parliament.

obtaining'.²⁵ These three final examples only confirm the general trend of inchoate judicial activism in Ireland, in which the free and creative way in which the courts interpret constitutional provisions is tempered by an instinct towards restraint which seeks to respect the position of the legislative branch of government.

III THE MACHINERY OF RESTRAINT

Although this instinct towards restraint operates in the context of fundamental rights adjudication, it is even more pronounced in other contexts. The judiciary has indeed adopted certain rules for judicial review — self-imposed limitations on the operation of the three mechanisms for review established in the Constitution by Articles 26, 34 and 50. Out of respect for the separation of powers and for the democratic mandate of elected representatives, the courts determined, while the Constitution was only a few years old, that both the abstract review and the concrete review mechanisms would entail a presumption of constitutionality, meaning that the court assumes that the legislation is valid until the claim of repugnancy is 'clearly established'.²⁶ This presumption, the courts note, 'springs from, and is necessitated by, that respect which one great organ of State owes to another'.²⁷ The corollary or 'practical effect' of this presumption was established in a later case, which holds that 'if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction ... [i]t is only when there is no construction reasonably open which is not repugnant to the Constitution that the provisions should be held to be repugnant'.²⁸ Commonly known as the double construction test (although it admits of the possibility of multiple unconstitutional constructions), this test may save a piece of legislation that looks to be *prima facie* unconstitutional and in principle undermines the rules of statutory interpretation.²⁹ The second corollary of the presumption of constitutionality is that the courts also apply a rule of self-restraint, enjoining themselves to 'reach constitutional issues last'; the court should explore other grounds on which relief may be granted to the plaintiff, in order not to put legislation 'to the test unnecessarily'.³⁰ Finally, legislation which is reviewed under the Article 15/34 mechanism is also subject to the doctrine of severability or separability, such that 'only the offending provision will be declared invalid' while the remainder of the legislation will continue to be of full force and effect, provided that it 'may be held to stand independently and legally operable as representing the will of the legislature'.³¹ These self-imposed rules both reveal and reinforce the reluctance of the judiciary to find legislation repugnant to the Constitution.

²⁵ *NVH v Minister for Justice and Equality* [2017] IESC 35, para. 21.

²⁶ This presumption was first established in relation to the Article 26 procedure in *In Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470 and in relation to the Article 15/34 procedure in *Pigs Marketing Board v Donnelly* [1939] IR 413.

²⁷ *Buckley v Attorney General* [1950] IR 67, 80.

²⁸ *McDonald v Bord na gCon* [1965] IR 217, 239.

²⁹ See, generally, Brian Foley, *Deference and the Presumption of Constitutionality* (Institute of Public Administration, 2008).

³⁰ *M. v An Bord Uchtála* [1977] IR 287, 293. Cf. *Cooke v Walsh* [1984] IR 710.

³¹ *Maher v Attorney General* [1973] IR 140, 147. Cf. *King v Attorney General* [1981] IR 233. This doctrine does not apply in respect of review under Article 26 because the Court must instruct the President either to sign the Bill, in which case all of it becomes law, or to refrain from signing the Bill, in which case none of it has legal effect. Cf. *In re Article 26 and the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181.

A *Restraint that undermines parliamentary democracy*

As noted above, the Irish Constitution uncompromisingly affirms that Parliament is invested with the ‘sole and exclusive power of making laws for the State’.³² The democratic ideal to which this provision aspires is compromised by the realities that the legislative and executive branches are fused, that party discipline is both strict and comprehensive, and that legislation is often introduced by the very Ministers who will be the beneficiaries of delegations of legislative power. Adjudicating on judicial review cases which come before them for breach of Article 15.2.1, the courts have articulated a non-delegation doctrine, which requires parliament to refrain from abdicating its law-making function. Initially, this doctrine was established in *Cityview Press v An Comhairle Oiliúna*,³³ and formulated as the ‘principles and policies’ test, designed ultimately to safeguard the constitutional separation of powers by ensuring ‘that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power neither contemplated nor permitted by the Constitution’.³⁴ Specifically, the test requires that delegated legislation should go no further than to ‘[give] effect to principles and policies which are contained in the statute itself’, such that ‘the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body’.³⁵ The judgment became the most authoritative precedent on the interpretation of Article 15.2.1 in relation to the permissible limits of delegation, and has been cited with approval by the Supreme Court in every relevant case since. In 2013, the High Court described *Cityview Press* as having ‘almost canonical status in this sphere of constitutional law’.³⁶

From a democratic perspective, the test seems to be a reasonable interpretation of Article 15.2.1: if Parliament would allow secondary legislation to establish principles and policies, then it would effectively be conferring its legislative function on the delegated authority, whereas if Parliament only allows the delegated authority to operate within the frame provided by the principles and policies established in Acts of Parliament, then Parliament both exercises its legislative function and curtails and controls the power of the delegatee. However, later cases have insisted that the application of the *Cityview Press* test is conditioned by the presumption of constitutionality and the double construction test which have sometimes been used to save legislation as compatible with the constitution, on the basis of interpretations that are semantically possible, but very obscure and unlikely.³⁷ Moreover, from a practical perspective, the test may not always be easy to apply both because legislation does not always clearly specify its principles and policies in order to assist the reviewing judge and because sometimes ‘filling in the detail’ can have a profound effect. For example, in the *Cityview Press* case itself, the delegated authority was entitled to determine the amount of the levy to be charged on employers in a particular sector but if they determined that they levy should be inordinately high, it could have the effect of bankrupting several businesses, or even wiping out private enterprise in that particular sector.

³² Article 15.2.1

³³ *Cityview Press v An Comhairle Oiliúna* [1980] IR 381.

³⁴ *Ibid* 398.

³⁵ *Ibid* 399.

³⁶ *Collins v Minister for Finance* [2013] IEHC 530.

³⁷ *Cooke v Walsh* [1984] IR 710; *Harvey v Minister for Social Welfare* [1990] 2 IR 232.

Nonetheless, the *Cityview Press* test has been used to invalidate legislation that invested in the Minister for Justice untrammelled power to make deportation orders on the basis that:

[the legislature] should not abdicate its position by simply handing over an absolute discretion to the executive. It should set out standards or guidelines to control the executive discretion and should leave to the executive only a residual discretion to deal with matters which the legislature cannot foresee.³⁸

It has also twice been used to invalidate legislation that allowed the Labour Court to legalise employment agreements negotiated by representatives of employers and employees working in a particular sector which established remuneration and conditions of employment for that sector.³⁹ In the first case, sections of Industrial Relations Acts 1946 and 1990 were declared to be invalid for unconstitutionality because they left complete discretion to the Labour Court to determine statutory minimum rates of pay and statutory terms and conditions of employment in the regulated sectors, ‘there [being] no core policies or principles identified in the Act to guide the exercise of delegated power’.⁴⁰ In the second case, the Supreme Court invalidated other sections of the same Acts on the grounds that they entailed ‘a wholesale grant, indeed abdication, of law-making power to private persons unidentified and unidentifiable at the time of grant to make law in respect of a broad and important area of human activity’.⁴¹ Although these results are consistent with the *Cityview Press* test, the judgments in these cases discussed the possibility of taking into account other aspects of the legislation — apart from principles and policies — in reaching a decision on unconstitutionality. In the deportation case, *Laurentiu v Minister for Justice*, the Supreme Court noted that it is ‘quite usual’ that Parliament would retain for itself a power of supervision or even annulment but ruled that ‘it could [not] be seriously suggested that a provision of this nature was sufficient, of itself, to save an enactment which was otherwise clearly in breach of Article 15.2’.⁴² However, in the employment cases the judgments held that the retention of a power of supervision, revocation or annulment was something that *could* be taken into account in the application of the *Cityview Press* test.⁴³ Although these cases regard the lack of a power of supervision or revocation as exacerbating the unconstitutional effect of the nonexistence of principles and policies, later judges, as discussed below, seem to believe that the existence of a power of supervision or revocation can actually compensate for the nonexistence of principles and policies, thus contradicting the *Laurentiu* dictum.

When the courts reviewed the *Misuse of Drugs Act 1977* in the case of *Bederev v Ireland*, the results made international headlines because the effect of the Court of Appeal’s decision was to decriminalise certain drugs for 24 hours in March 2015 while

³⁸ *Laurentiu v Minister for Justice* [1999] 4 IR 26, at 70-71. However, this legislation, the *Aliens Act 1935*, was enacted prior to the coming into force of the 1937 Constitution and therefore did not enjoy the presumption of constitutionality.

³⁹ *John Grace Fried Chicken Ltd. v Catering Joint Labour Committee* [2011] IEHC 277 and *McGowan v Labour Court* [2013] IESC 21.

⁴⁰ *John Grace Fried Chicken Ltd. v Catering Joint Labour Committee* [2011] IEHC 277, para. 31.

⁴¹ *McGowan v Labour Court* [2013] IESC 21, para 30.

⁴² *Laurentiu v Minister for Justice* [1999] 4 IR 26, 93.

⁴³ *John Grace Fried Chicken Ltd. v Catering Joint Labour Committee* [2011] IEHC 277, at para. 22. Indeed, the fact that there was no capacity for review built into the Industrial Relations Acts seemed to operate to their disadvantage: *John Grace Fried Chicken Ltd. v Catering Joint Labour Committee* [2011] IEHC 277, at para. 24 and *McGowan v Labour Court* [2013] IESC 21, at para 30.

Parliament hastily rushed through emergency legislation. The Court of Appeal invalidated the 1977 Act on the grounds that there were no principles and policies in the Act which could guide the Minister in the exercise of his discretion to declare certain drugs to be illegal.⁴⁴ In respect of the power of annulment, the Court held (consistently with the *Laurentiu* dictum, though without referencing it) that '[w]hile the existence of such a power is undoubtedly a valuable safeguard, it is not the particular safeguard which the Constitution requires, namely, that the law making power is reserved to the Oireachtas'.⁴⁵ In June 2016, however, the Supreme Court reversed the decision, affirming that the Act was not unconstitutional. The judgment disturbs the ground upon which the non-delegation doctrine rests because, although it does not overturn *Cityview Press*, it claims that the 'two principles' of the non-delegation doctrine are that 'legislation must set boundaries and a defined subject matter for subsidiary law-making and those affected by secondary legislation have an entitlement to know from the text of the legislation where those boundaries are and what that subject matter is'.⁴⁶ Essentially, this is simply a call for legislative clarity, which is intentionally indifferent to whether the legislative principles and policies are determined by Parliament or not. Moreover, although the Supreme Court did not expressly overturn *Cityview Press*, it does come close to reversing the *Laurentiu* dictum by stating that:

there is a fundamental difference between the Oireachtas launching the possibility of subsidiary legislative enactment as a boat which is never to return to the harbour of oversight [by Parliament] and one which, as under s.38(3) in the present case, requires a subsidiary order to be subject to parliamentary scrutiny.⁴⁷

While the presence or absence of principles and policies is considered by the Court to be immaterial, the presence or absence of a power of supervision and annulment is described as 'fundamental', if 'not necessarily ... decisive'.⁴⁸ It is the latter rather than the former which the Supreme Court deems to be the indication that 'control is thus retained by the legislature'.⁴⁹ This approach downgrades the legislative function entrusted exclusively to the Parliament by virtue of Article 15 of the Constitution to a mere oversight arrangement with the possibility of revocation.

Six months later, in the case of *Collins v Minister for Finance*, the Supreme Court had an opportunity to repudiate the *Bederev* decision as insufficiently respectful of the legislative role when it ruled on the validity of the *Credit Institutions (Financial Support) Act 2008*. Section 6 of the Act allows the Minister for Finance to offer financial support to credit institutions on any terms — commercial or otherwise — which he sees fit to design, with no necessary expectation that the monies would ultimately be recouped. The legislation was famously used to bail out certain banks through the issuing of promissory notes worth in excess of €30 billion. Remarkably, the Supreme Court judgment mentions the *Cityview Press* case only in passing, makes no reference whatsoever to the 'principles and policies' test, and seems to hint that legislation providing for financial regulation may be judged by a standard other than that provided

⁴⁴ *Bederev v Ireland* [2015] IECA 38.

⁴⁵ *Ibid* para. 72.

⁴⁶ *Ibid* para. 24.

⁴⁷ *Ibid* para. 24.

⁴⁸ *Ibid* para. 32.

⁴⁹ *Ibid* para. 32.

by Article 15.2.1.⁵⁰ Moreover, the Court notes that the legislation imposes on the Minister a duty to inform Parliament in respect of financial support being provided. Although there is no power of revocation or annulment, and the ministerial duty is only a reporting responsibility to be carried out once per year, the Court describes it as facilitating legislative ‘review and control’ over the Minister’s decisions,⁵¹ thereby giving the impression of equivalence with the situation in *Bederev*. It is undeniable that there would have been profound and almost certainly catastrophic economic consequences were the Supreme Court to declare the Act unconstitutional. In acknowledgement, the Court heavily and repeatedly stressed the exceptional nature of the case, warning that the 2008 Act could not be seen as ‘a template for broader Ministerial power on other occasions’ and specifically emphasised that if Parliament were to ‘concede such wide ranging power in other less pressing circumstances ... it clearly would not follow from this case that such was constitutionally permissible’.⁵² Nonetheless, and quite inexplicably, the Supreme Court insisted that the 2008 Act ‘is not consistent with the Constitution as an exception to some otherwise generally applicable rule’.⁵³ In other words, although stressing the exceptional nature of *Collins*, the Supreme Court in the next breath seemed to claim that the outcome of the case was *not* exceptional.

If indeed *Collins* is not exceptional, that means that the requirement that Parliament should write ‘principles and policies’ has fallen out of favour with the judiciary, and has *de facto* been overruled. Latterly, the courts have instead focussed to a high degree on the safety valve provided by legislative powers of annulment where they exist and even, in the *Collins* case, on reporting obligations as evidence of legislative ‘control’, in order to support a finding that Parliament has not abdicated its function. The point here is that the result of the courts’ deference to legislative output undermines the role of Parliament because the executive manipulates the legislative output for its own ends and the courts, in deferring to Parliament, are in fact complicit in allowing the executive to poach legislative responsibility as a ministerial privilege. In doing so, the courts — in their seeming judicial restraint — are seriously undermining the principle of separation of powers, the quality of our legislative democracy, and the supremacy of the Constitution which seeks to vindicate those principles.

B *Restraint that undermines popular democracy*

The same pattern is to be seen in respect of referenda. Quite unusually in comparative constitutional terms, Ireland holds a referendum in order to approve every amendment of the Constitution, and, to date, has made 29 amendments although the Constitution is not yet 80 years in force. Article 46 prescribes that a Bill to amend the Constitution must first be passed by the Houses of Parliament before being put to the people, a provision which ensures that there will always be a majority of parliamentarians in favour of the amendment proposal. The superior courts have several times dealt with the problem of government interference in referenda campaigns, specifically, government use of taxpayers’ money to fund one side of the campaign. The cases have called both for review of executive action in respect of public expenditure and review of ensuing results.

Initially, in 1992, the High Court was reluctant to accept that the court had jurisdiction to review executive decisions on public expenditure, holding that ‘judges

⁵⁰ *Collins v Minister for Finance* [2016] IESC 73, at para. 66.

⁵¹ *Ibid* para. 80.

⁵² *Ibid* para. 84.

⁵³ *Ibid* para. 84.

must not allow themselves to be led, or, indeed, voluntarily wander into areas calling for adjudication on political and non-justiciable issues',⁵⁴ and concluding that this was a matter of 'political misconduct on which this court can express no view'.⁵⁵ However, in the 1995 case of *McKenna v An Taoiseach (No. 2)*, the Supreme Court ruled that the government's action 'was not an action in the exercise of the executive power of the State'⁵⁶ and therefore could be judicially reviewed to determine 'whether such activity constitutes an interference with the constitutional process of amending the Constitution'.⁵⁷ Emphasising the honour with which the Constitution treats the Irish people — 'the guardians of the Constitution' — as well as 'the democratic nature of the State enshrined in the Constitution', the Court concluded that the use of public funds to campaign for a 'yes' vote was 'an interference with the democratic process and the constitutional process for amendment of the Constitution',⁵⁸ and that it was 'bordering on the self-evident that in a democracy ... it is impermissible for the Government to spend public money in the course of a referendum campaign to benefit one side'.⁵⁹ Moreover, the expenditure was held to have breached the right to equality and the right to freedom of expression.⁶⁰ In 2012, the Supreme Court was again charged with examining taxpayer-funded referenda campaign literature for unconstitutionality in the case of *McCrystal v Minister for Children*.⁶¹ Here, the argument was slightly different because the literature did not overtly exhort a 'yes' vote, but rather gave ostensibly neutral information which the Supreme Court ruled was biased in favour of a 'yes' vote. Finessing the legal principles, the Court listed nine principles, which centred on the need for respect for the right to equality, the right to a democratic process, the right to fair procedures and the right of freedom of expression, together with an acknowledgment that the Government is entitled to campaign for a 'yes' vote, and to spend personal or party money to support that campaign, and to give information and clarifications, but they should stop short of spending public money to finance a 'yes' vote.⁶² In short, according to the Court, 'a publicly funded publication about a referendum must be fair, equal, impartial and neutral',⁶³ and since this literature 'contain[ed] just one narrative ... in support of a 'yes' vote without expressly calling for a 'yes' vote',⁶⁴ once more the Government was found to have acted unconstitutionally.

In the aftermath of both referenda, the outcomes were challenged on grounds that they had been tainted by the illegal government action during the campaign. Details of factual circumstances are needed in order to appreciate the impact of the government illegality. The *McKenna* case was taken during the referendum campaign leading up to the divorce referendum, which proposal was carried by 50.3% of the votes (the slimmest margin ever) but the Supreme Court decision had been handed down on the 17th November and voting took place on 25th November. The *McCrystal* case was taken in the lead-up to the children's referendum (recalibrating the balance between children's rights, family rights and state duties in respect of children) which proposal was carried

⁵⁴ *McKenna v An Taoiseach* (No. 1) [1995] 2 IR 1, 5.

⁵⁵ *Ibid* 6.

⁵⁶ *McKenna v. An Taoiseach* (No. 2) [1995] 2 IR 10, 38.

⁵⁷ *Ibid* 40.

⁵⁸ *Ibid* 42.

⁵⁹ *Ibid* 43.

⁶⁰ *Ibid* 51 *et seq.*

⁶¹ *McCrystal v Minister for Children* [2012] IESC 53. It should be noted that the authors were involved in an advisory capacity with this case.

⁶² *Ibid per* Denham CJ, para. 77.

⁶³ *Ibid*.

⁶⁴ *Ibid per* Murray J, para. 77.

by 58% of voters, but the Supreme Court decision was handed down at noon on the 8th November, while voting took place on the 10th November,⁶⁵ and, as usual, there was a media blackout on the 9th, meaning that the electorate had half a day to learn about the government's illegality and try to understand how much of the information they had received as neutral information was in fact biased. Both challenges failed and, paradoxically, the reason the Court gives is the same reason that the earlier challenges had succeeded: reverence for the role of the people. The result of the divorce referendum (permitting the dissolution of marriage) was upheld in *Hanafin v Minister for the Environment* on the technical grounds that the unconstitutional activity itself 'was not an electoral wrongdoing within the meaning of [the Referendum Act]',⁶⁶ and the secrecy of the ballot meant that the true effect of the illegal government action was 'incapable of proof'.⁶⁷ However, the overriding concern was that reverence for the role of the people required that the judges not set aside the outcome of the referendum: '[t]he will of the people as expressed in a referendum providing for amendment of the Constitution is sacrosanct and, if freely given, cannot be interfered with'.⁶⁸ On one reading of the judgments, it was not reverence for the people, but anxiety about the limits of their own role and the 'awesome undertaking' of displacing a referendum result which preoccupied the judges.⁶⁹ Whatever the real motivation, the judges did not grasp the nettle that the will of the people very well may have been contaminated by the illegal government action, and that the referendum result was therefore not a reliable indicator of that will, particularly when the margin of victory was so insignificant.

The result of the children's referendum was upheld in *Jordan v Minister for Children* for largely the same reasons. The Supreme Court clarified that the test to be applied is to establish whether 'it is reasonably possible that the irregularity or interference identified affected the result', in other words, 'to identify the point at which it can be said that a reasonable person would be in doubt about, and no longer trust, the provisional outcome of the election or referendum'.⁷⁰ In applying that test, the Court directed itself to take into account 'some simple rules of common sense', including the fact that irregularities 'have the capacity to interfere with, and distort, the outcome', the fact the opinion polls and voting trends 'are relevant considerations', and the margin of victory. Notably absent from the list (which is presumably designed to assist the court in arriving at the decision of the reasonable person) are the time period between the identification of the irregularity and the polling day, and how difficult it is for the citizen to understand the nature of the irregularity and to calibrate its effect on their decision about how to cast their vote. Moreover, given the focus on the margin of victory in the application of the reasonable person test in *Jordan*, it cannot be said with certainty that the outcome in *Hanafin* is consistent with the test proposed in *Jordan*. These inconsistencies do not inspire confidence, and in terms of practical effect, the *Hanafin* and *Jordan* cases indicate that the courts do not seem to have the will to impose legal consequences on the government for illegal interference with a referendum campaign. In upholding the results of referenda campaigns that were tainted by illegalities affecting democracy, equality and freedom of expression, however, the judiciary loses the opportunity to hold the government to account for breaching those standards, and becomes complicit in the constitutional trade-offs that follow.

⁶⁵ Polling on the islands surrounding Ireland took place on the 8th.

⁶⁶ *Hanafin v. Minister for the Environment* [1996] 2 IR 321, 414.

⁶⁷ *Ibid* 437.

⁶⁸ *Ibid* 425.

⁶⁹ *Ibid* 438.

⁷⁰ *Jordan v Minister for Children* [2015] IESC 33, *per* O'Donnell J, para 85.

IV CONCLUSION

In ideal circumstances, the government would not control parliament, party discipline systems would not short circuit deliberative debate and the Irish Parliament would become a model of a parliamentary democracy in which reasoned and measured debate about policy objectives and their achievement within the framework provided by the Constitution would be intrinsic to the process of promulgating legislation. In those circumstances, judicial restraint would serve as the perfect complement to an already healthy democracy, creating a virtuous cycle by reinforcing parliamentary responsibility. In the less than ideal circumstances in which we find ourselves, however, the prevailing attitude of judicial restraint operates to undermine the very principles that it purports to respect. The judiciary becomes complicit in the erosion of parliamentary democracy as well as popular democracy when they demonstrate misguided deference to the outcomes that those processes present, when the processes themselves are constitutionally deficient. In these circumstances, the judiciary knowingly participates in undermining key constitutional principles even if they operate under the banner of judicial restraint.

JUDICIAL POWER AND THE UNITED KINGDOM'S CHANGING CONSTITUTION

MARK ELLIOTT*

I INTRODUCTION

The phrase ‘judicial power’ is an evocative one whose beauty — or danger — is to a large extent in the eye of the beholder. For some, the possession by the judicial branch of powers with real bite, up to and including powers of constitutional review, is a precondition of liberal democracy. For others, however, ‘judicial power’ conjures up something quite different — including the potential of curial authority to *threaten* democracy, and a corresponding imperative that such authority be approached with caution and rigorously cabined. Of course, the difficult questions, as always, arise other than at the extremes, where judges would respectively lack any power to uphold constitutional standards or, conversely, be free to run amok. The hard question is thus one of degree. Judicial power, in any rule of law-based system, is a given. But how much is too much?

There are many ways in which that question can be, and has been, approached. One possibility involves using constitutional or political theory as the predominant lens, with the aim of developing a model of democracy that prescribes, among other things, the legitimate extent and nature of the judicial role. In this article, however, I take a different, less abstract approach, by examining the question of judicial power within a particular temporal and jurisdictional context — namely, the United Kingdom today, where a recent and prominent strand of opinion holds that the judiciary is guilty of overreach, and that ‘judicial power’ is therefore something that needs not only to be watched, but to be scaled back.¹

In this paper, I take the unease that animates that school of thought and use it as a starting-point. I do not, however, set out to prove that those who express such sentiments are right or wrong. Rather, I seek to make sense of how the UK has arrived at the position in which it currently finds itself and consider in general terms how — given the particularities of the UK’s constitutional system — one might go about identifying the proper limits of judicial power. I therefore begin by addressing the key constitutional parameters by reference to which the notions of judicial power and overreach have traditionally been calibrated. I then trace the many senses in which the exercise of judicial power has grown, and consider the forces that have brought such developments about. Against that background, I contend that while the evolution of the judicial role evidences a reconceptualization, as distinct from the repudiation, of relevant fundamental constitutional principles, it should not be assumed that the UK constitution’s famous flexibility is limitless. To that end, I conclude by examining the recent and controversial Supreme Court judgments in *Evans*² and *Miller*³ in which, in different ways, the proper limits of judicial power have been tested.

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¹ See generally the work of Policy Exchange’s Judicial Power Project: <www.judicialpowerproject.org.uk>. For a notable contribution to the debate, see John Finnis, *Judicial Power: Past, Present and Future* (2015) Judicial Power Project <www.judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/>.

² *R (Evans) v Attorney General* [2015] AC 1787.

³ *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583.

II TRADITIONAL PARAMETERS

The setting of institutional parameters is a core function of any ‘constitution’ properly so-called. In seeking to discern the location of such parameters, the constitutional text is, in most systems, the natural starting point, even if it can serve as no more than a point of departure. In the UK, however, the identification of relevant parameters must necessarily proceed in a different way. That is so most obviously because of the absence of any constitutional text *per se*. But there is the further (and related) point that the doctrine of parliamentary sovereignty means that dividing lines that trace the respective provinces of different constitutional actors are mutable and implicit to an extent that is likely to be unfamiliar to those accustomed to the relative rigidity and formality of textual constitutionalism. Notions of constitutional propriety are thus informed in the UK to a peculiar degree by accretions of understanding and consensus born of institutional practice and interaction. And if institutional practice changes, the question arises of whether that evidences a challenge to or a shift in the prevailing consensus. It is against that background that the growth of judicial power in the UK in the recent past falls to be considered. In addressing such matters, the middle of the last century forms a useful benchmark, as the development of administrative law began to gather pace. When the role played by the courts in the public law sphere at that time is examined, it becomes clear that a number of constraints were generally considered to apply. Three such ‘traditional parameters’ are particularly noteworthy.

The first is the principle of parliamentary sovereignty — and, in particular, the relatively straightforward and unqualified terms in which it was acknowledged. The resulting dynamic was one that situated Parliament firmly in the driving seat, the courts’ role being to take the legislation enacted by Parliament and give effect to it in the way that best implemented the intention that Parliament was taken to have had. The notion that courts might decline to enforce duly enacted legislation was not just anathema, it was unheard of;⁴ but the sovereignty principle exerted a penumbral effect that went well beyond that limitation upon the judicial role.⁵ The idea might be summed up in terms of judicial subservience to Parliament — as distinct from judicial engagement with Parliament on the more equal constitutional terms that can be inferred from some of the contemporary jurisprudence.

Second, if we shift our focus from the judicial-legislative to the judicial-administrative interface, we encounter a second well-established axiom: the appeal-review distinction. This is rooted in the related (albeit distinct) divisions that are drawn between questions pertaining respectively to the legality and merits of executive policies, rules and decisions, and between evaluations of matters of process and substance. Here, there has been substantial movement in recent decades. Turn back the clock to the middle of the 20th century, and the appeal-review distinction is nothing less than an article of constitutional faith, as adherence to the strictures of the *Wednesbury* unreasonableness doctrine illustrates.⁶ However, as we will see, the picture today is different.

⁴ *British Railways Board v Pickin* [1974] AC 765, 782.

⁵ T R S Allan, ‘Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective’ (2006) 59 *Current Legal Problems* 27.

⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

Third, the judicial-administrative interface — and the proper extent of judicial intervention, in particular — has traditionally been shaped by a further notion: the concept of justiciability. In its traditional form, this was taken to mean that certain matters were to be treated as extra-judicial not in the relatively subtle sense that courts should examine them only reluctantly or marginally (as is the case, at least on an orthodox account, with substantive review of merits questions), but in the absolute sense that they should not be examined by courts at all. Such issues have traditionally been identified, often in broad-brush terms, by reference to their subject-matter — an approach that is perhaps epitomised by Lord Roskill's judgment in the *GCHQ* case,⁷ in which the House of Lords' willingness to acknowledge the in-principle reviewability of decisions made under prerogative powers was substantially hollowed out by the long list of prerogatives that were said to be non-justiciable. In contrast, the notion of justiciability is viewed today in far less rigid terms.

The foregoing parameters that traditionally shaped the judicial role were not plucked out of thin air. They draw upon and are inspired by the trinity of fundamental principles — the sovereignty of Parliament, the rule of law and the separation of powers — that lend a normative dimension to the UK's uncodified constitutional order. But the traditional parameters reflect only certain aspects of those fundamental principles: in particular, aspects that emphasise the constitutional value of legislative and administrative functions while, at least to some extent, postulating judicial power as a potential threat to them. For instance, the rule of law was traditionally perceived, at least to an extent, in a way that emphasised restrictions upon the courts' function as much as anything else. This is apparent when the role of the *ultra vires* doctrine — which supplied the conventional theoretical basis for the judicial review jurisdiction — is considered.⁸ Under that approach, the courts' job was centrally understood in terms of a limited notion of the rule of law, the emphasis being firmly upon ensuring that legislative boundaries upon administrative authority were not transgressed. Rooting the courts' judicial review function firmly in the notion of upholding the sovereign will of Parliament served to cloak the exercise of that function with constitutional propriety. But it simultaneously served to constrain the courts' role, not least by denying, or at least marginalising, any role in relation to the supervision of the administrative branch that the judiciary might be thought to have *independent* of the effectuation of legislative will. Indeed, a common thread that joins traditional understandings of the judicial role involves the viewing of other constitutional principles through the lens of parliamentary sovereignty, in ways that serve to underscore the limits of the judicial role and that (correspondingly) serve to emphasise the importance of respect both for parliamentary authority itself and for the authority of Parliament's administrative delegates.

Against this background, what we are witnessing today in the UK boils down to a tension between two visions of the constitutional order. As we have seen, the first — the traditional — vision places the sovereignty of Parliament centre stage and refracts other constitutional principles, and hence the judicial role, through it. But a competing vision postulates a different dynamic: one that acknowledges fundamental constitutional principles' capacity to influence and shape one another, and that therefore gives rise to a different understanding of the judicial role — one that is informed to a greater degree by constitutional principles' potential to drive, as well as constrain, judicial intervention. I return to this idea below. First, however, it is necessary to put some flesh on the bones, by examining the ways in which the judicial role has developed in recent decades. The

⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418.

⁸ See generally Christopher Forsyth, *Judicial Review and the Constitution* (Hart Publishing, 2000).

changes have been multifarious, and the following amounts to nothing more than selected highlights.

III DEVELOPMENT OF THE JUDICIARY'S CONSTITUTIONAL ROLE

Administrative law has enjoyed a notable renaissance over the course of the last 70 or so years. In 1951 — moved to do so by the Privy Council's decision in *Nakkuda Ali v Jayaratne*,⁹ in which requirements of procedural fairness were held not to apply to a so-called 'administrative' licensing function — Sir William Wade wrote of the 'twilight of natural justice'.¹⁰ Subsequently, however, as is well known, the principle of natural justice in particular, and administrative law more generally, awoke from what Sir Stephen Sedley dubbed its 'long sleep',¹¹ as is evidenced by such seminal decisions as *Ridge v Baldwin*,¹² *Anisminic*,¹³ and *Padfield*.¹⁴ Such cases might be thought of as emblematic of an initial phase of the renaissance, which to some extent — *Ridge v Baldwin* being a prime example of this — restored old orthodoxies that had been eroded during English administrative law's slumber. But just as the renaissance artists did not simply replicate that from which they took their inspiration, so the English judges who became the architects of modern administrative law went well beyond mere restoration of that which had gone before. Thus entirely new grounds of judicial review, such as the doctrine of legitimate expectation, emerged,¹⁵ developed,¹⁶ and continue to be refined¹⁷, while long-established grounds — such as error of law — have been developed almost beyond recognition¹⁸ (and, arguably, utility).¹⁹

These expansions of judicial review's doctrinal tentacles have been accompanied by other developments pertaining to its depth and scope. As to the former, the appeal-review distinction has been refined, albeit not eschewed, through the emergence of an 'anxious scrutiny' form of reasonableness review²⁰ and the embrace, in certain contexts, of proportionality.²¹ Meanwhile, judicial review today extends not only to questions about the existence²² but also the lawfulness of the exercise²³ of prerogative powers, as

⁹ [1951] AC 66.

¹⁰ H W R Wade, 'The Twilight of Natural Justice' (1951) 67 *Law Quarterly Review* 103.

¹¹ Sir Stephen Sedley, 'The Long Sleep' in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford UP, 2009).

¹² [1964] AC 40.

¹³ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

¹⁴ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

¹⁵ See generally Christopher Forsyth, 'The Provenance and Protection of Legitimate Expectations' (1988) 47 *Cambridge Law Journal* 238.

¹⁶ *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213.

¹⁷ *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546.

¹⁸ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Lord President of the Privy Council, Ex parte Page* [1993] AC 682.

¹⁹ *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48.

²⁰ *R v Ministry of Defence, Ex parte Smith* [1996] QB 517.

²¹ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

²² *Re De Keyser's Royal Hotel Ltd* [1920] AC 508;

²³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453.

well as to the exercise of some other non-statutory powers.²⁴ At the same time, the courts have to some extent shrugged off the constraints imposed by the concept of justiciability, moving away from the categorical approach of *GCHQ*, and towards a more subtle one that focusses upon the appropriateness of judicial engagement with the particular issue raised by the claimant.²⁵

Meanwhile, on a more explicitly constitutional plane, courts have exhibited increasing enthusiasm for the 'principle of legality' as a constitutional tool of statutory construction and for the allied notion of 'common law constitutional rights'.²⁶ A related but distinct development has been the emergence of 'constitutional statutes',²⁷ and, more recently, of the idea that such statutes may be imbued with subtly varying degrees of constitutionality — a property that informs the extent of their vulnerability to implied repeal — depending upon the normative worth of the constitutional values that they institutionalise.²⁸ All of this has been coupled with an interpretive approach that has, at least on occasions, been notably bold,²⁹ and that might be considered, in some instances, to be a functional form of 'soft strike-down'.³⁰ Indeed, questions have explicitly been raised about judges' fidelity to statute, including by judges themselves, who have suggested — not only extra-curially³¹ but also from the bench³² — that, *in extremis*, they might be prepared to disregard a statutory provision on the ground of its constitutional offensiveness.

Paradoxically, the likelihood of such a judicial nuclear option being exercised is considerably lessened by the strengthening of the courts' authority in other respects, most obviously via the *Human Rights Act 1998* ('HRA'). This not only gives the courts extensive powers — and, indeed, duties — of constitutional interpretation,³³ which they have on occasions used with notable gusto,³⁴ but also authorises them to declare that primary legislation is incompatible with relevant rights.³⁵ And the latter, far from the anodyne non-remedy that it may appear to be, is in fact a potent device that invokes at least the prospect of binding adjudication by the European Court of Human Rights ('ECHR'), thereby enabling British judges denied strike-down powers by the doctrine of parliamentary sovereignty to appropriate for domestic purposes the constraining forces to which the UK is subject in international law by dint of its treaty obligations. Meanwhile, until the UK exits the European Union, domestic judges remain capable of refusing to apply domestic legislation that conflicts with directly effective EU law,³⁶ and have acquired a fresh constitutional role thanks to devolution, where questions can and do arise about whether territorial legislatures have exceeded their powers by (for

²⁴ *R v Panel on Takeovers and Mergers, Ex parte Datafin plc* [1987] QB 815.

²⁵ *R v Secretary of State for the Home Department, Ex parte Bentley* [1994] QB 349.

²⁶ *R (Unison) v Lord Chancellor* [2017] UKSC 51.

²⁷ *Thoburn v Sunderland City Council* [2003] QB 151.

²⁸ *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] 1 WLR 324.

²⁹ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

³⁰ In the sense of an implicit refusal to apply the as-enacted provision. See, eg, *R (Evans) v Attorney General* [2015] AC 1787.

³¹ See, eg, Lord Woolf, 'Droit Public — English Style' [1995] *Public Law* 57; Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72.

³² See, eg, *R (Jackson) v Attorney General* [2006] 1 AC 262; *Moohan v Lord Advocate* [2015] AC 901.

³³ *Human Rights Act 1998* (UK) c 42, s 3.

³⁴ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

³⁵ *Human Rights Act 1998* (UK) c 42, s 4.

³⁶ *R v Secretary of State for Transport, Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603.

instance) legislating in breach of protected human rights³⁷ or encroaching upon matters reserved to the UK Parliament.³⁸

IV JUDICIAL POWER, LEGISLATIVE WILL AND PARLIAMENTARY SOVEREIGNTY

The various changes to the judicial role charted above can be organised in a variety of ways. Certain themes, for instance, emerge, such as a growing emphasis upon rights; the internationalisation of UK constitutional law through the impact of the ECHR (via the *HRA*) and (for the time being) EU membership; the increasingly layered character of the British constitution thanks to devolution and (again, for now) EU membership; judicial anxiety in the light of the growth of the administrative state and concern about the efficacy of political mechanisms of control; and a greater willingness, evidenced by the development of such constructs as constitutional rights and constitutional statutes, to engage in adjudication that is explicitly 'constitutional', the absence of a constitutional text *per se* notwithstanding.

For present purposes, however, a further way of organising the various expansions of the judicial role is pertinent — bearing in mind the points made above about the way in which parliamentary sovereignty has traditionally operated, as a double-edged sword, so as to simultaneously serve as a root of and as a limit upon judicial authority. Viewed thus, organising recent changes to the judicial role by reference to the extent of any relevant parliamentary authorisation is instructive. And to that end, a continuum might be visualised, at one end of which judges act with Parliament's clear imprimatur. As we move along the scale, however, the relationship between parliamentary authority and judicial intervention becomes less obvious, until, at the far end, we encounter circumstances in which the two are either unaligned or even misaligned. Some examples, arranged at four points along this continuum, will help to illustrate the point.

First, then, are situations in which the curial role has grown thanks to the exercise of functions explicitly conferred upon judges by legislation. The *HRA* is a good example. It requires judges to exercise new interpretive powers, so as to reconcile UK law and the ECHR whenever possible,³⁹ and invests certain courts with a novel remedial power, enabling them to issue a declaration of incompatibility when such interpretive reconciliation is deemed infeasible.⁴⁰ Similar considerations apply in respect of the functions that courts have acquired as the arbiters of the constitutional demarcation disputes that can now arise thanks to devolution; the courts may have broken new ground by adjudicating upon such matters, but they have done so at the explicit behest of Parliament. This is not to deny that questions about overreach can arise when courts exercise such legislatively conferred constitutional functions. If, for instance, such functions are conferred in relatively open-textured terms, questions can readily arise about how far judges can properly go in exercising such powers.⁴¹ But legislative

³⁷ See, eg, *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868.

³⁸ See, eg, *Imperial Tobacco Ltd v Lord Advocate* 2013 SLT 2.

³⁹ *Human Rights Act 1998* (UK) c 42, s 3.

⁴⁰ *Human Rights Act 1998* (UK) c 42, s 4.

⁴¹ There has, for instance, been a lively debate about how far courts can properly go when exercising their interpretive power under the *Human Rights Act 1998* (UK) c 42, s 3. See, eg, Alison Young, 'Ghaidan v Godin-Mendoza: Avoiding the Deference Trap' [2005] *Public Law* 23; Aileen Kavanagh, 'Parliamentary Intent, Statutory Interpretation and the Human Rights Act 1998' (2006)

conferral serves at least in broad terms to legitimise the exercise of the function, particularly if one adopts a constitutional paradigm that places particular weight upon the principle of parliamentary sovereignty.

Second, situations arise in which the extension of the judicial role — in the sense of judges innovating in ways that enhance the scope for constitutional adjudication — is attributable to statutory intervention, even if it does not straightforwardly involve doing things that statute explicitly requires. Take, for example, the notion of constitutional statutes. The anvil upon which this idea has been beaten out is the UK's membership of the European Union — and, specifically, the difficult questions that it raises about the relationship between the principles of the sovereignty of the UK Parliament and the primacy of EU law. In *Thoburn*,⁴² Laws J made an important contribution in this regard. He characterised the *European Communities Act 1972* ('ECA'), which gives domestic effect to and provides for the domestic priority of EU law, as a 'constitutional statute'. Membership of this novel category, it was said, signified the Act's immunity from implied repeal. On this view, the ECA continues to operate — and so ascribe effect and priority to EU law — even in the face of primary legislation that is contrary to relevant EU norms, unless the ECA is explicitly overridden. That idea was subsequently developed and refined by the Supreme Court, again in the EU context, in *HS2*,⁴³ and was also applied, in a different context, in *H v Lord Advocate*.⁴⁴ Judicial articulation of a category of constitutional statutes represents a notable departure from the Diceyan orthodoxy that all Acts of Parliament are of equal status in legal (if not in political-constitutional) terms.⁴⁵ This, in turn, evidences a significant exercise of judicial power in terms of contributing to the development of the constitutional order itself. But the point of departure was a conundrum that Parliament had created. By enacting the ECA, it left the courts with little choice but to acknowledge the priority of EU over domestic law and to fashion an intelligible framework within which such prioritisation could be constitutionally rationalised. The notion of constitutional statutes thus does not amount to the straightforward implementation of Parliament's will; but it is nonetheless a measured judicial response to an issue that was legislatively created.

A third point on the continuum is represented by exercises of judicial power that are neither explicitly directed nor otherwise precipitated by statute. Here we find, among other things, such notions as common law constitutional rights and judicially articulated grounds of review that do not, at least in any straightforward sense, amount to the implementation of legislative will. Such developments are thus liable to be regarded with suspicion if a view of the constitutional order is adopted that places parliamentary sovereignty front and centre, given that the effect of such a constitutional worldview is to marginalise or deny other constitutional principles' independent capacity to legitimise the extension and exercise of judicial authority.

If the third point on the continuum is characterised by judicial power that is wielded in the absence of any specific legislative imprimatur, the fourth point is where we encounter judicial interventions that are not merely independent of specific manifestations of legislative will, but which are (or at least appear to be) positively in tension with it. Perhaps the clearest example is supplied by legislative ouster clauses and

26 *Oxford Journal of Legal Studies*; T R S Allan, 'Parliament's Will and the Justice of the Common Law' (2006) 59 *Current Legal Problems* 27.

⁴² *Thoburn v Sunderland City Council* [2003] QB 151.

⁴³ *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] 1 WLR 324.

⁴⁴ [2013] 1 AC 413.

⁴⁵ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 145.

judicial responses thereto, the *Anisminic* case⁴⁶ being a celebrated example of curial unwillingness to take such a provision at face value and instead to interpretively neutralise it or (as Sir William Wade notably argued) baldly disobey legislation that flouts the rule of law.⁴⁷ *Anisminic* is now joined by the Supreme Court's recent decision in *Evans*,⁴⁸ to which I return in the final section of the article.

V ON THIN ICE?

Looked at from a traditional perspective, judges might be thought to be on thinner and thinner constitutional ice as we move along the continuum sketched above. They find themselves on the strongest ground when what they do can be characterised in terms of the performance of a statutorily assigned function, the sovereign legislature's imprimatur being the ultimate touchstone of constitutional legitimacy (on this view). But exercises of judicial power become more questionable as their relationship with legislative will diminishes — and, by the time the fourth point on the spectrum is reached, is ultimately inverted. According to this analysis, the constitutional ice grows progressively thinner because it primarily consists, in the first place, of parliamentary authorisation of the judicial enterprise. It was, for instance, for precisely such reasons that it was traditionally thought necessary, by way of the *ultra vires* doctrine, to characterise judicial review in terms of the implementation of legislative will. Thus, once we reach the fourth point on the continuum, the ice is not merely thin, but wholly incapable of bearing the weight placed upon it by what must, on this view, be considered improper judicial activism.

At least some recent accretions of judicial power thus begin to look highly suspect, the erosion of the parameters that traditionally constrained the judicial role reducing to a challenge to fundamental constitutional principles themselves. However, a competing interpretation of recent history paints a less dramatic picture. On this view, at least most recent developments imply not the repudiation of fundamental principles, but rather serve as evidence of evolving understandings concerning their weight and relationality. By this I mean that the preponderant weight conventionally assigned to the sovereignty of Parliament has been revised, and the relative weight of other principles, including the rule of law and the separation of powers, has been reassessed. In this way, the three key principles that form the normative heart of the UK's unwritten constitution are increasingly considered in co-equal terms. This alternative view treats the parameters that traditionally conditioned the judicial role not as fixed and brittle constraints, but as mutable and contestable inferences drawn from the fundamental principles that animated them in the first place. It follows that the repudiation of those parameters in favour of different — and, from a judicial perspective, more generous — ones does not necessarily imply the repudiation of the underlying principles. This is not, however, to suggest that those parameters have been, or are ever likely to be, rendered entirely irrelevant. That is so not least because the kernel of each reflects constitutional principles that are deep-rooted, such that departure from them would be difficult to contemplate absent some form of crisis-evidencing constitutional rupture. Importantly, however, when we move beyond the very centre of the propositions that the parameters convey, we quickly also move beyond constitutional axioms that are so hallowed as to be unyielding. Viewed in

⁴⁶ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

⁴⁷ H W R Wade and C F Forsyth, *Administrative Law* (Oxford UP, 2009) 616.

⁴⁸ *R (Evans) v Attorney General* [2015] AC 1787.

this way, the 'traditional parameters' are simply a snapshot of an institutional accommodation that obtained at a given point in time.

Take, for example, the appeal-review distinction. At one time, it was an article of British constitutional faith that courts should not examine the substance of administrative decisions other than by asking whether they were so irrational as to be outrageous.⁴⁹ In contrast, the courts are today prepared — in some circumstances, such as when a relevant ECHR right,⁵⁰ a common law constitutional right,⁵¹ a fundamental status⁵² or a substantive legitimate expectation⁵³ is at stake — to intervene if the relevant matter has been disproportionately impacted by the administrative decision in question. This might seem to imply that the courts have simply cast off former restrictions, and have begun asserting new powers that are at odds with their proper constitutional role. The reality, however, is far more complex, and serves as a helpful illustration of the various forces that have operated so as to refashion the judicial role in recent decades.

For one thing, when relevant ECHR rights are involved, the *HRA* in effect requires proportionality review, thus implicating the points raised in the previous section about legislative allocations of judicial authority. And while the *HRA* is not relevant when ECHR rights are not in play, the very fact that Parliament has sanctioned judicial recourse to proportionality by enacting the *HRA* cannot be ignored, not least because it signals a view on the part of Parliament that it is not inevitably improper for courts to engage in proportionality review. It would, however, be naïve — and ahistorical — to suggest that courts have taken themselves to be permitted to engage in proportionality review only because Parliament has sanctioned it. Their willingness to resort to proportionality in relation to such matters as substantive legitimate expectations — in which the *HRA* is implicated neither directly nor analogically — evidences a judicial commitment to the rule of law value of legal certainty as well as a preparedness to engage in relatively intensive review absent parliamentary authorisation. This, in turn, implies a judicial conviction that the constellation within which the three fundamental constitutional principles are arranged differs from that which was implicit in earlier thinking that took *Wednesbury* review to mark the outer limit of the curial role in judicial review cases.

But none of this implies disregard for — as distinct from fresh thinking about — those principles. Indeed, recent developments in the area of substantive review can be understood as an attempt to take the thinking that underpinned the crude, binary appeal-review distinction, and fashion something that is more subtle but which remains true to the kernel of constitutional principle that gave rise to that distinction. Thus it is not the case that UK courts are today willing to second guess the administrative branch, boldly substituting executive decisions with judicial ones. Even in *HRA* cases, where proportionality is legislatively sanctioned, courts have shown themselves willing to tread cautiously, most obviously by developing a doctrine of deference that modulates the intrusiveness of proportionality review. This ensures that courts remain sensitive — when relevant — to other branches' claims of democratic legitimacy and institutional competence. Proceeding thus is respectful of the possibility for constitutional mischief that inspired the appeal-review distinction as it was originally refracted, in a more severe form, through the *Wednesbury* doctrine, but in a way that is less dogmatic and that

⁴⁹ See, eg, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418.

⁵⁰ See, eg, *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621.

⁵¹ See, eg, *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

⁵² See, eg, *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591.

⁵³ See, eg, *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

exhibits greater sensitivity to the fact that the relevant constitutional concerns will exert more or less force depending upon the context.⁵⁴

VI THE LIMITS OF CONSTITUTIONAL FLEXIBILITY

My purpose in this article has not been to closely analyse every respect in which judicial power has grown in the UK in recent decades, far less to argue that no exercise of that power has led the courts to exceed the bounds of constitutional propriety. Rather, I have attempted to show that while a clear direction of travel can be discerned, and while the associated expansion of curial authority challenges the parameters that have traditionally been understood as constraining it, this need not be taken to imply a repudiation of the underlying constitutional principles that gave rise to those parameters. Indeed, the UK system, lacking allocations of institutional power that are authoritatively fixed in place by a constitutional text, depends upon institutions interacting in a way that facilitates the emergence (and sometimes the evolution) of a form of constitutional equilibrium: that is, a tacit understanding about how such institutions are to relate to one another, about where the boundaries upon their respective roles and powers are to be found, and about the underlying values and principles by reference to which such issues fall to be negotiated. In such circumstances, we should not be surprised if, over time, ideas evolve about what a proper constitutional balance looks like. Lacking the sort of hard limits that a paramount constitutional text is capable of laying down, the institutional parameters found within the British constitution are inevitably softer, and potentially more transitory, in nature.

However, that the nature of the UK constitutional order is such that the perimeters of institutional authority are far from neatly tabulated should not be taken to mean that the resulting flexibility is infinite. The role played by inter-institutional negotiation — as powers are exercised, limits tested and reactions taken on board — does not strip the constitution of any normative content. Rather, that process of institutional negotiation takes place against the background of, and is centrally informed by, senses of constitutional propriety that are rooted in fundamental principles. In the light of this, it is certainly not the case that the constitution generally, or the constraint it implies upon the judicial role, is limitlessly flexible. Griffith was therefore wide of the mark, at least in this regard, when he asserted that, in the UK, ‘Everything that happens is constitutional’.⁵⁵

Against this background, I turn, by way of conclusion, to *Evans* and *Miller*: two of the UK Supreme Court’s most controversial recent decisions. Both cases, I contend, have something to contribute if we are seeking to develop a sense of what judicial overreach may look like in the UK context: not because either unarguably constitutes overreach, but because they flag up two matters that are of central importance. *Evans* demonstrates that in assessing whether a court is guilty of overreach, it is necessary to move beyond crude and straightforward understandings of constitutional principle. Instead, we must acknowledge that such principles are portmanteau concepts consisting of core and penumbral values, and that what a given principle requires — and, in terms of judicial intervention, justifies — must be assessed in the light of the principle’s interaction with

⁵⁴ See further Mark Elliott, ‘From bifurcation to calibration: twin-track deference and the culture of justification’ in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart Publishing, 2015) 61.

⁵⁵ J A G Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1, 19.

other relevant principles. *Miller*, meanwhile, serves as a salutary reminder that forensic analysis and reasoned judgement are central to the judicial role — and that eschewal of those curial techniques in favour of a free-wheeling, instinctual approach amounts to a form of overreach in itself.

VII *EVANS*

In *Evans*, a ministerial veto power in the *Freedom of Information Act 2000* was deployed so as to override a judgment of the Upper Tribunal⁵⁶ — a superior court of record⁵⁷ — ordering that correspondence between the Prince of Wales and Government Ministers be released. On judicial review, the use of the executive veto was quashed, a plurality (consisting of three of the five majority judges) construing it so narrowly as to render it exercisable only in extremely narrow, and unlikely, circumstances. So emaciated was the veto power left by that construction that Lord Hughes (dissenting) said that the power had been rendered ‘vestigial’,⁵⁸ while Lord Wilson (also dissenting) said that the plurality ‘did not ... interpret’ the relevant provision but ‘re-wrote it’.⁵⁹ While the plurality had ‘invoked precious constitutional principles’ in support of their conclusion, it was necessary to recall that ‘among the most precious [of those principles] is that of parliamentary sovereignty’,⁶⁰ the implication being that the plurality had ignored that ‘most precious’ principle. A number of commentators appear to agree, and *Evans* has attracted notable charges of judicial overreach.⁶¹

Are those charges warranted? If, as suggested above, constitutional principles are best thought of as portmanteau concepts that stand for a range of propositions — some penumbral, some axiomatic — then the requirement that courts apply legislation in a way that reflects some plausible reading of the statutory text surely lies at the very core of the notion of parliamentary sovereignty. It is the assault that *Evans* appears to make upon that axiomatic element of the sovereignty principle that renders it especially suspect. Of course, it is generally recognised that even this core requirement affords judges some latitude, such that more creative, or strained, interpretations are acceptable if a more literal reading of the provision would threaten a fundamental constitutional value. But the fact that the plurality assigned to the veto provision a construction that rendered it something close to a dead letter might well be thought to signify that any interpretive latitude was plainly exceeded.

It is important, however, to bear in mind that the strength of the plurality’s response to the veto provision was doubtless a function of the extent of its incompatibility with constitutional fundamentals other than sovereignty. As they put it, a generous veto power would ‘cut across ... constitutional principles’ that are ‘fundamental components of the rule of law’,⁶² by ‘flout[ing]’ the notion that judicial decisions cannot be ignored by anyone, ‘least of all ... the executive’, and by ‘stand[ing] ... on its head’ the axiom that administrative action ‘must be subject to judicial scrutiny’.⁶³ Such propositions are not

⁵⁶ *Evans v Information Commissioner* [2012] UKUT 313 (AAC).

⁵⁷ *Tribunals, Courts and Enforcement Act 2007* (UK) c 15, s 3(5).

⁵⁸ *R (Evans) v Attorney General* [2015] AC 1787, [156].

⁵⁹ *Ibid* [168].

⁶⁰ *Ibid* [168].

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

⁶² *R (Evans) v Attorney General* [2015] AC 1787, [51].

⁶³ *Ibid* [52].

merely penumbral features of the rule of law; they lie at its core. Whether that justifies the radical interpretive approach of the plurality depends ultimately upon how the relationship between the relevant principles is understood, and upon the relative weight that is assigned to them. The plurality, self-evidently, considered their construction of the veto power to reflect an appropriate accommodation of the respective demands of parliamentary sovereignty and the rule of law. The political branches could, of course, have retaliated; indeed, a legislative response was initially threatened,⁶⁴ but the threat was subsequently withdrawn such that the veto power remains in the statute book, unamended.⁶⁵

It would be simplistic to say that from this episode we can infer that the plurality has ‘won’, that Parliament has accepted its view, and that that is an end of the matter. But it would be equally simplistic to suggest that the plurality acted in a straightforwardly unconstitutional way. The plurality was, on any reasonable view, certainly exploring the boundaries of judicial authority in *Evans*. But the precise location of that boundary — and the extent to which it is legitimate for judges to push the envelope of their authority in circumstances in which a more normal interpretive approach would itself yield an ‘unconstitutional’ outcome, in the sense of assaulting a fundamental principle such as the rule of law — must, in a system like the UK’s, to some extent fall to be inferred from the process of inter-institutional negotiation that a judgment like *Evans*, taken in combination with its political aftermath, represents. This does not, however, mean that criticism of *Evans* falls very wide of the mark, even if it does not inevitably hit its target; the undeniable tension, if not incompatibility, between the plurality’s judgment and an axiom lying at the core of the sovereignty principle must render that judgment suspect, whether or not it makes it ‘wrong’, constitutionally speaking.

Evans thus illustrates that curial exposure to plausible charges of overreach is, or at least can be, a complex function of a series of interlocking factors. Those factors include the extent to which judicial intervention appears to threaten a fundamental constitutional principle; the extent to which the threat is to a core as distinct from a penumbral aspect of the principle; the extent to which the threat might be considered a legitimate means of defence of another such principle; the relative weight to be accorded to the principles that are in tension with one another; and the extent to which relevant institutional interactions evidence consensus (or otherwise) as to the accommodation of competing principles secured by the judgment. More specifically, the plurality’s judgment in *Evans* illustrates a contemporary tendency, touched upon earlier in this article, to postulate fundamental constitutional principles as phenomena that interact upon a playing field that is more level than traditional theory allows.

VII MILLER

Evans demonstrates that the judicial overreach klaxon (rightly) sounds ever louder the closer a court comes to impinging upon the very essence of a constitutional principle,

⁶⁴ Rob Evans and Robert Booth, ‘Cameron concedes defeat over publication of Prince Charles’s letters’, *The Guardian* (online), 26 March 2015 <www.theguardian.com/uk-news/2015/mar/26/cameron-concedes-defeat-publication-prince-charles-letters>.

⁶⁵ Ben Quinn, ‘Review decides not to change Freedom of Information Act’, *The Guardian* (online), 1 March 2016 <www.theguardian.com/politics/2016/mar/01/freedom-of-information-review-decides-no-legal-changes-to-act>.

albeit that the alarm might prove to be a false one if matters are evaluated with appropriate subtlety. The majority's judgment in *Miller* highlights a different, and arguably more insidious, form of overreach.⁶⁶ The case concerned the question of whether the UK Government could use its foreign affairs prerogative to notify the European Council of the UK's intention to withdraw from the European Union, thereby initiating the exit process provided for in Article 50 of the Treaty on European Union. By a majority of 8–3, the Supreme Court held that the foreign affairs prerogative could not be so used. Whereas *Evans* gave rise to understandable concern about *the way* in which the plurality engaged with relevant matters of fundamental principle, *Miller* raises concerns because of the majority's *failure* to engage with such matters, at least in a transparent way, in the first place.

Miller undeniably raised a set of difficult questions, including about the relationship between the executive and the legislature, the corresponding relationship between the prerogative and Acts of Parliament, and the nature and status of EU law viewed from a UK perspective. Unsurprisingly, these questions implicated a rich set of fundamental constitutional principles. Against that background, the most striking feature of the majority judgment is its signal failure seriously to engage with the content and interaction of those principles. It is true that the majority professed to decide the case by reference to 'long-standing and fundamental principle',⁶⁷ and that it invoked the rhetoric of 'basic concepts of constitutional law'.⁶⁸ Yet one searches the judgment in vain for clues as to what those 'fundamental principles' and 'basic concepts' might actually be.

By way of a substitute, the majority instead relied upon platitude masquerading as constitutional principle, repeatedly asserting that the legal changes that would be wrought by the initiation of the Article 50 process were too great in scale to be realisable via prerogative. Thus, for instance, the majority baldly asserted that 'a major change to UK constitutional arrangements can[not] be achieved by ministers alone'.⁶⁹ Is that proposition the 'fundamental principle' that drove the majority to its conclusion about the unavailability of the prerogative? Or is it a function of some other such principle? Accepting the former possibility, given the absence of any meaningful attempt in *Miller* to justify a novel 'no major change without legislation' principle, would require us to acknowledge that judges can conjure constitutional principle from thin air. Yet the latter alternative is equally problematic. If the prohibition upon bringing about major change without legislation derives its legitimacy from some acknowledged principle, the obvious candidate is parliamentary sovereignty. But, on reflection, that cannot be the principle that is at work here. The issue in *Miller* was whether statute, in the form of the *ECA*, precluded recourse to prerogative, on the ground that its use for the purpose of securing the UK's exit from the EU would be incompatible with the scheme set out in that legislation. That question, which the majority answered in the affirmative, necessarily turned upon the meaning to be assigned to the *ECA* and upon associated characterisations of the arrangements made by the *ECA* for the domestic effect of EU law. In such circumstances, the sovereignty principle would plainly be relevant if the statute, properly interpreted, was understood as precluding recourse to the prerogative. At that point, the sovereignty principle would kick in so as to prevent the prerogative from being used so as to circumvent the statute. But the sovereignty principle could not logically be relevant to the question of whether, in the first place, the statute fell to be so interpreted.

⁶⁶ *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583.

⁶⁷ *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583, [81].

⁶⁸ *Ibid* [82].

⁶⁹ *Ibid* [82].

Such is the slipshod nature of the reasoning in *Miller* that it is hard to escape the conclusion that the majority's gut instinct was that the executive should not be allowed to proceed as it wished to, but that it could not quite put its finger on why. As a consequence, it was forced to fall back upon the vague and hitherto unknown notion that constitutional changes whose scale exceeds a certain (but unstated) threshold cannot be effected without legislation, while asserting that such a restriction derived from basic constitutional principles that were never identified and whose identity is difficult to infer. That such deficiencies should beset the majority judgment in *Miller* is unfortunate. When the same case was decided by the High Court, the judges — who, like their Supreme Court colleagues, ruled that the prerogative was unavailable — were dubbed 'the enemies of the people',⁷⁰ on account of the perception, in some quarters, that the court was frustrating the popular will manifested in the referendum on EU membership held in June 2016. Like most lawyers, I consider that characterisation to be wholly inapposite. *Miller* raised a crucial *legal* question, and it was the courts' constitutional responsibility to answer it as best they could. However, the legitimacy of judicial intervention, particularly in relation to such politically sensitive matters as those raised by *Miller*, depends upon courts deciding cases on the basis of established legal principle in a way that is transparent and adequately reasoned. Whether the majority judgment in *Miller* meets that standard is debateable.

VIII CONCLUSION

Evans and *Miller* highlight — whether or not they also embody — two distinct forms of potential judicial overreach. To the extent that *Evans* can legitimately be criticised as an undue exercise of judicial power, the nature of the alleged overreach must be substantive. The plurality in *Evans* clearly confronted the fundamental constitutional principles that were in play and arrived at a view as to what they permitted, in terms of judicial construction of the statute, in the particular circumstances of the case. We might agree or disagree with the substance of the conclusion at which the plurality arrived, but any contestation at least relates to matters that the plurality confronted. *Miller* is different. It points towards (whether or not it realises) the dangers of what might be considered a formal mode of judicial overreach: that is, of an adjudicative style, on matters of great constitutional sensitivity, that prizes curial instinct over transparent articulation of and rigorous engagement with whatever constitutional principles are considered to be in play. This is a type of overreach in itself. Exercises of judicial authority are in the first place rendered legitimate, among other things, by adherence to the strictures of the adjudicative process. And key among those strictures is the discipline of giving rigorously reasoned judgments that are, where relevant, rooted in established constitutional principles or in justified inferences from or developments of such principles.

Taken together, substantive and formal judicial overreach supply the conditions for a perfect storm from which the judiciary would be unlikely to emerge unscathed. Muscular assertions of judicial authority that are unrooted in transparently articulated and defensibly deployed fundamental principles are likely, at the very least, to elicit criticism; but it is easy to envisage far more substantial consequences. I do not suggest that the British judiciary is likely to take this wrong turn; and I certainly do not argue

⁷⁰ James Slack, 'Enemies of the People', *Daily Mail* (London), 4 November 2016, 1.

that there is any systematic evidence at present that it has done, or is in the process of doing, so. But there is, at the very least, the odd warning sign that ought to give pause. *Miller* is one example. Another includes a flight from doctrine on the part of certain judges in some areas of administrative law, a notable example being the suggestion — by a Supreme Court Justice, no less — that in substantive review cases judges should simply ask themselves ‘whether something had gone wrong of a nature and degree which required the intervention of the court’, while leaving it ‘to the academics to do the theorising’ so that ‘they can tell us what we really meant’ and ‘we can make it sound better next time’.⁷¹

My purpose here has not been to demonstrate that the judiciary in the UK is or is not guilty of overreach, either generally or in particular cases. It will, nevertheless, be clear by this point that I consider some of the criticism that has been levelled at the judiciary to be unwarranted and reactionary, at least to the extent that it assumes that parameters that have traditionally constrained the judicial role to be set in aspic rather than recognising them for what they are — namely, particular and contestable inferences drawn from fundamental principles whose meaning and implications can be properly understood only by reference to their interaction at both normative and institutional levels. None of this, however, should be mistaken for an assertion that anything goes. For reasons foreshadowed above, the plurality in *Evans* was, in my view, entitled to explore the boundaries of judicial authority by deciding the case as it did (just as Parliament was entitled, in enacting the veto power in the first place, to explore the boundaries of what it can legislatively accomplish while exhibiting fidelity to constitutional principles other than its own sovereignty). It is inevitable that such exploration may, on occasion, involve transgression. And the Heath Robinson nature of the UK's constitution enables it to cope with such circumstances, experimentation in institutional interaction being part and parcel of the processes through which constitutional points of equilibria are, over time, settled and adjusted. It is, however, imperative that such exploration and experimentation occur in ways that are not merely grounded in constitutional principle, but that are transparently so grounded — for it is curial adventurism that is not demonstrably anchored in the bedrock of principle that rightly signals judicial entry into the most dangerous of constitutional territory.

⁷¹ Lord Carnwath, ‘From judicial outrage to sliding scales – where next for *Wednesbury*?’ (Speech delivered to the Constitutional and Administrative Law Bar Association, 12 November 2013) <www.supremecourt.uk/docs/speech-131112-lord-carnwath.pdf>.

THE COURTS, DEVOLUTION, AND CONSTITUTIONAL REVIEW

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I INTRODUCTION

The defining feature of the United Kingdom's ('UK') traditional constitution is the absence of constitutional review. The UK Parliament, since it enjoys unlimited sovereignty, cannot be said to have acted unlawfully, and therefore its acts cannot be struck down by the courts. In recent years, however, this feature of the constitution has come under pressure from a number of different directions,¹ including the establishment of devolved legislatures for Scotland and Northern Ireland in 1999,² and for Wales in 2011.³ Since these bodies do not share Westminster's sovereignty, they are susceptible to judicial review on the ground that they have strayed beyond their legislative competence as defined in their parent statutes, and potentially — in extreme circumstances — also at common law.⁴

Judicial review of a subordinate legislature is not unprecedented in the UK context. Review had been possible of legislation enacted by the former Parliament of Northern Ireland, established under the *Government of Ireland Act 1920*, which existed from 1922 until 1972. However, resort to the courts was relatively uncommon — a fact attributed inter alia to the absence of a constitutional tradition of legislative review⁵ — and there was only one successful challenge in the Parliament's 50-year history.⁶ By contrast, judicial control has proved to be a far more important feature of the contemporary devolution settlements, both in terms of their institutional design and their practical operation. For instance, provisions in Acts of the Scottish Parliament ('ASPs') have been declared *ultra vires* on five occasions so far,⁷ whilst Welsh Assembly measures have been successfully challenged once⁸ (although there have as yet been no challenges at all — successful or otherwise — to devolved primary legislation in Northern Ireland).

In this article, we explore the role and significance of constitutional review in the devolved context, focusing on the experience in Scotland. We discuss, first, the model

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¹ See, eg, Mark Elliott, 'Legislative Supremacy in a Multi-Dimensional Constitution' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge UP, 2015); for a defence of the traditional understanding, see Richard Ekins, 'Legislative Freedom in the United Kingdom' (2017) 133 *Law Quarterly Review* 582.

² *Scotland Act 1998*; *Northern Ireland Act 1998*.

³ The Welsh Assembly was also established in 1999, by the *Government of Wales Act 1998*, but only gained primary legislative powers in 2011 following a referendum held under the terms of the *Government of Wales Act 2006*.

⁴ *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

⁵ See James Mitchell, *Devolution in the UK* (Manchester UP, 2009) 74-75.

⁶ *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79. Calvert notes that there were other examples of persuasive criticisms being made of the validity of Northern Irish legislation, which on at least one occasion led to legislative correction — Harry Calvert, *Constitutional Law in Northern Ireland: a Study in Regional Government* (Stevens & Sons Ltd/Northern Ireland Legal Quarterly, 1968) 289.

⁷ *Cameron v Cottam* 2013 JC 12; *Salvesen v Riddell* 2013 SC (UKSC) 236; *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29; *P v Scottish Ministers* 2017 SLT 271; *AB v HMA* 2017 SLT 401.

⁸ *Re Recovery of Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016.

of constitutional review put in place by the *Scotland Act 1998*; second, we explore the operation of these constraints in practice; and, third, we consider the developing devolution jurisprudence. In so doing, we identify a key tension in understanding the constitutional implications of the role of the courts in relation to the devolved legislatures. Is it, on the one hand, to be understood as a marker of the subordinate status of the devolved legislatures — which therefore serves to bolster the constitutional status of the UK Parliament by the fact of its freedom from corresponding constraints? Or is it, alternatively, a manifestation of a ‘new constitutionalism’, by which the Scottish Parliament has, in the words of Lord Rodger in *Whaley v Lord Watson of Invergowrie*, ‘joined that wider family of Parliaments’ which ‘owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law’?⁹ If the latter understanding is correct, this is a feature which underlines the unusual constitutional status of the UK Parliament,¹⁰ and which may therefore be important as a step on the road towards a more general acceptance of the legitimacy of constitutional review in the UK context.

II CONSTITUTIONAL REVIEW UNDER THE *SCOTLAND ACT 1998*

The legislative competence of the Scottish Parliament is set out primarily in sections 28 and 29 of the *Scotland Act 1998*. The Act adopts a ‘reserved powers’ model of legislative competence whereby the Parliament is given plenary power to make laws by section 28(1), but these are subject to specific limits set out in section 29. The most important restrictions contained in section 29¹¹ are of two main types. First, there are what might be termed ‘federal’ restrictions; in other words, those which define the division of competences between the UK and Scottish levels of government. Thus, the Parliament may not make laws which ‘relate to’ the list of policy areas reserved to the UK Parliament set out in Schedule 5 to the Act (as subsequently amended).¹² In addition, it may not modify specific statutes listed in Schedule 4 (including some, but not all, of the provisions of the *Scotland Act* itself) nor modify the ‘law on reserved matters’¹³ (a distinct restriction from reserved policy areas),¹⁴ except insofar as this occurs as part of a modification of the general rules of Scots private or criminal law which govern reserved and devolved matters alike.¹⁵ Secondly, there are ‘constitutional’ restrictions. These are cross-cutting constraints applicable to legislation otherwise within devolved competence which seek to protect other important constitutional values, namely that ASPs must not be incompatible with rights contained in the European Convention on Human Rights (‘Convention rights’) or (for the time being) with European Union (EU) law.¹⁶ To these express statutory restrictions, we must now add the further common law

⁹ 2000 SC 340, 349.

¹⁰ Ibid.

¹¹ The Parliament is also prohibited from legislating extra-territorially (s 29)(2)(a)), or from removing the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland (s 29)(2)(e)).

¹² s 29(2)(b).

¹³ s 29(2)(c).

¹⁴ See *Christian Institute*, above n 7, at para 63.

¹⁵ Sch 4, para 2. See *Martin v HM Advocate* 2010 SC (UKSC) 40; *Henderson v HM Advocate* 2011 JC 96.

¹⁶ s 29(2)(d). Legislation on certain protected subject matters are now also subject to a procedural constraint whereby they require to be passed by a two-thirds majority — *Scotland Act 1998* s 31A.

constraint that (as discussed further below) the Parliament must not legislate in a way which would breach the Rule of Law.¹⁷

As this last point suggests, one way in which these competence constraints may be enforced is via the ordinary supervisory jurisdiction of the courts at common law. But the 1998 Act itself also contains a range of mechanisms — both political and judicial — designed to ensure that the Parliament remains within competence. The political controls include requirements on the minister or other member introducing a Bill to state that its provisions are *intra vires*, as well as an independent requirement on the Parliament's Presiding Officer to state her opinion as to the competence of the Bill,¹⁸ and a veto power for UK ministers for use in situations where they reasonably believe that a Bill is incompatible with international obligations or the interests of defence or national security, or that it modifies the law on reserved matters in a manner which would have an adverse effect on the operation of that law.¹⁹ The judicial controls include a power for UK or Scottish Government law officers to refer a Bill to the Supreme Court for a ruling as to its competence in the four week period between the passing of the Bill by the Parliament and its submission for Royal Assent.²⁰ In addition, Schedule 6 empowers the Law Officers to initiate post-enactment competence challenges, and regulates the handling of so-called 'devolution issues' which arise in other proceedings, including provision for notification of the law officers, and reference to higher courts. A separate procedure, introduced by the *Scotland Act 2012*, regulates so-called 'compatibility issues', which are questions arising in criminal proceedings, inter alia, as to whether an ASP is compatible with Convention rights or EU law. Finally, the 1998 Act makes provision for interpretation of ASPs, instructing judges to read legislation 'as narrowly as is required for it to be within competence, if such a reading is possible',²¹ and for remedies in the event of a finding that legislation is without competence.²²

Three features of the system of constitutional review created by the *Scotland Act* are particularly noteworthy. The first is that it is, in comparative terms, a very *expansive* one. Provision is made for both pre-legislative and post-legislative challenge to the *vires* of legislation. Statutes can be attacked both directly, in proceedings raised specifically for that purpose, or collaterally in the course of other proceedings. In other words, both abstract and concrete review is permitted. In addition to the express provision for institutional challenge by the law officers made by the *Scotland Act*, any party with 'sufficient interest in the subject matter of the application' can raise judicial review proceedings at common law,²³ which is now interpreted widely to permit public interest as well as individual challenges.²⁴ And there are no specific time limits for the raising of a devolution or compatibility issue; provided that the proceedings in which the issue is raised are not themselves time-barred, the *vires* of an ASP could potentially be questioned many years after the legislation was enacted.

Perhaps surprisingly, the extent of the judicial control over the decisions of a democratic legislature to which this model potentially gives rise — the prospect, as one early commentator put it, for the creation of '*un gouvernement des juges*',²⁵ with extensive freedom to interpret necessarily broad constitutional limits on the powers of

¹⁷ *AXA General Insurance Ltd*, above n 4.

¹⁸ *Scotland Act 1998* s 31.

¹⁹ *Scotland Act 1998* s 35.

²⁰ *Scotland Act 1998* ss 32A and 33.

²¹ *Scotland Act 1998* s 101.

²² *Scotland Act 1998* s 103.

²³ *Court of Session Act 1988* s 27B(2)(a).

²⁴ *AXA General Insurance Ltd*, above n 4; *Walton v Scottish Ministers* [2012] UKSC 44.

²⁵ Aidan O'Neill, 'The Scotland Act and the Government of Judges' 1999 *Scots Law Times (News)* 61.

the Scottish Parliament — was not controversial at the time the *Scotland Act* was enacted. This contrasts starkly with attitudes during earlier, abortive attempts at creating devolved assemblies for Scotland and Wales during the 1970s. As Tam Dalyell MP explained during the Commons Second Reading debate on the Scotland Bill:²⁶

Who is to decide whether the Scottish Assembly has overstepped its powers? During the 1974-77 saga, that was a matter of hot debate within the Government, centring on the issue of judicial review. One school held, virtually as a matter of basic legal and constitutional principle, that it would be wrong to deny citizens the right to argue in the courts that an assembly Act that disadvantaged them exceeded the powers granted by Westminster in the devolution statute. The other school held ... that it would be unreasonable in practice, for lack-of-certainty reasons, and politically objectionable to Scotland that the primary legislation of the Assembly should be liable at any time — perhaps long after enactment — to be struck down by the courts as *ultra vires*. The more broadly drawn the delineation, the greater — so that school argued — the risks.

Mitchell cites the minute of a meeting in October 1974 of Whitehall Permanent Secretaries convened to discuss the issue of devolution. The participants:

noted that little thought had been given to resolving constitutional disputes but rejected a “constitutional tribunal such as the Judicial Committee of the Privy Council” as “entirely contrary to the spirit of devolution within a unitary state with one sovereign Parliament.” This, they maintained, “should not be contemplated.”²⁷

What had changed by 1998? Dalyell points to the impact of EU law as having meant that ‘public opinion has become more accustomed to the idea that the legal system might indeed be able to overrule democratically enacted statute’.²⁸ But also significant is the origins of the 1998 Act in the work of the Scottish Constitutional Convention.²⁹ This body had begun life by endorsing the 1988 Claim of Right for Scotland, which proclaimed the sovereignty of the Scottish people over the sovereignty of the Westminster Parliament, and asserted the need for a system of checks and balances rather than concentration of power. Thus the Convention rooted its proposals for a Scottish Parliament in a claimed ‘historical and historic Scottish constitutional principle that power is limited, should be dispersed and is derived from the people’.³⁰ By the time the Scotland Bill was enacted, therefore, the principle that disputes over legislative competence should be subject to judicial resolution was no longer controversial.³¹ As will be discussed further below, the only issue subject to serious debate was the identity of the court to which final appeal on devolution issues would lie.

The second important feature of constitutional review in the devolution context is its *asymmetry*. The hard legal limits on the competence of the *Scottish* Parliament are

²⁶ HC Deb Vol 304, col 88, 12 January 1998.

²⁷ Mitchell, above n 5, 120-121.

²⁸ Above n 26.

²⁹ See Jean McFadden, ‘The Scottish Constitutional Convention’ [1995] PL 215.

³⁰ Scottish Constitutional Convention, *Scotland’s Parliament, Scotland’s Right* (1995) 10.

³¹ The case for judicial resolution had been set out in detail prior to the 1997 election by Colin Boyd QC, who subsequently became Solicitor General for Scotland: ‘Parliaments and Courts: Powers and Dispute Resolution’ in St John Bates (ed), *Devolution to Scotland: the Legal Aspects* (T & T Clark, 1997).

not mirrored by equivalent limits on the UK Parliament. As far as the federal constraints are concerned, the power of the UK Parliament to legislate for Scotland in devolved matters is expressly preserved by section 28(7) of the *Scotland Act 1998*. Its exercise is subject only to political constraint in the form of the so-called Sewel Convention, which states that the UK Parliament will not normally legislate in respect of devolved matters without the consent of the Scottish Parliament. Notwithstanding the statutory ‘recognition’ of the convention by section 2 of the *Scotland Act 2016*, the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union*³² held that it remains a convention rather than a binding legal rule, and that the courts therefore have no role to play in either interpreting or enforcing its requirements.³³

As regards the constitutional constraints, Convention rights bear more heavily on the Scottish Parliament than on the UK Parliament. Whereas an ASP which is incompatible with Convention rights is ‘not law’, in relation to UK statutes the courts are merely empowered to issue a ‘declaration of incompatibility’, which does not invalidate the legislation.³⁴ Only the EU law constraint operates more or less symmetrically, insofar as the courts may ‘disapply’ an Act of the UK Parliament which is contrary to EU law,³⁵ though even here there is a theoretical difference since there is judicial authority stating that the courts would give effect to an Act of the UK Parliament which expressly contradicted EU law.³⁶ More significantly, if the European Union (Withdrawal) Bill is enacted in its current form, the devolved legislatures will continue to be bound by ‘retained EU law’ even after the UK leaves the EU, while the UK Parliament will become free to amend it as it pleases.

From one perspective, this asymmetry is unremarkable; it merely marks the important constitutional distinction between a scheme of devolution and one of federalism, thereby underlining the subordinate status of the devolved legislatures. However, the justification for asymmetry is less obvious in relation to the cross-cutting constraints, especially Convention rights. Here the case can be made in principle that it is the democratic nature of a legislative body that entitles it, rather than the courts, to the last word on questions of rights protection within its sphere of competence, and not merely the ‘technicality’ of parliamentary sovereignty which uniquely entitles the Westminster Parliament to judicial deference.³⁷ The anomaly is underlined by the fact that the Scottish Ministers are also more tightly bound by Convention rights than their UK counterparts in that they cannot act incompatibly with Convention rights even if acting under a UK statute which authorises the incompatibility.³⁸ In relation to EU law, similarly, it may be argued that the refusal to lift the competence constraint on the devolved institutions post-Brexit evinces a lack of trust and a pulling of constitutional rank by Westminster, which is difficult to justify as a matter of constitutional principle.

The final notable feature of the devolution model of constitutional review is the role of the *UK Supreme Court* as the final arbiter of devolution issues. As originally enacted, the final appeal court for devolution disputes was the Judicial Committee of the Privy Council (‘JCPC’). The JCPC was chosen for a number of reasons: it had played this role under the *Government of Ireland Act 1920*; it had experience of constitutional

³² [2017] UKSC 5.

³³ This does not mean that it might not be given some legal force, for instance as an aid to interpreting the intention of Parliament in circumstances where it is unclear whether or not it intends to legislate for Scotland on a devolved matter.

³⁴ *Human Rights Act 1998* s 4.

³⁵ *R v Secretary of State for Transport ex p Factortame Ltd (No 2)* [1991] 1 AC 603.

³⁶ *Thoburn v Sunderland City Council* [2003] QB 151.

³⁷ See Chris Himsworth, ‘Rights versus Devolution’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford UP, 2001).

³⁸ *Scotland Act 1998* s 57(2).

adjudication in relation to Commonwealth jurisdictions; and above all it avoided the perception — had the House of Lords been chosen as the apex court — of the UK Parliament sitting in judgment on disputes to which it was a party. Nevertheless, amendments were tabled both by the Scottish National Party ('SNP') in the House of Commons³⁹ and by the Liberal Democrats in the House of Lords,⁴⁰ to replace the JCPC with a specially-constituted constitutional court. For the SNP, the main objection was to the composition of the JCPC, particularly its dominance by English-trained judges. For the Liberal Democrats, the primary concern was the JCPC's lack of institutional independence.

The latter issue was resolved in 2009, with the establishment of the Supreme Court⁴¹ and the transfer to it of the JCPC's devolution jurisdiction (a reform which also resolved the practical problem created by the existence of two 'apex courts' which were sometimes asked to resolve the same legal issues by different procedural routes). However, the creation of the Supreme Court revived the SNP's objection to an English-dominated court having the last word on matters relating to Scots law. In fact, it commissioned a review of the possibilities for 'repatriating' final appeals in Scots cases to an Edinburgh-based court, although the resulting report concluded that this would be constitutionally inappropriate while Scotland remained part of the United Kingdom.⁴² Of particular sensitivity, though, was the question of final appeals in criminal cases. The *Scotland Act 1998* had inadvertently created a right of appeal in criminal cases from the High Court of Justiciary to the JCPC/Supreme Court, where none had previously existed, because of the inclusion of the Lord Advocate (head of the Scottish criminal prosecution system) within the definition of the Scottish Ministers, and hence the subjection of prosecution decisions to devolution constraints. Following controversy about the operation of this appeal process amongst Scottish judges, and well-publicised objections by the then Scottish First Minister and Justice Secretary to the Supreme Court's decisions in *Cadder v HM Advocate*⁴³ and *Fraser v HM Advocate*,⁴⁴ the separate compatibility issues procedure was created for criminal cases, which limits the role of the Supreme Court to the determination of the compatibility issues and requires the case to be referred back to the High Court of Justiciary ('HCJ') for final disposal.⁴⁵

In determining devolution or compatibility issues, the Supreme Court is — uniquely — sitting as a UK court, rather than a Scottish (or English and Welsh, or Northern Irish) one as it does in all other cases.⁴⁶ In other words, determination of the limits of the Scottish Parliament's legislative competence is conceived of as a matter of UK constitutional law, rather than a matter of Scots law. Again, from one perspective, it is unremarkable that the establishment of institutions for self-rule through devolution should be balanced by the creation of a mechanism for asserting a common understanding of the limits to that self-rule. Nevertheless, the role of the Supreme Court remains contestable for two reasons. One is that differently-situated judges might have different understandings of the nature of the evolving constitutional order and of the place of the Scottish Parliament within it — something that is potentially problematic

³⁹ See HC Deb Vol 312, cols 203-215, 12 May 1998.

⁴⁰ See HL Deb Vol 593, cols 1963-1986, 18 October 1998.

⁴¹ Under the *Constitutional Reform Act 2005* Pt 3.

⁴² Neil Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (2010) Scottish Government <www.gov.scot/Resource/Doc/299388/0093334.pdf>.

⁴³ [2010] UKSC 43.

⁴⁴ [2011] UKSC 24.

⁴⁵ See Aileen McHarg, 'Final Appeals in Scots Criminal Cases', UK Const Law Blog, 4 October 2011; Chris Himsworth and Christine O'Neill, *Scotland's Constitution: Law and Practice* (Bloomsbury, 3rd edn, 2015) para 14.20.

⁴⁶ *Constitutional Reform Act 2005* s 41(2).

given the *political* understanding of the origins of devolution as an expression of a peculiarly Scottish constitutional tradition at odds with the dominant UK tradition. Secondly, as will be discussed further below, the idea of a common devolution jurisdiction is problematic given the diversity of the devolution settlements in Scotland, Wales and Northern Ireland themselves. And even in the application of the common external constraints of Convention rights and EU law, there is room for greater recognition of internal diversity than the unifying role of the Supreme Court may permit.⁴⁷

III JUDICIAL AND PARLIAMENTARY CONSTITUTIONAL REVIEW

A *Judicial Constitutional Review*

At the outset of the devolution project there was a certain expectation that the courts would regularly be called upon, whether by UK and/or Scottish Government Law Officers referring Bills to the Supreme Court during the statutory pre-enactment period⁴⁸ or in post-enactment challenges raised by private parties, to exercise their new powers of constitutional review. Whilst for some this was an aspiration — to be a model for democracy, according to Crick and Millar ‘[a new] Scottish Parliament ... needs [to be limited by law] as much as any other’⁴⁹ — for others the possibility was more problematic. As Aidan O’Neill had warned, by being ‘dragged into the political arena’ in order to police constitutional boundaries the integrity of the judges themselves was at stake: the danger being that their decisions would not be portrayed as ‘upholding individual rights but as the thwarting of the democratic will’ as expressed through the acts of new legislature and executive.⁵⁰ However, the experience to date has been quite different.

Contrary to the expectation that the Scottish Parliament would be of a different nature to Westminster’s ‘legislative sausage factory’⁵¹ the devolved Parliament has been something of a hyper-active legislature, having passed 264 ASPs (an average of 15 per annum) since its first — the *Mental Health (Public Safety and Appeals) (Scotland) Act* — in 1999.⁵² Notwithstanding the volume of legislation, however, *no* Bills have been referred by the Law Officers to the Supreme Court⁵³ and there have been relatively few post-enactment challenges raised by private parties. Of the latter, just 18 ASPs have been subject to judicial review (albeit some more than once).⁵⁴ Incompatibility with Convention rights has been the dominant ground of challenge, with just three cases invoking the reserved/devolved boundary and three arguing for an incompatibility with

⁴⁷ See David Feldman, ‘None, One or Several: Perspectives on the UK’s Constitution(s)’ (2005) 64 CLJ 329.

⁴⁸ *Scotland Act 1998* s 33.

⁴⁹ Bernard Crick and David Millar, *To Make the Parliament of Scotland a Model for Democracy* (John Wheatley Centre, 1995) 9.

⁵⁰ Above n 25, 66.

⁵¹ Alan Page, *Constitutional Law of Scotland* (W Green, 2015) 201.

⁵² This Act was itself the subject of an unsuccessful challenge in *Anderson v Scottish Ministers* 2002 SC (PC) 63.

⁵³ By way of contrast, in Wales two Bills have been referred to the Supreme Court by the Attorney General (the legality of each being upheld) and one, which was struck down, has been referred by the Counsel General for Wales.

⁵⁴ The *Tobacco and Primary Medical Services (Scotland) Act 2010* was challenged separately on reserved matters grounds by Imperial Tobacco ([2012] UKSC 61) and on EU law grounds by a subsidiary, Sinclair Collis ([2012] CSIH 80).

EU law. Of the 18 ASPs that have been challenged five have been held to have fallen foul of section 29. All five have succeeded on Convention rights grounds, albeit in *Christian Institute* there was a parallel incompatibility as between article 8 ECHR and equivalent provisions of the EU Charter of Fundamental Rights.⁵⁵ The residual Rule of Law ground set out in *AXA* has not been a significant feature of devolution litigation, receiving sustained attention only once, in an unsuccessful challenge to the exclusion of prisoners from the right to vote in the *Scottish Independence Referendum (Franchise) Act 2013*.⁵⁶ Given the high threshold for judicial intervention on this ground, this is unsurprising. In this case, however, the Supreme Court did illustrate the sort of (unlikely) situation to which this ground might apply: whilst the common law could not be used to extend the franchise beyond the limits set by the legislature, the Supreme Court — ‘informed by principles of democracy and the rule of law and international norms’ — would declare legislation to be unlawful which sought to ‘entrench [the executive] power by curtailment of the franchise or similar device’.⁵⁷

Of the five cases to date in which legislation has been held ‘not [to be] law’ it is notable that each has related to specific provisions within the statutory scheme rather than to the statute or to the overall policy objective in its entirety. This being so the Supreme Court has so far adopted something of a ‘dialogic’ remedial approach as opposed to a rigid and final strike down. In two of the three civil challenges that were successful — *Salvesen* and *Christian Institute* — the Supreme Court exercised its discretion under section 102(2)(b) of the *Scotland Act 1998* to suspend the effect of its decisions that section 72(10) of the *Agricultural Holdings (Scotland) Act 2003* and the information sharing provisions of Part 4 of the *Children and Young People (Scotland) Act 2004* respectively were incompatible with Convention rights. This, the Court said, would allow an opportunity for the Scottish Parliament and the Scottish Ministers (if they so decide) to take measures in order to remedy the identified incompatibilities.⁵⁸ The dialogic nature of this remedy was underlined in *Christian Institute* in which, although the Court felt it ‘inappropriate to propose particular legislative solutions’,⁵⁹ it nevertheless took the opportunity to warn the executive and legislature that minimal amendments that failed to address the complexity of the breach would run the risk of further judicial sanction.⁶⁰ The third, *P v Scottish Ministers*, was a decision by the Outer House which at the time of writing had been put out to order pending submissions on the use of the court’s remedial powers.⁶¹ In the remaining two successful cases — *Cameron* and *AB*, each of which raised ‘compatibility issues’ relating to criminal procedure in Scotland — the decisions that section 58 of the *Criminal Justice and Licensing (Scotland) Act 2010* and section 39(2)(a)(i) of the *Sexual Offences (Scotland) Act 2009* respectively were ‘not law’ were returned to the HCJ for that court to determine whether or not to suspend or to vary the effects of the resulting invalidity.

In *Martin*, Lord Hope expressed a degree of surprise that — in light of the complex and multi-layered boundaries to legislative competence — there had been so few challenges to the validity of ASPs, and noted as ‘remarkable’ the fact that those challenges had mostly been confined to Convention rights grounds.⁶² Though the reserved matters model adopted in the *Scotland Act 1998* might not be ‘a model of

⁵⁵ *Christian Institute*, above n 7, paras 102-105.

⁵⁶ *Moohan v Lord Advocate* [2014] UKSC 67.

⁵⁷ *Ibid* para 35.

⁵⁸ *Salvesen*, above n 7, para 57.

⁵⁹ *Christian Institute*, above n 7, para 107.

⁶⁰ *Ibid*.

⁶¹ *P*, above n 7, para 65.

⁶² *Martin*, above n 15, para 4.

clarity' he thought it striking that it had so far achieved the aim of maximum stability. To this stability Lord Hope attributed harmony between the UK (Labour majority) and Scottish (Labour-led coalition) governments until the SNP formed a minority government in May 2007.⁶³ However, it is a significant feature of the SNP minority (2007-2011 and 2016-present) and majority (2011-2016) governments that political disharmony as between the Scottish and UK Governments since 2007 has not manifested in overt attempts by the former unilaterally to push the limits of devolved competence and to make political capital out of even adverse judgments about competence by the UK Supreme Court. Instead the close attention that is paid to the reserved/devolved boundary during the process of *parliamentary* review — in particular in the dialogue between the UK and Scottish Governments that precedes the Advocate General's decision to make a reference to the Supreme Court — as well as politicians' and officials' instincts for what sits within the sphere of devolved competence and a genuinely-held commitment on both sides to government according to the rule of law — seems to have policed the reserved/devolved boundary effectively (at least in the sense of producing legislation that has so far avoided judicial censure).⁶⁴ To the reasons for the surprisingly few cases raised on reserved matters grounds we might add the willingness on both sides to utilise the flexibility inherent in the devolution settlement to supply omissions in legislative competence where there is a degree of policy convergence through the transfer of competence⁶⁵ or by the UK Parliament legislating with devolved consent in reserved areas that overlap with Scottish Government policy. We might attribute the greater frequency of — and the more successful recourse to — Convention rights grounds to the simultaneously more obvious and yet more vague nature of the ECHR boundary. On the one hand Convention rights issues are more readily identifiable — both by lawyers and by those who are potentially affected by legislative or executive action — than are issues arising from the nuances of schedules 4 and 5, with a vast body of ECHR grounded case law (both at Strasbourg and in the domestic courts) to draw upon. On the other hand, it may be more difficult for legislators and officials correctly to anticipate how courts might apply abstract Convention rights to particular statutory provisions in the absence of directly analogous cases.

If the fear was that the judiciary would regularly be called upon to (and would often) exercise strong powers of judicial review in relation to ASPs, this has not yet materialised. Indeed, Page has argued that it is not judicial activism but judicial *inactivity* that has defined the experience so far: that 'conscious of the more exposed position in which they find themselves as a result of devolution' the judiciary have been — and might continue to be — wary of wielding those powers, with 'bleak' consequences for the aspiration of a legislature and government limited by law.⁶⁶ However, even if its use (for better or for worse) has been infrequent there is no doubt that the presence of what has been described by Lord Neuberger to be in effect a *constitutional* court in the

⁶³ Ibid.

⁶⁴ For more detailed analysis of the vetting process see Bruce Adamson, 'The Protection of Human Rights in the Legislative Process in Scotland' in Murray Hunt et al (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015) ch 13, and Christopher McCorkindale and Janet L Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 21(3) *Edinburgh Law Review* 319.

⁶⁵ This might happen by Order-in-Council under section 33 of the *Scotland Act 1998* or by way of primary legislation by the UK Parliament.

⁶⁶ Above n 51, 268.

devolved context⁶⁷ — to which the final word as to the legality of legislation has been vested — has significantly impacted upon the devolution landscape.

First, there is an opportunity for those with significant commercial interests at stake — and deep resources to draw upon — to (ab)use the legal process in order to *delay* for three to five years the implementation of legislation for short term, private gain. Even if ultimately their challenges were unsuccessful in the Supreme Court, the opportunity for AXA General Insurance to delay the implementation of legislation requiring them to make payments to the victims of asbestos exposure (with the hope of having to make fewer payments to still surviving victims at a later date of implementation), or the opportunity for Imperial Tobacco⁶⁸ or the Scotch Whisky Association⁶⁹ to delay the implementation of legislation with a likely negative impact upon the sale of tobacco or alcohol products (weighing income from sales during the period of the challenge against the cost of legal fees), illustrates the way in which judicially-enforceable limits on legislatures can be used strategically to subvert democratic institutions even where the judicial power to strike down legislation is wielded only sparingly. It is, in other words, the *existence* as well as the *exercise* of judicial power that proves problematic. Second, whilst remedial discretion in the event of a successful challenge returns the issue to be resolved by the democratically elected parliament or government, the courts wield a significant power therein actively to shape that resolution (as in *Christian Institute* by making a bold assertion of what would *not* be acceptable). Moreover, for those affected by ultra vires legislation a decision, for example, to limit the retrospective effect of the judgment (as in *Cameron* where the effect of the decision was limited only to ‘live’ cases) may have perverse effects for individuals who have in the past suffered from a resulting harm.⁷⁰ Third, the devolution jurisprudence (actual or anticipated) of the Supreme Court drives the assessments of legislative competence that are made at the sections 31 and 33 checkpoints during the *parliamentary* process of constitutional review, washing judicial norms through the political process.

B Parliamentary Constitutional Review

In recent years public law scholarship has sought to describe, and to defend, an alternative or ‘third way’ of constitutionalism. This approach builds upon (rather than breaks with) antecedent models of legislative or judicial supremacy in which *either* the parliament or the courts have the last word on the legality of legislation.⁷¹ Two characteristics distinguish this approach. One is constrained judicial remedial powers. For Westminster-based parliamentary systems, the idea of introducing a judicially-enforceable bill of rights represents a fundamental departure from previously held assumptions about the core constitutional principle of parliamentary supremacy. However, by distinguishing between judicial *review* and judicial *remedies*, it is possible

⁶⁷ Lord Neuberger, ‘The Constitutional Role of the Supreme Court in the Context of Devolution in the UK’ (speech delivered at the Lord Rodger Memorial Lecture, 2016 <www.supremecourt.uk/docs/speech-161014.pdf>).

⁶⁸ *Imperial Tobacco v Lord Advocate* [2012] UKSC 61.

⁶⁹ *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76.

⁷⁰ See Robert Leckey, ‘The Harms of Remedial Discretion’ (2016) 14(3) *International Journal of Constitutional Law* 584.

⁷¹ See for example, S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge UP, 2013); M Tushnet, *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, 2008); G Williams, ‘The Victoria Charter of Human Rights and Responsibilities: origins and scope’ (2006) 30 *Melbourne University Law Review* 880; F Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights* (Penguin, 2000).

to retain the legislature's last word on the validity of legislation. The second fundamental characteristic is that this approach envisages a far more important role for rights review at the legislative stage than is usually associated with a bill of rights. By placing a statutory obligation on the executive to report to parliament when a Bill is inconsistent with rights this particular focus reflects the following ideals:⁷² first, identifying whether and how proposed legislation implicates rights; second, encouraging more rights-compliant ways of achieving legislative objectives (and in the extreme discourage the pursuit of objectives that are fundamentally incompatible with rights); third, facilitating parliamentary deliberation about whether legislation implicates rights, thereby increasing parliament's capacity to pressure government to justify, alter or abandon legislation that unduly infringes rights.⁷³

Whilst the *Scotland Act* model departs from this 'third way' by reserving to the judiciary the last word on the legality of ASPs, the statutory reporting requirement set out in sections 31 and 33 expand the traditional scope of parliamentary review in two ways. First, by requiring not only the responsible person (typically, the responsible Minister) but, in addition, the Parliament's Presiding Officer to report to the legislature on the question of competence, and by *permitting* the Scottish and UK Government Law Officers to refer a Bill directly to the Supreme Court where concerns persist, the *Scotland Act* requires a far more expansive range of assessments of competence that combine so as to create stronger incentives than exist in other jurisdictions for the executive to revisit opinions of competence or to make amendments in order to secure a safe passage for its legislation. Second, the devolution model expands the range of constitutional boundaries against which these assessments must be made. Not just rights review, the *Scotland Act* requires parliamentary *constitutional* review in a broader sense, taking account of the territorial division of power between the UK and the devolved institutions as well as the rights and obligations that flow from membership of the European Union. Taken together, the aims of this form of review are two-fold. Internally, it serves to ensure that at each of the relevant check-points a proper and informed assessment has been made about competence.⁷⁴ It should, in other words, be extremely difficult for the Scottish Government (knowingly or otherwise) to introduce, and for the Scottish Parliament to pass, legislation that is without competence. Externally, it serves to aid the Scottish Parliament in the exercise of its scrutiny function by informing Parliament so that — as the Bill makes its way through the chamber — its members may 'ask questions about [those assessments], raise queries as to whether [they are] entirely correct, and no doubt identify particular provisions in the Bill where there may or may not be some doubt as to whether the provisions lie within the legislative competence'.⁷⁵ Constitutional review, in other words, ought in the first instance to be a *political* exercise conducted during the legislative process and in relation to all Bills rather than a *judicial* examination of the relatively few pieces of legislation that are brought to the attention of the senior courts.

The experience of judicial review outlined above points to the relative effectiveness of these checks in achieving the first aim: the protection of legislation against judicial censure. However, the second aspiration — informing the legislature so that it might be aware of and engage with competence concerns during the legislative process — has not

⁷² These reporting obligations vary. Some are made by the Attorney General (New Zealand, ACT) or Justice Minister (Canada), whereas others are made by the sponsoring minister (UK and Victoria); some include only government Bills (Canada, UK); and some require reports only for inconsistency (Canada, New Zealand) whereas others report both affirmative and negative reports of compatibility (UK, ACT and Victoria).

⁷³ James B Kelly and Janet L Hiebert, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge UP, 2015) 1-6.

⁷⁴ HL Deb Vol 592, col 1353, 28 July 1998 (Baroness Ramsay of Cartvale).

⁷⁵ Ibid col 1350 (Lord Mackay of Drumadoon).

yet been met. Despite there being serious disagreement between the Scottish Government and the Presiding Officer and/or Law Officers as to the legislative competence of a Bill once or twice in a typical year⁷⁶ there have been *no* instances of the Presiding Officer disclosing the existence or the nature of any disagreement to the Parliament upon introduction, and disagreement between the Scottish and UK Government has not yet been manifested in the reference of a Bill by the Advocate General to the Supreme Court during the four week pre-enactment period.⁷⁷ Instead these disagreements are resolved in a series of iterative processes that take place mostly between *officials* during the policy formulation stage (between the Scottish Government Legal Directorate ('SGLD') and the Lord Advocate) and in the pre-introduction period (between the Scottish Government and (separately) *both* the Solicitor to the Scottish Parliament, on behalf of the Presiding Officer, and the Office of the Advocate General ('OAG') on behalf of the UK Government). During these processes the key *question* for each of the relevant actors is: 'how would the Supreme Court be likely to decide' in the event of a judicial challenge. For the Scottish Government, the key *decision* is whether to amend legislation *before* it is introduced into the Parliament in order to address concerns expressed by the Lord Advocate, the Presiding Officer or by OAG that the Supreme Court would be likely to strike down the legislation (or provisions therein) in its existing form, or whether to continue with its view that the legislation is likely to be saved by the Court. In the case of close calls the benefit of the doubt will normally be given to the Scottish Government's view where it is reasonably arguable that legislation (or powers conferred therein) would be more likely than not to survive judicial censure.⁷⁸

A holistic analysis of these processes is beyond the scope of this article.⁷⁹ For present purposes we need only stress two important ways in which the *possibility* of judicial constitutional review influences this process. First, because the ultimate sanction is judicial strike down the question of competence is seen as a legal question that is best addressed by legal advisors reflecting upon the jurisprudence of the Supreme Court, rather than by political actors. On the question of competence Ministers will defer entirely to the view of the Lord Advocate whilst the Presiding Officer — a Member of the Scottish Parliament ('MSP') typically with no legal background — will lean heavily on the advice offered by the Solicitor to the Scottish Parliament. Moreover, MSPs in plenary or in committee will defer to the view of the Presiding Officer that a Bill is within competence rather than look behind that statement to determine whether there persists a reasonable (but undisclosed) doubt that should be examined further during the legislative process. The legal nature of the exercise in other words undermines the aim of informed *parliamentary* review behind the process's 'efficient secret': the more impactful exercise of *bureaucratic* review by officials *before* the Bill is introduced into Parliament. Second, because the test is conceived of in legal terms the aspiration to think *politically* about legislative competence risks giving way to an assessment of the bare minimum protection required by law. So, the exclusion of prisoners from the franchise in the 2014 independence referendum seemed to proceed not from a principled position on the merits or not of allowing (to some) prisoners the right to vote in a referendum of

⁷⁶ McCorkindale and Hiebert, above n 64.

⁷⁷ Unlike the reporting requirement placed on UK Ministers by the Human Rights Act it is *ultra vires* for Scottish Ministers knowingly to introduce legislation that would be without competence.

⁷⁸ McCorkindale and Hiebert, above n 64.

⁷⁹ See articles by Adamson and by McCorkindale and Hiebert, above n 64.

such constitutional significance but instead to a narrow reading of the scope of the right to vote.⁸⁰

IV DEVOLUTION JURISPRUDENCE

This third section draws out certain of the themes of the case law in which the devolution settlement has been considered. It works outwards from the question which most neatly captures the tension, already identified, between two understandings of the judicial role within that settlement: on one hand, the notion that the courts' role thereunder is a marker of the subordinate status of the devolved institutions and, on the other, the claim that their new functions have in fact an inescapably constitutional essence, with implications beyond the devolution context. That question is the status of the devolution statutes, and — in turn — the approach that is to be taken to their interpretation.

A *Review of the Scotland Act 1998*

With regard to the interpretation of the devolution statutes themselves we might usefully distinguish between two levels of judicial power: the first-order power of interpretation and the second-order power to choose which approach is to be taken to the task. In the early case law the status of the Parliament was contested. Lord Rodger, then in the Inner House, noted in *Whaley* that the court at first instance had given 'insufficient weight to the fundamental character of the Parliament as a body which — however important its role — has been created by statute and derives its powers from statute' and which must therefore (and 'like any other statutory body') 'work within the scope of those powers'.⁸¹ However, the question of the status of the Parliament does not itself determine the status (and correct approach to the interpretation) of the instrument which created it, and these questions persisted even after the status of the devolved legislature was settled, prompted most clearly by attempts to employ certain dicta of the House of Lords in the Northern Irish case of *Robinson* in order to argue that the devolution statutes (as the House of Lords had said of the *Northern Ireland Act 1998*) were 'in effect' constitutions, and so were to be interpreted 'generously and purposively'.⁸²

The alleged implication of these remarks — that an approach be taken to interpretation that was special to the devolution statutes and which would in effect give the benefit of the doubt to the Parliament in deciding whether or not ASPs were within competence — was consistently rejected in later cases. In *Imperial Tobacco*, Lord Hope stated that 'the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation';⁸³ instead, the rules in the 1998 Act 'must be interpreted in the same way as any other rules that are found in a UK statute'. Though the system it created must 'be taken to have been intended to create a system for the exercise of legislative power by the Scottish Parliament that was coherent, stable and workable',

⁸⁰ Here reliance was placed upon the exclusion of referendums from the scope of Article 3 Protocol 1, which has been held only to apply to elections concerning the choice of the legislature. See *Moohan*, above n 56, paras 7-17.

⁸¹ *Whaley*, above n 9, 348.

⁸² *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, 11.

⁸³ *Imperial Tobacco*, above n 68, para 15. In the Inner House, Lord Reed had said that '[t]he Scotland Act is not a constitution, but an Act of Parliament' and that there are 'material differences', including its density and detail, as well as the ease of amendment as compared to a typical constitution: *Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9, 71.

that factor was not unique to it, but was common to all statutes.⁸⁴ ‘The best way of ensuring that a coherent, stable and workable outcome is achieved’, Lord Hope continued, ‘is to adopt an approach to the meaning of a statute that is constant and predictable’, an end achieved by constituting the statute ‘according to the ordinary meaning of the words used’.⁸⁵ The approach ultimately taken therefore amounts in the first place to a multiple renunciation of judicial power: first, the power to depart from the ordinary meaning of words; second, the power to infer the purpose of the devolution statutes and to use it to place on the language therein a construction which the ordinary meaning of the words may not be capable of bearing. It remains the case, however, that this renunciation of a first order judicial power is itself an exercise of the second order power identified above, where — albeit within important limits — judges can and do decide what they get to decide. The courts have been willing to acknowledge the constitutional status of the Scotland Acts when little or nothing is at stake in doing so, but have been mostly unwilling to accept that the fact of devolution effected any constitutional change beyond what is immediately apparent from the terms of those statutes and their counterparts elsewhere.

One partial exception to this approach is the decision of the Supreme Court in *H v Lord Advocate*,⁸⁶ in which Lord Hope held (applying Lord Justice Laws’ obiter dictum in *Thoburn*)⁸⁷ that the *Scotland Act*, as a constitutional statute, could not be impliedly repealed. The issue here was whether the *Extradition Act 2003*, which excluded an appeal from the High Court of Justiciary to the Supreme Court in relation to a decision under that Act, overrode the provisions in Schedule 6 of the *Scotland Act* for dealing with devolution issues. The court held that they did not. Ahmed and Perry argue that Lord Hope’s ruling about the inability to impliedly repeal the *Scotland Act* was itself merely obiter,⁸⁸ since he ultimately found no inconsistency between the two statutes. However, his reasoning is ambiguous, and complicated by the fact that he noted a general presumption of statutory interpretation against implied repeal which, he argued, ‘is even stronger the more weighty the enactment that is said to have been impliedly repealed’.⁸⁹ Though this was ultimately, therefore, a case in which the constitutional status of the *Scotland Act* was relevant to the resolution of the issues before the court, it is striking that no attempt was made to link the question of the *Scotland Act*’s status in *Thoburn* terms to superficially analogous dicta in the early devolution case law.

B Review of Acts of the Scottish Parliament

If one key issue resolved by Lord Hope in *Imperial Tobacco* was the significance of the constitutional quality of the *Scotland Act* both for the interpretation of that Act and of the legislation made under its authority, a second was the approach to be taken to resolving boundary disputes as between reserved and devolved matters. In the earlier case of *Martin*, Lord Hope had already eschewed the ‘pith and substance’ approach — common to federal constitutions such as Canada as well as to the earlier devolution of legislative powers to Northern Ireland under the 1920 Act, and according to which a view is taken as to the statute as a whole in order to determine if it sits within or without competence — in favour of a close reading of the rules set out in the devolution

⁸⁴ *Imperial Tobacco*, above n 68, para 14.

⁸⁵ *Ibid.*

⁸⁶ [2013] 1 AC 413.

⁸⁷ *Thoburn v Sunderland City Council* [2003] QB 151.

⁸⁸ Farah Ahmed and Adam Perry, ‘Are Constitutional Statutes “Quasi-Entrenched”?’ UK Const Law Blog, (25 November 2013) (available at: www.ukconstitutionallaw.org).

⁸⁹ *BH v Lord Advocate* [2012] UKSC 24, 30.

legislation itself. As Lord Hope said there, the ‘pith and substance’ test might have informed the approach adopted in the modern devolution schemes, but ‘the Scotland Act provides its own dictionary’ as to the rules to be applied to the question of legislative competence.⁹⁰ In *Imperial Tobacco*, Lord Hope restated this principle.⁹¹ The judicial role, he said, was not to determine where legislation is best made — that choice has already been made and set out in some considerable detail and nuance by the UK Parliament in the *Scotland Act* — but instead is to apply the rules in the 1998 Act ‘bearing in mind that a provision may have a devolved purpose and yet be outside competence as it contravenes one of the rules’.⁹² On the one hand this principle provides clarity as to how one should identify the ‘purpose’ of a provision in order to determine whether that provision ‘relates to’ a reserved matter and therefore falls foul of the section 29 test. First, by rejecting the singular approach to the purpose of legislation that characterises the ‘pith and substance’ test, the Supreme Court has admitted the possibility that legislation may have more than one purpose. In this case ‘the fact that one of its purposes relates to a reserved matter will mean that the provision is outside competence’ unless that purpose can be shown to be ‘consequential and thus of no real significance’ with regard to what the provision ‘overall seeks to achieve’.⁹³ Second, it clarifies factors that may be taken into account when interpreting what is reserved — including the headings and sidenotes in schedule 5 as well as the notes which accompanied the introduction of the Scotland Bill. Third, a focus on the language of the *Scotland Act* (which provides a mechanism for determining whether legislation is without — and not, instead, within — legislative competence) clarifies that — ‘within carefully defined limits’ — the devolution scheme was intended to be a ‘generous settlement of legislative authority’.⁹⁴ Accordingly, the test is thought by the relevant *legislative* actors to give the benefit of the doubt to the purpose(s) of ASPs as set forth by the Scottish Government and therefore to authority of the devolved institutions.⁹⁵ On the other hand, however, because the ‘rules’ set out in the *Scotland Act* — and the reservations to which those rules attach — are at times narrowly construed and technical it has been said that case law on the reserved/devolved boundary is of limited value: telling us much about the specific reservations upon which a challenge has been raised but leaving to another day the proper approach to be taken to the interpretation of the other reservations about which there is as yet no case law.⁹⁶

A secondary limitation on reserved competence reflects the fact that — whilst not themselves reserved — Scots private law and Scots criminal law encompass a vast range of topics that do not easily or necessarily respect the boundaries of reserved and devolved matters.⁹⁷ For that reason, a provision of an ASP which ‘makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters’ is to be treated as relating to such matters — and therefore without the Parliament’s competence — ‘unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise’.⁹⁸ This, however, is not the end of the matter: a second, and partially overlapping, limitation on competence (found in Schedule 4) provides that an

⁹⁰ *Martin*, above n 15, para 15.

⁹¹ In *Christian Institute* this principle had to once again be restated by Lord Reed, rebuking the ‘pith and substance’ approach taken to the impugned legislation in favour of the ‘purpose’ test set out in the Scotland Act itself (above n 7, para 32).

⁹² *Imperial Tobacco*, above n 68, para 13.

⁹³ *Ibid* para 43.

⁹⁴ *Ibid* para 15.

⁹⁵ See McCorkindale and Hiebert, above n 64.

⁹⁶ *Ibid*.

⁹⁷ *Imperial Tobacco*, above n 68, para 19.

⁹⁸ *Scotland Act 1998* s 29(4).

ASP ‘cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters’, where the latter formulation includes ‘any enactment the subject matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament’ and ‘any rule of law which is not contained in an enactment and the subject matter of which is a reserved matter’.⁹⁹ This limitation is subject to two exceptions: the first that it ‘applies in relation to a rule of Scots private law or Scots criminal law... only to the extent that the rule in question is special to a reserved matter’;¹⁰⁰ nor does it apply to modifications of the law on reserved matters which ‘are incidental to, or consequential on, provision made... which does not relate to reserved matters’ and ‘do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision’.¹⁰¹ Though there is a ‘strong family likeness’ between the two restrictions on competence, the Supreme Court has clarified that they reflect a distinction ‘between a rule of Scots criminal law which is special to a reserved matter on the one hand and one which is general in its application on the other because it extends to both reserved matters and matters which have not been reserved’.¹⁰²

In *Martin*, the court split on the question of whether the provision under challenge — section 45 of the *Criminal Proceedings etc (Scotland) Act 2007*, which increased the maximum sentence which could be imposed by the Sheriff Court exercising summary jurisdiction — was ‘special to a reserved matter’. The majority (including Lord Hope) took the view that it was not, understanding that limitation to reflect a desire to prevent ‘the fragmentation of rules of Scots criminal law which are of general application into some parts which are within the Scottish Parliament’s competence and some parts which are not’.¹⁰³ Lord Rodger, in the minority, expressed the view that ‘a statutory rule of law is “special to a reserved matter” if it has been specially, specifically, enacted to apply to the reserved matter in question — as opposed to being a general rule of Scots private or criminal law which applies to, inter alia, a reserved matter’.¹⁰⁴ At the heart of that disagreement, however, lay a deeper tension as to the appropriate extent of judicial control over the exercise of devolved powers. Whilst for Lord Hope the Scottish Parliament was plainly intended to regulate the Scottish legal system and therefore a ‘generous application ... which favours competence’ — and which requires the aid of Westminster ‘to do no more than dot the i’s and cross the t’s of the necessary consequences’ — is to be preferred,¹⁰⁵ for Lord Rodger a narrower approach was required. According to the latter view the Scottish Parliament is barred from ‘modifying any enactment which must be taken to reflect the conscious choice of Parliament to make special provision for the particular circumstances, rather than to rely on some general provision of Scottish private or criminal law’.¹⁰⁶ Offering a more restrictive approach to the interpretation of ASPs, Lord Rodger continued that ‘[w]hether or not to modify such an enactment involves questions of policy which must be left for the UK government and Parliament which are responsible for the matter’.¹⁰⁷

The overlap of policy responsibilities as between the Scottish and UK Governments could have had significant consequences in the challenge by Scotch Whisky Association to legislation implementing a statutorily determined minimum unit price (‘MUP’) on the

⁹⁹ *Scotland Act 1998* sch 4, paras 2(1) and (2).

¹⁰⁰ *Scotland Act 1998* sch 4, para 2(3).

¹⁰¹ *Scotland Act 1998* sch 4, para 3(1).

¹⁰² *Martin*, above n 15, para 21.

¹⁰³ *Ibid* para 38.

¹⁰⁴ *Ibid* para 139.

¹⁰⁵ *Ibid* paras 38 and 66.

¹⁰⁶ *Ibid* para 139.

¹⁰⁷ *Ibid*.

sale of alcohol products¹⁰⁸ — a flagship policy by the Scottish Government with the object and purpose of reducing alcohol consumption in Scotland, with a focus on harmful drinkers and the impact of alcohol misuse and over-consumption on, inter alia, public health. The unsuccessful challenge focused on the proportionality of MUP as the means to achieve that aim given the impact — acknowledged by the Scottish Government — that such a measure would be likely to have on the internal market and, specifically, on EU trade in alcohol. In the Inner House¹⁰⁹ the court referred to it as the ‘elephant in the room’ that whilst the suggested alternative — raising the level of tax on alcohol products — was a power reserved to the UK Government, the UK Government conversely has little input into the devolved matter of the health of the inhabitants of Scotland.¹¹⁰ Whilst both parties agreed that, as a matter of EU law, this was of no consequence — at that level the member state is the UK and the internal organisation of policy power is of little concern — the Inner House was more sensitive to the devolution context, remarking on the ‘curious anomaly’ that ‘increasing tax is a viable alternative, when the political reality is that it is clearly not’.¹¹¹ In the UKSC, a challenge by the Lord Advocate to the assumption that UK legislation could be introduced to bridge this legal and political reality with the co-operation of the UK and Scottish Governments and Parliaments, was dropped and — because it was not critical to the Court’s unanimous decision to uphold the validity of the legislation — the point was not further developed.¹¹² Nevertheless, the judgment of the UKSC did demonstrate a sensitivity to the constitutional legitimacy of the devolved institutions in rejecting the disproportionality *strictu sensu* of MUP on the basis that the balance sought was one between two incomparable values: on the one hand the value of health as well as the reduction of socio-economic inequality in relation to mortality and hospitalisation, on the other the market and economic impact of the measure on producers, wholesalers and retailers of alcohol products.¹¹³ ‘[I]t is not for any court’, Lord Mance said, ‘to second guess the value that a domestic legislator’, Westminster or devolved alike, ‘may decide to place on health’.¹¹⁴ His Lordship continued:

Would or should a court intervene because it formed the view that the number of deaths or hospitalisations which the member state sought to avoid did not ‘merit’ or was not ‘proportionate to’ the degree of market interference which would be involved? I very much doubt it. Any individual life or well-being is invaluable...[and so]...it follows that I see very limited scope for the sort of criticism that the petitioners make about the absence of EU market evidence.¹¹⁵

C Review across the Devolution Statutes

One further question regarding the themes of the case law is that of whether the Scottish jurisprudence stands alone or whether the cases discussed below form part of a wider ‘devolution jurisprudence’ common to the three nations and regions to which power has been devolved; something that is more than the mere aggregate of the different

¹⁰⁸ *Alcohol (Minimum Pricing) Scotland Act 2012*.

¹⁰⁹ *Scotch Whisky Association v Lord Advocate* [2016] CSIH 77.

¹¹⁰ *Ibid* para 192.

¹¹¹ *Ibid*. Though here the Inner House held in any case that a general increase in tax on alcohol sales could easily be absorbed by supermarkets and would be less effective in targeting hazardous and harmful drinkers and the overconsumption of cheap alcohol (*ibid* paras 196-200).

¹¹² *Scotch Whisky Association*, above n 69, paras 41-45.

¹¹³ *Ibid* para 48.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid*.

decisions made by the various courts regarding the relevant provisions of the Scotland, Wales and Northern Irish devolution legislation. The question arises in the first place because of devolution's asymmetries. Leaving aside the particular historical factors which made a form of consociationalism necessary in Northern Ireland, the Scottish and Welsh models of devolution initially differed in fundamental ways: the Welsh Assembly had no primary legislative power under the first of the Welsh devolution statutes,¹¹⁶ and when it acquired a legislative competence the model used was a 'conferred powers' one (whereby all was reserved apart from that explicitly devolved),¹¹⁷ in contrast to the 'reserved powers' model used in Scotland.¹¹⁸ Though both regimes continue to evolve (with the *Wales Act 2017* moving the Welsh Assembly to a reserved-powers model),¹¹⁹ the numerous differences prevented the early emergence of an over-arching devolution jurisprudence.¹²⁰ The possible emergence of such a thing has been belatedly facilitated by the use, in the Welsh context, of the power to make a reference to the Supreme Court to determine the legality of Acts of the Assembly, which has been employed three times since the Assembly acquired powers to make primary legislation.¹²¹ In its judgment, the Supreme Court drew on the approach taken in *Martin*, though Lord Neuberger noted that despite the close similarity of the words used, 'they are found in different statutes, and one must therefore be wary of assuming that they have precisely the same effect'.¹²² Similarly, Lord Hope presented principles developed in the Scottish context as relevant to the question of the legislative competence of the Welsh Assembly.¹²³ This willingness to read over from the Scottish context to the Welsh one was reaffirmed in the *Agricultural Sector (Wales) Bill* reference,¹²⁴ where the Supreme Court also confirmed that a Bill which relates to a conferred power would be within competence even if 'in principle it might also be capable of being classified as relating to a subject which has not been devolved'.¹²⁵

This read across has occurred also in the opposite direction: in *Christian Institute* the Supreme Court deliberately wove dicta from the Welsh *Agricultural Wages* reference into that from the challenge to an ASP in *Imperial Tobacco* in order to clarify the proper approach to be taken to the 'object and purpose' test when determining whether or not devolved legislation 'relates to' a reserved matter.¹²⁶ In the *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* case,¹²⁷ however, Lord Mance had pointed out the difficulty of this assimilation, noting that though the formulation 'relates to' is defined identically in the Scottish and Welsh legislation it is 'used in the *Scotland*

¹¹⁶ *Government of Wales Act 1998*.

¹¹⁷ *Government of Wales Act 2006* s 108.

¹¹⁸ *Scotland Act 1998* s 29(2)(b).

¹¹⁹ *Government of Wales Act 2006* s 108A, as substituted by the *Wales Act 2017*. The provision in question is not yet in force.

¹²⁰ For an early consideration of the overlapping elements of the devolution statutes, see Aidan O'Neill, 'Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council' (2001) 64 *Modern Law Review* 603. It is notable that all of the 'devolution jurisprudence' discussed by O'Neill relates to the work of the Scottish Parliament and Scottish Executive (as it was then called).

¹²¹ *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales* [2012] UKSC 53.

¹²² *Ibid* para 50.

¹²³ *Ibid* paras 78-81.

¹²⁴ *Agricultural Sector (Wages) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43, 5-6.

¹²⁵ *Ibid* para 67.

¹²⁶ *Christian Institute*, above n 7, para 30.

¹²⁷ *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3.

Act 1998 to define not the competence conferred to the devolved Parliament, but the competence reserved to the Westminster Parliament'.¹²⁸ The effect of this distinction was that to give the formulation a broad or a narrow interpretation would have opposite effects on the scope of the competence of the devolved legislatures: restricting that of the Scottish Parliament as it broadened out that of the Welsh Assembly, or vice versa.¹²⁹ A distinct and unitary body of devolution jurisprudence is likely only fully to emerge in the context of a unitary approach to devolution such as might be engendered by the shift in Wales towards a reserved powers model.

C *Review Beyond the Scotland Act 1998*

Some of the same dynamics are evident in the courts' treatment of the question of whether the grounds of review enumerated in the *Scotland Act* are exhaustive of those on which the legality of ASPs might be challenged. The argument in *AXA General Insurance*¹³⁰ that ASPs might be subject to challenge on common law grounds of irrationality was only partially successful, the Supreme Court holding that the possible grounds of review were more limited both than those which apply to executive acts and those which the Outer House of the Court of Session had, by analogy with 'subordinate legislation carrying direct parliamentary approval', held to be appropriate: 'extremes of bad faith; improper motive or manifest absurdity'.¹³¹ Instead, it was held, that the degree of common law review appropriate for ASPs is the irreducible minimum required to secure the rule of law, as understood in the (in)famous dicta of Baroness Hale, Lord Steyn and Lord Hope in *Jackson v Attorney General*.¹³² In *AXA*, Lord Hope related this common law backstop to the nature and composition of the Scottish Parliament, including the feature — its unicameral nature — which most clearly distinguishes it from the Westminster Parliament:

We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.¹³³

Lord Reed identified a broader basis for common law review of ASPs, justified by reference to the principle of legality as applied to the *Scotland Act 1998*, by which the (Westminster) Parliament it created could only have empowered the (Scottish) Parliament it created to legislate contrary to certain rights and values had it used express words to that effect, words which the 1998 Act does not in fact contain:

¹²⁸ Ibid para 25.

¹²⁹ A point made by Richard Rawlings, 'Riders on the Storm' (2015) 42 *Journal of Law and Society* 471, 486.

¹³⁰ *AXA General Insurance Ltd*, above n 4.

¹³¹ Ibid para 135.

¹³² *Jackson v Attorney General* [2005] UKHL 56.

¹³³ *AXA General Insurance Ltd*, above n 4, para 51.

Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.¹³⁴

An implication of this distinction is that a body possessing the same majoritarian features as are identified by Lord Hope (features which were of course a function of the contingent political circumstances of the period) might — on Lord Reed's account — be granted the power to act incompatibly with the rule of law by a statute employing suitably explicit language.¹³⁵ The basis of Lord Hope's decision is worth dwelling upon, however, for it is striking that many of the most aggressive public law decisions in recent decades have demonstrated a similar lack of confidence in the ability of the political organs of the state to obstruct the doing of illiberal acts or, at times, any act at all which the executive might wish to take. Amongst the most quietly scathing of such remarks are those of Lord Steyn in *Jackson*, where the suggestion that 'the courts may have to qualify a principle [the sovereignty of Parliament] established on a different hypothesis of constitutionalism' was linked to the possibility that the availability of judicial review is a 'constitutional fundamental' which 'even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'.¹³⁶ Given that the electoral system employed at the Scottish Parliament makes majority government less likely (and effectively excludes the possibility of a party enjoying the sort of super-majority which was until recently the norm at Westminster) the fairly casual — and not entirely convincing — assimilation of the Scottish with the Westminster political apparatus suggests that whether or not the scepticism as to the effectiveness of political scrutiny is empirically justified is neither here nor there. Judicial power in respect of ASPs, this is to say, has been extended by the Supreme Court partly on the basis of a suspicion about the quality of the political elements of the (Scottish) constitutional order which the judgments in *AXA* do too little to substantiate.¹³⁷

V CONCLUSION

Although fears of '*un gouvernement des juges*' have proved unfounded, the constitutional limits imposed on the Scottish Parliament, and the mechanisms established by and in the shadow of the *Scotland Act* for policing those limits, are clearly a fundamentally important feature of the way in which the contemporary devolution settlement operates. Perhaps surprisingly, there has been no popular or political backlash against the constraints these impose on the Scottish democratic process. It is striking that the debates which *have* arisen regarding judicial power in Scotland — who should

¹³⁴ Ibid para 153.

¹³⁵ *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131: 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost'.

¹³⁶ *Jackson*, above n 132, para 102.

¹³⁷ Though much earlier Lord Hope had expressed significant concerns regarding the quality of scrutiny in the Scottish Parliament, and endorsed — in order to address that defect — the creation of a second chamber: Lord Hope of Craighead 'What a Second Chamber Can Do for Legislative Scrutiny' (2004) 25 *Statute Law Review* 3. Even these remarks, however, would seem to do too little to justify the majoritarian concern Lord Hope later expressed in *AXA* — not least because they were made so early in the life of the Holyrood Parliament.

exercise it; what approach they should take in doing so; how far the common law should be allowed to augment the statutory mandate given to the courts — have nevertheless *not* featured a basic question which has defined contemporary constitutional debate at the United Kingdom (and, indeed, international) level: whether the existence of judicial power to strike down or otherwise impugn legislative acts should exist at all.

Thus, the reaction of the Scottish Government on those occasions when its legislation has been invalidated by the courts has been notably restrained, despite occasionally undiplomatic or politically insensitive language from the courts,¹³⁸ and despite the fact that strike down has sometimes caused further significant legal headaches.¹³⁹ As noted above, the major controversy that has arisen has concerned the role of the JCPC/Supreme Court in criminal cases, but this was an incidental effect of the devolution arrangements, which happened to inflame much longer-standing nationalist sensitivities (of both political and legal varieties) about the ‘intrusion’ of London-based courts into Scottish legal affairs.

This relative comfort with the judicial role in Scottish political discourse is perhaps evidenced most clearly by the Scottish Government’s proposals in advance of the 2014 independence referendum for an interim constitution, as well as an ‘inclusive and participative’ process for replacing it with a permanent instrument, reflecting — said the First Minister, Nicola Sturgeon — ‘the fundamental constitutional principle that the people, rather than politicians or state institutions, are the sovereign authority in Scotland’.¹⁴⁰ That popular sovereignty was reasserted by the draft bill itself, which provided that ‘[i]n Scotland, the people have the sovereign right to self-determination and to choose freely the form in which their State is to be constituted and how they are to be governed’ and that ‘[a]ll State power and authority accordingly derives from, and is subject to, the sovereign will of the people, and those exercising State power and authority are accountable for it to the people’.¹⁴¹ These radical assertions of popular sovereignty were set against the claim that the sovereign will of the people was to be expressed in a constitution which then limited that sovereign will.¹⁴² In the interim constitution the relevant limitations were the same as those applicable to the devolved Scottish Parliament: Scots law was to be of no effect if incompatible with either EU law or those rights under the ECHR specified by the interim constitution.¹⁴³ These proposals, which again were not seriously questioned, seemed to reflect an implicit belief that a written constitution (and the judicial power which almost invariably accompanies it) is the natural condition of modern polities.¹⁴⁴ Thus, in the context of continued membership of the UK rather than independence, the major criticism of the role of constitutional review concerns, not the existence of limits on the powers of the Scottish Parliament,

¹³⁸ See, eg, the criticism of ministerial motives in relation to the impugned provision in *Salvesen v Riddell*, or the unfortunate reference to the spectre of totalitarianism in *Christian Institute*.

¹³⁹ For example, the remedial order enacted in response to the ruling in *Salvesen v Riddell* that s 72 of the *Agricultural Holdings (Scotland) Act 2003* was *ultra vires* subsequently gave rise to a successful action for damages by the farmers thereby deprived of their expectation of gaining security of tenure — *McMaster v Scottish Ministers* 2017 SLT 586.

¹⁴⁰ ‘Foreword’ in Scottish Government, *The Scottish Independence Bill: A consultation on an interim constitution for Scotland* (2014), 4.

¹⁴¹ *Ibid*, clause 3, pages 12-13. See also clause 2: ‘In Scotland, the people are sovereign’.

¹⁴² Scottish Government, *above* n 132, clause 3(3) and (4).

¹⁴³ *Ibid* clauses 24 and 26.

¹⁴⁴ See, eg, Scottish Government, *Scotland’s Future: Your Guide to an Independent Scotland* (2013) 332, 334-5.

but rather the *absence of* equivalent constraints on the powers of the UK Parliament, particularly insofar as they potentially threaten the security of Scottish autonomy.¹⁴⁵

Attitudes to constitutional review in the Scottish context do therefore seem to be indicative of new constitutional thinking which is antithetical to the insulation of primary legislation from judicial control. However, the attitudes displayed by the courts themselves in exercising their powers of constitutional review in the devolved context are more ambivalent. On the one hand, there are times at which the courts appear to approach their task self-consciously as one of *constitutional* review — a matter of determining, on a principled basis, the balance of control and respect that is due to a primary legislator empowered by a constitutional instrument; an attitude which may spill beyond the devolution context to colour (or be coloured by) the courts' approach to UK Parliament legislation as well. The striking similarity of Lord Hope's reasoning as regards common law review of the Scottish Parliament and of the UK Parliament in *AXA* and *Jackson* is one example; the extension to the *Scotland Act* of the protection from implied repeal due to a constitutional statute is another. On the other hand, the statutory basis of the *Scotland Act* is sometimes seen as decisive, with the courts' powers of review therefore being regarded as no more than the application in a novel context of their familiar powers to supervise the legality of acts of subordinate bodies. On the whole, more conventional constitutional attitudes have been displayed in cases where the practical stakes are higher. This is not unusual in constitutional adjudication, particularly in recent UK experience. Nevertheless, it may be problematic in a political context in which the constitutional status and security of devolution is a highly sensitive issue. Ultimately, the willingness of the courts to shift to a new constitutional paradigm which can accommodate the idea of the Scottish Parliament as an institution with independent rather than derivative (albeit limited) constitutional authority, and which encompasses equivalent constraints on the UK Parliament may be an important factor in determining whether Scotland's constitutional future lies inside or outside of the Union.

¹⁴⁵ See Aileen McHarg, 'The Constitutional Case for Independence' in Aileen McHarg et al (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford UP, 2016) 115-121.

BREXIT, PREROGATIVE AND THE COURTS: WHY DID POLITICAL CONSTITUTIONALISTS SUPPORT THE GOVERNMENT SIDE IN *MILLER*?

GAVIN PHILLIPSON*

I INTRODUCTION

What makes the case of *Miller v Secretary of State for Exiting the European Union*¹ of interest in a volume dedicated to the rise of judicial power? What makes it noteworthy as a point of contestation between legal and political constitutionalists? One might observe first that *Miller* was probably unique in British constitutional history in terms of the sheer scale of both academic and general public interest that it generated. Dubbed the ‘constitutional case of the century’, it received saturation, if sometimes sensationalist, coverage across the UK print and broadcast media and was widely reported around the world. Given that it concerned the issue of Brexit — the most explosively contentious as well as the most important issue in British politics — this was perhaps not surprising. More importantly for our purposes, it produced a volume and intensity of engagement by the academic community that was unprecedented. Several hundred thousand words of commentary about it were published in a few short months, on the UKCLA blog and elsewhere,² including notable contributions by scholars from Australia³ and New Zealand.⁴ It also provoked passionate disagreement. The public law community was split down the middle. Moreover, as discussed below, academic commentary, perhaps unusually, amounted to an important source of the legal arguments used in the case.

Another notable feature of the case for our purposes is that Policy Exchange’s Judicial Power Project,⁵ which takes a highly sceptical stance on judicial power in the constitution, took a strongly pro-Government line throughout. This echoed the way that the public law community split on *Miller*. Broadly speaking, those seen as having a political constitutionalist bent — favouring political determinations of constitutional questions, and democratic power over judicial determination and judicial power — supported the Government side,⁶ legal constitutionalists the claimant side. There were of course exceptions: Mark Elliott, whom I would regard as a moderate legal

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¹ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583 (hereafter ‘*Miller*’).

² See eg, the list of contributions compiled by R Craig, *Miller: An Index of Reports and Commentary* (25 January 2017) Judicial Power Project <www.ukconstitutionallaw.org/2017/01/25/robert-craig-miller-an-index-of-reports-and-commentary/>.

³ N Aroney, ‘*R (Miller) v Secretary of State for Exiting the European Union*: Three Competing Syllogisms’ (2017) 80(4) *Modern Law Review* 685.

⁴ C McLachlan, ‘The Foreign Affairs Treaty Prerogative and the Law of the Land’, *UK Constitutional Law Blog* (14th November 2016).

⁵ See generally <www.judicialpowerproject.org.uk/>.

⁶ I would include within this list Richard Ekins, John Finnis, Adam Tomkins, Sir Stephen Laws, Mikolaj Barczentewicz, Timothy Endicott, Christopher Forsyth and Mike Gordon, all of whose work is discussed and cited in this paper.

constitutionalist, argued strongly for the Government side throughout.⁷ Conversely, Keith Ewing, one of the most long-standing and doughty advocates of the political constitution, argued against use of the prerogative.⁸ But the general tendency was clear.

Why then the intense controversy? At a general level, the stakes were extraordinarily high, given that the case related to the intensely divisive issue of Brexit, and followed the shock result of a nationwide referendum, in which a slim but clear majority voted to leave the EU.⁹ More specifically, the case concerned a challenge to the Government's assertion that it intended to use the 'foreign affairs' prerogative to commence the formal process of withdrawal by triggering Article 50 of the Treaty of Lisbon. And it is here that we start to uncover the deeper sources of the legal controversy. Since the early 17th century *Case of Proclamations*,¹⁰ courts have asserted that they have the power to adjudicate upon whether a claimed prerogative power exists and to delineate its scope. This was followed by a line of cases governing clashes between prerogative and statute. One well-known decision, *De Keyser's*,¹¹ determined that where Parliament legislates in an area previously occupied by the prerogative or abrogates it by specific statutory provision, the prerogative must give way and go into 'abeyance'. Another key principle, enunciated by the House of Lords in the *Rayner* case, is that:

the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or...depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament.¹²

This principle was said to be rooted in the declaration in Article 1 of the Bill of Rights 1689 that 'the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parlyament is illegall'. On this basis it has been said judicially that 'since the 17th century the prerogative has not empowered the Crown to change English common law or statute law'.¹³ Finally, the decisions in *Fire Brigades Union*¹⁴ and *Laker Airways*¹⁵ were said to give rise to a more specific, albeit related, principle: that the prerogative may not be used to 'frustrate' the intention of Parliament as expressed in any statute (hereafter, 'the frustration principle').¹⁶

At first sight, it might not be immediately apparent why a case concerned with the above principles should divide opinion as between legal and political constitutionalists. For arguably these principles flow logically from one of the simplest aspects of the doctrine of parliamentary sovereignty: that Acts of Parliament, as the highest form of

⁷ Though see eg, his critical analysis of some of the initial Government arguments: *The Government's Case in the Article 50 Litigation: A Critique* (30 September 2016) Judicial Power Project <www.judicialpowerproject.org.uk/mark-elliott-the-governments-case-in-the-article-50-litigation-a-critique/>.

⁸ See K Ewing, 'Brexit and Parliamentary sovereignty' (2017) 80(4) *Modern Law Review* 711, 716. He was joined in this by fellow strong political constitutionalist, Robert Craig: 'Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum' (2016) 79(6) *Modern Law Review* 1041. Both considered that there was *already* a statutory power available to the Government via the reception into UK law of Article 50, an argument that was not generally accepted; for a detailed rebuttal, see below n 19, 1069-78.

⁹ On 23 June 2016 the people of the UK and Gibraltar voted to leave the EU by 51.89% to 48.11%. (1610) 12 Co. Rep. 74; 77 ER 1352.

¹⁰ *Attorney General v De Keyser's Hotel* [1920] AC 508, 540 (HL).

¹¹ *JH Rayner (Mincing Lane Ltd) v DTI* [1990] 2 AC 418, 500.

¹² *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] AC 453 at [44].

¹³ *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513.

¹⁴ *Laker Airways v Department of Trade* [1977] QB 643.

¹⁵ The distinction between abeyance and frustration is valuably analysed by Craig, above n 8.

law, rank above inferior sources, including both prerogative and common law. Thus courts, in affirming these principles, may be seen not as advancing their own powers, but simply defending Parliament's. However, there were other aspects of *Miller* that pushed perceptions of it the opposite direction, making it appear a further stepping stone in the advance of judicial power. It did, after all, concern judicial review of the 'foreign affairs' prerogative, under which it is well-accepted that the Executive has power to enter into and withdraw from treaties. The starting point here is that 'the conduct of foreign affairs, including the making of treaties is still considered to be beyond the reach of judicial review'.¹⁷ Given that *Miller* concerned the formal opening of negotiations between the British Government and the EU, it might appear to be part of what Ekins has termed 'the drift towards ever more searching judicial review of ever more previously non-justiciable matters'.¹⁸ Before the case was heard, this author expressed the fear that, were the courts to rule against the British Government in the case, this would risk not just its international embarrassment but also serious interference with 'its ability to conduct... fruitful negotiations' with the EU, specifically its freedom 'to choose the moment that in its view was the most propitious one to start the exit process'.¹⁹ It was concerns like this that led, at that early stage, to 'widespread scepticism about whether the courts had the grounds to intervene, and if they did whether they would have the courage to do so'.²⁰

A further reason to urge judicial restraint seemed evident: as discussed below, in an area as intensely controversial as Brexit, and particularly after the decision to withdraw had been made via a nationwide referendum, any intrusion by the courts risked being seen as an attempt to frustrate the referendum result or as treading on Parliament's toes.²¹ As a sovereign legislature, Parliament could, at least in theory, impose whatever controls it wished upon the Executive's ability to commence the exit process; and as a

¹⁷ *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [237] (per Lord Kerr). Since *CCSU v Minister for Civil Service* [1985] AC 374, courts have affirmed that, *prima facie*, the exercise of prerogative powers may be subject to review. However, this advance was 'substantially hollowed out by the long list of prerogatives that were said to be non-justiciable', including the making of treaties, defence of the realm etc, although subsequent case-law made some inroads into those 'forbidden areas': M Elliott, 'Judicial Power and the United Kingdom's Changing Constitution' in this volume [2017] 36(2) *University of Queensland Law Journal* 273, text to n 7.

¹⁸ R Ekins, *The Dynamics of Judicial Power in the New British Constitution* (1 February 2017) Judicial Power Project <www.judicialpowerproject.org.uk/wp-content/uploads/2017/02/Ekins-text-final.pdf> 17.

¹⁹ G Phillipson, 'A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament', [2016] MLR 70(6) 1064, 1079. Subsequent events proved these fears largely groundless.

²⁰ K D Ewing, 'Editor's Introduction' (2016) 27(3) *King's Law Journal*, 289.

²¹ In *R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657, 666, Sir John Donaldson remarked that 'it behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or... even appearing to do so'. In a forthcoming essay ('Miller, Constitutional Realism and the Politics of Brexit' in M Elliott, J Williams and A L Young (eds) *The UK Constitution After Miller: Brexit and Beyond* (Hart: 2018)) Ekins and Gee argue strongly that *Miller* cannot be properly understood without recognising it as an attempt by legal elites to delay implementation of Brexit in the hope that the referendum result could ultimately be thwarted. However, the motives of litigants cannot ever be known with certainty (as they acknowledge) and, absent abuse of process, are irrelevant to the merits of the legal case (which, the authors acknowledge, turned on a point of law that was 'discrete and technical'). My view is therefore that such speculative arguments cannot amount to a serious reason for political constitutionalists to have supported the Government's legal case in *Miller*.

democratic legislature, it would naturally wish to respect the wishes of the people expressed in a referendum it itself had authorised. It was perhaps a combination of some or all of these considerations that led most political constitutionalists to rally to the banner of the prerogative and support the Government side.

On the other hand, the case did *not* appear to concern what is perhaps the core concern of political constitutionalists: policy decisions being taken out of the hands of democratic decision-makers and placed in the hands of judges.²² The court was only being asked to decide which of the two democratic branches of government was legally able to make a particular decision. Moreover, as is well known, at least one leading political constitutionalist — Adam Tomkins — has expressed active hostility towards the whole notion of prerogative powers. For the prerogative is, of course, a residue of royal power. Hence the prerogative powers have never been granted by any deliberate or democratic decision to the Executive. Instead they have been, in effect, inherited by Ministers from the residual powers of an unelected hereditary Monarch. Tomkins has argued that, ‘Government should possess only those powers which the people, through their elected representatives in Parliament have...conferred on it by statute’²³ and proposed therefore that prerogative powers should be abolished wholesale and replaced by modern statutory powers, whose extent and limits would be determined by Parliament. This then was another reason why the strong support of most political constitutionalists for the Government side might appear something of a puzzle.

Moreover, supporting the Government side meant *prima facie* supporting the notion that the Prime Minister, exercising her prerogative powers, could set in train a series of events that would cause a huge corpus of law — including a very substantial body of rights enjoyed and enforceable in UK domestic law, covering employment law, consumer law, environmental law, equal pay and so on — to simply evaporate.²⁴ Such an outcome *seems* contrary to the well-established principle set out above that the prerogative does not extend to changing domestic law or removing rights enjoyed in domestic law. Moreover, while the defence of a strong and effective Executive branch may be seen as an aspect of political constitutionalism,²⁵ it does not follow that executive power should be elevated over the rights of the individual given effect by statute.

This then is the concern of this article: to explore what could account for this enthusiastic support by political constitutionalists for an outcome that, on the face of it, appeared to favour the royal prerogative over rights given effect by parliamentary statute. Its purpose therefore is *not* to analyse the detailed doctrinal controversies around

²² N Aroney and B Saunders, ‘On Judicial Rascals and Self-Appointed Monarchs: The Rise of Judicial Power in Australia’ [2017] 36(2) *University of Queensland Law Journal* 221, 1.

²³ *Our Republican Constitution* (Hart, 2005) 132.

²⁴ This was because, under Article 50(3), the EU Treaties would cease to apply to the UK two years after Article 50 was triggered (unless the period was extended by unanimous agreement of all 28 member states) and with them, the whole corpus of EU law.

²⁵ Timothy Endicott’s energetic and scholarly defence of the legitimacy of prerogative powers (‘The Stubborn Stain Theory of Executive Power’ on *Policy Exchange* (7 September 2016) <www.policyexchange.org.uk/publication/the-stubborn-stain-theory-of-executive-power/>) to my mind amounts to a defence of *executive* powers, in general, rather than specifically *prerogative* powers. Moreover one could readily agree with Endicott’s argument for a strong Executive able to take swift, decisive action, but disagree this was the kind of decision that required this kind of decision-making. The question of when and how to commence withdrawal from the EU and with what future relationship in view is surely precisely the kind of multi-faceted and enormously important decision that requires lengthy and careful deliberation - and if possible the building of a broad cross-party consensus - and *not* the kind calling for quick determination by the Cabinet alone. In other words it is one intrinsically suited to deliberation in the legislature rather than swift Executive determination; this is particularly so given that there was no urgent need to trigger Article 50 quickly.

Miller — something I have done elsewhere.²⁶ Rather it is to critically evaluate some of the possible reasons *why* political constitutionalists were drawn to defend use of the prerogative in this case.

The article proceeds in four main steps. It first considers a preliminary objection to the claimant's case — one that suggested this was all a fuss about nothing, given Parliament's likely *future* role in legislating for Brexit. It then considers what it characterises as two broad-brush arguments favouring the Government side: the importance of the referendum result and Parliament's ability itself to control the Executive without judicial assistance. It argues that, while certainly *evoking* values of democracy and political accountability that are core to political constitutionalism, both ultimately fail to establish their relevance to the specific issue disputed in *Miller*. The article proffers instead an alternative means for the significance of the referendum to be constitutionally recognised. It then moves on to consider the two key legal arguments of the Government: those based on the *De Keyser's* principle and the alleged *conditionality* of EU law rights in domestic law, through the same lens of legal-political constitutionalism. Finally, it considers from that same perspective a specific issue in relation to which *Miller* may be argued to have changed our understanding of the UK constitution — the notion of 'constitutional statutes', commonly understood to be immune from implied repeal.

II ANTICIPATING OR IGNORING PARLIAMENT'S FUTURE ROLE IN BREXIT?

We noted above the core claimant argument in *Miller*: that the inevitable result of triggering Article 50 would be that a whole set of citizens' EU-law rights would disappear into thin air. One obvious reply to this concern is that this characterisation ignored the obvious fact that Parliament was always going to be involved legislatively in the process of Brexit. It would, at some point in the process, legislate both to repeal the European Communities Act 1972 ('ECA'), which gives effect to EU law in the UK, and to retain many of those rights. That indeed is what is happening now with the immensely complex European Union (Withdrawal) Bill 2017-2019, before Parliament at the time of writing. Once passed, this legislation will repeal the ECA and incorporate nearly all existing applicable EU law into UK law. Assuming this happens before the UK actually leaves the EU, at first sight, it would provide an answer both to the argument that the purpose of the ECA will be frustrated by withdrawal *and* that EU-law rights will disappear wholesale.²⁷ As Adam Tomkins put it:

triggering Article 50 will not dilute or diminish anyone's statutory rights...What happens to [our EU law] rights and obligations...will be a matter for Parliament to determine in due course.²⁸

This was the argument that became known as 'sequencing' when run by the Government side in the Divisional Court. But there are two main responses to it. First

²⁶ See G Phillipson, 'EU Law as an Agent of National Constitutional Change: *Miller v Secretary of State for Exiting the European Union*' (2017) *Yearbook of European Law* 46-93.

²⁷ See eg, Phillipson, above n 19, at 1085; M Gordon, 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond' (2016) 27(3) *King's Law Journal*, 333, 339.

²⁸ A Tomkins, 'Brexit, Democracy and the Rule of Law' (5 November 2016) Notes From North Britain <www.notesfromnorthbritain.wordpress.com/2016/11/05/brexit-democracy-and-the-rule-of-law/>.

there is a category of rights that will *inevitably* be lost by exit,²⁹ whatever form it takes. These include notably the right to stand and vote in elections to the European Parliament.³⁰ But second, even in relation to the rights that Parliament was always likely to legislate to retain, the Government rightly lost the ‘sequencing’ argument in the Divisional Court. For it was met with the simple but devastating rejoinder that the Government cannot defend a course of action that would be unlawful as things stand with the plea that Parliament will later enact legislation that will cure or avoid the illegality. As the majority put it in the Supreme Court, while ‘it is intended’ that a Withdrawal Bill will repeal the ECA 1972 and ‘convert existing EU law into domestic law’, ‘ministers’ intentions are not law, and the courts cannot proceed on the assumption that they will necessarily become law’.³¹ Indeed the problem with the ‘sequencing’ argument is illustrated by considering Lord Carnwath’s rather tentative invocation of it in his dissent. Noting the Secretary of State’s assurance that there would be legislation to ‘reproduce existing European-based rights in domestic law’³² he said that ‘*on the assumption* that such a Bill becomes law by the time of withdrawal’, there would be no breach of the rule that actions taken under the prerogative may not alter domestic law. He then concedes that ‘of course that result depends on the will of Parliament: it is not in the gift of the executive’ — which might be thought fatal to the argument he has just made. Yet he adds, ‘there is no basis for making the opposite assumption’³³ (that Parliament will *not* pass the relevant legislation). But, with respect, a court cannot in such a case make *any* assumption about what Parliament *will* do, based on representations by the Government.³⁴ In the *Fire Brigades Union* case, the contention that the legislative scheme frustrated by a contrary use of the prerogative would be repealed at some later date was rightly rejected as irrelevant by the House of Lords.³⁵ A court quite simply should not even enter into the enquiry about whether Parliament will, or will not, act in future. As the majority put it: ‘That is a matter for Parliament to decide in due course’. The court’s role is simple: to resolve the matter ‘in accordance with the law as it stands’.³⁶ Were it otherwise, a court could *always* be dissuaded from a finding of *ultra vires* by the argument that Parliament would doubtless legislate in future to supply the legal basis currently lacking.³⁷

²⁹ It was accepted that the relevant rights could be divided into three categories. The rights inevitably lost on exit were category 3. In the first category were those rights that would be lost but which could be legislatively converted into purely domestic law rights; in the second were those that could only be replaced with the agreement of other states — eg, free movement rights. The loss of at least some EU-law rights is explicitly conceded by the Government’s case on appeal: *R (on the application of Miller) v Secretary of State for Exiting the European Union* UKSC 2016/196: Printed Case of the Appellant, at 62[a].

³⁰ Guaranteed under the *European Parliamentary Elections Act 2002*.

³¹ *Miller*, [34] and [35].

³² *Ibid* [262].

³³ *Ibid* [264].

³⁴ I am referring to the situation in which a court is considering the *lawfulness* of proposed Executive action; the position may be different where a court is considering merely what remedy to award. Eg, in *Bellinger v Bellinger* [2003] 2 AC 467 (HL) the court considered that the likelihood of Parliament remedying the incompatibility legislatively was a reason for issuing a declaration of incompatibility under s 4 of the *Human Rights Act*, rather than re-interpreting the incompatible legislation under s 3.

³⁵ Per Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 552.

³⁶ *Miller*, [34] and [35].

³⁷ The majority quoted and applied dicta from Lord Browne-Wilkinson in the *Fire Brigades Union* case that, ‘it was inappropriate for ministers to base their actions (or to invite the court to make any decision) on the basis of an anticipated repeal of a statutory provision as that would involve

This leaves us with four main arguments on the Government side. Two I characterise as broad-brush constitutional arguments, based on democratic reasoning, which might be thought to hold an obvious *prima facie* appeal to political constitutionalists; two are tightly legal-doctrinal.

III TWO BROAD-BRUSH DEMOCRATIC ARGUMENTS

A *The constitutional significance of the referendum*

The first argument concerns the constitutional, and potentially the *legal*, significance of the EU referendum. Many commentators, including this author,³⁸ thought that the referendum result *must* make some kind of difference to the permissibility of using the prerogative to trigger Article 50. The argument was that in the classic cases concerning clashes of prerogative and statute — *Fire Brigades Union*, *Laker Airways*³⁹ and *De Keyser's* — the Executive was using its prerogative powers simply to further its own policies, and in doing so overriding or evading the will of Parliament as expressed in legislation. But that was not the case here. The Government was giving effect to the result of a huge democratic exercise: the 2016 referendum. Moreover, the legal basis for the referendum had been provided in legislation recently passed by Parliament itself.⁴⁰

Commentary on *Miller* gives the impression that many contributors to the debate felt that the referendum should therefore have a bearing on the outcome,⁴¹ but that they often struggled to articulate exactly how it should figure as a *legal* argument. This was reflected in the way that Government counsel when arguing the case constantly referred to the referendum result — but appeared unclear as to its precise legal relevance.⁴² One commentator suggested that it figure as a broader constitutional argument, but not a strictly legal one.⁴³ Mark Elliott argued that:

A bald, prerogative-based constitutional power grab by the executive at the expense of Parliament is one thing. But the constitutional offensiveness of using prerogative power in the circumstances with which *Miller* was concerned cannot sensibly be evaluated without reference to the fact that such power would have been being deployed so as to implement the outcome of a referendum...⁴⁴

ministers (or the court) pre-empting Parliament's decision whether to enact that repeal' (Miller, [51]).

³⁸ Phillipson, above n 19, 1087.

³⁹ *Laker Airways v Department of Trade* [1977] QB 643.

⁴⁰ *European Union Referendum Act 2015*.

⁴¹ See R Ekins, 'Constitutional practice and principle in the article 50 litigation' (2007) 133(Jul) *Law Quarterly Review* 347, 348.

⁴² In the Supreme Court, the majority noted that Sir James Eadie QC for the Government adopted a suggestion from the bench that 'the 2015 Act and the subsequent referendum dispensed with' the requirement of legislation that would otherwise have been present, '*but he did not develop that argument*, in our view realistically' (*Miller*, [38], emphasis added).

⁴³ M Barcentewicz, 'What is the Government Really Arguing in the Article 50 Litigation?: A Response to Mark Elliott', *Policy Exchange's Judicial Power Project* (5 October 2016) <www.judicialpowerproject.org.uk/mikolaj-barcentewicz-what-is-the-government-really-arguing-in-the-article-50-litigation-a-response-to-mark-elliott/>.

⁴⁴ M Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle'

But Elliott does not go on to explain exactly how the referendum could figure in the legal evaluation of the case; and in fact his (and Richard Ekins's) key arguments for the Government side do not depend at all on the referendum result and would apply regardless of it.⁴⁵ Adam Tomkins similarly criticises the Divisional Court's failure to grapple with the referendum result as 'a stark omission',⁴⁶ but again makes no attempt to suggest what its precise legal relevance could be. Only Forsyth made the tentative suggestion that the 2015 Act authorising the referendum could be seen as Parliament having 'impliedly delegated the power' to make the withdrawal decision to the people. But he admitted that '[i]t would require a bold judge to adopt',⁴⁷ such a reading of the Act, given its complete silence on the legal consequences of a vote either way. The general political constitutionalist objection to such 'bold re-readings' of legislation by activist judges⁴⁸ — which Forsyth strongly shares — perhaps explains the rather tentative nature of this suggestion.

Overall, while it was generally agreed that the referendum result could not be treated as legally *binding*, given the failure of the 2015 Act to prescribe any consequences of the outcome of the vote, there appeared to be some unease with the idea of the courts finding it to be wholly *irrelevant*. And indeed the rather cursory treatment of the referendum by the Divisional Court⁴⁹ put an unfortunate complexion on that Court's quotation of Dicey that 'the judges know nothing of any "will of the people"',⁵⁰ it almost gave the impression that the judges were wilfully *ignoring* the referendum. Surely the fact that the result was not legally *binding* did not mean that it should be treated as legally *irrelevant*?

B *The second broad-brush argument: Parliament does not need the courts' intervention*

This second argument characterises *Miller* as being about whether Parliament should be *consulted* or have 'a say over' whether and when Article 50 is triggered — and then robustly responds that Parliament can have whatever role it wants in relation to this matter, without assistance from the courts. As Lord Reed put it in the Supreme Court, 'it is for Parliament, not the courts, to determine the nature and extent of its involvement'.⁵¹ Unlike the referendum argument, this *did* figure strongly in the dissenting judgments in *Miller* — and indeed Paul Daly has described the division of

(2017) 76(2) *Cambridge Law Journal* 257, 282.

⁴⁵ As discussed below at 325, 327-329.

⁴⁶ 'Brexit, Democracy, and the Rule of Law' on *Notes From North Britain* (5 November 2016) <www.notesfromnorthbritain.wordpress.com/2016/11/05/brexit-democracy-and-the-rule-of-law/>.

⁴⁷ C Forsyth, 'The High Court's *Miller* Judgment', *Policy Exchange's Judicial Power Project* (8 November 2016) <www.judicialpowerproject.org.uk/christopher-forsyth-the-high-courts-miller-judgment/>. Gordon, above n 27, 338 also refers to Parliament having 'passed power to the electorate to decide whether to remain or leave the EU', but I assume this refers to political, rather than legal power.

⁴⁸ See eg, the highly critical commentary by Forsyth (with Ekins) on the bold 'reading-down' of the statutory ministerial veto in *R (Evans) v Attorney General* [2015] UKSC 21; R Ekins and C Forsyth, *Judging the Public Interest: The Rule of Law vs the Rule of Judges* (Policy Exchange, 2015).

⁴⁹ In which it merely noted, in three short paragraphs that it was 'advisory': *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768, [2017] 1 All E.R. 158.

⁵⁰ The quote of course concludes with '... except as expressed in legislation': *ibid* [22].

⁵¹ *Miller*, [262].

opinion on this argument as a ‘fault-line’⁵² between reliance on ‘political accountability’ (emphasised by the dissenters, especially Lord Reed and Lord Carnwarth) and the ‘legal accountability’ (emphasised by the majority). This division is of course one common way of expressing the difference between legal and political constitutionalism.

Arguments in favour of relying on political accountability in *Miller* were advanced by several commentators. This author suggested that while ‘the Government should not take a step as momentous as triggering Art 50 without in some way seeking the approval and consent of the Commons’, this was ‘a general principle of constitutional morality, the operation of which should be worked out between the two democratic branches’;⁵³ there was no need for the courts to intervene. Timothy Endicott similarly noted that, ‘Parliament has [a]...central role in...Brexit, and it was already carrying it out...through debate and scrutiny in both Houses...and the confidence of the Commons in Theresa May’s Government’.⁵⁴ Mike Gordon pointed out that ‘Parliament has been heavily involved’ in the decision on Brexit, ‘most significantly’ by enacting the 2015 Referendum Act’ and concluded that, while ‘[i]t is absolutely right — indeed, vital — that Parliament should debate and scrutinise the government’s plans for the withdrawal negotiations’, that role did not require legislation.⁵⁵ Similarly Lord Reed, in dissent, noted that ‘there has been considerable Parliamentary scrutiny’ of the issue including, in particular, the motion of 7 December 2016, in which the Commons expressly ‘call[ed] on the Government to invoke Article 50 by 31 March 2017’.⁵⁶ In other words, if *Miller* was about whether MPs should ‘approve’ the triggering of Article 50, then two arguments would appear to follow: first *how* it did so was a matter for Parliament, not the courts; second the Commons had already *expressly approved* the invoking of Article 50, at least by the time the Supreme Court was hearing the case, in December 2016.

It is Lord Carnwarth’s dissent which makes the most of this argument, by drawing a parallel with the *Fire Brigades Union* case (‘*FBU*’).⁵⁷ In *FBU*, the House of Lords held 3-2 that use of the prerogative to introduce a new scheme for criminal injuries compensation was unlawful because it frustrated the intention of Parliament that the Minister decide *when* (but not *whether*) to introduce an inconsistent legislative scheme that had been passed but not yet brought into force. The dissenters in that case regarded the decision as ‘a most improper intrusion into a field which lies peculiarly within the province of Parliament’;⁵⁸ a criticism which Tomkins vigorously endorsed, portraying the decision as turning on a stark choice between legal and political forms of accountability and thus rival versions of constitutionalism.⁵⁹ Lord Carnwarth analyses *Miller* as likewise inviting the courts to intervene unnecessarily in the relationship between Parliament and Government, and on a hugely controversial political issue. And, like several academic commentators, he refers to the fact of Parliament having legislated for the referendum itself in order to rebut the notion that the Executive was ‘foisting on Parliament’ the irreversible triggering of Article 50.⁶⁰ Noting in particular the December

⁵² P Daly, ‘Brexit: Legal and Political Fault Lines’ (2017) *Public Law*, Nov Supp (Brexit Special Extra Issue), 73.

⁵³ Phillipson, above n 19, 1079.

⁵⁴ Endicott, above n 25, 23.

⁵⁵ Gordon, above n 27, 338, 339.

⁵⁶ *Miller*, [162].

⁵⁷ *R v Secretary of State for the Home Department Ex p Fire Brigades Union* [1995] 2 AC 513, 567, per Lord Mustill; Lord Carnwarth cites the author’s analysis of the case: Phillipson, above, n 19, 1080-82.

⁵⁸ Lord Keith, *ibid* 544, quoted by Lord Carnwarth in *Miller*, [250].

⁵⁹ A Tomkins *Public Law* (Oxford, 2003) 28-30.

⁶⁰ *Miller*, [272].

2016 motion, in which the Commons expressly called for the triggering of Art 50, he concludes that ‘the formality of legislation is unnecessary to enable Parliament to fulfil its ordinary responsibility for scrutinising the government’.⁶¹

Seen in this way, *Miller* would be just another example of what Ekins has critically identified as one ‘rationalisation’ for the expansion of judicial review, namely that ‘executive domination of Parliament warranted a more assertive and intrusive role on the part of courts’.⁶² In other words, *Miller* could be seen as the courts rushing in to tame a Brexit-obsessed Government because they did not *trust* Parliament to do the job properly — a view of the case that would certainly rally political constitutionalists against it. One commentator indeed went so far as to suggest that the case entailed ‘questioning Parliament’s capacity or willingness’ to perform its ordinary functions and the court ‘telling Parliament how they should be done’, something that would be contrary to the fundamental constitutional principle of Parliament’s exclusive cognisance over its own proceedings.⁶³

My view now is that all the above arguments miss something fundamental about the case. They rely, consciously or unconsciously, on a mischaracterisation of what *Miller* was actually about.

C The answer to both broad-brush arguments: *Miller* was a *vires* case

Discussions of *Miller*⁶⁴ and in particular much media reporting during, before and after the case⁶⁵ often misrepresented it, presenting it as being variously about whether the Government had to ‘consult’ MPs about the triggering of Article 50, or ‘seek Parliament’s approval’ for doing so. Such descriptions obscure the most fundamental and vital fact about *Miller*: that it was, at its simplest, a question of *vires* — of whether the Executive had the *legal power* to initiate withdrawal from the EU, given the claimed dramatic effect this would have on domestic law. I now think that it is impossible to get a clear picture of what was at stake in this case without understanding this fundamental point. Thus the claimants were not arguing that Parliament should ‘approve’ or ‘be consulted’ about the triggering of Article 50: neither such contention would be any business of the judges. They were arguing that the Government *lacked legal power* under the prerogative to commence withdrawal from the EU. If that submission was correct, then the only way for the Government to obtain that legal power was through fresh primary legislation. Thus the legal question in *Miller* was one of the most basic the courts must decide in any state in which government, like the people, is subject to law: does the government have the legal power to do what it proposes to do?

⁶¹ *Miller*, [255].

⁶² Ekins, above n 18, 3.

⁶³ As set out in Article 9 of the Bill of Rights 1689 (Sir Stephen Laws, ‘Questioning Parliament in the Courts?’, *Policy Exchange’s Judicial Power Project* (25 January 2017) <www.judicialpowerproject.org.uk/sir-stephen-laws-questioning-parliament-in-the-courts/>).

This is a fundamental mischaracterisation of *Miller*: the judgments did not ‘tell Parliament’ to do anything: they merely found the Executive currently lacked legal power to trigger Article 50. If every finding of *ultra vires* were to be interpreted as ‘telling Parliament to pass legislation’ to provide the legal basis found lacking, and hence as breaching Article 9, then the courts would be barred from enforcing even the most minimal version of the rule of law.

⁶⁴ Eg, Ewing at one point summarises *Miller* as laying down a ‘requirement that there should be parliamentary approval to trigger Article 50’ (Ewing, above n 8, 712). The rest of the article of course makes clear that the issue was legal basis not approval.

⁶⁵ See eg, Fraser Nelson, ‘Since Article 50 was triggered a no-deal Brexit has been the default’ *The Spectator* (online), 12 November 2017, <www.blogs.spectator.co.uk/2017/11/since-article-50-was-triggered-a-no-deal-brexit-has-been-the-default/>.

What is the significance of this for the arguments considered so far? It shows, first, that even under the most minimalist account of the rule of law, the question in *Miller* was properly one for judicial determination.⁶⁶ This was no case of judicial adventurism. It did not concern judicial review of the manner of *exercise* of the prerogative power but only of the ‘logically prior’ question of its *extent*.⁶⁷ whether its scope included the triggering of Article 50, given the well-established principle that the prerogative could not be used to alter domestic law or remove rights enjoyed in domestic law.

While this basic point about *Miller* is of course generally understood, its significance for the two ‘broad-brush’ arguments has not always been fully recognised. For if *ultra vires* is used as the lens through which to view the case then a key conclusion comes sharply into focus: neither of the two broad-brush arguments can go to the *specific legal issue* it raised. If the issue is whether the Government has the legal *power* to trigger Article 50, then the fact that Parliament can question, scrutinise, or even take control of the process becomes simply irrelevant. One cannot excuse an action that lacks a legal basis by arguing that Ministers will be accountable to Parliament for it. Acceptance of such a view would drive a coach and horses not only through the *ultra vires* principle, but also the deeper constitutional principle it instantiates: the rule of law. Thus the case concerned not the necessity for obtaining Parliament’s *approval* for the government policy of leaving the EU — something which is indeed merely ‘a general principle of constitutional morality’⁶⁸ — but the need for *legislation*, to render lawful what would otherwise be unlawful. This also reveals that the cautionary judicial adjuration cited by Lord Carnwarth — that parliamentary scrutiny, not judicial review, is the best way of ensuring that ‘the executive... performs in a way which Parliament finds appropriate’, because ‘it is the task of Parliament and the executive... not of the courts, to govern the country’⁶⁹ — was in fact irrelevant. The issue was not whether the executive was ‘performing appropriately’, but whether it was proposing to act *unlawfully*. Meanwhile the courts were being asked not to help ‘govern the country’ but to perform the quintessentially judicial task of elucidating the necessary legal basis for a crucially important action the Executive proposed to take.

The same reasoning also makes clear that the referendum result cannot go to the key legal issue in the case. The majority in *Miller* says simply:

Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation.⁷⁰

Similarly, Lord Hughes in dissent notes briefly that ‘[n]o-one suggests that the referendum by itself has the legal effect that a Government notice to leave the EU is made lawful’.⁷¹

This author made the early suggestion that the democratic mandate given by the referendum to the Executive meant that ‘the normative concern typically generated by the Executive’s use of prerogative powers’ to override, frustrate or evade Parliament’s intention as expressed in legislation was arguably ‘absent in this particular case’. And

⁶⁶ As nearly all critics of the case agreed: see eg, Tomkins, above n 28.

⁶⁷ *Bancoult (No.2)* [2008] UKHL 61; [2009] 1 A.C. 453, [143].

⁶⁸ Phillipson, above n 19, 1079.

⁶⁹ Per Lord Mustill in *Fire Brigades Union* (at 567) cited by Lord Carnwarth, *Miller*, [252].

⁷⁰ *Miller*, [121].

⁷¹ *Ibid* [275].

that the courts could therefore perhaps conclude that the normal prohibition against such use of the prerogative was ‘not applicable on this novel set of facts’.⁷² However I now regard this suggestion as one that, like others, failed fully to appreciate that the issue here was *lack of power*. Once this is understood, it becomes plain that the referendum result *couldn’t* affect the outcome. If the prerogative is unavailable then, quite simply, there is no power. The Government cannot magic a power out of thin air by saying, in effect: ‘*Ah, but there was a referendum*’.

Moreover, one can accept this conclusion without consigning the referendum result to legal *irrelevance*. While it cannot properly go to the *existence* of a power to withdraw from the EU, it could — at least in theory — go to a challenge to the *exercise* of that power.⁷³ The majority described as ‘a bold suggestion’ the notion that the *exercise* — as opposed to the applicability — of the treaty prerogative could be reviewable,⁷⁴ but it is possible to imagine extreme examples in which a court might contemplate it. For example, imagine that the ‘Remain’ side had won the referendum but the Government had decided to withdraw the UK from the EU anyway. It is at least possible that, in those extreme circumstances, an action based either on *Wednesbury* or even, conceivably, frustration of substantive legitimate expectations (generated by the Government’s pledge to implement the referendum result) might have succeeded. This provides at least a possible path away from the complete legal irrelevance of the referendum. But while it points to a *possible* legal role for the plebiscite, it is only a tentative and speculative one; and, importantly also, not one that could have applied in *Miller* itself. A more substantive answer seems called for.

D *Affording the referendum constitutional significance: a new convention?*

Miller — and the vitriolic reaction to it in some quarters — was worrying in that it revealed a dangerous gap to have opened up between the *legal* view of the referendum and the *popular* view of it. Not only did the courts find that the referendum was not relevant to the narrow issue they had to decide, it was also frequently described by lawyerly Remainers as ‘only advisory’ — a description which, taken literally, seemed to conceive of the referendum purely as a form of ‘advice’ to those who would take the *real* decision — the politicians.

The trouble is that this was emphatically *not* the popular or general perception of the referendum. As many have pointed out, the Government sent a leaflet, paid for by public funds, to every house in the country, which said:

The referendum on Thursday, 23rd June is your chance to decide if we should remain in or leave the European Union. ‘This is your decision. The Government will implement what you decide’.⁷⁵

This echoed what the then Foreign Secretary had said, when introducing the Referendum Bill into Parliament: ‘the decision about our [EU] membership should be taken by the

⁷² See also D R Wingfield, ‘The Brexit case: does the Constitution Have a Place for Democracy?’ (2016) 35(2) *University of Queensland Law Journal* 343, 348.

⁷³ See Daly, above n 52, at 84.

⁷⁴ *Miller*, [92].

⁷⁵ Available: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/517014/EU_referendum_leaflet_large_print.pdf>.

British people, not by...Government Ministers or parliamentarians'.⁷⁶ Thus *no-one* during the referendum campaign was saying that the whole exercise was really just a giant opinion poll — there to give politicians an idea of public opinion on the matter; but only in order to help *them* decide the matter.

Thus my contention is that some of the furious reaction to *Miller* revealed that a dangerous gap had opened up between the *popular* perception of who was deciding the issue of withdrawal (the people, through the referendum) and the elite, 'insider', legal view: that the real decision remained one for the institutions of government: either Parliament or the Executive. The gap was between the legal reality and the political reality. And it may have been partly that gap that fuelled the extraordinary explosion of rage that greeted the first *Miller* decision,⁷⁷ including repeated accusations by senior Conservative and UKIP politicians and large sections of the press that the judges were trying to block Brexit⁷⁸ and extraordinary levels of public opprobrium being heaped on Gina Miller, including numerous threats of serious violence.⁷⁹

As noted above, one possible response to this intuition of a dangerous gap is to argue that it could be closed with legal doctrine. However as discussed above, while many argued for the relevance of the referendum to the case, there was very little by way of concrete doctrinal suggestion as to what exactly such an argument would be. So the question then becomes, as Wingfield has put it, how the results of referendums can be afforded 'constitutional significance' even if they cannot be given strictly legal significance.⁸⁰ At this point one might ask: what is the usual way in which the UK constitution resolves gaps between legal doctrine and political reality?

The answer of course is: through constitutional conventions. As many commentators have pointed out, one of the key functions of conventions is precisely 'to bridge gaps between legal positions that may be no longer normatively acceptable and a compelling political reality'.⁸¹ Aileen McHarg has referred to this as the functions conventions have in softening the impact of hard-law norms, making them acceptable in a contemporary context through governing the manner of their exercise.⁸² As she points out, this softening function of conventions has long applied to the exercise of legislative power by Parliament itself. Thus it is by a long-standing convention that the legally unlimited power of the Westminster Parliament to legislate for the self-governing overseas Dominions and territories was restrained so that such legislation was not

⁷⁶ United Kingdom, *Hansard*, House of Commons, 9 June 2015, 1047-1056 (Philip Hammond) <www.gov.uk/government/speeches/a-simple-but-vital-piece-of-legislation-to-deliver-on-our-promise-to-give-the-british-people-the-final-say-on-our-eu-membership>.

⁷⁷ See also Emerton and Crawford, 'Parliament, the People and Interpreting the Law: *R (Miller) v Secretary of State for Exiting the European Union*' (2016) *University of Queensland Law Journal* 35(2) 331, 340.

⁷⁸ See G. Phillipson, 'Enemies of the people: MPs and press gang up on the constitution over High Court Brexit ruling' *The Conversation* (online) 4 November 2016 <www.theconversation.com/enemies-of-the-people-mps-and-press-gang-up-on-the-constitution-over-high-court-brexite-ruling-68241>.

⁷⁹ See eg, Lisa O'Carroll 'Gina Miller afraid to leave her home after threats of acid attacks' *The Guardian* (online) 9 August 2017 <<https://www.theguardian.com/politics/2017/aug/09/gina-miller-afraid-to-leave-her-home-after-threats-of-acid-attacks>>

⁸⁰ Above n 72, 347.

⁸¹ See eg, Elliott and Thomas, *Public Law* (2016, 3rd ed), 62. An obvious example is the convention whereby the Queen's prerogative powers are exercised on her behalf by Ministers.

⁸² A McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853.

imposed unasked for.⁸³ More recently, the Sewel Convention squared the legal reality of the unlimited sovereignty of the Westminster Parliament with the political imperative to grant Scotland a real and strong measure of devolution whereby Scotland controls her own affairs in the areas devolved without interference from Westminster.⁸⁴ Thus as Mike Gordon reminds us:

the entire justification for the doctrine of parliamentary sovereignty, and the legally unlimited legislative power which it allocates to the UK Parliament, is premised on the fact that this power is constitutionally limited, just not by law.⁸⁵

This paper therefore contends that if the UK is to continue using referendums — which seems likely⁸⁶ — it is time to consider whether a convention should now be recognised to the effect that parliament and government will abide by the results of referendums.⁸⁷ Detailed consideration of the case for such a convention, both normative and analytical, must await another day. For now it suffices to briefly consider whether the famous ‘Jennings test’ for the existence of conventions might be satisfied. That test, it will be recalled, requires first, the existence of ‘precedents’; second that the actors in the precedents believed that they were ‘bound by a rule’, and third, a good ‘reason for the rule’.⁸⁸ Plainly there are numerous *precedents*: in every referendum held in the UK in the post-war period, the result has been respected.⁸⁹ The *reason* for such a rule would be obvious: that the whole purpose of holding a referendum in the first place is to obtain a direct democratic mandate for a constitutional change so important that it is felt that mere legislation will not suffice.⁹⁰ Having held a referendum, it would then be unconscionable, as well as undemocratic,⁹¹ not to implement its results:⁹² doing so would likely also provoke a major political crisis. The arguments around whether the political actors involved in the above precedents considered themselves to be ‘bound by a rule’ are more complex and would require detailed consideration. For now, it may be observed only that it is plain that all political actors in the recent referendums *did* regard themselves as bound to abide by the result. This was made particularly clear in the aftermath of the EU referendum. It is well known that there was a strong majority of MPs in the Commons for ‘Remain’; however the voting record makes clear that nearly

⁸³ Halsbury’s Laws of England, (4th ed, 1974), VI, para. 1027; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, esp. at 723.

⁸⁴ For discussion of the Sewel issue in *Miller*, see Jo Murkens, ‘Mixed Messages in Bottles: the European Union, devolution, and the future of the constitution’ (2017) 80(4) *Modern Law Review* 685, 690–94.

⁸⁵ Gordon, above n 27, 337.

⁸⁶ On whether a separate convention might be needed to govern *when* referendums should be called: see eg, P Leyland, ‘Referendums, Popular Sovereignty and the Territorial Constitution’ in Richard Rawlings, Peter Leyland, and Alison Young (eds.), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, 2014), 145.

⁸⁷ Such a convention would of course be moot where the enabling legislation itself specified its legal consequences, as with the AV Referendum in 2011.

⁸⁸ Sir Ivor Jennings, *The Law and the Constitution* (5th ed, 1959), 136.

⁸⁹ Examples include: the 1973 referendum on continued membership of the then EEC, the devolution referendums in Northern Ireland (1998) Scotland (1997) and Wales (1997 and 2011); the Alternative Vote Referendum (2011), the Scottish Independence Referendum (2014) and the EU Referendum itself in 2016.

⁹⁰ See V Bogdanor, ‘Brexit, the Constitution and the Alternatives’ (2016) 27(3) *King’s Law Journal* 314.

⁹¹ See Wingfield, above n 72, 347.

⁹² Exceptions might need to develop over time to cover eg., a major change of circumstances, or findings of significant irregularity in the conduct of the referendum.

all MPs plainly regarded themselves as bound to implement the result of the referendum, even where they passionately disagreed with it.⁹³ They thus appeared to recognise a powerful norm binding on them.

It is suggested therefore that there is now a *prima facie* case for a constitutional convention that would bridge the gap *Miller* exposed between the legal and the popular view of the EU referendum: a convention that Parliament and Government should generally abide by the results of any official referendum.

D Conclusion on the broad-brush democratic arguments

The analysis above has sought to demonstrate that, while there were arguments used about *Miller* that had a political-constitutionalist cast, closer analysis reveals them as unable to bite on the central issue in the case. But a second related point is perhaps more important: those arguing for the Government side did not in the end rely on arguments stemming from either the referendum or Parliament's ability to control the Executive. As the next section will show, the crucial arguments deployed by the Government and its academic supporters when the case went to the Supreme Court concerned the construction of the ECA; and they logically entailed that the Government would have been legally free to withdraw from the EU at any time, *regardless* of the referendum.⁹⁴ They did not need even to rely on the notion that Parliament would repeal the ECA at the appropriate time: for under the arguments advanced, there would have been no need to repeal that statute, since it would simply become 'spent' upon withdrawal, in no longer having relevant EU law to bite on. That is one reason why I changed my own view of *Miller*: had there been a way of arguing it that directly tied the Government's freedom to use the prerogative to the referendum result, that might have rendered use of the prerogative acceptable in those particular circumstances. But as the next section will show, the key doctrinal arguments used in the end had nothing to do with the referendum.

IV DOCTRINAL ARGUMENT I: LIMIT THE CASE TO *DE KEYSER*'S

In his elegant analysis of the competing syllogisms advanced in the *Miller* case, Aroney notes how each side tried to frame the case as centring on a different legal principle.⁹⁵ As we have seen, the claimants argued that triggering Article 50 would lead inevitably to the destruction of at least some EU-law rights given effect in domestic law

⁹³ The December 2016 Motion approving the triggering of Article 50 discussed above was passed by 448 votes to 75; the *European Union (Notification of Withdrawal) Act 2017* passed its Second Reading in the Commons by 498 to 114 votes. MPs who voted against either made clear that they were doing so not because they were seeking to frustrate the result of the referendum, but rather because they did not believe the Government had set out satisfactory plans for the UK's 'divorce agreement' with the EU (particularly re the position of EU citizens living in the UK) or its future relationship with the block. Only a tiny handful, including the veteran Conservative Europhile, Ken Clarke, made clear that they would vote to block implementation of the referendum result, if possible.

⁹⁴ The only possible hindrance would have been the possibility of a judicial review challenging the *rationality* of a decision to withdraw: given the judicial view that decisions taken under the foreign affairs prerogative are non-justiciable in this respect (see above n 17), this possibility must be counted a remote one save perhaps in extreme circumstances (above, text to n 74).

⁹⁵ N Aroney, '*R (Miller) v Secretary of State for Exiting the European Union*: Three Competing Syllogisms' (2017) 80(4) *Modern Law Review* 685.

by statute, thus changing domestic law, contrary to the general principle enunciated in *Rayner*.⁹⁶ In contrast, the Government sought to frame the case as resting on the application of the *De Keyser's* principle: that the foreign affairs prerogative empowered the Government to withdraw from the EU, *unless* legislation had actively abrogated that power, expressly or impliedly.

The reason why the Government was so anxious to persuade the court that *De Keyser's* was the governing principle is clear. Had it been accepted that the applicable principle was, 'the prerogative to withdraw subsists unless Parliament can be shown to have deliberately abrogated it', then the Government would have won.⁹⁷ It had only to point to the fact that there was no provision in any statute purporting to regulate or restrict the decision to trigger Article 50,⁹⁸ an omission made more striking by the fact that Parliament *had* put restrictions — including, by 2011, 'referendum locks'⁹⁹ — on a long list of *other* things that the Government might vote for or do in the EU.¹⁰⁰

The significance of this point for present purposes is this: had the Government been right that *De Keyser's* was the relevant principle, then there *was* a possible political constitutionalist argument here. Finnis put it well by saying that the claimants were essentially trying to use the *courts* to impose a limit upon the use of Article 50 that Parliament had carefully refrained from imposing.¹⁰¹ Viewed that way, the case *could* be seen as illegitimately advancing judicial power over statute: the claimants were seeking to get the courts to, in effect, add a restriction upon the government that the relevant legislation had never contained.

The trouble with this argument is simply that *De Keyser's* was not the relevant principle. The claimants had never argued that Parliament had ousted the prerogative to withdraw from the EU by specific provision in the ECA or elsewhere.¹⁰² Plainly it had not. Their argument was *not* that any particular provision in legislation had replaced or excluded the prerogative. It was that the *general principle* of law set out in *Rayner* — that the prerogative cannot be used to remove rights, change domestic law or frustrate the intention of any statute — precluded use of the prerogative in these circumstances. Despite its best efforts to steer the case away from the *Rayner* principle and onto the safer territory of *De Keyser's*, the Government's lawyers had to confront this argument in the end. And this is where, drawing heavily on commentary by Mark Elliott and John Finnis, they came up with their most clever and subtle counter-argument: that of *conditionality and contingency*.

⁹⁶ Above n 12.

⁹⁷ Especially given judicial suggestions that Parliament needs to make its intention very clear in order to abrogate an existing prerogative: see eg, *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552.

⁹⁸ This included in particular the *European Union Amendment Act 2008*, which added the Lisbon Treaty, including Article 50, to the list of treaties to which the ECA gives effect.

⁹⁹ By virtue of sections 2, 3 and 6 of the *European Union Act 2011*.

¹⁰⁰ A point also made by Gordon, above n 27, 338.

¹⁰¹ J Finnis, *Brexit and the Balance of Our Constitution* (2016) Policy Exchange Website, <www.policyexchange.org.uk/judicial-power-project-john-finnis-on-brexit-and-the-balance-of-our-constitution/> 24.

¹⁰² The extraordinarily influential blog post setting out what became the core of the claimant's case, by Nick Barber, Jeff King and Tom Hickman (the latter subsequently instructed as junior counsel for Gina Miller) did not rely on the *De Keyser's* principle: 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role', *UK Constitutional Law Blog* (27 June 2016).

V DOCTRINAL ARGUMENT II: EU LAW RIGHTS AS CONDITIONAL AND CONTINGENT

As Elliott puts it: ‘The axiom that the prerogative cannot be used to change domestic law does not bite directly upon EU law if it is not, in the first place, domestic law’.¹⁰³ The core argument here was that the design of the ECA meant that it never guaranteed any particular set of EU-law rights at all, but only such rights as were, ‘from time to time’, available under EU law, as it applied to the UK. Hence EU law was said not to be domestic law or to give rise to domestic law rights because the statute giving effect to it, the ECA, was ‘ambulatory’: it did not itself enact the rights, but acted as a mere ‘conduit’ for the conveyance into domestic law of what remained a distinct body of treaty-based law. As such, the application of this body of law in the UK remained *conditional* upon the UK’s continued membership of the EU — and hence *contingent* on the continuing decision of the Executive not to use its prerogative powers to terminate that membership. Since the EU-law rights were only ever intended to have effect during the UK’s membership, withdrawal would neither frustrate the intention of Parliament nor remove ‘domestic rights’. Whether this argument was correct as a matter of statutory interpretation is an issue considered at length elsewhere.¹⁰⁴ The point for present purposes is not whether the argument is right or wrong; it is undoubtedly a cogent one that attracted considerable distinguished academic support as well as three of the eleven Supreme Court Justices.¹⁰⁵ Rather the question is how the argument looks, viewed through the lens of political constitutionalism.

The most important argument made here is that the argument is *neutral* as between legal and political constitutionalism. It is a technical doctrinal argument, revolving around contested interpretations of Parliament’s intention and, in particular, a rather conceptual disagreement about the nature of EU law as it takes effect in domestic law. This was not a case like *Evans*,¹⁰⁶ in which one side was seeking to apply legislation as drafted, and another was seeking drastically to ‘read it down’ by reference to common law constitutional rights or principles.

If anything, the Government argument could be seen as inviting the judges to assume a power to decide that there is, in effect, a second-class category of statutes and of statutory rights: those that, unlike, normal statutory rights, count as subordinate to the prerogative. (The argument would not render the ECA and 2002 Act (below) subordinate in a *formal* sense, but rather in the practical and vital sense that its *effect* is to render the rights to which those statutes give effect removable by the Executive, using the prerogative — unlike other statutory rights).¹⁰⁷ Such statutes are in *one* sense subordinate to the prerogative: they can be rendered ‘otiose’, or ‘spent’ through Executive action; hence the rights given effect by them exist only precariously, subject to Executive grace. As Emerton and Crawford put it, under this conception, EU-law entitlements are not

¹⁰³ Elliott, above n 44, 271.

¹⁰⁴ For critical analysis see Phillipson, above n 26; Paul Craig, ‘Miller, Structural Constitutional Review and the Limits of Prerogative Power’ (2017) *Public Law* (Brexit Special Issue) 48 and, in the same volume, Robert Craig, ‘A simple application of the frustration principle: prerogative, statute and Miller’ (2017) *Public Law* (Brexit Special Issue) 25; Tom Poole, ‘Devotion to Legalism: On the Brexit Case’ (2017) 80(4) *Modern Law Review* 696.

¹⁰⁵ Lord Reed, Lord Hughes and Lord Carnwarth.

¹⁰⁶ *R (Evans) v Attorney General* [2015] UKSC 21.

¹⁰⁷ Finnis’s attempt to suggest that there was a clear existing analogy with Double Taxation Treaties was subject to comprehensive critique showing the contrary: see esp. K Beal, ‘The Taxing Issues Arising in Miller’ *UK Constitutional Law Blog* (14 November 2016); J King and N Barber, ‘In Defence of Miller’, *UK Constitutional Law Blog* (22 November 2016). I have argued that his attempted analogy with extradition legislation is also unpersuasive: above n 26, 57–58.

rights ‘firmly rooted in the law of the land’ but rather ‘transitory privileges that come and go, depending upon how the executive decides to conduct its international relations’.¹⁰⁸ Given the hostility that some political constitutionalists have expressed towards the prerogative powers as lacking a democratic pedigree, compared to statute, one might have expected that in thus elevating Executive prerogative power over the continuing effect of these statutes, this argument might have made some political constitutionalists at least a little uneasy.¹⁰⁹

Of course its proponents would reply that they are *not* elevating prerogative over statute at all: their argument is precisely that Parliament *intended* to give effect to EU-law rights in a way that left them contingent upon a continued Executive decision to adhere to the EU treaties. But that argument in turn meets two difficulties. First, while there *is* a textual foundation for it in the particular ‘ambulatory’ design of the ECA, there is no direct textual evidence for it in the very different *European Parliamentary Elections Act 2002* — which sets out in the body of the statute specific rights to stand and vote for elections to the European Parliament. Hence in making the argument that this statute should also be read as granting only rights ‘conditional’ on the prerogative, proponents ‘read in’ that contingency. Here therefore, the *claimants* were relying on a more literal, textual reading of an Act of Parliament; their opponents on a parliamentary intention that was constructed without any direct textual support from the statutory language.¹¹⁰ This reverses the normal pattern of legal *v* political constitutionalist approaches to statutory interpretation.

The second difficulty with the argument is that it requires a court to reconcile this *de facto inferior* status of the ECA with the fact that Parliament had famously given that statute an *elevated* status above that of ordinary Acts of Parliament: elevated in that it could — and did — override and displace even the provisions of future Acts of Parliament as the well-known *Factortame* litigation demonstrated. The result of *Factortame (No 2)*¹¹¹ — the disapplication of the later *Merchant Shipping Act 1988* by the earlier ECA — was so remarkable that it led Sir William Wade to describe the outcome of the case as a technical ‘revolution’.¹¹² While this was doubtless an exaggeration, the rulings of the then House of Lords in *Factortame (No 1)*¹¹³ and *Factortame (No 2)* showed beyond doubt that the ECA, and the EU law it gives effect to, have an elevated constitutional status in UK law — and one that was bestowed by Parliament itself. Thus not only were the Government and its academic supporters arguing for (in effect) a second-class category of statutes, they were doing so in the face of Parliament’s clear intention to endow the most important of these statutes with an elevated status that was unprecedented.¹¹⁴

This feeds into the overall conclusion on the ‘conditionality’ argument. It may safely be described as ‘neutral’ as between legal and political constitutionalism because both it, and the rival claimant case, are genuine attempts to interpret and apply the intention of Parliament as expressed in the relevant legislation. But the three factors discussed above together suggest that, if anything, the Government’s argument was one

¹⁰⁸ Above n 77, 340.

¹⁰⁹ It did make one such commentator uneasy: Keith Ewing refers to the Government’s key argument on conditionality as a ‘rather unattractive back door argument’ ‘rightly rejected by the majority’: above n 8.

¹¹⁰ Hence I refer to this as the ‘non-textual argument’ and discuss it, above n 26, 63-66.

¹¹¹ *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 A.C. 603, applying s 2(4) ECA.

¹¹² Sir William Wade, ‘Sovereignty — Revolution or Evolution’ (1996) 112 *Law Quarterly Review* 568.

¹¹³ [1990] 2 AC 85.

¹¹⁴ As both *Miller* decisions noted: see below.

that should have little appeal to political constitutionalists. These were: the elevation of prerogative power over the continuing effect of particular statutes; the ‘read-in’ of conditionality into the *European Parliamentary Elections Act 2002*; and the incongruity of asserting that an exercise of the prerogative may lawfully negate the effect of a statute that Parliament had regarded as so important that it had protected it — unprecedentedly — from implied repeal. Seen in this light, the pro-Government argument begins to look concerned more with preserving *Executive* power than Parliament’s intent. This takes us nicely to our final point — concerning ‘constitutional statutes’.

VI *MILLER*: PUTTING THE ‘CONSTITUTIONAL’ STATUS OF STATUTES BACK IN THE HANDS OF PARLIAMENT

Both the Divisional Court and the Supreme Court were strongly influenced by the fact that Parliament had afforded the ECA a special status above that of ordinary legislation, such that it could override and displace even the provisions of *future* Acts of Parliament. In light of this, both courts reasoned that it was most unlikely Parliament had intended that the prerogative — a source of legal authority that ranks *below* Acts of Parliament — could be used to render the ECA a dead letter.¹¹⁵ In response, critics have argued that it is wrong to claim that *Parliament* can give an Act ‘constitutional status’ that sets aside the doctrine of implied repeal. This is said to be erroneous because contrary to certain well-known *obiter dicta* of Laws J (as he then was) in *Thoburn v Sunderland City Council*,¹¹⁶ that *only the common law* may bestow such status. In that case, the judge observed that Parliament:

cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal... The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty.¹¹⁷

Commentary written by David Feldman¹¹⁸ and Mark Elliott and Hayley Hooper¹¹⁹ therefore argued that the Divisional Court had ‘mis-state[d] the process by which a statute comes to be regarded as ‘constitutional’, an argument picked up by the Government’s case on appeal to the Supreme Court.¹²⁰

¹¹⁵ The Divisional Court put it as follows: ‘Since in enacting the ECA as a statute of major constitutional importance, Parliament has indicated it should be exempt from casual, implied repeal by Parliament itself, still less can it be thought to be likely that Parliament nonetheless intended that its legal effects could be removed by the Crown through the use of its prerogative powers’ (above n 49, [88]). Similarly, the Supreme Court commented that, ‘Ministers acting alone cannot cut off the source of EU law from the UK’ because: ‘the source in question was brought into existence by Parliament through primary legislation [the ECA], *which gave that source an overriding supremacy* in the hierarchy of domestic law sources’ (*Miller* [81], emphasis added).

¹¹⁶ [2002] EWHC 195 (Admin); [2003] QB 151.

¹¹⁷ *Ibid* [59].

¹¹⁸ D Feldman, ‘Brexit, the Royal Prerogative, and Parliamentary Sovereignty’ *UK Constitutional Law Blog* (8 November 2016).

¹¹⁹ ‘Critical reflections on the High Court’s judgment in *R (Miller) v Secretary of State for Exiting the European Union*’ *UK Constitutional Law Blog* (7 November 2016).

¹²⁰ Above n 29, appendix, para. 2.

I have set out elsewhere my detailed argument that *Thoburn* was clearly wrong in this specific respect.¹²¹ It is necessary for present purposes only to observe that the dicta above are impossible to square with both the plain words of section 2(4) of the ECA¹²² and the effect given to them by a unanimous House of Lords in *Factortame Ltd v Secretary of State (No 2)*,¹²³ which held that the requirement to ‘disapply’ the later *Merchant Shipping Act 1988* came directly from Parliament’s enacted intention, as expressed in s 2(4) of that Act. As Lord Bridge explained in *Factortame (no 1)*, that provision:

has precisely the same effect as if a section were incorporated in Part II of the Merchant Shipping Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable [EU law] rights of nationals of any Member State of the [EU].¹²⁴

For current purposes the key question is *not* which viewpoint is right as a matter of doctrine, but rather which elevates judicial power and which parliamentary power? The answer is obvious. The *Thoburn* approach privileges the role of courts: *only* the common law can elevate the status of a statute; Parliament is declared *unable* to do so. In contrast, the view of the courts in *Miller* is that *Parliament* can decide to give one of its statutes a special constitutional status — and did so with the 1972 Act.¹²⁵ Hence *Miller* elevated *parliamentary* power in this area, by putting legislative intent firmly centre stage; its critics would have continued to elevate *judicial* power. Regardless of whether *Miller* is doctrinally correct on this point, it clearly represents a modest step away from legal constitutionalism *towards* political constitutionalism.

VII CONCLUSION

Ekins, in his critical commentary on *Miller*, quotes Lord Reed’s warning in that case: ‘It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary’.¹²⁶ The concern of this article has been strongly to contest the notion that *Miller* amounted to the ‘legalisation of political issues’. It has argued that, given the case was concerned only with the extent and applicability of an admitted prerogative, and not the propriety of its exercise, the principle applied in *Miller* was one that is both core to the rule of law and a central means of enforcing parliament’s sovereignty: *ultra vires*. It has sought to demonstrate that the broader-brush democratic arguments that, for good reason drew political constitutionalist to the government’s side, could not in the end affect this basic legal point. Finally, it has been argued that in at least one clear respect — its treatment of the ECA as a ‘constitutional statute’ — *Miller* amounts to a modest turn away from legal towards political constitutionalism. This article has not therefore

¹²¹ Phillipson, above n 26, 87-92.

¹²² Section 2(4), by saying that any Act ‘to be passed’, that is, any *future* Act, must take effect ‘subject to’ the provisions of the 1972 Act that made EU law effective in UK law, suggested that the courts must allow EU law to prevail over subsequent Acts of Parliament, thus suspending the normal doctrine of implied repeal.

¹²³ [1991] 1 AC 603.

¹²⁴ [1990] 2 AC 85.

¹²⁵ For the avoidance of doubt, I do not suggest this means that courts are *unable* to bestow constitutional status, on a statute, merely that Parliament can too.

¹²⁶ *Miller*, [240]; quoted by Ekins, above n 41, 353.

found good reasons for why political constitutionalists should have supported the Government side in *Miller*.

This might explain, finally, a curiosity about the case: that the divide in the academic community along legal-political constitutional lines that this article has explored was emphatically *not* reflected in the views of the judges who heard the case. At first instance it was notable that, of the three-strong bench who found unanimously for the claimant, one was Sales LJ, who is well known as a leading advocate for judicial restraint. Similarly, in the Supreme Court, Lord Sumption, perhaps an even more outspoken advocate of such an approach, joined with the majority against the Government. If nothing else does, this should surely prompt some self-reflection amongst those political constitutionalists who rallied to the Government side in *Miller*. Why did the very judges who are normally such reliable allies fail to defend the political constitution in this case? This article has suggested the obvious answer: *Miller* never put it under threat. More than this: *Miller's* robust legal defence of parliamentary sovereignty and its determination to ensure that the sovereign Parliament was in the driving seat over the constitutionally critical issue of Brexit should be seen as a *vindication*, and not a threat to, the core values of the political constitution.

JUDICIAL ACTIVISM IN THE COURT OF JUSTICE OF THE EU

GUNNAR BECK*

I INTRODUCTION

The Court of Justice of the EU ('CJEU') is the most influential, the most powerful and the most widely studied regional court. Except for the Supreme Court of the United States, no other court has had a similarly profound effect on the development and political direction of its legal system — in the CJEU's case, the legal order of the European Union. This paper argues that the CJEU's extreme judicial activism is rooted in its ultra-flexible interpretative approach. The CJEU favours a purpose-based and gap-filling approach, which maximizes judicial discretion and, in cases of conflict, often prioritizes the purposes of EU integration over a more text-based interpretation, especially if the latter supports a less integrationist outcome. The CJEU's extreme judicial activism has been facilitated by an unusually permissive political environment.

The *Treaty on European Union* ('TEU') provides that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'.¹ In the name of preserving 'the rule of law' within the EU, the CJEU has used its powers to interpret the EU Treaties and EU legislation adopted under them to develop principles of a constitutional nature as part of the EU legal order. It has also established its own human rights jurisdiction and, as interpreter of the Treaties, has asserted the right to adjudicate on the limits of EU competences in opposition to the highest courts of the Member States. The CJEU's expansive interpretation of its own jurisdiction has, over time, resulted in a significant extension of the EU's powers at the expense of that of its Member States. The CJEU's expansive reading of its own jurisdiction has also stretched far beyond the ordinary meaning of many Treaty provisions. For this reason, the CJEU has often been accurately described as 'a motor of the integration process'.²

This article focuses on the methodology (or lack thereof) of the CJEU's legal argumentation across key areas of EU law. As will become clear, the CJEU's approach to judicial interpretation has been central to its transformation of EU law from treaty-based international law into a supra-national legal order which has made deep inroads into the legal systems and legal sovereignty of the EU Member States across many areas traditionally the sole domain of national law. The CJEU's integrationism has been favoured by a number of institutional and political features which have not been replicated in other treaty-based international legal orders and thus needs to be explained, at least in outline. This part of the discussion will be brief but revisited where relevant in the main body of the article.

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¹ Art. 19.

² See e.g. Patrick Neill, 'The European Court of Justice: a case study in judicial activism' (London: European Policy Forum), 1995; Trevor Hartley, 'The European Court, judicial objectivity, and the constitution of the European Union' (1996) 112 LQR 95.

A *The Near-Unassailable Status of CJEU judgments*

The EU Treaties empower the CJEU to issue authoritative decisions on all aspects involving the interpretation of EU law. Once the CJEU has interpreted an EU Treaty or legislative provision, its interpretation of the written law cannot be challenged; it effectively replaces the apparent meaning of the underlying written law, until the CJEU changes its mind in a future case. The only manner in which the treaty signatories — i.e. the EU Member States — can overrule the Court is by unanimous treaty amendment. Since its foundation, the EU Treaties have been subject to major revisions several times, but never with the intention or effect of overruling a CJEU judgment. Because of the unanimity requirement, Treaty changes are extremely difficult to agree, and practically impossible in the case of judgments which are opposed by some Member States but which typically also suit others. The CJEU, as a consequence, operates in a political environment which is extremely permissive and which vis-à-vis the Member States places the Court in a much more powerful position than that of national courts, including supreme courts in relation to national governments. Typically, national governments are able to overrule judicial interpretations by simple super parliamentary majorities or, over a longer time frame, by influencing the composition of supreme courts. To do anything at all equivalent in the EU, all 28 Member States must be of the same mind.

B *The asymmetrical right to review national law but not EU Law*

The CJEU is not an appeal court in the manner of national supreme courts. Access to CJEU is either by direct access or by reference from a national court. There lies no right to appeal against CJEU decisions, whether by direct action (Article 263 *Treaty on the Functioning of the European Union* (TFEU)) or the preliminary reference procedure (Article 267 TFEU). The CJEU has claimed sole jurisdiction to review the legality of EU legal acts. Direct access to the CJEU is largely confined to the EU institutions and EU Member States. Individuals generally have no direct standing before the CJEU.

However, in accordance with the doctrine of direct effect, individuals may start proceedings against a Member State for non-compliance with EU law. Under Article 267 TFEU national courts may, and the highest national courts must, refer a question of the interpretation or application of EU law to the CJEU unless there is CJEU case law on the point or the answer is patently obvious. The CJEU will issue a preliminary ruling on the point, to be applied to the facts of the case by the referring national court. In contrast, individuals cannot generally start a direct action with a view to annulling EU law except in certain narrowly defined circumstances, e.g. where the national court deems the review of the underlying EU legislation necessary to the review of national legislation or with reference to overriding requirements of national constitutional law. For this reason the validity of EU law can generally only be challenged by Member States which, in the majority of cases, agreed to it under the EU's legislative procedure in the first place. Where a Member State was outvoted in the relevant EU legislative chamber, the Council of Ministers, the situation is doubly unsatisfactory because the voters are subject to laws which not even their government or parliament agreed to. From the ordinary EU citizen's point of view EU law of general application cannot generally be judicially challenged. Nor does EU law necessarily mean what the written text says it means; it means what the CJEU resolves it should mean and citizens have no general right to challenge it.

At the same time, national courts regularly refer for review national law for its compliance with EU law. The CJEU's preliminary ruling is binding, and the national

court is obliged to set aside national law in cases of conflict. In contrast, the CJEU has laid down a very restrictive interpretation of the standing requirements of private parties which effectively denies them the right to review EU legislative acts. The CJEU has thus created an asymmetrical system of EU judicial review which encourages the review of national law on grounds of possible non-compliance of EU law as interpreted by the CJEU and discourages the judicial review of EU law.

C The Establishment of a European Court System and the Doctrine of De Facto Precedent Based on the Supremacy of EU Law

In common with civil law systems EU law does not formally accept the binding force of judicial precedents in accordance with the hierarchy of courts and the principle of *ratio decidendi*. Preliminary references by national courts and most direct actions – except competition and sanctions cases – go directly to the CJEU, against whose decisions there lies no right to appeal. Actions reserved for the CJEU include all quasi-constitutional cases and in particular all cases involving the allocation of powers between Member States and the EU. All CJEU judgments are binding on all national courts. This includes preliminary rulings in ongoing national litigations and, thereafter, in all future national legislation, as well as any CJEU ruling on the interpretation of EU law in any other type of action before it.

Although the CJEU's preliminary reference procedure depends on the cooperation of national courts which cannot be forced to refer a case and which cannot be directly sanctioned for not applying a CJEU preliminary ruling, voluntary co-operation amongst national courts has been high. The CJEU thus effectively created an EU-wide judicial system where national courts are both obliged to follow EU and national law and, in the case of conflict, favour EU over national law. National courts thereby became agents of the CJEU, ensuring that EU law as it is interpreted by the CJEU is applied in all Member States.

At no point and in no Member State has there been sustained judicial defiance or non-acceptance of CJEU rulings. On the contrary, national courts throughout the EU have generally accepted CJEU case law no matter how activist and incompatible with a literal interpretation of the EU Treaties or how contrary to settled public international law. The case law accepted by national courts includes the CJEU doctrines of the supremacy of EU law in all matters which the CJEU deems to be within the scope of EU law broadly conceived, and of the direct effect (i.e. enforceability in national courts) of EU law. Neither doctrine, however, has any clear basis in either the EU Treaties or the general principles of treaty interpretation. In this fashion national courts became collaborators in the CJEU's gradual establishment of a quasi-constitutional framework for the EU and in the enforcement not merely of EU law but of the quasi-constitutional supremacy of EU law.

D The CJEU's Claim to Kompetenz-Kompetenz

Overall, there has been a very high degree of acceptance by national authorities — political as well as judicial — of the binding force and unchallengeable status of CJEU case law and of the purely judge-made doctrines of the supremacy and direct effect of EU law. This is all the more remarkable since the CJEU's transformation of the EU law into a quasi-constitutional legal order runs counter both to general principles of international law and the generally accepted principles of treaty interpretation codified in Articles 31 and 32 Vienna Convention on the Laws of Treaties.

Even more remarkably, national governments generally accepted the CJEU's claim to *Kompetenz-Kompetenz*; that is, the power to define the limits of the EU's competences. General acquiescence in the CJEU's self-transformation from an international tribunal into a 'supreme court' competent to rule on the allocation of powers between the EU and its Member States is subject to one theoretical qualification. In some Member States, notably Germany, the national constitutional courts have challenged the CJEU's claim to *Kompetenz-Kompetenz* and reserved a jurisdiction of last resort over EU law. The national judicial challenge to the CJEU's claim to be the ultimate arbiter over the allocation of powers between the EU and its Member States has been developed most fully in the case law of the Bundesverfassungsgericht ('BVerfG') over a forty-year period from the *Solange I* decision³ to its 2009 Lisbon Judgment.⁴

In the Lisbon Judgement the BVerfG affirmed that it would review EU acts on two grounds: (i) to ensure the EU did not exceed the powers conferred on it under the EU Treaties (*ultra vires review*), and (ii) to ensure that EU law did not encroach upon the core identity of the German Constitution which reserved the core powers in the areas of social, cultural and taxation policy for the national legislature (*identify review*). After a forty-year stand-off following the *Solange I* ruling, the BVerfG's resolve to disapply *ultra vires* or unconstitutional EU law was finally put to the test in the *Gauweiler* litigation. In 2014 the BVerfG published an initial opinion which stated that the European Central Bank had exceeded its mandate when the Bank announced an unlimited bond-buying programme to prevent the imminent collapse of the euro currency union.⁵ In 2015 the CJEU dismissed the BVerfG's analysis and declared the programme lawful although it ran counter to the wording and purpose of valid EU law and clear economic evidence.⁶ When the case returned to the BVerfG, the German judges lacked the 'courage to follow their own reason', revising their initial opinion and submitting like a lamb.⁷

The BVerfG did not formally abandon its claim to *Kompetenz-Kompetenz*. Nevertheless, the *Gauweiler* litigation in all but theory resolved the issue in favour of the CJEU. From its inception, the CJEU had attached little weight to periodic disquiet and doctrinal reservations by national judiciaries trying to assert national constitutional limits on the transfer of sovereign rights to the supra-national EU institutions. The BVerfG's *volte face* in the *Gauweiler* litigation validates the political acumen animating the CJEU's assertive approach and consolidated the CJEU's position as the final arbiter over the allocation of powers between the EU and its Member States.

II TREATY INTERPRETATION

The academic literature distinguishes between courts whose interpretative approach is primarily text based and those which more liberally draw on other criteria, especially teleological and policy criteria.⁸ Courts of the former type seek to minimise

³ *Solange I* — *Internationale Handelsgesellschaft von Einfuhr — und Vorratsstelle für Getreide und Futtermittel*, Decision of 29 May 1974, BVerfGE 37, 271.

⁴ Judgment of 30 June 2009, Bundesverfassungsgericht, BVerfG, 2 BvE 2/08.

⁵ BVerfG, Beschluss des Zweiten Senats vom 17. Dezember 2013 — 2 BvR 1390/12.

⁶ Case C-62/14.

⁷ BVerfG, Judgment of the Second Senate of 21 June 2016 — 2 BvR 2728/13.

⁸ See e.g. Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) *British Yearbook of International Law* 26, 48; George Letsas

judicial discretion and confine it to cases where the text itself is ambiguous. Courts of the latter type expand judicial discretion beyond the sphere of textual uncertainty and seek to interpret legal instruments with reference both to the text and its underlying objects and purposes, which may be construed narrowly or more widely, and not necessarily by giving primacy to the former. Courts of the latter type are therefore also referred to as 'activist'.

The general rules of treaty interpretation are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ('VCLT').⁹ The VCLT rules apply, in principle, to all international courts or tribunals, irrespective of their institutional set-up, subject matter, or geographical scope. Articles 31 and 32 offer two main principles of interpretation. The first general rule (Article 31) is that treaties must be interpreted in 'good faith', in accordance with the 'ordinary meaning' of the 'terms' or text of the treaty, in their 'context', and in light of the treaty's 'object and purpose'. The VCLT's second supplementary principle (Article 32) states that the 'preparatory work of the treaty and the circumstances of its conclusion' are only secondary sources of interpretation, and are to be used to confirm a meaning established under the first principle or in case the meaning of the treaty remains unclear or leads to an absurd result.

In the academic literature on the subject and in judicial practice, broadly three main schools of thought of treaty interpretation may be distinguished.¹⁰ These are known as the '*intention of the parties*' (or the 'founding fathers' school);¹¹ the '*textual*' (or 'ordinary meaning of the words') school;¹² and the '*teleological*' (or 'aims and objectives') school.¹³

'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law*, 509–41; Patrick Neill, *The European Court of Justice: a case study in judicial activism* (European Policy Forum, 1995); Trevor Hartley, 'The European Court, judicial objectivity, and the constitution of the European Union' (1996) 112 *Law Quarterly Review* 95.

⁹ *Vienna Convention on the Law of Treaties* signed 23 May 1969, 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980.

¹⁰ For discussions of the various schools of treaty interpretation, see for instance, Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2nd ed, 2007); Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2nd ed, 2008); David J Bederman, Christopher J Borgen, and David A Martin, *International Law: A Handbook for Judges*, (American Society of International Law, 2003); A D McNair, *The Law of Treaties* (Clarendon Press, 2nd ed, 1961); Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2nd ed, 1984); R P Schaffer, 'Current Trends in Treaty Interpretation and the South African Approach' (1981) 7 *Australian Yearbook of International Law* 129, 130.

¹¹ Few academic and judicial commentators would disagree that the judicial task is to give effect to the intention of the parties. However, there is no agreement as to the criteria for establishing intention: a tribunal's dominant hermeneutic can be text, party intent, or objective. In that sense the intention-based approach disguises rather than settles underlying disagreement about the correct approach to treaty interpretation.

¹² The textualist approach maintains that the best and most objective expression of intent can be found in the treaty text itself. See for instance Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *British Yearbook of International Law* 1, 204–205; Alexander P Fachiri, 'Interpretation of Treaties' (1929) *American Journal of International Law* 23.4, 745–52; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008); Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) *European Journal of International Law* 14.3, 529–568.

¹³ The teleological approach focusses not so much on the raw text of the treaty, but on the underlying objectives these drafters were attempting to achieve. For examples see e.g. Hersch Lauterpacht,

In judicial practice, the elements in each of these schools are not necessarily exclusive of one another, and theories of treaty interpretation can be and are constructed and compounded from all three.¹⁴ Neither the academic literature nor the text of the VCLT settle which approach is to prevail in which sets of circumstances.

It has been suggested that the VCLT envisages treaty interpretation ‘as a holistic, non-hierarchical exercise’, which involves the ‘summing up of text, context, and purpose’, ‘albeit one that starts with the text of the treaty’.¹⁵ This view seems questionable on the grounds that, although not expressly stating that the ordinary meaning of the terms of the text should always prevail over its purpose and object, Article 31 clearly states that treaties must be interpreted in ‘good faith’ and the treaty text must be given its ‘ordinary meaning’. This implies that it is only when that meaning is ambiguous or ‘manifestly absurd or unreasonable’ (Article 32) that contextual or teleological criteria may prevail over the text. It is thus only for a good reason—i.e. textual ambiguity, vagueness or absurdity—that the ordinary meaning of a treaty provision may be displaced by an interpretation based on its context or underlying purpose. Article 32 further suggests that in determining the ordinary meaning of the text, courts may adopt an historical approach by looking at the preparatory works and circumstances leading to the conclusion of the treaty.

Apparent textual ambiguities and the lack of doctrinal guidance in the literature concerning the application of Articles 31 and 32 have resulted in considerable divergence between international tribunals in the practical application of the VCLT rules, and it is often an open question whether, on any particular interpretative question, a tribunal will rely primarily on: (a) the text of the treaty; (b) the intent of the parties to the treaty; or (c) the underlying objective that the treaty seeks to attain.¹⁶

‘Teleological’ courts tend to take an evolutionary approach to treaty interpretation in that they view legal instruments as ‘living instruments’ whose meaning is not tied to the original and historical understanding of textual terms at the time of their conclusion nor to the subjective intention of the parties as may be deduced from the preparatory works. By contrast, tribunals favouring the textual school are more likely to regard themselves as agents giving effect to the intention of the parties, in particular as revealed by the text or the historical documents surrounding its conclusion. Teleological courts, on the other hand, are activist and gap-filling beyond the rules provided in the treaty. They are more likely to regard themselves as ‘self-confident agents’ operating largely independently of the parties that made the treaty and established the tribunal.¹⁷ International tribunals associated with the textual approach are the WTO’s Appellate

‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) *British Yearbook of International Law* 26, 48; George Letsas ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) *European Journal of International Law* 21.3, 509–41.

¹⁴ Gerald Fitzmaurice, ‘The Law and Procedures of the International Court of Justice: Treaty Interpretation and Certain Other Points’ (1951) 28 *British Yearbook of International Law* 1.

¹⁵ Georges Abi-Saab, ‘The Appellate Body and Treaty Interpretation’ in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010), 99–109.

¹⁶ J H H Weiler, ‘The Interpretation of Treaties — a Re-examination’ (2010) *European Journal of International Law*, 21.3, 507; Joost Pauwelyn and Manfred Elsig, ‘The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals’ (2010) *European Journal of International Law*, 21.3, 451–2.

¹⁷ Pauwelyn and Elsig, above n 16, 455.

Body¹⁸ or the International Court of Justice (ICJ). Prime examples of ‘activist’ international tribunals are the European Court of Human Rights¹⁹ and the CJEU.²⁰

III THE COURT OF JUSTICE’S APPROACH

In *Merck v Hauptzollamt Hamburg-Jonas*,²¹ the CJEU summarised its interpretative approach as follows:

... in interpreting a provision of [Union] law it is necessary to consider not only its wording, but also the context in which it occurs and the objects of the rules of which it is part.

At first sight, this statement appears to echo the text of Article 31 VCLT.²² The CJEU’s approach to legal interpretation also resembles that of other national constitutional and international courts in that it appears to apply many of the same techniques and arguments.²³ In addition, the CJEU refers to specific provisions or text passages more frequently than any other interpretative consideration, except its own previous decisions.²⁴ And finally, the CJEU liberally cites its own previous decisions and does so at least as frequently as other higher courts.²⁵ However, there are important features of the CJEU’s approach which are not apparent from its subtle reformulation of Article 31 VCLT. Eight features, in particular, bear special emphasis.

First, the EU is not a signatory to the VCLT although its Member States are. Since the VCLT applies to all treaties entered into by its signatory states, the CJEU should follow the VCLT’s interpretative rules. However, the CJEU does not regard itself as bound by the VCLT and does not refer to the VCLT in its judgments despite the fact that it professes to follow the general principles of international law.

Second, although the CJEU frequently refers to the words used in the legal instrument it interprets, this in itself establishes little. The CJEU does so in a perfunctory manner and without extensive textual analysis. Crucially, the CJEU’s respect for the wording of provisions is subject to a critical proviso. Compared to many other courts, it

¹⁸ See e.g. Abi-Saab, above n 15, 106.

¹⁹ See e.g. V Tzevelekos, ‘The Use of Article 31(3)(c) of the VCLT in the Case-law of the ECtHR: an Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration’ (2010) *Michigan Journal of International Law* 31, 621–690; Malgosia Fitzmaurice, ‘Interpretation of Human Rights Treaties’ in Dinah Shelton (ed.), *The Oxford Handbook of IHL* (Oxford University Press, 2013) 739.

²⁰ See for instance Koen Lenaerts ‘Interpretation and the Court of Justice: A Basis for Comparative Reflection’ (2007) *The International Lawyer*, 41.4, 1011–32.

²¹ *Merck v Hauptzollamt Hamburg-Jonas* (Case C-292/82) [1983], [12].

²² As will be shown, some commentators have rightly concluded that the Court follows instead a ‘meta-teleological’ approach. See, for instance, V Moreno-Lax, ‘Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law’ in DJ Cantor and J-F Durieux (eds.), *Refuge from Inhumanity?* (Brill, 2014), 295–341.

²³ Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2013), 287–233.

²⁴ In 2011, the Court referred to particular provisions or their wording in nearly 97% of its decisions, compared to 74% where it cites purposive arguments. Ibid 286.

²⁵ Ibid 234–277.

is relatively more willing to give priority to teleological criteria over linguistic criteria in cases where the former enables an integrationist outcome, or supports an otherwise politically convenient solution, and the literal reading does not.²⁶

Third, the CJEU rarely, if ever, uses historical arguments.²⁷

Fourth, the CJEU relies liberally on meta-teleological criteria and not merely, as it suggests in *Merck*, teleological considerations²⁸ which refer to the explicit ‘objects of the rules of which [a legal provision] forms part’.²⁹ Meta-teleology as used here denotes the CJEU’s tendency to rely on a small number of recurring abstract ‘umbrella’ purposes or principles which are judge-made rather than treaty-based, and generally favour further EU integration. The CJEU’s approach is meta-teleological despite the fact that it rarely expressly refers to the ‘ever closer union’ objective and only somewhat more frequently to the ‘spirit of the Treaties’.³⁰ In important cases, however, the idea of ever further integration is almost always implicit, as it is inseparable from the principles of the uniform application of Union law as well as the effectiveness of Union law.³¹

Fifth, any CJEU decision may effectively become a precedent.³² Because many important cases were decided on meta-teleological considerations, understood to include those principles which favour an expansive interpretation of the scope of EU law and of the competences of the EU institutions, the body of precedents itself acquires a *communautaire* — or pro-Union — flavour. The importance of *de facto* precedents in the CJEU’s argumentation is borne out by the fact that there is hardly any case in which it does not refer to at least one previous decision. In both 1999 and 2011 there were more cases in which it cited case law than any classical interpretative argument.³³ In referring back to its own case law, the CJEU thus implicitly also relies on meta-teleological considerations. In this way precedents solidify and reinforce the CJEU’s *communautaire* leaning. Moreover, the appeal to previous decisions enhances judicial credibility in the sense it suggests judicial objectivity and creates the impression that the court did not exercise a choice but instead reached its decision subject to the constraints of legal consistency and certainty. The appeal to precedent lends later decisions only the *aura* of legal objectivity, simply because in analysing a case not every relevant previous case is excavated and subjected to legal analysis.³⁴ The previous decision is taken as authoritative when all too often it was a judicial choice based on a far from impartial interpretative approach skewed in favour of integrationist outcomes.

Sixth, as discussed earlier, the CJEU operates in an extremely permissive political and judicial environment. National courts, without much demur, have accepted the

²⁶ Ibid 280-317.

²⁷ Ibid 217-219.

²⁸ For an elaboration on the ‘meta-teleological’ approach followed by the Court, with particular focus on asylum cases, see Moreno-Lax, above n 23, 295-341 (and references therein).

²⁹ Case C-292/82 *Merck v Hauptzollamt Hamburg-Jonas*, [12]. See e.g. Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Routledge, 2016), 42.

³⁰ Beck, above n 23, 319-322; Vaughne Miller, ‘Ever Closer Union’ (House of Commons Library, Briefing Paper 07230, 16 November 2015).

³¹ Beck, above n 23, 320-321.

³² Whether it does will depend on whether the CJEU treats it as such. The same, in principle, applies to all precedents anywhere. The CJEU, however, displays a much greater willingness than other courts simply to ignore and disregard inconvenient previous decisions.

³³ Beck, above n 23, 290-91.

³⁴ Ibid 245-249.

CJEU's reading of the EU Treaties and legislation as authoritative. The CJEU's decision-making, in turn, builds not on the treaty text itself but on meta-teleology and its own body of interpretative decisions.³⁵ The meaning of the Treaties, although not their wording, invariably reflects (and in this way also evolves with) ongoing views of the CJEU's judges. Over time the Treaties in this manner acquired a distinctly more integrationist flavour than their wording suggests. In circumstances where CJEU judgments can be overruled only by the CJEU itself or by unanimous treaty amendment by the Member States, general acceptance throughout the EU of the CJEU's activist approach to legal interpretations effectively means that the CJEU acquires a de facto power of amending and extending the EU's quasi-constitution, which (to further compound matters) is itself essentially a creation of the CJEU's daring early decisions on supremacy, direct effect and the relationship between EU and national law.

Seventh, in contrast to courts which apply the VCLT in good faith, the CJEU does not accept a hierarchy amongst the VCLT's literal, purposive and other criteria.³⁶ The CJEU does not attach a consistent weight to specific criteria. It presents its conclusion as the cumulative result of the variable application of all criteria. The CJEU's approach to legal reasoning may therefore be described as a cumulative, variable or ultra-flexible approach.³⁷

Finally, the CJEU's variable or cumulative approach, combined with its meta-teleological dimension, gives its decision-making a distinctive pro-Union *communautaire* tendency: a predisposition, in other words, to resolve legal uncertainty in favour of further integration.

The CJEU's *communautaire* predisposition tends to be irrelevant in most run-of-the-mill cases, which concern the application of more or less clear, detailed and technical provisions. Examples of these are mostly agriculture, VAT, customs union, and tariff cases. These fields seldom involve issues central to the Union's interests, and as such it is rare for the CJEU to reach a conclusion based solely or primarily on teleological criteria at odds with a literal reading. However, its pro-Union default position becomes a crucial and often decisive factor in cases involving major issues of principle or the allocation of powers between the EU and Member States. In 'constitutional' cases its *communautaire* tendency inclines the CJEU to resolve legal uncertainty in favour of meta-teleological objectives, especially the 'ever closer union' objective which is implicit in many of its most influential decisions. The CJEU in such cases may disregard the *lex specialis* principle and override a more or less specific rule where that rule suggests a less integrationist outcome, in favour of a meta-teleological reading based not on the 'objects of the rules of which [the rule] forms part',³⁸ but the general aspirations

³⁵ Ibid 317-319.

³⁶ Ibid 280-293, 316-317; K P E Lasok and Timothy Millett, *Judicial Control in the EU* (Richmond Law & Tax Ltd, 2004), 375-391.

³⁷ There are different understandings of the term 'cumulative approach'. Here it means that the CJEU presents its decisions in terms of the cumulative weight of literal, systemic, teleological and, often, meta-teleological considerations, with no specific weight attached to each criterion across all or most cases. For this reason, the author also refers to this approach as 'variable' or 'ultra-flexible'. See further Beck, above n 23, 280-293; Cf. V Moreno-Lax, 'Systematising Systemic Integration: 'War Refugees', Regime Relations, and a Proposal for a Cumulative Approach to International Commitments' (2014) 12 *Journal of International Criminal Justice* 907-929, analysing the interpretative methodology of the CJEU in Case C-285/12 *Diakité* and related case law.

³⁸ Case C-292/82 *Merck v Hauptzollamt Hamburg-Jonas*, [12].

of the Union Treaties.³⁹ The following are amongst the most important fields where the CJEU's pro-Union interpretative stance is operational and has had a profound pro-integrationist effect.

IV THE 'GREAT' TRANSFORMATIVE CASES

In its early quasi-constitutional cases from *van Gend*,⁴⁰ *Costa*,⁴¹ the *Internationale Handelsgesellschaft*,⁴² *Nold*,⁴³ and through to *Francovich*,⁴⁴ the CJEU was presented with issues to which the Treaty provided no explicit answer. In each of these cases, it reached an integrationist outcome without textual support, in defiance of established public international law, though not necessarily openly in opposition to the text.⁴⁵ In these cases, the CJEU filled the 'gaps' left by the signatory Member States with meta-teleology. 'Gap-filling' and the readiness to adopt a more teleological rather than textual approach are the key features of an activist court.

Crucially, since courts do not approach new cases *de novo* but in the light of their own previous decisions – teleological and gap-filling decisions – especially where they are relevant to the legal order as a whole, this fact tends to move the judicial decision-making process further down the same activist road. This phenomenon characterises the evolution of EU law. The principles established in the CJEU's early 'constitutional' cases quickly became part of the foundation of EU law and have been cited or simply applied in many subsequent key cases where they have had the effect of tilting the balance in favour of an integrationist outcome. With each subsequent *communautaire*

³⁹ At the same time, it should be added, the Court's *communautaire* predisposition is just that, a dominant tendency, not an inevitable conclusion. The Court of Justice is, in fact, a politically most astute court. Where Member States' political or budgetary sensitivities are engaged, the Court frequently adopts a compromise solution which may involve deferring to the Member States concerned, either on the facts or in law, or more commonly with reference to the flexible proportionality principle, which involves minimal constraints for future decisions and leaves the Court's future discretion largely untouched (Beck, above n 23, 404-409).

⁴⁰ Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

⁴¹ Case C-6/64 *Flaminio Costa v ENEL*.

⁴² Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel*.

⁴³ Case C-4/73 *J Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft*.

⁴⁴ Case C-6/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*. In *Costa v ENEL* the Court of Justice justified the supremacy of EU over national law in terms of a meta-teleological reading of the Treaty (the aspirational grand meta-objective of 'ever closer union') which, ultimately, can be used to justify any integrationist conclusion provided Member States will politically accept it. In the *Internationale Handelsgesellschaft* case the Court reiterated and extended its conclusion by additional reference to the principle of the uniform application of EU law, which it uses whenever the Treaties themselves provide inadequate textual support or are silent. And in *Francovich* the Court imposed liability in damages on Member States for breaches of Union law, esp. in implementation cases, again without textual basis and by reference to the principles of effectiveness and the uniform application of Union law.

⁴⁵ The CJEU brushed aside such counter-arguments with the argument that the EU legal order is *sui generis* — which may be plausible but has no express treaty basis.

decision, the body of precedents became a degree more integrationist, and the goalposts were shifted.⁴⁶

The CJEU's case law on the scope and content of EU citizenship rights provides a powerful example of the cumulative integrationist effect of a few cardinal initial judicial choices. The CJEU's initial choices were made possible by political acquiescence by national governments and reinforced by the judicial compliance of national courts. This politico-judicial cabal collaborated to transform EU law from international law into a quasi-sovereign constitutional supra-national legal order which increasingly set the parameters within which the relationship between national law and EU law was to evolve. This transformation illustrates the degree to which an activist international court indulged by national political and judicial acquiescence or silent approval can become a vitally important political agent able to take decisions which national governments would not dare to take because they violate national constitutions, the principles of public international law, and make a travesty of the natural meaning of the relevant treaties and/or undermine the principles of democratic self-government. In short, the CJEU is an ideal-type example of a disturbing trend in Western so-called democratic societies where governments delegate central functions to 'independent' institutions such as central banks, supervisory agencies and higher courts, which are then able to make political choices for which neither they nor anyone can be held electorally or otherwise accountable.

V EU CITIZENSHIP AND THIRD COUNTRY FAMILY REUNIFICATION

The legal concept of EU citizenship was introduced into the EU Treaties in 1993 with the Treaty of Maastricht. EU citizenship is complementary to, and does not replace, national citizenship. Apart from conferring certain political rights at EU level, its principal legal effect consists in the protection it offers any citizens of any EU Member State against arbitrary discrimination on the grounds of nationality when he or she moves to another EU Member State.⁴⁷ However, the right to equal treatment which the EU Treaties confer on any EU citizen in another EU member state only applies within the scope of EU law, not in areas where legislative powers remain with the Member States (e.g. social policy or taxation), and is further expressly 'subject to the limitations and conditions' provided for in the EU Treaties and EU legislation.

In practice, the CJEU has largely ignored the Treaty limitations on the scope of EU citizenship rights. In its early transformative cases the CJEU had adopted a 'gap filling' approach to establish a supra-national legal order in the absence of Treaty language to the contrary.⁴⁸ When the judicial power grab did not result in a Member State revolt, the CJEU was emboldened to go further. In the area of EU citizenship rights it incrementally expanded the right of EU citizens to equal treatment not merely in the absence of Treaty support, but in defiance of the principle of conferral and in opposition to both the

⁴⁶ Another case where the Court clearly made law in the absence of any treaty basis for the protection of fundamental rights in the EC treaty is *Nold v Commission* (Case C-4/73). Despite the absence of any treaty reference to fundamental rights, the Court held that 'fundamental rights form an integral part of the general principles of law, the observance of which it ensures'. The CJEU did not, and could not, appeal to any basis in the EC Treaty, it simply made law by deciding the general principles of Community law also extended to the protection of fundamental rights under national law — there was no basis for this assertion until the treaty revisions of the 1990s.

⁴⁷ TFEU, Art. 21 (in conjunction with Art. 18).

⁴⁸ *Infra*.

ordinary meaning of Treaty language and detailed provisions of the applicable implementing legislation.

The right of EU citizens to non-work related financial and other benefits is an area in which the CJEU's judicial activism has been particularly pronounced. According to the principle of conferral, the EU may only adopt policies and law in areas where Member States have authorised it to do so in the EU Treaties. Where the Treaties do not confer legislative competence, the Member States alone may legislate. The EU Treaties do not empower the EU to adopt legislation governing benefits entitlements to EU migrants who are not workers or ex-workers. This is in contrast to the status of economically active EU migrant citizens who have long enjoyed an equal right to in-work and contributions-based benefits on par with domestic workers.⁴⁹ Nor does Title X TFEU⁵⁰ include rules governing benefits entitlements for economically inactive EU citizens within the list of social policy fields where the Union has a supplementary competence to support national policies.⁵¹ It follows that, in contrast to in-work benefits, benefits entitlements for economically inactive EU migrants fall outside the scope of the non-discrimination principle. Where EU citizens leave their home country for another EU Member State without employment or adequate financial resources, the EU Treaties, according to the ordinary meaning of the words used, do not confer a right to social assistance in the host state.

The adoption of Directive 2004/38 has not changed the pre-2004 distribution of competences, nor could it in the absence of a treaty change.⁵² Instead, and in contradistinction to the treaty rights of workers and ex-workers and their family members, Directive 2004/38 states that EU citizens who are not 'workers or self-employed persons in the host Member States' only have a right to residence in another EU Member State beyond three months if they 'have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence'.⁵³ Article 24(2) specifically provides that 'the host Member State shall not be obliged to confer entitlement to social assistance ..., nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families'.

Notwithstanding these provisions, the CJEU in a series of seminal cases extended the right to social assistance to various groups of economically inactive Union citizens and EU citizens' rights to family unification. In *Grzelczyk*,⁵⁴ a pre-2004 case, the CJEU was asked to decide if a French student was entitled to a 'minimex' maintenance grant while studying in Belgium. National law laid down that only Belgian nationals were entitled to the minimex. However, the CJEU delphically opined that 'Union citizenship

⁴⁹ See TFEU, Arts. 18, 21, 45(2). Art. 45(2) prohibits any discrimination on grounds of nationality between home and EU migrant workers in relation to remuneration and other work conditions.

⁵⁰ TFEU, Arts. 151 to 161.

⁵¹ TFEU, Art. 153.

⁵² Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158.

⁵³ Ibid, Art. 7. NB: The 'sufficient resources' requirement does not apply to EU migrants who have acquired the right to permanent residence, who entered as workers, or who after a minimum period of employment become unemployed. It is likewise qualified with regard to retired workers who wish to remain in the host Member State (Ibid Art. 17).

⁵⁴ Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*.

is destined to become the fundamental status of nationals of the Member States enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.⁵⁵ Furthermore, it held that Union law 'accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'.⁵⁶ On those grounds, the CJEU concluded, the minimex could not be denied.

Articles 18 and 21 TFEU refer to the 'scope of application of EU law' and restrict the application of the equal treatment principles to those areas where the Union has legislative competence as provided for in Articles 3, 4 and 6 TFEU. This does not include non-work related social assistance and financial support for students which do not fall into this area. In *Grzelczyk*, the CJEU implicitly extended the competences of the Union legislator. The Court affirmed this position in *D'Hoop*⁵⁷ and in *Ioannidis*,⁵⁸ and extended the right to social assistance in *Bidar*,⁵⁹ where it held that, notwithstanding a lawful residence requirement under national law, a migrant student who does not meet that requirement might nevertheless qualify for a subsidised student loan in the host state. *Bidar* and *Ioannidis* were decided *after* adoption of Directive 2004/38, which limits the right to free movement of economically inactive EU citizens to workers and those with sufficient resources. The CJEU disregarded this restrictive provision and instead justified its conclusions by analogical reference to the underlying rationale established in its previous decisions, including *Grzelczyk* and *D'Hoop*.

The CJEU followed a similarly expansive approach to the application of the equal treatment principle in relation to differential tax treatment for national and non-national pensioners⁶⁰ and post-bankruptcy debt.⁶¹ The CJEU's judicial integrationism has even encroached upon national rules governing the registration of surnames and nationality laws, paradigmatic areas of national autonomy.⁶² The CJEU's decisions in these cases appear humane. However, the EU Treaties do not confer any competence on the EU in relation to rules governing the registration of surnames or the conferral or withdrawal of nationality.

Another area in which the CJEU has used the concept of EU citizenship to undermine national sovereignty is immigration law. Save for asylum and subsidiary protection law, rules regarding immigration, family reunification, and residency and naturalization of third country nationals (TCN) remain matters for national law. The TCN may, however, enjoy a derivative right to residence and non-discrimination if he is a family member of an EU citizen who has exercised the right to free movement within the EU. That TCN right is derivative in that it depends on the family link with an EU

⁵⁵ Ibid [31].

⁵⁶ Ibid [24].

⁵⁷ Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi*.

⁵⁸ Case C-258/04 *Office national de l'emploi v Ioannis Ioannidis*.

⁵⁹ Case C-209/03 *R(Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills*.

⁶⁰ Case C-544/07 *Uwe Rüffler v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Walbrzychu*.

⁶¹ Case C-461/11.

⁶² See Case C-148/02 *Carlos Garcia Avello v Belgian State*; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul*. Cf. Case C-208/09 *Sayn-Wittgenstein* in which CJEU qualified but did not reverse its step-by-step erosion of the national prerogative over the law of surnames when it held that Member States retain that prerogative even in cross-border situations if the person affected changed her name to circumvent national constitutional rules abolishing titles of nobility.

citizen and, as the CJEU correctly held in *McCarthy*,⁶³ does not apply in wholly internal situations (i.e. where the EU citizen has only ever been resident in one Member State).

In *Zambrano*, however, the CJEU held that Article 20 TFEU precluded the expulsion of family members of an EU citizen who had never exercised his freedom of movement.⁶⁴ Accordingly, the CJEU decided that TCN parents of EU-citizen children born and resident in Belgium had a right under EU law to remain in Belgium although the children had never left Belgium. In these circumstances the correct view should have been that EU citizenship was not applicable because the situation was wholly internal. The CJEU has since affirmed its *Zambrano* decision in a series of cases in *S&G*,⁶⁵ *Iida*,⁶⁶ and *O&B*.⁶⁷

The EU Treaties and EU legislation are clear: the determination of the rights of TCN family members to reside in an EU member state falls outside the scope of Union law and remains a matter for national law unless the TCN qualifies for temporary or permanent residence under asylum or subsidiary protection law or can claim a derivative right qua family member of a 'moving' EU citizen. The *Zambrano* decision, together with the CJEU's subsequent cases which affirm that decision, extend EU competence into areas of immigration law which the EU Treaties reserve to the member states. They are prime examples of judicial-led 'competence creep'.

A certain pattern emerges. The CJEU's competence creep typically starts with a 'hard case' brought by a morally attractive litigant. To achieve a 'just' result, the CJEU bends and expands relevant provisions of EU law, by exploiting vagueness and resolving norm pluralism in an integrationist direction where possible and by *contra legem* pro-Union interpretation where necessary. If the decision goes largely unnoticed, or if there is no widespread media and political reaction, both of which are rare, the CJEU, encouraged by favourable academic commentary and a lack of Member State opposition, will start citing and applying the initial activist principle in subsequent cases. In this fashion, the CJEU creates the impression of relying on uncontroversial, well-established precedents which require no further justification but which the Court may use to override or subtly tilt the meaning of restrictive provisions of EU law in a more integrationist direction.

VI THE EURO CRISIS DECISIONS

Nowhere is the CJEU's pro-Union bias more evident than in the euro crisis litigation where it takes the crucial step from law-making to law-breaking: it decides one way, when the Treaty clearly says otherwise. The term 'law-breaking' is, of course,

⁶³ C-434/09.

⁶⁴ C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*. The CJEU's effective ultra vires reading of the scope of the EU's non-discrimination powers has been qualified to some extent in the subsequent decision in Case C-256/11 *Dereci v Bundesministerium für Inneres*. However it is that *Dereci* does not represent a general reversal of the CJEU's expansive reading of its fundamental rights jurisdiction. See for instance Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department*; and Joined Cases C-356/11 and C-357/11 *O, S v Maahanmuuttovirasto*.

⁶⁵ Case C-457/12.

⁶⁶ Case C-40/11.

⁶⁷ Case C-456/12.

rarely used in academic literature and least of all with regard to courts or judges. The more common term would be mis-application of the law by judges.⁶⁸

The first patently integrationist and political decision is *Pringle*.⁶⁹ Before turning to the judgment, a few words must be said about the nature of the EU's monetary union. The European single currency, known as the euro, was established with the Treaty of Maastricht in 1993.⁷⁰ The Maastricht Treaty bases monetary union on the principle of individual national budgetary responsibility.⁷¹ This means that although Member States agreed to a common monetary policy to be conducted by the European Central Bank ('ECB'), they would remain responsible for the management of their own public debt levels which, *inter alia*, are influenced by the interest rate and other policies of the ECB. To ensure responsible financial management by Member States, a no bail-out clause was inserted in the Treaties. This is Article 125 TFEU.⁷²

Article 125 is as clear as legal provisions can be: there is to be no mutual financial assistance between eurozone governments, except for very specific limited projects. However, in the wake of the euro crisis, eurozone governments very quickly began to ignore the no-bail-out clause. In 2012, they established a permanent bail-out fund, the so-called European Stability Mechanism ('ESM'), with a total volume of EUR 500bn and, including other funds, of EUR 700bn.

In the *Pringle* case, the CJEU was asked to assess to the compatibility of the ESM with Article 125. It upheld the legality of the permanent rescue fund, essentially on two grounds. First, it resorted to a disingenuous literal argument: mutual financial assistance amongst several eurozone countries via the establishment of a rescue fund on the one hand, and the assumption of existing debts of one country by another on the other, are said to be two entirely different things. This is because 'assistance (via a rescue fund) amounts to the creation of a new debt, owed to the ESM by the recipient government, which remains responsible for its commitments to its creditors in respect of its existing debts'.⁷³ In other words, the 'no bail-out' clause does not forbid assistance given through an intermediary.

In essence, the CJEU confines Article 125 to cases where the existing debt of one country is assigned to another Member State, so that the donor 'steps into the shoes' of the original debtor and assumes legal liability for the pre-existing debt. On this reasoning, any mutual financial assistance involving a transfer of the default risk from

⁶⁸ The term law-breaking here is used to refer to situations where a court adopts an argumentation that imposes minimal methodological constraint and maximises judicial discretion, effectively allowing it to choose and rely on whatever interpretative criterion supports its own conclusions in preference to those which do not. It equally applies to situations where putative literal arguments do not reflect the ordinary meaning of the terms of the relevant provision, or when a court adopts a teleological interpretation at variance with the ordinary meaning of the treaty, which is supported by historical evidence about the intention of the parties and does not lead to absurd, but simply a politically or economically inconvenient result, or one that threatens important and influential business and financial interests.

⁶⁹ Case C-370/12.

⁷⁰ The Treaty on European Union ('TEU'), signed in Maastricht 7 February 1992, entered into force on 1 November 1993 (OJ C 191).

⁷¹ Art. 104b.

⁷² Art. 125 TFEU states that '[t]he Union ... [and] a Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project' (emphasis added).

⁷³ *Thomas Pringle v Government of Ireland and Others* (Case C-370/12) [2012] ECLI [139].

the original debtor to the donor(s), but without a formal assignation of one and the same debt is outside the scope of the ‘no-bail out’ clause. If Article 125 was never intended to prevent the transfer of financial risk between eurozone governments, as the CJEU evidently concludes, then the so-called ‘no-bail out’ clause does little to restrict debt mutualisation.

The CJEU’s supposedly literal interpretation even fails on its own terms. Article 125, on a literal interpretation, is not restricted to direct bail-outs between states. The words ‘shall not be liable or assume’ cover situations where the default of one country triggers a legally binding promise of support by another, though the resulting obligation may be legally distinct. Moreover, under the ESM Treaty⁷⁴, euro members guarantee loans and guarantees given by the ESM, according to a contribution formula equivalent to their shares in the capital of the ECB. However, if one eurozone member is unable to honour its commitments, then, according to Article 25 ESM Treaty, it falls to the remaining ESM members to assume the shortfall.⁷⁵ They thus assume the commitments of the failing Member State — precisely the ‘assumption of liability’ which, even on the CJEU’s view, is prohibited by Article 125. The supposedly literal interpretation of Article 125 patently conflicts with an equally literal interpretation of the ESM Treaty.

Second, the CJEU then develops a classical meta-teleological argument, premised on the aim of Article 125 as being ‘to ensure that the Member States follow a sound budgetary policy’.⁷⁶ The ESM, the Court notes, takes account of this objective in that it links the award of financial assistance to ‘strict conditionality ... [designed to] ensure that the Member States pursue a sound budgetary policy’.⁷⁷ The ESM, the Court concludes, complies with Article 125, as it ‘ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union’.⁷⁸ However, the ESM suspends precisely the operation of market processes which Article 125 tries to uphold.

It should be noted that Article 125 has one obvious aim — to prevent mutual financial assistance — and that aim is clearly set out. That aim admittedly, in turn, is designed to ensure a sound monetary policy, just as any immediate aim usually has another long-term objective. Yet, in invoking that further goal, the CJEU ignores that the EU Treaties make a very clear choice as to how ‘sound budgetary policy’ is to be achieved, which is obvious from the wording of Articles 119 and 125 TFEU, namely that budgetary discipline is to be achieved not through the debt mutualisation, but via individual national budgetary responsibility.

⁷⁴ *Treaty establishing the European Stability Mechanism* (‘ESM’), OJ L 91, (entered into force 2 February 2012), 1.

⁷⁵ Article 25(2) ESM Treaty.

⁷⁶ *Thomas Pringle v Government of Ireland and Others* (Case C-370/12) [2012], [135].

⁷⁷ *Ibid* [143].

⁷⁸ *Ibid* [135]. The Court held that is that ‘strict conditionality’ ensures Member States remain subject to the market. That confidence seems surprising in view of the fact that a previous international agreement entered into by Member States, namely the Stability and Growth Pact, has been broken since its inception on a year-on-year basis by an average of two thirds of the eurozone Member States. That pact did nothing to ensure the observance of precisely that ‘sound budgetary policy’ which the Court now so confidently expects the ESM agreement to promote, in the absence, it should be noted, of any additional Treaty safeguards.

In *Pringle* the Court essentially upheld an agreed political deal. To give this convenient conclusion at least the semblance of legal credibility, the Court relies on two types of arguments it usually employs only extremely rarely. First, it expounds a putative literal argument, which is at variance with the ordinary meaning of Article 125 TFEU and Article 25 ESM Treaty, and thus is not a literal argument at all. Second, it refers to the preparatory works as support for its teleological reading — something the CJEU practically never does, as it commonly chooses to present the Treaties as evolving and not as historical documents to be interpreted with the subjective intention of the signatories.⁷⁹ That teleological argument distorts the message of the preparatory works which supports the view that Article 125 makes a clear textual choice that sound budgetary policy is to be achieved through budgetary self-reliance, not mutual assistance. It also runs counter to basic economic theory and empirical psychological evidence which suggests the mutualisation of debt reduces, rather than enhances, incentives for budgetary discipline (known as the ‘moral hazard’ argument in economic theory).

The simple and convincing construction of the rationale of Article 125 TFEU would have been an ordinary language reading, according to which ‘the assumption of the commitments’ of one Member State by another would have been taken to refer to, and strictly prohibit, any *de facto* transfer of the financial risk of public debt between Member States, save where expressly provided for in the Treaties.

In *Gauweiler*⁸⁰ the CJEU had to consider two issues. The first question was whether unlimited government bond buys are a lawful monetary policy instrument under the EU Treaties. The second question was whether the EU Treaties authorise the ECB to conduct monetary policy aimed at ‘safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy’.⁸¹ The CJEU held that bond buys were monetary policy and thus part of the ECB’s mandate — and that, for those reasons, ‘safeguarding an appropriate monetary policy transmission’, the so-called ‘singleness of monetary policy’,⁸² was a legitimate monetary policy objective. This aim has no basis in the Treaties. The measure is turned into monetary policy only because the ECB says so and it, in effect, secures the preservation of the euro. The CJEU not only effectively amended the Treaties, which confine the ECB to the pursuit of price stability,⁸³ but it also took the ECB’s declared aims at their face value, when it held that the nature of a policy measure is to be assessed primarily by reference to its objectives and not its substance or effects. This not only ignores the Treaty text, but contradicts the CJEU’s own previous decisions that the aim of EU Acts is to be determined objectively, not subjectively.⁸⁴

⁷⁹ See for instance Beck, above n 23, 280-291; Hjalte Rasmussen, *The European Court of Justice* (GadJura, 1998); Oreste Pollicino, ‘Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint’ (2004) *German Law Journal* 5.3, 283-317, especially 284-285 and 317.

⁸⁰ *Gauweiler and Others v Deutsche Bundestag* (Case C-62/14) [2015].

⁸¹ The slightly awkward wording of the supposed objective of the OMT programme is not the author’s translation of some document originally drawn up in Italian, but the ECB’s official words in its programme description.

⁸² European Central Bank, ‘Technical features of Outright Monetary Transactions’ (Press Release, 6 September 2012).

⁸³ See the text of Art. 127 TFEU.

⁸⁴ *Infra*.

On the first issue, the CJEU's conclusion, that bond buys may be a legitimate monetary policy measure, sits uneasily with its decision in *Pringle* that bond buys by the ESM 'to preserve the stability of the Euro' were economic, not monetary policy. In *Gauweiler*, it then decided that, when the ECB buys bonds for an allegedly different purpose, bond buys become monetary policy just because (and for no other reason than that) the ECB buys the bonds and states it is pursuing monetary policy.

The CJEU's conclusion further not merely ignores the fact that Article 123 TFEU prohibits direct bond buys from the issuing public bodies,⁸⁵ but also entirely glosses over the fact that recital (7) of Council Regulation 3603/93 extends the prohibition of monetary financing of government debt to 'purchases made on the secondary market',⁸⁶ which may have the effect 'to circumvent the objective of that Article'.⁸⁷ In *Gauweiler* the CJEU simply ignored Council Regulation 3603/93.

Gauweiler was decided nearly five months after the ECB had launched a quantitative easing bond-buying programme and nearly three years after the announcement of the Outright Monetary Transactions ('OMT').⁸⁸ At the time of the *Gauweiler* judgment, the economic effects of the ECB's bond-buying programme had become obvious. Both the announcement of the programmes and the commencement of the purchases had resulted in substantial declines in risk premiums and the interest on newly issued eurozone bonds. This is precisely the type of monetary financing of public debt which Article 123 TFEU and Regulation 3603/93 prohibit. The CJEU chose to ignore this unequivocal economic evidence, as readily as it ignored the prohibition of secondary market purchases by Council Regulation 3603/93.

⁸⁵ Article 123 TFEU:

'1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments'.

⁸⁶ Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty, OJ L 332, 1-3.

⁸⁷ Recital (8) of the Regulation lends additional support to a broad and very strict construction of the prohibition of monetary financing and states that neither the ECB nor the European System of Central Banks may engage in purchases 'of marketable debt instruments' issued by a euro Member State which may, in any way, 'help to shield the public sector from the discipline of market mechanisms'.

⁸⁸ OMT is an ECB programme to purchase sovereign bonds. It was announced by ECB President Draghi in 2012. As part of the OMT programme, the ECB can purchase the sovereign bonds of specific euro area countries on secondary markets with no set ex ante quantitative limits. The prerequisite for purchasing sovereign bonds is that the state in question complies with conditions specified in the ESM programme. The OMT programme was never implemented but subsequently absorbed within a more broad-based money printing ECB programme known as the Quantitative Easing (QE) programme. In contrast to the 'conditionality' of the OMT programme, the QE programme launched by the ECB in January 2015 consists of unlimited and unconditional sovereign bonds purchases from all euro area governments. Officially the ECB justifies both programmes with reference to the alleged need to improve the transmission of the central bank's monetary policy and the 'maintenance of price stability' which the ECB has re-interpreted as a controlled inflation target of two per cent in the medium term. In reality, both the OMT and the QE programmes amount to monetary financing of both governments and private sector banks.

The CJEU's conclusion on the second main issue — i.e. whether improving the transmission mechanism for the ECB's monetary policy is a legitimate monetary policy — likewise plainly disregards the Treaty. The EU Treaties and the Statute of the ECB are clear on this point. The overriding objective of monetary policy in the eurozone is the maintenance of price stability,⁸⁹ whilst the tasks of the ECB also include the carrying out of foreign exchange operations, the management of foreign currency reserves, and the maintenance of the payment systems within the Eurozone. The ECB's declared aim — in both the OMT and its subsequent Quantitative Easing programme — of improving the transmission mechanism for its monetary policy has no treaty basis. Market economies are not planned economies. In market economies, the central bank sets base interest rates and minimum reserve requirements for commercial banks and carries out short-term open market foreign exchange and securities operations, but the transmission of these central bank monetary 'impulses' is deliberately left to market processes. Commercial banks then determine interest rates and lending volumes to the corporate sector and private households, and the interest rate and credit limits they set for loans to individuals incorporate a variable risk premium, which reflects the default risks of individual borrowers. The ECB's attempt to interfere with the transmission mechanism directly conflicts with the principle of an 'open market economy' enshrined in both Articles 119 and 120 TFEU. By distorting risk premiums on government bonds, the ECB, in truth, pursued, one objective only: to prevent a breakup of the euro. However, the survival of the euro is not a Treaty objective, no more than 'monetary policy transmission'.

In *Gauweiler*, the CJEU held that 'improving the transmission mechanism' of central bank policy fell within the ECB's mandate because the nature of a measure — i.e. whether it is to be regarded as monetary or economic policy — is to be assessed principally with reference to the ECB's putative aims, even if the measure 'may have indirect effects' which have nothing to do with monetary policy and these effects are very substantial.⁹⁰ Previously, it was settled case law that the objective of an EU act is to be determined objectively, not subjectively, and that in determining the nature of an EU measure, primary regard must be had to its objective effects, and not the declared objective.⁹¹ In particular, the CJEU had always insisted that it 'must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature'.⁹² In *Gauweiler*, the CJEU conveniently ignored its own settled case law.

Pringle and *Gauweiler* are two decisions which illustrate how far, in promoting the goal of further EU integration, the CJEU is prepared to defy conventions of legal argumentation and free itself from any methodological constraints on judicial decision-making. In *Pringle* the CJEU purported to rely on, but in reality glossed over, the natural meaning of Article 125 TFEU and its wider legislative context, notably Article 21 ESM Treaty as well as the teleo-systemic purpose of Article 125 provided by Articles 120 to 127. It opts instead for a reading based on a meta-teleological objective, i.e. the

⁸⁹ Art. 127(1) TFEU.

⁹⁰ *Gauweiler and Others v Deutsche Bundestag* (Case C-62/14) [2015], [46]. See also [47]-[52].

⁹¹ *Germany v Parliament and Council* (Case C-376/98) [2000], [85]; see also *Spain v Council* (Case C-350/92) [1995], [25]-[41]; *Germany v Parliament and Council* (Case C-233/94) [2007], [10]-[21]; *Ezz v Council and Commission* (Case C-220/14) [2015], [42].

⁹² *Germany v Parliament and Council* (Case C-376/98) [2000], [85]. See further *Spain v Council* (Case C-350/92) [1995], [25]-[41]; *Germany v Parliament and Council* (Case C-233/94) [2007], [10]-[21]; *Ezz v Council and Commission* (Case C-220/14) [2015], [42]; *Parliament v Council* (Case C-130/10) [2012], [42]; C-453/03, C-11/04, C-12/04 and *ABNA and Others v Secretary of State for Health and Others* (C-194/04) [2005], [53].

preservation of the euro as an end in itself. It does so in preference to the express legislative choice made by Article 125, namely that a sound budgetary policy is to be achieved through national budgetary responsibility.

In *Gauweiler*, the CJEU goes further. The Court not merely turns the meaning of Treaty provisions on their head, but disregards relevant EU legislation *tout court*, notably Council Regulation 3603/03 which is relevant to the interpretation of both Articles 123 and 127 TFEU. In *Gauweiler*, the CJEU likewise ignored its own inconvenient settled case law when it took the view that the nature of a measure may be determined by the subjective purpose of the policy-maker and not objectively by reference to its effects. Previously the CJEU has always insisted on an objective, i.e. effects-based, test for determining the object of a measure. *Pringle* and *Gauweiler* illustrate the CJEU's approach to legal interpretation in its ideal-type form stripped of all justificatory niceties and conventions: The right answer to any question of interpretation of EU law is to be found not in the wording, nor the treaty-based objects of a measure, and nor for that matter the CJEU's own case law, but any consideration which best suits the meta-teleological objective of promoting EU integration.

VII CONCLUSION

In a rare frank moment, Jean-Claude Juncker, the current EU Commission President who has been at the centre of EU politics for forty years, once described the EU's 'system' of promoting EU integration by stealth. 'We decide on something, leave it lying around and wait and see what happens', he explained. 'If no one kicks up a fuss, because most people don't understand what has been decided, we continue step by step until there is no turning back'.⁹³ Juncker's candid remarks equally apply to the CJEU which, in its interpretation and application of the EU Treaties, has been as politically adept and ideologically committed to use the law to promote EU integration as the other EU institutions.

The foregoing discussion has shown that in cases involving the division of competences, EU citizenship rights and in the eurozone litigation, the CJEU adopts an ultra-flexible, often meta-teleological and strongly pro-Union interpretative approach which goes well beyond that suggested in *Merck v Hauptzollamt Hamburg-Jonas*.⁹⁴ The CJEU's pro-Union bias is equally evident in its interpretation of written EU law and in its approach to its own case law.

The CJEU regards itself as free to rely on literal, systemic, teleological and meta-teleological considerations, without any rule of priority or hierarchy between them and with no fixed weight to be given to each criterion. In many of the more technical run-of-the-mill cases which deal with specific issues in EU agriculture, fisheries, environmental or transport legislation, and which rarely raise fundamental issues for the Union or the division of powers between the EU and the Member States, the various interpretative criteria rarely point to very different conclusions. In these circumstances the CJEU usually follows the ordinary meaning of provisions and only exceptionally does violence to the language of the legislation.⁹⁵ The CJEU may also follow the literal approach in cases which raise significant issues for the EU legal order as a whole, where it supports an integrationist answer or suits the CJEU's interests for other reasons (e.g. those rare

⁹³ 'Why Brussels isn't boring' *The Economist* (online) 12 September 2002 <www.economist.com/node/1325309>.

⁹⁴ *Merck v Hauptzollamt Hamburg-Jonas* (Case C-292/82) [1983].

⁹⁵ For a more detailed discussion, see Beck, above n 23, 344-45.

contexts where the Court considers it expedient to show judicial deference). Typically, however, where the outcome matters, the CJEU relies on whichever arguments favour a pro-Union solution to the legal question raised and an expansive reading of the competences of the EU institutions.

This ultra-flexible interpretative approach minimises methodological constraint and affords the CJEU almost complete freedom of interpretation. This methodological flexibility leaves the CJEU free to give the greatest weight to whatever arguments, usually teleological criteria, support its preferred conclusion. The purposes the CJEU may then invoke are not necessarily confined to those written into the Treaty nor to the most immediate objects evident from the legislative context. Rather, the purpose, in the CJEU's view, may be presumed as well as treaty-based, and it may refer to meta-teleological considerations just as readily as to either the immediate or indirect purposes, each of which may be either subjectively or objectively construed, depending on which most readily support its preferred solution. Moreover, by purpose the CJEU may also refer to effects, means, functional criteria, or general consequences. In general terms, whether explicitly or impliedly, when the Court invokes purposive interpretative criteria, it almost always falls back on what best suits EU integration, even where this contradicts specific Treaty provisions and conflicts with the *lex specialis* principle in international law.

The CJEU adopts a similarly flexible approach to its own previous decisions. It liberally relies on previous decisions when this lends an air of legal objectivity to justify an integrationist decision, whilst it will readily ignore a previous decision that runs counter to its pro-Union, integrationist objectives. In its citizenship judgments, to gloss over persistent departures from the wording of the Treaties and relevant EU legislation, the decisions of the CJEU abound with references to previous decisions, in preference to an analysis of the precise wording of the underlying legislative provisions. Over time, by reiterating certain judge-made principles, the Court creates an impression of continuity and consistency which disguises the judicial choices which distorted inconvenient written provisions that impose clear and precise limits on the EU's powers. However, the CJEU does not regard itself as bound by its previous decisions. For the sake of further EU integration the CJEU not only frequently departs from the text but will also just as readily ignore previous decisions. In *Gauweiler*, for instance, the CJEU disregarded both key aspects of its *Pringle* decision and settled case law according to which the aim of any EU measure has to be assessed objectively, not subjectively.

Paradoxically, the decision-making of the CJEU is not subject to unusually high legal uncertainty. The CJEU's decisions are probably more predictable than many higher national courts. They are predictable, however, not because the CJEU's approach is governed by a high degree of methodological rigour, but because its pro-Union prejudice is so settled. The CJEU may thus be regarded as a tribunal which combines a relatively high degree of legal certainty in its decisions with extreme methodological freedom in its judicial reasoning. With its methodological flexibility and its ready reliance on non-textual and meta-teleological considerations, the CJEU must be placed at the extreme 'activist' end of the judicial spectrum. If legal reasoning should be construed as imposing genuine methodological constraints on judicial decision-making, then the CJEU ultra-flexible approach affords the CJEU the interpretative freedom to operate 'lawlessly'. Law, for the CJEU, is essentially the continuation of politics by other means.

JUDICIAL POWER, THE JUDICIAL POWER PROJECT AND THE UK

PAUL CRAIG*

I INTRODUCTION

It is axiomatic that all power requires justification, and that is equally true for judicial power as for other species thereof. This article is primarily concerned with judicial power in the UK. The subject will be approached through consideration of the Judicial Power Project, which has been critical of the courts, much of this being sharp-edged, and fierce. There is repeated talk of judicial overreach and consequent legitimacy crisis, as the courts are said to encroach on terrain that is properly the preserve of the political branch of government.¹

It is by the same token important that the critics are properly scrutinized. This is *a fortiori* so the more far-reaching the critique, especially when the project has a ‘political dimension’, informing governmental views about judicial power. The article begins by setting out the principal argument of the Judicial Power Project, henceforth JPP. It then assesses the JPP’s claims from four perspectives: individual cases, judicial review doctrine, judicial practice and the theory of adjudication.

I should at the outset clarify my own position: academics should critically assess all exercise of power, including judicial power and have always done so; courts should show respect for other branches of government on constitutional, epistemic and institutional grounds, and in general terms have done so.² I do not believe that the JPP’s claims are supported by evidence flowing from the positive law, and they rest on normative assumptions concerning the limits of what common law courts should be able to do that are highly contestable.

It should be acknowledged that the JPP site accepts responses that take a contrary view to publications it has posted. It is open, and this is to be commended.³ While there are responses to particular papers, there has, to my knowledge, not been a more general assessment of the project, and the evidence on which it rests. That is the objective of the present article.

* Professor of English Law, St John’s College, Oxford. An earlier version of this paper was given at the Administrative Law Bar Association (ALBA) Meeting 23 July 2016. The general theme of the conference was ‘Is it Time to Rein in the Judges?’. I am grateful for comments from those at the ALBA conference, and from Eirik Bjorge, Mark Freedland, Aileen Kavanagh, Jeff King, Sir Stephen Sedley and Alison Young.

¹ See e.g. the work of Policy Exchange’s Judicial Power Project <www.judicialpowerproject.org.uk/about/>.

² For a statement of my detailed arguments in this respect, see P Craig, *UK, EU and Global Administrative Law, Foundations and Challenges* (Cambridge University Press, 2015), Ch. 2.

³ I can attest to this on a personal level. Richard Ekins encouraged me to post my views on the JPP site after the ALBA conference that we both attended, even though he knew that I was critical of the JPP. I did not have time to complete the paper at that stage. Richard Ekins also encouraged me to participate in this symposium on judicial power.

II THE JUDICIAL POWER PROJECT: THE CENTRAL ARGUMENT

The detailed claims made by the Judicial Power Project will be examined in due course. It is nonetheless important to be clear at the outset about the general nature of the thesis.

The focus of this project is on the proper scope of the judicial power within the constitution. Judicial overreach increasingly threatens the rule of law and effective, democratic government. The project aims to address this problem — restoring balance to the Westminster constitution — by articulating the good sense of separating judicial and political authority. In other words, the project aims to understand and correct the undue rise in judicial power by restating, for modern times and in relation to modern problems, the nature and limits of the judicial power within our tradition and the related scope of sound legislative and executive authority.⁴

The Judicial Power Project acknowledges that ‘judicial power has a central, strategic place in any well-ordered constitutional arrangement’ and it is accepted that there is a role for courts ‘in securing the rule of law, by fairly adjudicating disputes in accordance with settled law’.⁵ This is, however, subject to the caveat that such judicial power has not generally involved ‘oversight of the justice or prudence of the laws that fall to be applied’, with the consequence that ‘the courts have a limited capacity to develop the common law’.⁶

For the JPP, Parliament is the body principally charged with protecting human rights, as attested to by its role in abolishing slavery, extending the franchise, establishing the National Health Service, protecting workers who form unions, abolishing capital punishment, and decriminalizing homosexual acts. It is Parliament that has the principal responsibility for overseeing the content of the law and changing it when required. The supremacy of Parliament within the constitution does not therefore constitute ‘a departure from the rule of law or a failure to recognize the importance of human rights’.⁷ For the JPP,⁸

[T]he good sense of this separation of powers is now increasingly doubted, within Britain and, in different ways, in other common law countries. Many in the academy and legal profession now share an expansive, adventurous understanding of judicial power and the willingness and authority of the courts to oversee Parliament’s lawmaking actions or to overrule the executive’s exercise of its lawful powers has sharply expanded.

The adherents to the JPP do not contend that the expansion of judicial power is the result of any single development. To the contrary, they regard it as a complex phenomenon, which is driven in part by a wider global trend, influenced by US thought, and in part by ‘the increasing self-confidence of the legal community and a corresponding failure of confidence in the adequacy of parliamentary government or democratic politics’.⁹

There is, by parity of reason, said to be no single political or legal decision, including the *Human Rights Act 1998*, which explains the rise of judicial power within the United Kingdom, and the expansion of judicial authority is not limited to the field of

⁴ Judicial Power Project <www.judicialpowerproject.org.uk/about/>.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

human rights law. It is, moreover, argued that the rise in judicial power within the United Kingdom has taken place without sustained public debate, the critique being that the constitution 'should not be fundamentally unsettled in so haphazard or surreptitious a way'.¹⁰ The self-avowed aim of the JPP is to address this problem by making clear 'the ways in which the judiciary's place in the constitution has been changing, and might well change in the future, and then giving these developments and possibilities the close attention that they deserve'.¹¹

The project's concern is with how and by whom public power is exercised. Doubts about the wisdom of an expansive, adventurous understanding of judicial power have been, are and should be shared by people and groups who otherwise have very different political commitments. The project's central idea is that the decisions of Parliament ought not to be called into question by the courts and that the executive ought to be free from undue judicial interference, which fails to respect political judgment and discretion. These are broad propositions — the devil will often be in the details — but nonetheless they warrant restatement and application to new problems in our law and practice. They are open to adoption by all who share a commitment to parliamentary democracy and the rule of law.¹²

These are powerful and important claims. They must perforce be sustained. The more far-reaching the claim, the better must be the empirical and normative grounding for the argument.¹³ The remainder of this article unpacks these claims and subjects them to close scrutiny.

III JPP EVIDENCE: PROBLEMATIC CASES

The concerns voiced by the JPP are predicated on certain data, as is evident from the website. A prominent part of this is the listing of 50 problematic cases, which are said to exemplify the infirmities that beset the exercise of judicial power.¹⁴ Analysis and critique of individual decisions is part of what we academics do; no problem with that. There will inevitably be judicial decisions that receive a critical reception, but this is to say no more than that all institutions, including the political branch of government, are imperfect. There are, however, significant problems with this 'rap sheet' of judicial infirmity.

First, there is no clear rationale for inclusion on the list. The adjectival form 'problematic' is protean. It is clearly intended by the JPP to cover a range of 'judicial sins', including excessive judicial activism, poor judicial reasoning, insufficient deference to the primary decision-maker, and lack of fidelity to text.¹⁵ It is, however, often unclear which infirmity is said to attach to a particular case on the list. This difficulty is exacerbated because the explanation/justification for inclusion on the list is exiguous in the extreme. Complex judicial decisions are condemned on the basis of a three to five-line summation of the alleged infirmity in the reasoning and result. This comes dangerously close to CNN sound-bite commentary, where there is no warrant for

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ See also, A Kavanagh, 'Constitutional Review, the Courts and Democratic Scepticism' (2009) 62 *Current Legal Problems* 102.

¹⁴ R Ekins and G Gee, *50 Problematic Cases* (2016) Judicial Power Project <www.judicialpowerproject.org.uk/50-problematic-cases/>.

¹⁵ Ibid.

this form of assessment, more especially because the critic can thereby avoid meaningful scrutiny of his or her own reasoning by the very brevity of the summation on the charge sheet.

Secondly, the JPP architects of the list eschew claims as to methodological robustness and express the wish that it will prompt further debate.¹⁶ This is, however, problematic from both a legal and political perspective. Thus, while there has been some exchange in this respect,¹⁷ the relative paucity is readily explicable, legally and politically. In legal terms, the choices for engagement are limited. The commentator can engage in tit for tat soundbites, but then most academics rightly think that this is wasted time. The alternative strategy is to write a longer memo, three to four pages, explaining why the initial characterization of the case is misplaced. This, however, lends credibility to a mode of argumentation that is not academically sound: a three-line soundbite does not create the onus to produce a three-page defence, and we are diminished academically if we believe it to be so. The same conclusion emerges from a political perspective, albeit for very different reasons. The JPP seeks to exert political influence. That is readily apparent from its placing within the larger Policy Exchange network,¹⁸ from the fact that the Secretary State for Justice turns up when the leading JPP theorist is giving a lecture and from multiple other sources on the site. This is not, I should hasten to add, illegitimate. There is, nonetheless, a certain naïveté about the JPP in this respect. The salient point is that some in the political forum who are antagonistic to courts welcome the idea that major decisions can be eviscerated in three lines. They will not seek further explication. They will not look for contestation. Truth to tell, the three-line critique plays into a tabloid view of the courts. Claims by JPP proponents that they never meant the material to be taken in this way will come as scant comfort. They would do well to remember the Faustian lesson, viz that those who believe themselves in control may in reality end up being ‘played’ by the very forces they seek to influence.

Thirdly, if we assume that the critic is operating ‘rationally’ the three to six lines should embody the most potent critique of the decision. There were, nonetheless, many occasions when such critiques misconstrued the reasoning, policy or result in the case.¹⁹ There were other instances where the brief appraisal ignored the complexity of the issues the court had to resolve, fastening critically on one ‘issue’, while ignoring other textual and normative considerations that informed the court’s reasoning.²⁰

Fourthly, the difficulty in this respect is exacerbated by the fact that a case can be criticised for being problematic in certain respects, while it might also be regarded as being a good decision as judged by other desiderata valued by the JPP. Consider by way of example the inclusion of *Cart* on the list,²¹ the reason being that it involves too much judicial discretion in deciding whether to review for error of law. Leaving aside whether this critique is correct or not, it is clearly in tension with another prominent JPP objective, which is to accord greater deference to the primary decision-maker, which the Supreme Court’s decision clearly does.

¹⁶ Ibid.

¹⁷ See, e.g., S Lee, *A Problematic Manifesto?* (2016) Judicial Power Project <www.judicialpowerproject.org.uk/simon-lee-a-problematic-manifesto/>; and A McHarg, *50 Problematic Cases: A Comment* (2016) Judicial Power Project <www.judicialpowerproject.org.uk/aileen-mcharg-50-problematic-cases-a-comment/>.

¹⁸ Policy Exchange <www.policyexchange.org.uk/>.

¹⁹ This is true of pretty much all the EU cases on the list, and of many of the domestic cases.

²⁰ See, just by way of example, *Benkharbouche v Republic of Sudan* [2015] EWCA Civ 33, upheld on appeal, [2017] UKSC 62; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45.

²¹ *R (Cart) v The Upper Tribunal* [2011] UKSC 28.

Fifthly, the list is asymmetrical between judicial over-reach and judicial under-reach. To be sure, the JPP can in principle criticize courts for being excessively reticent, as exemplified by the inclusion of *Liversidge*²² on the list. The reality is, nonetheless, that the predominant focus is on judicial over-reach. This impression is reinforced by the detailed studies on the website, all of which have this focus. This asymmetry is a serious problem with the project. There is no pragmatic or normative argument presented as to why judicial over-reach, insofar as it exists, is more serious than judicial under-reach. Thus why not include cases such as *Nakkuda Ali*,²³ *Duncan*,²⁴ and *Church Assembly*²⁵ as instances where the courts placed undue limitations on judicial review; why not criticise earlier case law as being insufficiently supportive of rights, including fundamental rights based on gender and race? This asymmetry between judicial over-reach and judicial under-reach is further evident in the ‘double jeopardy’ faced by the courts, damned if they do too much, damned if they do too little. The tensions in this respect are readily apparent in the case law on process rights in contexts where statutory closed material procedures apply.²⁶

Sixthly, the preceding difficulties are exemplified by the critical treatment of the decision in *Miller*,²⁷ where the Supreme Court decided that the executive could not trigger Article 50 TEU without securing statutory approval from Parliament. The decision was contestable, as attested to by Lord Reed’s strident dissent. The salient point is, however, why the decision was felt to be problematic from the JPP perspective. It might be argued that this was another instance of judicial usurpation of political power. This does not, however, withstand examination, since the case was not about accretion of judicial power at the expense of the political. The contestation was as to whether the power to trigger Article 50 TEU should reside with the legislature or the executive. This was the zero-sum issue in the *Miller* litigation, and the result either way did not augment judicial power. It might be contended by way of response that the decision was problematic in a different way, viz that the Supreme Court’s reasoning was defective in certain respects. This is indeed the nub of many of the critical postings. This reveals the protean meanings of the term ‘problematic’ within the JPP agenda, since insofar as it includes decisions where the reasoning was felt to be defective it would thereby encompass all academic commentary on case law, with the consequence that the JPP project would cease to serve any independent function. The very attribution of the label defective to the Supreme Court’s reasoning is itself highly contestable. I believe that the majority decision was correct,²⁸ and I also believe that the answer one way or another requires close attention to complex argumentation of a kind that cannot be done in short blogs on the decision.

Lastly, there is something ‘mildly Kafkaesque’ about the list, if that is not an oxymoron, which it probably is. Picture the scenario: the somnolent law reports, disturbed by the midnight click on the internet link to the database; the sturdy JPP

²² *Liversidge v Anderson* [1942] AC 206.

²³ *Nakkuda Ali v Jayaratne* [1951] AC 66. See also, *R v Metropolitan Police Commissioner, ex. p Parker* [1953] 1 WLR 1150 QBD; *R v Leman Street Police Station Inspector, ex. p Venicoff* [1920] 3 KB 72.

²⁴ *Duncan v Cammell, Laird & Co Ltd* [1942] AC 6.

²⁵ *Church Assembly* [1928] 1 KB 41.

²⁶ *Secretary of State for the Home Department v AF* [2010] 2 AC 269; *Secretary of State for the Home Department v AF* [2010] 2 AC 269; *Al Rawi v Security Service (Justice and others intervening)* [2011] UKSC 34.

²⁷ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

²⁸ P Craig, ‘Miller, Structural Constitutional Review and the Limits to Prerogative Power’ [2017] *Public Law Special Issue* 48.

messenger revealing those on the charge sheet, ‘*Cart, Bancoult, Hirst*, step forward’; scant explanation for being placed on the list of problematic cases, bad reasoning, bad result, bad judgment, take your pick, tick a box; no explanation concerning the informer that ‘fingered’ the particular case for inclusion in the list; no due process, no apparent way of being removed from the charge sheet; a sound dose of judicial re-education to prevent future infirmity, with compulsory daily readings of set texts on the limits to the judicial role; and of course special treatment reserved for the judicial recidivists, the repeat offenders, who must be purged in some more dramatic manner. To adopt a Kantian perspective, one cannot but wonder how the academic organizers of the JPP would react if their scholarship were to be treated in analogous fashion. We could construct a rap sheet of academic infirmity, in which complex arguments were condemned through a three or four-line statement appended to the article. The howls of indignation at such unjust treatment would echo through the academic corridors and beyond.

IV JPP EVIDENCE: LEGISLATION, COURTS AND DOCTRINE

The discussion thus far has been on individual cases. The focus now shifts from the specific to the more general. A recurring feature in the JPP literature is the idea that we are facing a legitimacy crisis, or something akin thereto. It features as a headline on the website and informs many of the policy papers placed thereon. Good news is rarely as gripping as bad news, at least insofar as it relates to the courts. A conclusion expressed as crisis will therefore pay commensurate publicity dividends, even more so if the crisis can be cast in terms of legitimacy and judicial over-reach. The power of criticism nonetheless comes with attendant responsibility: the more far-reaching the critique, the better must be the ammunition to sustain it; and the more far-reaching the criticism, the more searching should be the evaluation thereof. There are three related points that are relevant in this respect.

A Conflation of Different Rationales for Alleged Judicial Over-reach

The JPP site and the contributions thereto conflate two very different rationales for the judicial over-reach, which they claim to identify. There is the contention that the judiciary is over-reaching in ordinary judicial review cases by exercising such review in a manner that is too intrusive, and hence trespasses on the role of the legislature/executive. There is also the claim that the judiciary are making judgments of a kind for which they are ill-suited under the HRA, or which should be the preserve of the legislature, even though when doing so they are fulfilling an express constitutional or legislative obligation cast on them. The conflation of these issues is evident in the descriptive brief of the JPP mission,²⁹ and permeates many contributions to the JPP site. Where the distinction is noted, it tends to be oblique and in passing, as evident in the

²⁹ Above n 4.

contributions from Jeffrey Goldsworthy³⁰ and John Finnis.³¹ This is problematic for the following reason.

There is a mountain of literature on the legitimacy of constitutional review, more especially the hard-edged variety, whereby courts invalidate primary legislation for constitutional infirmity.³² The JPP project adds nothing new in this respect, nor is it the purpose of this article to revisit this terrain. What is apposite to the present inquiry is the following. While this debate is commonly conducted with US literature as the backdrop, it is distinctive insofar as the US Constitution provides no express authority for the courts to review primary legislation. The reality, by way of contrast, is that many constitutions make express provision for such review, and so too does the UK, albeit through statute in the form of the *Human Rights Act 1998*.³³

There is a tension, to say the very least, between a core precept of the JPP, which is respect for political choice, and dislike of this choice insofar as it invests courts with authority to engage in rights-based review that some believe that they should not have. There is something markedly ironic about a project that extols the virtue of deliberative political choice, while deprecating the result thus made by countless nations, including the UK, which have expressly opted for rights-based review in a constitution or statute. This is seeking to play both sides of the street at the same time.

The elliptical use of terminology is dangerous, more especially when it is politically laden. There is the world of difference between a 'legitimacy crisis' cast in terms of courts allegedly trespassing on the legislature's terrain; and such a crisis that connotes the difficulties said to flow from the discharge of a constitutional or legislative mandate expressly accorded to the courts. The reality is that the JPP elides the two, notwithstanding the fact that the normative considerations that underpin them are very different.

The use of the term legitimacy in the former context connotes the idea that the courts are thereby intruding on terrain where they have no authority to do so; the use of the term in the latter context is quite different, capturing the idea that even if the courts have an obligation to undertake rights-based adjudication flowing from a constitution or a statute there are legitimacy problems because the court is forced to, for example, balance variables that are said to be incommensurable.

³⁰ J Goldsworthy, *Losing Faith in Democracy: Why Judicial Supremacy is Rising and What to do About it* (2015) Judicial Power Project <www.judicialpowerproject.org.uk/jeffrey-goldsworthy-losing-faith-in-democracy-why-judicial-supremacy-is-rising-and-what-to-do-about-it/>.

Compare, however, J Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' (2003) 38 *Wake Forest Law Review* 451, 457.

³¹ See, e.g., J Finnis, *Judicial Power: Past, Present and Future* (2015) Judicial Power Project <judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/>.

³² See, e.g., J Waldron, *Law and Disagreement* (Oxford University Press, 1999) and 'The Core Case against Judicial Review', 115 *Yale Law Journal* 1346 (2006); R Bellamy, *Political Constitutionalism, A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); M Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press, 1999); R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996); C Eisgruber, *Constitutional Self-Government* (Harvard University Press, 2001); L Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (Yale University Press, 2004).

³³ For analysis of the numbers, see, T Ginsburg and M Versteeg, 'Why do Countries Adopt Constitutional Review?' (2013) *Journal of Law, Economics and Organization* 1.

The complex issues raised by this latter type of claim cannot be analysed in detail here.³⁴ Suffice it to say the following: there is little in the JPP that addresses this latter issue; the general JPP discourse on the topic is shot through by assumptions concerning the existence of balancing in public law, and its alleged absence in private law that are contestable; and it is also shot through by contestable presuppositions as to whether judicial creativity manifest in the creation of a doctrinal rule that involves the admixture of two or more foundational values is any less significant than *ad hoc* balancing in individual cases.

B Conflation of the Particular and the General

It might be argued by way of response that the courts have exceeded their mandate in ordinary judicial review actions and thus trespassed on legislative terrain, and/or that they have gone beyond their brief under the HRA 1998. There is no doubt that some particular cases might be criticised. That is inevitable in any such regime. This does not, however, show systemic failure, legitimacy crisis, or anything akin thereto.

The legal reality is that UK judicial review doctrine is shot through with discussion of the deference/respect/weight that courts do and should accord to primary decision-makers. It informs judicial³⁵ and academic discourse.³⁶ There is debate concerning the

³⁴ See on these issues, e.g., J Raz, *The Morality of Freedom* (Clarendon Press, 1988), Ch 13; E Anderson, *Value in Ethics and Economics* (Harvard University Press, 1993); R Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, 1997); *Incommensurable Values* (2007) Stanford Encyclopedia of Philosophy, <www.plato.stanford.edu/entries/value-incommensurable/>; C Sunstein, 'Incommensurability and Valuation in Law' (1993-94) 92 *Michigan Law Review* 779; Symposium on Law and Incommensurability (1998) 146 *University of Pennsylvania Law Review* 1169; P Craig, 'Limits of Law: Reflections from Private and Public Law', in N Barber, R Ekins and P Yowell (eds), *Lord Sumption and the Limits of Law* (Hart, 2016) 175-192.

³⁵ See, e.g., *R v DPP, ex p. Kebilene* [2000] 2 AC 326; *R (Begum) v Denbigh High School Governors* [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420; *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312; *Bank Mellat v HM Treasury* [2013] UKSC 39; *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60; *Michalak v General Medical Council* [2017] UKSC 71.

³⁶ D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy', in M Taggart (ed), *The Province of Administrative Law* (Hart, 1997) Ch 13; P Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 *Law Quarterly Review* 589; R Edwards, 'Judicial Deference and the Human Rights Act' (2002) 65 *Modern Law Review* 859; Lord Hoffmann, 'Separation of Powers' [2002] *JR* 137; J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity' [2003] *Public Law* 592; M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford University Press, 2003) Ch 13; T R S Allan, 'Common Law Reason and the Limits of Judicial Deference', in D Dyzenhaus (ed), *The Unity of Public Law* (Hart, 2004) Ch 11; L Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures' (2005) 3 *International Journal of Constitutional Law* 617; R Clayton, 'Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention under the Human Rights Act' [2004] *Public Law* 33; Lord Steyn, 'Deference: A Tangled Story' [2005] *Public Law* 346; T Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act' [2005] *Public Law* 306; T R S Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' [2006] *Cambridge Law Journal* 671; Lord Justice Dyson, 'Some Thoughts on Judicial Deference' [2006] *JR* 103; R Clayton, 'Principles for Judicial Deference' [2006] *JR* 109; T Hickman, 'The Courts and Politics after the Human Rights Act: A Comment' [2008] *Public Law* 84; J King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal*

circumstances in which such deference/respect/weight should be accorded, but this is to be expected. The reality is that there is significant commonality in the judicial and academic discussion as to when such respect should be shown, notwithstanding differences concerning nomenclature and taxonomy. Thus few doubt the epistemic and institutional rationales for giving respect, with admittedly more debate as to whether it should be afforded on constitutional grounds.

The relevant point for present purposes is that we in the UK do not inhabit a world in which the judiciary routinely substitute judgment on discretionary choices for that of the administration. To the contrary, our jurisprudence is permeated by judicial recognition of the need for caution, and this plays out time and again in HRA and non-HRA case law. There are to be sure controversial cases where it can be argued that the courts went too far,³⁷ or indeed that they did not go far enough.³⁸ This is inevitable, but provides nothing like the requisite empirical foundation for claims concerning legitimacy crisis, or systemic failure manifest in judicial over-reach. The temptation to regard questionable individual decisions as evidence of some more general malaise within the system is an impulse that should be resisted, whether the decisions are judicial or political in nature. If you wish to make the more general claim, then there is an obligation to provide the empirical grounding for it, which must be balanced and objective.

It is, in a similar vein, important to consider carefully arguments that courts have made mistakes, more especially so when it is said that the error concerns not merely an individual case, but has wider implications. Consider in this respect Richard Ekins' claim that the 'courts are responsible for extending the [Human Rights] Act beyond its intended scope'.³⁹ Ekins regards judicial interpretation of HRA section 3 as a particularly egregious instance of this, arguing that it has been wrongly understood to create a judicial power to change the meaning of legislation, whereas it merely imposed a duty on all parties to read legislation to be in conformity with Convention rights.

There are doubtless various ways in which the injunction in section 3 could be read, and the line between interpretation and legislation can be difficult.⁴⁰ The argument that the interpretation of section 3 in *Ghaidan*⁴¹ constitutes some radical judicial misconstruction of the HRA does not, however, withstand examination. The injunction in section 3 to read and give effect to primary and secondary legislation so as to conform to Convention rights, insofar as it is possible to do so, clearly accords a power and a duty to courts. They are to fulfil this duty within the limits of interpretation, the boundaries of which were delineated in *Ghaidan*. The House of Lords did not, as Ekins maintains,⁴²

Studies 409; A Young, 'In Defence of Due Deference' (2009) 72 *Modern Law Review* 554; A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222; A Brady, *Proportionality and Deference under the Human Rights Act 1998: An Institutionally Sensitive Approach* (Cambridge University Press, 2012); P Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press, 2012); M Elliott, 'Proportionality and Deference: The Importance of a Structured Approach', University of Cambridge, Legal Studies Research Paper Series, 32/2013; Craig, above n 2, 236-55; A Young, *Democratic Dialogue and the Constitution* (Oxford University Press, 2017).

³⁷ See, e.g., *R (Evans) v Attorney General* [2015] UKSC 21.

³⁸ See, e.g., *Secretary of State for the Home Department, ex. p. Rehman* [2002] 1 All ER 122.

³⁹ R Ekins, *The Dynamics of Power in the New British Constitution* (2017) Judicial Power Project <www.judicialpowerproject.org.uk/richard-ekins-the-dynamics-of-judicial-power/> 9.

⁴⁰ A Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 *Oxford Journal of Legal Studies* 259.

⁴¹ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

⁴² Ekins, above n 39, 10.

say that the statutory words and intended meaning were to be disregarded. It held that the words might be qualified and modified. This would in turn depend, *inter alia*, on whether the suggested interpretation was in accord with fundamental features of the statute; and on whether the change had broader implications, such that it should be left to the legislature,⁴³ and not be done by the courts pursuant to section 3.⁴⁴ It should, moreover, be noted that the case law post-*Ghaidan* does not reveal judicial re-writing of legislation in the manner suggested by Ekins. There are numerous instances where the courts held that it was not possible to interpret the legislation consistently with Convention rights, and therefore issued a declaration of incompatibility under section 4 HRA.⁴⁵

C Empirical Foundation for JPP Claims: Case Studies

It might be argued that the judicial excess of authority is evident in particular doctrinal studies written for the JPP, which are highly critical of the courts. Such critiques must, however, be sustained, more especially because many such studies make far-reaching claims. Space precludes examination of all such papers. A couple of examples will suffice in this respect.

Jason Varuhas' paper, entitled *Judicial Capture of Political Accountability*, concerns judicial review of the Ombudsman, which he regards as illegitimate and symptomatic of some broader legitimacy malaise that besets the courts.⁴⁶ He contends that the PCA is an officer of the House of Commons, responsible to the Public Administration and Constitutional Affairs Select Committee. For Varuhas, the lawmaker's intention was that the PCA should answer only to the House of Commons. The PCA system was, in his view, intended as an alternative and autonomous system for dispute resolution running parallel to and independent of courts.

Varuhas is particularly excised by the type of reasonableness review used in *Bradley*⁴⁷ and *EMAG*,⁴⁸ which he regards as beyond the legitimate judicial remit. Varuhas contends that the scope of review was enlarged, and that the 'courts adopted an exceptionally aggressive approach' to such review.⁴⁹ The cases are said to be beset by a double infirmity: the courts had the temerity to review not just the PCA decision, but the ministerial response thereto; and the courts subjected the Minister's views 'to searching scrutiny, effectively intervening because the court disagreed with or was not itself convinced by the Minister's reasoning or view'.⁵⁰ Varuhas castigates the courts for

⁴³ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [33], [34], [49], [114]. These limits were said to be exemplified by earlier decisions in *Re S* [2002] 2 AC 291 and *Bellinger v Bellinger* [2003] 2 AC 467.

⁴⁴ A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009), Ch 3.

⁴⁵ See, e.g., *A v Secretary of State for the Home Department* [2005] 2 AC 68; *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718; *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484; *AS (Somalia) v Entry Clearance Officer (Addis Ababa)* [2009] UKHL 32; *R (Wright) v Secretary of State for Health* [2009] 1 AC 739; *R(F) v Secretary of State for the Home Department* [2011] 1 AC 331.

⁴⁶ Jason Varuhas, *Judicial Capture of Political Accountability* (2016) Judicial Power Project <www.judicialpowerproject.org.uk/jason-varuhas-judicial-capture-of-political-accountability/>.

⁴⁷ *R (on the application of Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116.

⁴⁸ *R (on the application of Equitable Members Action Group) v HM Treasury* [2009] EWHC (Admin) 2495.

⁴⁹ Varuhas, above n 46, 12.

⁵⁰ *Ibid* 13.

departing from classic *Wednesbury* reasoning, said to be a ‘totem of non-intervention’. The decision in *Bradley* is said to entail a radical departure from *Wednesbury* orthodoxy, since the court required ministerial rejection of the PCA’s findings to be based on cogent reasons, which ‘effectively involves the court asking for itself whether the Minister’s reasons stack up or are convincing’,⁵¹ with the consequence that there is ‘very little light between such approach and the court intervening simply because it disagrees with the Minister’s view’.⁵²

There is much in Varuhas’ paper that turns on wider assumptions concerning the nature of public law, and the role of the courts therein. They cannot be addressed here, since that would take us beyond the scope of the present paper.⁵³ The analysis will, therefore, focus more directly on the arguments concerning the ombudsman regime. The JPP deserves credit for hosting responses to its publications by those who take different views. It is, therefore, fitting to give voice to such views on Varuhas’ paper.

Richard Kirkham concluded that while the judiciary sometimes made mistakes, they performed a powerful service in retaining the integrity of the PCA model created by Parliament. He is, moreover, sceptical as to conclusions of a legitimacy crisis, stating that a more balanced assessment of the case law ‘on the ombudsman sector would have been that not only does it provide little evidence of a legitimacy crisis, but arguably it provides model guidance for how a judge should demonstrate institutional restraint to avoid all the concerns that Varuhas raises’.⁵⁴

Consider in the same vein Carol Harlow’s response to Varuhas’ paper, more especially given that she regards balance between courts and Parliament as particularly important. She expresses some sympathy with Varuhas’ general line of argument, and accepts that there have been cases where the courts strayed too far, but contends that the position in relation to the PCA is more nuanced than is apparent from Varuhas’ argument.

Her starting point is that while the PCA is an officer of the House of Commons, the office is largely independent and autonomous, and the ‘PCA is not and was never envisaged as a political actor’.⁵⁵ She rejects Varuhas’ conceptualization of the PCA as a parallel and autonomous justice system. For Carol Harlow, the Parliamentary and Health Service Ombudsman ‘is a member of our oversized family of public ombudsmen and an inherent part of our fragmented administrative justice system’, but ‘this does not mean, however, that the PCA operates as a parallel and autonomous justice system’.⁵⁶ While supportive of the PCA, Harlow also accepts that mistakes can be made, and that the PCA must therefore be amenable to judicial review. The ombudsmen were, as she argues, either carrying out administrative functions as investigators, in which case their decisions were clearly reviewable; or if they were adjudicators, they could be classified with subordinate jurisdictions. The judicial review should, however, be sensitive to the PCA’s expertise, and she draws an analogy with *Cart*.⁵⁷

⁵¹ Ibid 16.

⁵² Ibid 16.

⁵³ For discussion, see, P Craig, ‘Taxonomy and Public Law: A Response’, forthcoming.

⁵⁴ R Kirkham, *A Reply to Judicial Capacity of Political Accountability* (2016) Judicial Power Project <www.judicialpowerproject.org.uk/richard-kirkham-a-reply-to-judicial-capture-of-political-accountability/>.

⁵⁵ C Harlow, *A Comment on Judicial Capture of Political Accountability* (2016) Judicial Power Project <www.judicialpowerproject.org.uk/carol-harlow-a-reply-to-judicial-capture-of-political-accountability/>.

⁵⁶ Ibid.

⁵⁷ *R (Cart) v Upper Tribunal* [2011] UKSC 28.

Carol Harlow also takes a different view concerning the second limb of the argument, the standard of review used in *Bradley*. The ministerial decision was, as she rightly notes, clearly reviewable, and there were decisions going back to *Padfield*⁵⁸ and beyond that required ministers to give reasons for decisions. For Harlow, such review was 'surely unexceptional by the standards of every contemporary judicial review system'.⁵⁹ In terms of the intensity of review, she states that the court might have asked whether the ministerial decision to reject the PCA's findings was so unreasonable that no reasonable decision-maker would have made it, but that it was also open to the court to hold, in the light of the statutory schema, that the 'findings of fact in an ombudsman investigation are presumptively binding in the sense that they can only be rejected for good reason'.⁶⁰ As Harlow states,⁶¹

What is the point of setting up a fact-finding body be it an ombudsman investigation, a tribunal, a public inquiry or parliamentary committee, if its findings are simply ignored? There is no statutory avenue of appeal and Parliament is not the place for a parallel fact-finding inquiry. And, as Wall LJ stressed, the decision is 'procedural rather than substantial. The decision is quashed as unlawful, and the Minister must think again' (*Bradley* at [138]). This does not seem unduly onerous.

Similar caution is required in relation to an earlier report entitled *Clearing the Fog of Law: Saving our Armed Forces from Defeat by Judicial Diktat*, by Richard Ekins, Jonathan Morgan, and Tom Tugendhat. There are two principal lines of criticism voiced against the Strasbourg Court: failure to disapply Convention rights in cases where British troops act abroad, the claim being that it was only intended to apply in times of peace; and that human rights law supplanted and undermined the older and more suitable body of International Humanitarian Law, viz the four Geneva Conventions. The report castigates the Strasbourg Court for unwarranted judicial activism, lack of sound legal method and overbearing judicial power, the argument being predicated on the general understanding that the ECHR should not apply extraterritorially. These views are, as is common with JPP reports, expressed strongly and with conviction. The report is critical and hard-hitting, on a politically sensitive issue. The twin foundations of the critique are, however, highly contestable to say the very least.

The idea that the ECHR was inapplicable during war is, as Judge Greenwood⁶² and Eirik Bjorge have pointed out,⁶³ impossible to square with Article 15 ECHR, which provides that a state may derogate from the ECHR in times of war, not that the entire ECHR was *ipso facto* inapplicable in such circumstances. Extraterritorial application of the ECHR Convention was, moreover, not unheard of, or novel, when the Human Rights Act was enacted, nor was the idea that the Convention applied in armed conflict. The other limb of the argument, viz the JPP's critique of the way in which the ECHR treated the inter-relationship between human rights law and international humanitarian law, has

⁵⁸ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

⁵⁹ Harlow, above n 55.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² C Greenwood, 'Rights at the Frontier — Protecting the Individual in Times of War', in B Rider (ed), *The Law at the Centre — The Institute of Advanced Legal Studies at Fifty* (Kluwer Law, 1999), Ch 17.

⁶³ E Bjorge, *Manning the Fogmachine of War: A Comment on the Report Clearing the Fog of War* (2015) UK Constitutional Law Blog <www.ukconstitutionallaw.org/2015/04/15/eirik-bjorge-manning-the-fogmachine-of-war-a-comment-on-the-report-clearing-the-fog-of-law/>.

also been subject to critical analysis, with Andrew Clapham⁶⁴ and Eirik Bjorge⁶⁵ pointing out that the critique of the relevant Strasbourg decisions was based on a misreading of the facts and legal reasoning in the instant cases.

The response by Eirik Bjorge generated a counter-response from Richard Ekins,⁶⁶ to the effect that the argument of the original paper had been misunderstood; that Article 15 ECHR had not been ignored therein; that this provision for derogation rendered it problematic as to whether the ECHR should continue to apply in times of war; and that Strasbourg jurisprudence concerning the jurisdictional reach of the ECHR was open to question.

This is not the place to engage in further deliberation as to these issues. Suffice it to say the following: the fiercer the critique, the better must be the substantive foundation of the argument, more especially so in relation to a topic that is sensitive and highly-charged. The impulse for those involved in the JPP is to castigate courts fiercely for what they regard as unwarranted usurpation of power. This impulse should be tempered insofar as the critique is predicated on assumptions as to the positive law, and its normative underpinnings, which are highly contestable.

V JPP EVIDENCE: LEGISLATION, COURTS AND PRACTICE

There is a further evidential component in relation to claims made by the JPP. It is less obvious than the issues addressed in the previous sections, but equally important. The ‘back story’ to the present discourse reads something like this. Judicial review must be kept within proper bounds, which from the JPP’s perspective means that it should be narrowly drawn. This preference is informed in part by its vision of the proper line between courts and the political branch of government. It is also informed by a perception of judicial review as predominantly red-light in its orientation, whereby the judicial focus is exclusively on control of the administration, the assumption being that the courts ignore the virtues of the legislation that is being reviewed and hence show scant regard for what is known as the green-light perspective. This then reinforces the demand for review to be narrowly confined.

This does not represent an accurate picture of judicial review at any time in its history. Judicial review has always possessed a Janus-like quality. It is the mechanism through which judicial doctrine is used when an individual contests the legality of a decision or regulatory norm made by a public or quasi-public body. This is the face that we perceive. Judicial review is, however, also the legal mechanism through which the courts routinely effectuate the regulatory schema challenged before them. The claimant challenges the legality of a decision and loses, because the court does not agree that there is such an illegality judged by the terms and purposes of the legislation. In reaching this conclusion the courts interpret the statute to attain the specified objectives, and often fill gaps to render the legislation more efficacious. This face is not hidden, but is largely ignored in our evaluation of what administrative law is ‘about’. It is clear from a reading of the case law over circa 400 years that the courts were generally fully cognizant of the value of the regulatory schema that they were interpreting, and strove to ensure that they

⁶⁴ A Clapham, ‘The Complex Relationship between the 1949 Geneva Conventions and International Human Rights Law’, in A Clapham, P Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015), Ch 35.

⁶⁵ Bjorge, above n 63.

⁶⁶ Richard Ekins, *The Reach of the ECHR: A Reply to Eirik Bjorge* (2015) Oxford Human Rights Hub <www.ohrh.law.ox.ac.uk/the-reach-of-the-echr-a-reply-to-eirik-bjorge/>.

were properly effectuated. There were perforce instances where the courts got things wrong, proof once again that all institutions are imperfect.

This does not, however, alter the point being made here. Judicial review should not be viewed solely in terms of being a constraint on legislative or executive power. This did not represent judicial reality in 1616 or any date thereafter. There were as many, or more, decisions in which judicial power in the context of actions for judicial review was used to ensure that the legislative or executive purpose was properly effectuated.⁶⁷

VI JPP EVIDENCE: LEGISLATION, COURTS AND THEORY

The discussion thus far has assessed the evidence used to support JPP claims. There is, however, a normative foundation underpinning the Judicial Power Project, a vision as to the legitimate scope of adjudication, with consequential implications for the relationship between courts and legislature. This is unsurprising. Views concerning the legitimacy of judicial decisions will inevitably be informed by some normative theory concerning the nature of adjudication and its limits. The JPP is no different in this respect, the principal intellectual contribution coming from John Finnis.⁶⁸ He articulates a vision of the judicial role, and defends it with characteristic vigour. The essence of the thesis can be presented as follows.

A *Thesis*

First, courts adjudicate on the existing legal commitments that pertain between the relevant parties when the matter is adjudicated. The focus is in that sense essentially backward looking. The legislature, by way of contrast, has the responsibility to make ‘new or amended public commitments about private rights (and public powers) for the future’,⁶⁹ and in that sense it is forward looking. The executive is obliged to carry out commitments as defined by the legislature and as adjudged enforceable by the courts.

Secondly, for Finnis, the declaratory theory of the common law is not fiction, but a statement of judicial responsibility, capturing the idea that courts identify the ‘rights of the contending parties now by identifying what were, in law, the rights and wrongs, or validity or invalidity, of their actions and transactions when entered upon and done’.⁷⁰ The declaratory theory is, says Finnis, a statement of the judge’s vocation and responsibility.⁷¹ Courts, especially a supreme court, may exceptionally depart from the accepted body of positive law, because it is so out of step with principles or policies that it should be regarded as mistaken.⁷² In doing so, this should not, says Finnis, be seen as akin to an act of legislation, even though it is ‘new in relation to the subject-matter and area of law directly in issue between the parties’.⁷³ Finnis acknowledges that lawyers can disagree as to when such criteria are met, admitting that they are ‘subtle and elusive’.⁷⁴

⁶⁷ Craig, above n 2.

⁶⁸ Finnis, above n 31.

⁶⁹ Ibid 5.

⁷⁰ Ibid 5.

⁷¹ J Finnis, ‘Judicial Law-Making and the “Living” Instrumentalisation of the ECHR’, in Barber, Ekins and Yowell, above n 34, 76.

⁷² J Finnis, ‘The Fairy Tale’s Moral’ (1999) 115 *Law Quarterly Review* 170.

⁷³ Finnis, above n 31, 5.

⁷⁴ Ibid 5-6.

Thirdly, courts should in general refrain from reforming or changing the common law because their efforts are normally unproductive or counter-productive. The judiciary commonly lacked the information from which to decide on the best reform. They were, moreover, subject to time constraints and procedural limits inherent in the adjudicative process.⁷⁵ Courts were therefore ill-suited and lacked competence for anything more than incremental law reform.⁷⁶

Fourthly, courts should recognize and accept certain legal precepts as embedded in the law. For Finnis, this included the idea that courts do not and should not review the manner of exercise of an admitted prerogative, and attempts to change such matters should be viewed as contrary to the rule of law.⁷⁷ An analogous sin is said to beset the *Belmarsh Prison* case, the reasoning in which was said to be fallacious and manifestly erroneous.⁷⁸

Fifthly, 'in maturely self-determined polities with a discursively deliberative legislature, it is not wise to require or permit judges to exercise the essentially non-judicial responsibility of overriding or even of condemning legislation for its not being "necessary", or for its "disproportionality", relative to open-ended rights and the needs of a democratic society'.⁷⁹ Finnis regards such determinations as not properly within the judicial realm, entailing balancing of the kind to which courts are ill-suited, and intruding on determinations that were the preserve of the legislature.

Sixthly, there should be strict limits on the extent to which courts can update doctrine through recourse to concepts such as the living instrument doctrine. It was legitimate for courts to apply statutes or constitutions to new situations, provided they fell within the 'categories picked out by the propositions expressed in the statute or other instrument, even if the new instances of those categories were not envisaged at the time of enactment'.⁸⁰ But a court should not apply current values, ideas about right and wrong, to ensure that an old situation 'would now be dealt with in a way that is new and incompatibly different'⁸¹ from that originally intended.

B Comment

John Finnis' thesis provides the theoretical backdrop for those engaged in the JPP project. His argument raises important issues that cannot be fully addressed within the confines of this article, concerning matters such as the proper approach to treaty interpretation, and broader issues of law and democracy.⁸² There are, nonetheless, comments that are especially pertinent, since they have direct implications for the JPP.

⁷⁵ Ibid 7-9.

⁷⁶ Ibid 10.

⁷⁷ Ibid 12.

⁷⁸ Ibid 13-18.

⁷⁹ Ibid 20.

⁸⁰ Ibid 23.

⁸¹ Ibid 23.

⁸² See: A Stone, *Judicial Power, Past, Present and Future, A Response to Professor Finnis* (2015) Judicial Power Project <www.judicialpowerproject.org.uk/judicial-power-past-present-and-future-a-comment-on-professor-finnis/>; G Webber, *Past, Present and Justice in the Exercise of Judicial Power, A Response to Professor Finnis* (2015) Judicial Power Project <www.judicialpowerproject.org.uk/gregoire-webber-past-present-and-justice-in-the-exercise-of-judicial-power/>; M Elliott, *Judicial Power in Normative, Institutional and Doctrinal Perspective, A Response to Professor Finnis* (2015) Judicial Power Project <www.judicialpowerproject.org.uk/mark-elliott-judicial-power-in-normative-institutional-and-doctrinal-perspective-a-response-to-professor-finnis/>. See, also, 'S Fredman, 'Living Trees or

(a) Declaratory Theory of Adjudication: Tensions

It is central to Finnis' theory that adjudication must be seen as declaratory and backward looking. For Finnis, it must be so regarded as a matter of stipulation, since it is only by doing so that the requisite sense of judicial responsibility can be secured. If it were not so then a crucial factor in the divide between adjudication and legislation would crumble, since the former would be forward looking, in certain instances at least.⁸³

There is, however, a tension running throughout this reasoning: Finnis contends that the instances in which change can be legitimately secured through the common law should be closely confined, so as to ensure that courts really are declaring pre-existing rights and obligations and not legislating,⁸⁴ however his thesis as to what the declaratory theory really means cuts the ground from under this conservative premise, since it could be used to legitimate much change in common law doctrine.

This tension becomes apparent from Finnis' view as to the true meaning of the declaratory theory. He notes the argument that courts make law, and that to pretend the contrary is a fiction. He nonetheless rejects this view, sticking firmly to the belief that the declaratory thesis, properly understood, accurately captures judicial responsibility and preserves the line between adjudication and legislation.

The central tenet of his argument is that it is sound to say 'both that a settled rule of common law existed [for many years], *and* that all those years the settled view that the presupposed rule is part of our law was an error awaiting correction by better legal reasoning and sound adjudication'.⁸⁵ It is therefore open to a court to hold that a rule contrary to that understood to be currently applicable should apply 'as having been at all relevant times legally correct and an authentic legal rule', with the consequence that 'the newly declared rule would not, in the last analysis, be retroactive — would, in the last analysis, abrogate no part of our law's substantive content'.⁸⁶ There are three difficulties with this reasoning, which are especially salient for the Judicial Power Project.

First, while the whole thrust of the JPP is, as seen, towards the circumscription of judicial power, the declaratory theory, as articulated above, would legitimate far-reaching judicial change. Pretty much any incremental change through analogical reasoning could be regarded as legitimate on the preceding criterion. More far-reaching change could also be legitimate, provided that the shift could be seen as 'an error awaiting correction by better legal reasoning and sound adjudication'. It might be argued by way of response that there are certain changes that judges and commentators alike agree should not be made by courts, but should instead be left to the legislature. This is undoubtedly true, but the truth does not flow from, nor does it have any especial connection with, the declaratory theory as advanced by Finnis, which *prima facie* legitimates change in accord with the broad criterion set out above.

Secondly, this vision of the declaratory theory is grounded on problematic normative and empirical foundations. The core of the argument is captured in the following quotation.⁸⁷

Deadwood: The Interpretive Challenge of the European Convention on Human Rights', in Barber, Ekins and Yowell, above n 34, Ch 4; J King, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy', in Barber, Ekins and Yowell, Ch 8.

⁸³ Finnis, above n 71, 76-8; Finnis, above 72, 173-5.

⁸⁴ Finnis, above n 31, 5-6.

⁸⁵ Finnis, above n 72, 174 (*italics in the original*).

⁸⁶ *Ibid* 174-5.

⁸⁷ *Ibid* 175 (*italics in the original*).

[A]djudication involves the duty not to declare and apply a rule unless it can fairly be said to have been all along a legally appropriate standard, more appropriate than alternatives, for assessing the validity and propriety of the parties' transactions. When that can fairly be said, the same rule, having been declared and applied, is clearly the only legally appropriate standard for assessing the *correctness* of the parties' belief in the legal validity and propriety of their transactions.

The core premise is thus that adjudication is only legitimate if the rule now applied to the parties before the court can be regarded 'all along' to be a legal standard that is more appropriate than alternatives. When discovered this is then the 'only' legally appropriate standard for assessing the correctness of the parties' belief in the validity of their transactions, even if it is different from that previously applicable.

This reasoning is, however, problematic from both a temporal and a static perspective. The temporal problem is that values and assumptions change over time. There is no necessary reason why parties in the eighteenth century would, for example, have the same view as to the most legally appropriate standard to judge unfair contract terms as would their twenty-first century counterparts, and to pretend the contrary is fiction. The idea that common law doctrine that changes to accord greater protection for consumers can be deemed to have always been the law, on the ground that parties would, all along, have regarded it as a legally appropriate standard, does not withstand examination. The reasoning is also difficult from a static perspective, since there is often considerable contestation as to what the best or most appropriate rule is in the modern day. The court will perforce make the choice that it believes to be optimal in this respect, but insofar as it is different from the previous law, that will be constitutive for the parties to the instant case, and others who planned their lives on the pre-existing legal regime.

Thirdly, John Finnis' version of the declaratory theory elides the legitimacy of change, with the characterization of the rights that people have always had. They are two sides of the same coin. When change can be viewed as legitimate, as determined by the previous criterion, the altered rule should be seen as the rule that always existed; there has, therefore, been no retroactive alteration in the rights of those before the court; and therefore we can preserve the veneer that adjudication is backward-looking.

This elision is problematic from the perspective of the parties before the court. Adjudication that establishes a new rule where none existed will, by definition, alter the parties' relevant legal rights and obligations before they came to court. From the perspective of those parties, so too will incremental change, since the party that is caught by this shift was not within the remit of the relevant rule hitherto, and thus the court could not be said to be adjudicating on rights and obligations that such a party possessed prior to the judicial decision. To reason from the assumption that because change or legal development is legitimate, as adjudged from the holistic perspective of the legal system, to the conclusion that the parties before the court in the instant case should accept with equanimity that their pre-existing rights have not changed, does not follow. To reason from the premise that change in the rules is warranted, to the conclusion that the parties should acknowledge that the new rule is the only legal basis for assessing the correctness of their belief in the validity of their transactions, when they had bona fide relied on the pre-existing legal rule, does a disservice to those engaged in litigation. It is a theory designed to preserve the pretence that courts do not make law, achieved at the expense of the very people engaged in litigation from which the law emerges.

(b) Adjudicative Change: Limits

Tensions are also apparent when the conservative dimension to the thesis assumes prominence, with the consequence that change must be left to Parliament. The argument, at certain points, resembles a form of common law originalism, such that if a proposition has been embedded in the common law for some time it can presumptively only be altered by legislation, not by judicial decision. Thus John Finnis believes that case law on the prerogative dating from the seventeenth century could not legitimately be changed so as to render the manner of exercise of such power reviewable.⁸⁸ There are two difficulties with this view.

First, it raises the question as to why the early decision should be invested with such authority. There is a large body of literature concerning originalism as a form of constitutional interpretation. The difficulties of this mode of reasoning are considerably greater when applied to the common law. It is not self-evident why a judicial decision given at a particular time should be invested with some special authority, such that judicial change or alteration of the rule should be castigated as contrary to the rule of law, or as acting contrary to the authority of established law.⁸⁹

We need to tread carefully here. There may, as noted above, be good reasons why courts think that certain changes can only be brought about by legislation. There may also be good normative reasons why it is felt that the older rule should be retained, because it is preferable to the suggested alternative. This can be readily accepted, but does not meet the point being made here.

It remains unclear why a particular common law rule at a particular point in time is invested with such authority. It is also unclear as to why it is illegitimate for the courts to modify such a rule, where the change is not of a kind requiring the imprimatur of the legislature, and where there are good normative reasons for preferring the alternative.

It is important when reflecting on this to recognize that the initial rule, whatsoever it might be, became the 'law' because of an admixture of values, normative argument and practice that led the earlier court to imbue a certain set of facts with a particular legal status. This is true for any common law rule. It did not just 'happen'. It should not, therefore, be regarded as beyond the judicial remit for a later court to re-think an aspect of the pre-existing common law rule and modify it, provided that there are sound normative arguments for doing so, and accepting that values may well have changed in the intervening period.

Thus, the shift whereby the courts recognized that the manner of exercise of prerogative power should be reviewable, subject to limits of justiciability, was entirely legitimate, since there was no principled reason why the executive should fare better when exercising discretionary power pursuant to the prerogative as opposed to statute. If limits were to be placed on such review they should, as the House of Lords stated, be grounded in the subject matter, not the source of the power.⁹⁰

Secondly, the Finnis thesis raises difficult questions about when change in judicial review doctrine is to be regarded as legitimate. Does it mean that the shift from the collateral fact doctrine to *Anisminic*⁹¹ and thence to *Page*⁹² was illegitimate judicial legislation, given that the former doctrine had existed for over 300 hundred years? No one claims that the collateral fact doctrine was wrong when expounded, simply that the courts believed that there was a better criterion for review for error of law. What of the

⁸⁸ Finnis, above n 31, 12.

⁸⁹ Ibid 12.

⁹⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

⁹¹ *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

⁹² *R v Hull University Visitor, ex p. Page* [1993] AC 682.

subsequent shift from *Page* to *Cart*⁹³ and *Jones*,⁹⁴ with the limitation of review for error of law in relation to tribunals? What of the expansion in review for error of fact? Or the recognition of new heads of review such as legitimate expectation? If such developments are regarded as illegitimate judicial legislation, being outside the bounds of incremental change, and offensive to the idea that courts declare the law on the basis of pre-existing rights and obligations, then this has significant consequences for legal development in this area. If, by way of contrast, such jurisprudence is perceived as a legitimate exercise of judicial authority then it throws into doubt how far the declaratory nature of adjudication, as articulated by Finnis, places constraints on judicial change.

(c) Adjudication: Rights and Proportionality

It is evident from the foregoing summation that John Finnis is opposed to rights-based adjudication and proportionality. There is a wealth of literature on this issue. Suffice it to repeat for present purposes: the UK legislature chose to accord courts this power and hence its exercise is legitimate as determined by Parliament; and the critique that this type of power is wholly different from exercised by courts in other contexts is based on a plethora of assumptions that are implicit, and contestable. There is, however, another dimension to this inquiry, which is that the problems said to exist would be obviated if the HRA were repealed. This argument is, however, far more contestable than its proponents acknowledge.

Let us imagine a world with no HRA. Let us make two bare normative assumptions: not all interests are equally important, and some interests are sufficiently important to be regarded as rights. Disavowal of the first would be morally arbitrary; refusal to accept the second is equally implausible in the UK in the present day. It follows from the first proposition that there would have to be variable intensity of review. It follows from the second that the courts would have to determine the meaning of the contested right. They would have to decide the qualifications to such rights, given that many are not absolute. They would have to devise a test for determining whether the qualification could be invoked in a particular case, which might be cast in terms of proportionality or reasonableness. They would, moreover, have to devise rules for the interpretation of legislation/executive action that impinged on a particular right. These determinations would be made taking full account of any relevant statute. This is, of course, much like the common law that pre-dated the HRA.

For the avoidance of doubt, I am making no general claim concerning what might happen if the HRA were to be repealed. I am not saying that the rights recognized at common law would necessarily be the same as those in the ECHR. I am making no claim that the courts should be able to override legislation. I also accept that the legislature is very important in terms of rights' protection, and thus nothing in the preceding paragraph is premised on the idea that courts are the only site for the protection of rights.

My point is more modest. It is to test the assumptions underlying the JPP's desired promised-land. If you accept the two bare normative assumptions then the 'problems' concerning the judicial role with which JPP advocates are concerned will not disappear, and it is misleading to pretend the contrary. If you do not accept these assumptions, then you have to explain this to many people, who would not accept such disavowal with equanimity.

There is a further dimension to this line of inquiry, which is equally important. The JPP concern as to judicial power is targeted at review of legislation and executive power.

⁹³ *Cart*, above n 21.

⁹⁴ *R (Jones) v First-tier Tribunal* [2013] UKSC 19.

Review of the latter is clearly different from the former, more especially so given that such review can encompass oversight not just of ministers, but also agencies, local authorities, educational bodies and health authorities. The consequences of the desired diminution of judicial control are unclear from the JPP, and there is equivocation in this regard. For some, the desired outcome is that the contested executive action should simply be allowed to stand, subject to exiguous controls in terms of *Wednesbury* irrationality as configured by Lord Greene, which are in practical terms impossible to satisfy. For others, there is talk of alternative modes of accountability, in which case some details must be provided over and beyond vague statements that recourse should be had to ministerial accountability or the Ombudsman.

VII CONCLUSION

It is, as noted at the outset, important to subject all forms of power to critical scrutiny, including that exercised by the judiciary. It is equally important for the critique to be objective, balanced and measured. I do not, for the reasons set out above, believe that there is a crisis of judicial legitimacy in the UK, nor do I believe that the courts have in some systemic and unwarranted manner encroached on terrain that is beyond their remit. There are perforce legal decisions that are open to criticism, but this does not constitute a legitimacy crisis, any more than instances in which Parliament strays from a deliberative ideal, or the executive constrains the opportunity for legislative input, betokens a deep crisis in the functioning of our political institutions.

Judicial power has doubtless increased in large part due to the enactment of the HRA 1998. This was, however, a conscious decision of Parliament, and the courts have in general shown sensitivity on epistemic, institutional and constitutional grounds in the exercise of their authority under that legislation. Space precludes detailed consideration of JPP papers and blogs attacking the CJEU and the Strasbourg Court. Suffice it to say the following. The jurisprudence of those courts should be subject to critical scrutiny, in the same manner as domestic courts. There are decisions from both courts that warrant such criticism. There is, nonetheless, much in the JPP archive concerning these courts that is intemperate, where the severely critical language is not borne out by the substance of the argument being made and where it is predicated on theories of how, for example, the CJEU does and should reason that do not withstand scrutiny.⁹⁵

⁹⁵ Thus, for example, Gunnar Beck's highly critical posts concerning the CJEU are predicated on his views concerning a theory of adjudication, see, G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2013). For criticism of that theory, see, M Bobek, 'Legal Reasoning of the Court of Justice of the EU' (2014) 39 *European Law Review* 418; P Craig, 'Pringle and the Nature of Legal Reasoning' (2014) 21 *Maastricht Journal of European and Comparative Law* 205; M Lester, *The 'Rogue' European Court in the Campaign for Brexit* (2016) Judicial Power Project <www.judicialpowerproject.org.uk/maya-lester-the-rogue-european-court-in-the-campaign-for-brexit/>.

PUTTING JUDICIAL POWER IN ITS PLACE

RICHARD EKINS* AND GRAHAM GEE**

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).