
Judicial Power and the United Kingdom's Changing Constitution

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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

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

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.

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

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.

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.

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.

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 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

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

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).

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

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

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 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.

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 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 '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

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.

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.

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

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.

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.

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 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 conferral serves at least in broad terms to legitimise the exercise of the

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) 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.

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.

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.

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 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.

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,

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

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

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

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 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.

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.

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

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

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.

rooted in a 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 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.

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 that ‘most precious’ principle. A number of commentators appear to agree, and *Evans* has attracted notable charges of judicial overreach.⁶¹

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

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).

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 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

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

⁶³ *Ibid* [52].

⁶⁴ Rob Evans and Robert Booth, 'Cameron concedes defeat over publication of Prince Charles's letters', *The Guardian* (online), 26 March 2015 <<https://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 <<https://www.theguardian.com/politics/2016/mar/01/freedom-of-information-review-decides-no-legal-changes-to-act>>.

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.

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, 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

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].

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 on 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.

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

⁶⁸ Ibid [82].

⁶⁹ Ibid [82].

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

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.

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 turning; and I certainly do not argue 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

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) <<https://www.supremecourt.uk/docs/speech-131112-lord-carnwath.pdf>>.

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.