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Article (Accepted version)
(Refereed)

Original citation:
Murkens, Jo Eric Khushal (2018) *Judicious review: the constitutional practice of the UK Supreme Court.* Cambridge Law Journal. ISSN 0008-1973

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Available in LSE Research Online: March 2018

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Judicious Review: The Constitutional Practice of the UK Supreme Court

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Word count:

including footnotes: 11,500

excluding footnotes: 9,400

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Abstract: The role of the UK Supreme Court as conventionally understood is to give effect to, and not to challenge, the will of Parliament. At the same time, the UK's constitution forces the UKSC to develop a constitutional jurisprudence to resolve clashes of higher-order principles, for instance between parliamentary sovereignty and the rule of law. This development puts the legitimacy of unelected and unaccountable judges invalidating legislation under the spotlight. Instead of arguing for US-style strike-down powers, I argue that cautious and corrective judicial intervention is constitutionally mandated and democratically legitimate.

Keywords: constitutional law, constitutional theory, democracy, legitimacy, judicial review, UK Supreme Court.

Judicious Review: the Constitutional Practice of the UK Supreme Court

In modern pluralistic democracies judicial review of legislation inevitably raises normative questions with respect to the proper relationship between judiciary and legislature. Constitutional review usually operates when three conditions are met. First, where a constitutional document purports to constrain the enactment of laws and the exercise of public power. Second, where a judicial body operates independently of the legislature and the executive. Third, where the judiciary is authorised to adjudicate challenges to legislation as against the principles of the constitution.[1] The United Kingdom ticks only the independent judiciary box.[2] The first and third conditions are not met: no constraining constitution exists, and the UK Supreme Court (UKSC) does not have the power to adjudicate challenges to Parliament's authority to enact any particular piece of legislation.

That said, there is growing evidence that senior judges no longer view the broader constitutional context as purely advisory. The UKSC Justices not only resolve individual cases, but also interpret and implement constitutional law and principles. The cases examined in this article are intricate and deeply reasoned, rather than pithy applications of the doctrine of legislative intent. This process of constitutional interpretation resembles the function of constitutional review, e.g. in the USA. Domestically this process does not happen in the structured, top-down, way that is familiar from systems with a constitution empowering the judiciary to limit the public powers.[3] It is a gradual process of the UKSC holding public

[1] See generally, D. Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton N.J.: Princeton University Press, 2010), 6.
[2] See generally G. Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015).
[3] R.A. Posner, "Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights" (1992) 59 University of Chicago Law Review 433-450.

bodies to constitutional standards and putting Parliament on alert that it could conceivably do the same for legislation.

I am not claiming that the UKSC is morphing into a legislative third chamber or is equipping itself with legislative strike-down powers, but nor do I accept that the UKSC Justices understand their role as mechanically giving effect to parliamentary intention. Instead, the UKSC operates under the competing demands of autonomy and constraint: it is institutionally independent from politics, but must generate and secure its own kind of legitimacy through adherence to law and the constitution. Autonomy requires interpretative parity with Parliament over the constitution.[4] Legitimacy involves complex value judgements in areas where law meets politics, as where individual justice clashes with public policy.

David Robertson defines constitutional review in liberal democracies as "a mechanism for permeating all regulated aspects of society with a set of values inherent in the constitutional agreement the society has accepted".[5] This definition fits with judicial review in the UK at the highest level as well. This overlap in turn gives rise to the well-known clash between a system of independent judicial supervision of parliamentary legislation and the principle of electoral democracy. The literature largely dismisses the possibility of "exceptional circumstances review" in the context of oppressive or arbitrary legislation on the basis that such review lacks authority and justification in constitutional law.[6]

My response is that judicial intervention in hard but non-exceptional cases, i.e. those that involve a clash of higher-order principles, is already a feature of the UK's constitutional landscape. Since judicial review cannot be justified with reference to constitutional law, I will shift the focus and ask instead whether it can be justified with reference to democracy. I will

[4] S. Sedley, "Human Rights a Twenty-First Century Agenda" [1995] Public Law 386, 389.
[5] Robertson, *The Judge as Political Theorist*, 7.
[6] M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford: Hart, 2015), 236.

discuss the merits and demerits of judicial review in the next section. I then fall back on literature to examine the role of top courts in constitutional democracies. Finally, I explain how a significant number of Justices utilise the creative tension between autonomy and constraint to assert the UKSC's jurisdiction over hard cases and complex questions. I argue that the obstacles to exceptional circumstances review are gradually being eroded, that the UKSC is likely to assert its authority over more cases and issues in the future, and that sound reasons for judicial intervention meet the requirements of democratic legitimacy.

JUDICIAL REVIEW AND THE CONSTITUTION

Paul W. Kahn bases the legitimacy of every legal order on two standards: a standard of will, according to which law is grounded in popular consent; and a standard of reason that corrects procedural and substantive deficiencies.[7] In the USA, the question whether a judicial body that was not elected by and is not accountable to the public should invalidate majoritarian policies is polarised by camps that are broadly rights-sceptic (standard of will) and rights-foundational (standard of reason). On one end of the spectrum, Alexander Bickel[8] and Jeremy Waldron[9] stand for a position that regards constitutional review as an illegitimate constraint upon the principle of political participation. It limits the equal right of citizens to take part in and influence the political decision-making processes that give rise to the laws with which they have to comply. Writing about the USA, H.L.A. Hart described judicial review of legislation as an "extraordinary judicial phenomenon" that is "particularly hard to justify in a democracy".[10] John Hart Ely saw the main issue with judicial review of legislation being that "a body that is not elected or otherwise politically responsible in any significant

[7] P.W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999), 7-8.
[8] A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edn (New Haven: Yale University Press, 1986).
[9] J. Waldon, "The Core Case Against Judicial Review" (2006) 155(6) Yale Law Journal 1346-1360.
[10] H.L.A. Hart, "American Jurisprudence Through English Eyes" in *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), 125.

way is telling the people's elected representatives that they cannot govern as they'd like".[11] Michael Perry reminds his readers that in a democracy electorally accountable government is "axiomatic", whereas judicial review requires "justification".[12]

The other end of the spectrum, exemplified by Ronald Dworkin and John Rawls, deals with the two institutions separately. Judicial review of legislation is legitimate in so far as it involves an appeal to individual rights and constitutional principle, which set out the parameters within which political power may be legally exercised.[13] The legislature, by contrast, ought to make use of policy when enacting laws to advance the public good and society at large. On this view, the courts and Parliament are not rival institutions but, in their own ways, both engaged with what Rawls calls "the idea of public reason", i.e. the idea of a stable constitutional democratic society.[14] The role of the court is not limited to checking the process of legislating, but should also ensure substantive compliance with democratic values.[15]

In the UK the absence of constitutional review greatly weakens the equivalent positions. One branch of the debate argues that the doctrine of ultra vires performs a democratic requirement in giving effect to parliamentary will. A rival branch counters that the principles of judicial review (illegality, irrationality, impropriety, proportionality) were created by the common law, developed by courts, and have little or nothing to do with parliamentary intent. Paul Craig encapsulates the comparatively innocuous parameters in one sentence:

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[11] J.H. Ely, *Democracy and Distrust: A theory of judicial review* (Cambridge Mass: Harvard University Press, 1980), 4-5.
[12] M. Perry, *The Courts, the Constitution, and Human Rights* (New Haven: Yale University Press, 1982), 9.
[13] R. Dworkin, "Political Judges and the Rule of Law" in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) 9, 11–12; J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 212–54.
[14] Rawls Ibid.
[15] David A. J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986), 14-19.

> The essential dividing line between supporters and opponents of the ultra vires model is as to how far legislative intent can provide a satisfactory explanation for the norms which constitute judicial review.[16]

These two positions are, in any case, not beyond reconciliation. The modified ultra vires doctrine assumes that Parliament intends to legislate in accordance with judicially-enforceable rule of law criteria that include individual rights and principles of good governance.[17] Judges already look for express statutory words to empower a public body to act contrary to fundamental principles.[18] Independent courts are needed, on this view, to protect individuals and minorities from the will of the majority.[19]

Of course there is more to these domestic debates. The point is that most political constitutionalists do not decry judicial review as "illegitimate" or regard it as a "deviant institution"[20] and most legal constitutionalists do not advocate for the "rule of law courts" or judicial supremacy. The arguments for and against judicial review are made within the constitutional framework, and not in opposition to it. Alison Young considers the literature on legal and political constitutionalism in greater detail. She concludes that for the most part the differences are a matter of degree, not kind. There is significant overlap between the rival camps regarding human rights protection and the need for judicial review, and they end up favouring either legal or political controls. On the question posed at the outset, whether an account of the judicial role can be given that is consistent with the principle of majoritarian

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[16] P.P. Craig, *Competing Models of Judicial Review*, in C. Forsyth (eds) *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000), 392.
[17] M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart, 2001), ch.4.
[18] *R. v Secretary of State for the Home Department, ex p Simms and O'Brien* [1999] UKHL 33, [2000] 2 A.C. 115, per Lord Steyn at p.130 and per Lord Hoffmann at p.131
[19] S. Sedley, "The Common Law and the Constitution" in M.P. Nolan and S. Sedley (eds) *The Making and Remaking of the British Constitution* (London: Blackstone Press, 1997), 25. See also *A and X v Secretary of State for the Home Department* (*Belmarsh detainees*) [2004] UKHL 56; [2005] 2 A.C. 68, per Lady Hale at [237]; *R. (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] 1 A.C. 719, per Lord Brown at [158]; *R. (Alconbury) v Secretary of State for the Environment* [2001] UKHL 23; [2001] 2 All E.R. 929, per Lord Hoffmann at [70].
[20] Bickel, *The Least Dangerous Branch*, 18.

government, Young finds "no conclusive proof for any argument" and suggests that the supposed rivalry amounts to little more than a labelling exercise.[21] Adam Tomkins also accepts the validity of both positions: it is undemocratic for unelected and unrepresentative judges to rule over constitutional questions, but judicial intervention is also an essential corrective against democratic pathologies, e.g. a temptation by the majority to violate minority rights.[22]

One recurring theme, however, is the conception of courts in opposition to the legislature. Their differences are obvious. Parliament is the proper institution to enact generally-applicable legislation on the basis of public consultation and deliberation. Courts are the proper forum for resolving disputes between private litigants. Whereas legislation applies prospectively and determines the future direction of society, judicial decisions apply retroactively to events that occurred in the past.[23]

However, it does not follow that all legislation is presumptively democratic, or that a judicial decision that rivals statutory law is undemocratic on the grounds that judges are unelected. This oppositional stance results in a zero-sum game in which "courts are always cast as the villain in the democratic piece".[24] The connection between the court's unelected composition and the illegitimacy of constitutional review is taken for granted when it is precisely that connection that has to be challenged in order to ascertain whether the courts' review function is indispensable in a constitutional democracy.

[21] A. L. Young, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press, 2017), 66.
[22] A. Tomkins, *Public Law* (Oxford: Clarendon Press, 2003), 210.
[23] J. Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983), 9-10.
[24] A.C. Hutchinson, "The Rule of Law Revisited: Democracy and Courts" in D. Dyzenhaus (ed.) *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999), 202.

The two institutions also have more in common than is commonly assumed. First, like legislatures, courts enjoy status and power.[25] Unlike legislatures, judicial decisions do not have to follow political imperatives or public opinion. Instead, '…courts have certain capacities for dealing with matters of principle that legislatures and executives do not posses'.[26] This is of particular value as regards causes on which the legislature, for political reasons, may never decide to act.[27] Second, like the elected political branches, courts also claim to represent the people.[28] Courts are not 'representative' in the same way that an MP is an envoi of the electorate in his or her constituency. The courts are rather 'representational' in that they represent the public interest or common good. As Bickel notes, courts articulate principles that are capable of obtaining popular consent.[29] Finally, like legislatures, courts require legitimacy. Unlike legislatures, courts do not derive their legitimacy from a simple conception of democracy, i.e. the aggregation of majority preferences. Instead, judicial legitimacy stems from a complex constellation that comprises professional expertise, institutional autonomy, and an enduring concern with Rawls' idea of public reason. To summarise my argument, the democratic legitimacy of judicial review depends on constitutional *principle* as a normative reference point, on the courts as *representational* organs, and on the law as 'a continuous, *historical process* in which the law is developing through constant efforts of reform'.[30] These themes will be explored in the next section. For all their differences, courts and legislatures

> …are in the same game, namely fashioning and implementing a notion of democracy that can provide practical answers to the challenges that presently confront society.

[25] Bell, *Policy Arguments in Judicial Decisions*, 270.
[26] Bickel, *The Least Dangerous Branch*, 25.
[27] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] 1 A.C. 657 at [300], per Lady Hale.
[28] Kahn, *The Cultural Study of Law*, 78.
[29] Bickel, *The Least Dangerous Branch*, 239.
[30] Kahn, *The Cultural Study of Law*, 15, emphasis added.

> And, in doing that, neither courts nor legislatures have a lock on political judgement about what it is best to do.[31]

Accepting the democratic legitimacy and indispensability of both institutions allows us to inquire into the legitimacy of judicial review of legislation. What is the proper role of the judiciary in the UK constitution? How can judges secure the independence of their institutions and the autonomy of their decisions? Finally, how can judges respect the principle of democracy and provide for "the evolution and application of society's fundamental principles"?[32]

JUDICIAL REVIEW AND DEMOCRATIC LEGITIMACY

Martin Shapiro notes critically how the judicial function to give effect to the will of Parliament operates against the courts. If legislative supremacy is the overriding constitutional axiom the courts cannot effectively limit government action except in so far as the outcome of judicial review proceedings enforce and enshrine legislative intent: 'whatever judicial independence might mean in the English context, it certainly could not mean political independence'.[33] But appearances can be deceptive, and the existence of the common law renders the relationship between Parliament and the courts more complex than the formal description suggests. As guardians of the common law, courts have developed principles, such as fairness, reason, accountability, fundamental rights, and equality of treatment, which are presumed not to be undermined by Parliament when it legislates (save for express terms to the contrary). But judges not only resolve disputes, they also interpret the law, which in the

[31] Hutchinson, "The Rule of Law Revisited", 218-9.
[32] Bickel, *The Least Dangerous Branch*, 109.
[33] M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 66.

context of appeals courts involves some measure of developing norms. 'If judges make law' Shapiro concludes, 'then judicial independence is a very problematic value in a democracy'.[34]

The previous section shows how the examination of judicial review in a constitution that is structurally imbalanced by the existence of two rules of recognition (parliamentary sovereignty and the common law) involves 'paradox, conflict, ambiguity, and unresolved tensions'.[35] This deadlock needs to be broken. The question in this section is whether analysing judicial independence on the presumption of democratic legitimacy generates different themes. The scholars I have selected broadly contribute to "judicial institution building", which Crow understands as "the creation, consolidation, expansion, or reduction of the structural and institutional capacities needed to respond to and intervene in the political environment".[36] The emerging themes outline a finely balanced justification of judicial review that protects democracy's structural conditions, respects the UKSC's institutional capacities, recognises a need for cautious and corrective intervention, and that is rooted in a deep concern for democratic legitimacy.

Judicial Review and Democracy's Structural Conditions

The first justification for judicial review lies in protecting democracy's structural conditions, which contradicts Bickel's claim that judicial review is essentially undemocratic. It also goes against Ely's primary concern with preserving the integrity of majoritarian legislative procedures. Electoral legitimacy, which stresses the equal rights of political participation of

[34] M. Shapiro, "Judicial Independence: New Challenges in Established Nations" (2013) 20(1) *Indiana Journal of Global Legal Studies* 253-277, 257.
[35] Shapiro, *Courts*, 66.
[36] J. Crow, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton N.J.: Princeton University Press, 2012), 8.

citizens and majoritarian decision-making, is clearly the base line. However, a decision does not become right because a group of persons reaches it by simple or special majority rules.

Samuel Freeman, a legal philosopher, does not assume that the links between judicial review and democracy exist.[37] From the outset, Freeman constructs a conception of democracy as a form of sovereignty rather than as a form of government. The form of government is based on a procedural understanding of democracy that is defined by the basic requirements of universal franchise, free and fair elections, equal representation, and majority rule.[38] It is a standard of will. By contrast, the form of sovereignty assumes the existence of "structural requirements" and the "background conditions" of stable democracies, as well as the "normative requirements of the values and ideals" that underpin democratic institutions.[39] It is a standard of reason. Form and procedure represent necessary but insufficient conditions for legitimate law-making: democracy's structural requirements must also be satisfied. These stem from the recognition of civil and political rights that support the equal freedom and independence of citizens. In particular, Freeman mentions "whatever rights are necessary for free and informed political deliberation and public discussion", such as freedoms of speech and association.[40] Utilising the social contract theory of Jean Jacques Rousseau and John Rawls, Freeman identifies rights and procedures as democratic if they "promote the good of each citizen and maintain the equal rights that constitute their democratic sovereignty".[41] Democracy, in short, is a form of sovereignty that is justified by a social contract of the people.

[37] S. Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" (1990-1991) 9 Law and Philosophy 327-370, 328.
[38] Freeman, "Constitutional Democracy", 337.
[39] Freeman, "Constitutional Democracy", 336.
[40] Freeman, "Constitutional Democracy", 350.
[41] Freeman, "Constitutional Democracy", 350.

The constitutional system generates its own procedures for determining the legality of political decisions. However, these must be complemented by independent criteria for assessing the legitimacy of those decisions, which are provided by the democratic system. The constitution of a democratic society straddles a procedural concern for legality and the formal equality of individuals, and a substantive concern for legitimacy according to which people determine and pursue their own conception of a good life in accordance with general social rules. Democracy allows people to rule themselves in Rawlsian fashion by enacting laws on the basis of principles that everyone can accept.

In light of the above, Freeman welcomes judicial review of legislation as a pre-commitment of free, equal, and rational citizens, under which "citizens provide themselves with a means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative processes".[42] Taking democracy's infrastructure "off the legislative itinerary" is not undemocratic: judicial review of legislation only limits "ordinary legislative power in the interest of protecting the equal rights of democratic sovereignty".[43] After all, if democracy emphasised only equal political rights and rule by majority there would be no incentive to obey the law. Without constraints, majoritarianism threatens the idea of a legal system. Courts may be imperfect institutions, but they provide citizens with a "means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative processes".[44] In conclusion, Freeman highlights in what circumstances democratic judicial review can be distinguished from undemocratic judicial review.

[42] Freeman, "Constitutional Democracy", 353.
[43] Freeman, "Constitutional Democracy", 353.
[44] Freeman, "Constitutional Democracy", 353.

> There is nothing undemocratic…about the judicial review of laws that infringe against the equality of such fundamental moral rights as liberty of conscience and freedom of thought, freedom of association, freedom of occupation and choice of careers, political participation, and more generally, the freedom to pursue one's own plan of life. Judicial review is undemocratic when it contravenes majority decisions in order to maintain the power and legal privileges of elite social and economic classes against social change and economic reforms designed to enable each citizen to achieve independence and to effectively exercise these fundamental rights.[45]

These are the choices: either the absence of electoral accountability or political will is equated with the absence of democratic legitimacy, or judicial review on the basis of legal principles is one of the choices made by pre-committed, free, and equal citizens to protect their sovereignty and independence. Either democratic theory is merely about establishing the rights and principles according to which citizens wish to be governed, or it also includes constitutional mechanisms for their protection. For Freeman, courts are the appropriate institution, and judicial review a sensible mechanism, to uphold democracy's structural conditions.

Judicial Review and Representation

The second justification for judicial review is representational, which has an experiential and a constructive component. The experiential aspect demands some form of social acceptance. On the one hand, the complete absence of social acceptance would be fatal for any public institution: "[n]o institution can survive the loss of public confidence, particularly when the people's faith is its only support".[46] On the other hand, courts should not be pressured into

[45] Freeman, "Constitutional Democracy", 367-68.
[46] D. Alfange, *The Supreme Court and the National Will* (Garden City, N.Y.: Doubleday Doubleday, 1937) 235.

securing mainstream public opinion or "specific support" for individual cases. Public disagreement with a judicial decision does not equate to withdrawing support for the judiciary as an institution. As representational organs, then, courts depend on "diffuse support", i.e. broadly favourable public attitudes even when the public disagrees with the outcome of a specific case.[47] However, the more important task lies in the construction of courts and judicial review as 'representation of the people'.[48]

The central point underpinning Kahn and Freeman is that democratic government combines will and procedure with reason and structure. Christopher L. Eisgruber, a constitutional scholar, embraces the dualism by refuting the received wisdom that only elected legislatures are qualified to make decisions on behalf of the people. Eisgruber refashions the judiciary (and the US Supreme Court in particular) as "a sophisticated kind of representative institution".[49] Judicial review ought not to be conceived negatively as a constraint, but positively "as one institutional mechanism for implementing a complex, non-majoritarian understanding of democracy".[50] Elected and majoritarian institutions do not accurately represent the people: neither the majority nor the electorate can sensibly be equated with the people. It follows that elected bodies need to be supplemented by other types of institutions, such as independent agencies, central banks, and constitutional courts.[51]

Like Dworkin, Eisgruber regards judicial review as an "ingredient" of a modern legal system, and not as an external constraint.[52] In *Law's Empire*, Dworkin breaks judicial

[47] See generally G. A. Caldeira and J.L. Gibson, "The Etiology of Public Support for the Supreme Court" (1992) 36 American Journal of Political Science 635-664.
[48] R. Alexy, "Balancing, Constitutional Review, and Representation" (2005) 3(4) International Journal of Constitutional Law 572-581, 578.
[49] C.L. Eisgruber, *Constitutional Self-Government* (Cambridge, Mass.: Harvard University Press, 2001), 48.
[50] Eisgruber, *Constitutional Self-Government* 48.
[51] Eisgruber, *Constitutional Self-Government* 52.
[52] Eisgruber, *Constitutional Self-Government* 77.

decision-making down into three stages.[53] The *pre-interpretative* stage identifies the preliminary rules and standards that relate to a certain social practice. At the *interpretative stage* the judge formulates a narrative of the main elements of that practice and assesses whether the general shape of that practice is worth pursuing. During the *post-interpretative stage* the judge considers the stage two justifications, and decides the case on the basis of what the prevailing social practice requires. Dworkin's theory of adjudication, which forms a branch of his theory of integrity, rests on the articulation of principles or values that are fundamental to the constitution and underpin the legal rules. In other words, Dworkin regards judicial review as a necessary ingredient of a constitutionalised legal system.

Dworkin envisions a *constitutional* role for judges, who are guided by conceptions of justice based on fundamental rights and principles. But what about a distinctly *democratic* role for judges? Whereas Ely understands judicial review as merely "representation-reinforcing",[54] scholars like Robert Alexy and Eisgruber refer to judges as "representatives of the people". Judges are said to represent the common interest or general will of the people. The legislature represent the people through elections, votes, and reflecting transient public opinion, the judiciary by developing and protecting a timeless account of justice.[55] This can only be achieved if the judges' reasons are grounded in *ex ante* principles or structural conditions that "are at some greater level of generality and at some temporal remove from the statutes that judges are called on to apply".[56]

How convincing is the argument that elitist and unelected judges have a better idea of the people's sense of justice than elected representatives? Jeb Rubenfeld takes up the

[53] R.M. Dworkin, *Law's Empire* (London: Fontana, 1986), 65-68.
[54] J.H. Ely, *Democracy and Discontent*, 87.
[55] Eisgruber, *Constitutional Self-Government* 78; see also 7, 52, 126; Kahn, *The Cultural Study of Law* 80.
[56] K.L. Scheppele, "Declarations of Independence: Judicial Reactions to Political Pressure" in S.B. Burbank and B. Friedman (eds) *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, 2002), 227, 245.

implications of Eisgruber's thesis. Rubenfeld plays with the idea of a federal statute establishing Christianity as the national religion in the USA, which would clearly violate the US Constitution irrespective of popular support. Should the US Supreme Court judges enforce the historical commitments to justice and liberty? Or might they find that the statute accurately reflects the moral judgement of contemporary society and deem it to be constitutional?[57] The problem with Eisgruber's thesis lies in the imprecision with which he describes judges as making decisions "on the basis of a conception of justice with which Americans in general could plausibly identify themselves".[58] Rubenfeld spots this weakness immediately and, taking Eisgruber at his word, undercuts the "judges-as-spokesmen-for-the-people" position[59] through simple hypotheticals.

Yet Rubenfeld's criticism goes too far. It is correct that judges ought to make decisions on the basis of legal reasoning and their legal knowledge, experience, and understanding, and without being subject to external political pressures. Yet the manner in which courts represent the people is "purely argumentative".[60] Asking judges to try to identify and express the principles and values of contemporary society is not, *pace* Rubenfeld, the same as government by judicial proxy. Arguably their reputation as fair decision-makers is at stake not when they become embroiled in hard cases involving clashes of principles, but when they publish their opinion: "[t]he real controversy today is about *which* morally and politically contested issues judges should address, not about *whether* they should address such issues at all".[61] By concerning themselves with the public interest and the common good the courts as representational organs supplement the role of political and representative institutions.

[57] J. Rubenfeld, "Of Constitutional Self-Government" (2003) 1555 Faculty Scholarship Series Paper 1749-1765, 1751-1752.
[58] Eisgruber, *Constitutional Self-Government*, 126.
[59] Rubenfeld, "Of Constitutional Self-Government", 1754.
[60] Alexy, "Balancing, Constitutional Review, and Representation" 579.
[61] Eisgruber, *Constitutional Self-Government* 74.

Improving public discussion by framing political issues in terms of reasons and principle, and not influence and will, contributes a further democratic justification for judicial review.

Judicial Review and Time

The third justification for judicial review adds a diachronic element to democracy's structural conditions and the court's representational function. The French modern political historian Pierre Rosanvallon reaffirms Kahn and Freeman by demanding and generating novel types of legitimacy to add to the traditional forms based on electoral representation. Democracy has become "decentred"[62] since the collapse of the dual forms of electoral legitimacy (universal suffrage) and bureaucratic legitimacy (public administration) in the Western world since the early 1980s.[63] The old democratic order is complemented by a new representative order based on independent authorities and novel processes.[64] Elections still matter, but whereas previously legitimacy derived from the intrinsic attributes of the relevant institutions (the ballot box and a competitive selection process for civil servants), the new forms of legitimacy are defined by qualities that "are never definitively acquired. They remain precarious, always open to challenge, and dependent on social perceptions of institutional actions and behaviour".[65]

Rosanvallon tracks Eisgruber by focussing on those institutions that are not usually regarded as democratically legitimate, such as constitutional courts and regulatory agencies. Constitutional courts are caught in the binary trap between reason and will, law and democracy, between constitutional supervision and the majoritarian principle, which in the

[62] P. Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princteon, N.J.: Princeton University Press, 2011), 7.
[63] P. Crouch, *Post-Democracy* (Cambridge: Polity, 2004); M. Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), Ch.15; P. Mair, *Ruling the Void: The Hollowing of Western Democracy* (London: Verso, 2013).
[64] Rosanvallon, *Democratic Legitimacy*, 92.
[65] Rosanvallon, *Democratic Legitimacy*, 7, 95, 97.

UK translates into the respective doctrines of the rule of law and ultra vires. Rosanvallon instead seeks to connect independent authorities to his conception of pluralist democracy. He does this in two ways. First, by treating the adversarial form of electoral-representative competition for votes (a "realm of partisan politics") and the more consensual form of decision-making based on the general interest (a "realm of common existence") as two sides of the same coin.[66] Second, by supplementing electoral-representative legitimacy with new modes of democratic legitimacy: impartiality, reflexivity, and proximity. *Impartiality* allows independent institutions without electoral authority, but with administrative expertise, to monitor or regulate the activities of others. *Reflexivity* allows constitutional courts, for instance, to hold the lawmaker to account and, if need be, "to compensate for the failure of electoral majorities to embody the general will".[67] *Proximity* results from an ideal of government that concerns itself with "everyone's problems". Proximity is not associated with any particular institution, but emerges from "a range of social expectations as to the behaviour of those who govern".[68]

Rosanvallon follows in the footsteps of Marquis de Condorcet, who rendered "representative democracy" more complex than many of his post-revolutionary contemporaries had thought. For Condorcet, the people could only exist politically through representation, which expressed itself in multiple ways. The short term could be addressed with referendums and through censure; the periodic through institutionalised elections; and the long term through constitution. Rosanvallon adds to the complexity of the concept of

[66] Rosanvallon, *Democratic Legitimacy*, 114.
[67] Rosanvallon, *Democratic Legitimacy*, 6.
[68] Rosanvallon, *Democratic Legitimacy*, 11.

democratic legitimacy by mirroring Condorcet's manifestations of the people, which oscillate between "the people of the ballot box and the people as principle".[69]

The abstraction of the people to an axiomatic principle that is constituted by equality and held together by fundamental rights and citizenship[70] resonates with the representational function discussed in the previous section. It bears on the democratic legitimacy of constitutional courts in three ways. First, the modern democratic polity sustains a complex tension between institutions of conflict, such as legislatures, and institutions of consensus,[71] such as courts. Consensus does not mean that judges always agree, but refers to the source of judicial legitimacy, namely the courts' "constituent impartiality"[72] towards the people as principle. Courts represent the people socially and politically,[73] which allows individuals and groups to challenge a government decision if, in Pettit's words, the decision is unsupported by "public reasons recognised in the community and should therefore be amended or rejected".[74] Judicial review necessarily brings representation clashes to the fore: the government speaks for the majority or popular opinion (political will), the courts stand for the permanent interest of the people (constitutional principle).[75] Rosavallon stresses that "[a]ny regime based on universal suffrage suffers from the fundamental flaw of mistaking the majority for the whole, and it is the job of the courts to stand as a constant reminder of this."[76]

Second, Rosanvallon links the courts' representational function to time. Courts are not just adjudicators in individual cases but, by developing rights and principles, participants in

[69] Rosanvallon, *Democratic Legitimacy*, 140-141.
[70] Rosanvallon, *Democratic Legitimacy*, 130-131; 140.
[71] Rosanvallon, *Democratic Legitimacy*, 12-13.
[72] Rosanvallon, *Democratic Legitimacy*, 114.
[73] Rosanvallon, *Democratic Legitimacy*, 140.
[74] P. Pettit, "Depoliticizing Democracy" (2004) 17(1) Ratio Juris 52–65, 61.
[75] Kahn, *The Cultural Study of Law*, 78-80.
[76] Rosanvallon, *Democratic Legitimacy*, 143.

democratic deliberation. As norm-developing institutions, courts "reconstruct the history of the law"[77] and gradually produce a "collective memory".[78] For Kahn, judicial opinions are a special form of legal self-justification. "They are designed to be read in an indefinite future, with the expectation that they will invoke in the reader a continuing loyalty to the rule of law".[79] This is echoed by Rosanvallon, for whom courts fulfil two related functions. they are "the guarantors of the promises that community makes to itself"; and "they preserve the identity of democracy over time".[80]

Third, Rosanvallon ties the axiom of the people to stable constitutional principles. The formal component of law-making, parliamentary government, produces only ordinary (short-term) politics. Democracies are intrinsically biased in favour of the present,[81] meaning that short-termism is a necessary condition of the political system rather than the failing of individual politicians. To counteract the constant perils of short-termism, which viewed from the future appears as "the dead hand of the past",[82] Rosanvallon underlines the need for timeless constitutional principles. Decisions need to be made on the basis of norms and principles, which in turn generate their own social acceptance and legitimacy.

Rosanvallon overcomes the tired binary trade-offs of conventional constitutional theory. Constitutionalism is not the opposite of democracy, but its necessary condition. Courts and elected institutions do not operate antagonistically, but as components of a unified framework.[83] Judicial review and parliamentary decision-making are "complementary procedures for expressing the general will": one has immediate effect, the other operates

[77] Rosanvallon, *Democratic Legitimacy*, 144-145.
[78] Rosanvallon, *Democratic Legitimacy*, 141.
[79] Kahn, *The Cultural Study of Law*, 125.
[80] Rosanvallon, *Democratic Legitimacy*, 142.
[81] D.F. Thompson, "Democracy in Time: Popular Sovereignty and Temporal Representation" (2005) 12(2) *Constellations* 245-261, 246.
[82] Thompson, "Democracy in Time", 246.
[83] Rosanvallon, *Democratic Legitimacy*, 142.

reflexively and across time.[84] Decisions by the top court are not the expression of a contextual constitutional interpretation, but normatively stable and valid for the long-term. But how can a court produce normative stability and ensure long duration?

Here Rosanvallon relies on an idiosyncratic and decontextualized understanding of law. Decisions by the top court remove normative claims from their point of origin and political interests. They become ahistorical, apolitical, and acontextual. This portrayal of courts as "outside politics" reflects a Continental understanding that does not accurately describe common law institutions. According to Max Weber, in a bureaucratic state with rational laws,

> …the judge is a kind of legal paragraph-machine into which one throws the documents on a case together with the costs and fees so that it will then spit out a judgement along with some more or less valid reasons for it […].[85]

By contrast, in England, Weber continues, the shaping of law is a practical process that casts the judge as a less mechanical but still rule-bound political actor. Normative stability in the common law is generated by judges who are bound by precedent. The doctrine of precedent connects the past to the present and the future. Principles become timeless due to their systemic connection and continuity. On the one hand, the practice ensures certainty and predictability, or in Weber's phrase "*calculable* schemata".[86] On the other hand, it still provides some room for manoeuvre. Judges "…work the past so as to realise its present possibilities for future innovation".[87]

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[84] Rosanvallon, *Democratic Legitimacy*, 145.
[85] M. Weber, "Parliament and Government in Germany under a New Political Order" in P. Lassman and R. Speirs, *Weber: Political Writings* (Cambridge: Cambridge University Press, 1994), 148-9.
[86] Ibid.
[87] Hutchinson, "The Rule of Law Revisited", 216.

THE CONSTITUTIONAL JURISPRUDENCE OF THE UKSC

In the final section I want to show that the UKSC is increasingly committed to the three reference points (structural conditions, axiomatic representation, and historical process) that were outlined in the previous section. The UKSC has approached a number of recent cases with reference to *ex ante* principles, such as the rule of law and the separation of powers, rather than solely on the basis of legislative intent. This is not a case of Justices simply articulating their personal preferences into law – a near-impossible proposition within the context of a judicial institution.[88] Rather, constitutional law compels them to speak in an idiom that embraces rights and principles as "inherent and fundamental to democratic civilised society".[89] Additionally they draw on time to articulate legal history and collective memory: "We are not making it up as we go along, but building upon the centuries of law and jurisprudence which make up our national narrative".[90] Higher-order principles and an account of justice across time are incorporated into judicial reasoning, which fosters a rich, multifaceted, and non-majoritarian understanding of democracy. It also contributes to an axiomatic form of judicial representation of the public good.

Lord Steyn's judgment in *Jackson*[91] stands out as the high watermark of a shift in judicial approaches from deferential adherence to sovereignty to a recognition of free-standing constitutional principles.[92] The Attorney General had intimated that a government could combine its majority in the House of Commons with the Parliament Act 1949 to

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[88] S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, N.C.: Duke University Press, 1989), 366-7.
[89] *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532 Lord Cooke of Thorndon at [30].
[90] Lady Hale, "The Supreme Court in the United Kingdom Constitution", The Bryce Lecture, Oxford, 05 February 2015, p.18.
[91] *Jackson v Attorney General* [2005] UKHL 56; [2006] A.C. 262; decided by the Appellate Committee of the House of Lords as the predecessor of the UKSC.
[92] See also *R. (on the application of E) v Governing Body of JFS* [2009] UKSC 1; [2010] 1 All ER 1, and the discussion by C. McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: the *JFS* case considered' (2011) 9(1) *International Journal of Constitutional Law* 200-229.

introduce "oppressive and wholly undemocratic legislation", e.g. to abolish the House of Lords (the legislative chamber) or judicial review.[93] Although Lord Steyn acknowledges this position as technically correct he goes on to ponder the existence of a "constitutional fundamental", such as judicial review, "which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish".[94] This sentiment resonates with Lord Hope, who stresses the rule of law as "the ultimate controlling factor" of the British constitution,[95] and Lady Hale, who imagines that a court would "treat with particular suspicion (and might even reject) any attempt to subvert the rule of law".[96] This was an unprecedented judicial shot across Parliament's bow as part of a judgement. Lord Hope re-issues the warning in *Axa* when he counsels the government against abolishing judicial review or individual rights: "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".[97]

Jackson and *Axa* do not establish a springboard for judicial intervention that utilises the rule of law to strike down oppressive parliamentary legislation.[98] They merely suggest that some senior judges acknowledge the need for corrective judicial intervention in truly exceptional and altogether undemocratic circumstances. I do not use this article to speculate about what additional circumstances might qualify. Instead, I examine three cases post-*Jackson/Axa* to show that some judges are successfully expanding the UKSC's constitutional case law by testing legislative authority in hard but non-exceptional cases. The doctrine of legislative intent no longer goes unchallenged by the UKSC; the objections to judicial review

[93] *Jackson*, per Lord Steyn at [101-102].
[94] *Jackson* at [102].
[95] *Jackson* at [107].
[96] *Jackson* at [159].
[97] *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46; [2012] 1 A.C. 868, Lord Hope at [51] and Lord Reed at [149]. The comments were made in the context of Acts of the Scottish Parliament, but were sufficiently abstract to apply to the Westminster Parliament as well.
[98] T.R.S. Allan, "Questions of Legality and Legitimacy: Form and substance in British constitutionalism" (2011) 9(1) International Journal of Constitutional Law 155–162.

are being systematically addressed and dismantled; the simplicity of the position that strike-down powers are unconstitutional is countered with a more complex set of factors that renders cautious and corrective intervention, or judicious review, legitimate in a constitutional democracy such as the UK.

The first case to consider in more detail is *ex p Evans.*[99] The case pits the Upper Tribunal's order to disclose Prince Charles' memos to government ministers against the Attorney General's statutory power[100] to block disclosure on "reasonable grounds". A seven-member UKSC addresses a delicate separation of powers argument, namely whether the Freedom of Information Act permitted a government minister (the Attorney General) to override a judicial decision. *Evans* reveals deep disagreement over whether to defer to the ostensible will of Parliament, or to uphold the rule of law and subject an executive decision to judicial review.

In a bold move, Lord Neuberger (with whom Lord Kerr and Lord Reed concurred) denies that the Attorney General held a veto power. His reasoning would not appear out of place in a court with constitutional review powers. For Lord Neuberger, the rule of law qualifies as a structural requirement in the sense that Freeman articulates. From this premise, and reasoning from the top-down, it follows that a judicial decision must bind all the parties to it, including the executive, and that a government decision is generally reviewable by a court of law at the suit of an affected citizen.[101] Lord Neuberger also sets much store by the fact that the disclosure order had been issued by a tribunal whose legitimacy reflects Rosanvallon's values of impartiality, reflexivity, and proximity: i) its decisions are subject to appeal; ii) it had particular relevant expertise and experience; iii) it had conducted a full

[99] *R. (Evans) v Attorney General* [2015] UKSC 21; [2015] 1 A.C. 1787.
[100] Freedom of Information Act 2000, s.53(2).
[101] *Evans* at [52].

hearing with witnesses; iv) it was a public tribunal which heard full adversarial argument; v) the decision of the tribunal was closely reasoned.[102]

By contrast, the dissenting opinions of Lord Hughes and Lord Wilson, which defer to the doctrine of parliamentary sovereignty, appear timid and unconvincing.[103] Lord Hughes agrees with the proposition that Parliament would not ordinarily empower a government minister to override a judicial decision, but goes on to state that "Parliament has plainly shown such an intention in the present instance".[104] Acknowledging the central importance of the rule of law, Lord Hughes concludes that "it is an integral part of the rule of law that courts give effect to Parliamentary intention". Lord Wilson, similarly, bases his dissent on "the most precious" constitutional principle of "parliamentary sovereignty, emblematic of our democracy".[105] However, this position is flawed for authorising a member of the executive to veto a decision by a court or tribunal.

The disagreement falls neatly within the framework provided by will and reason, or ultra vires and the rule of law. One side of the argument is typified by judges who defer to the plain meaning of the statute in combination with executive discretion at the behest of Parliament. The other side is characterised by judges who seek to uphold the principle of legality, who resist the plain meaning approach, and who insist that ministerial discretion be controlled by reason and deliberation.[106]

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[102] *Evans* at [69].
[103] Lord Mance, with whom Lady Hale agreed, took an orthodox administrative law approach to an executive decision, which I do not discuss here.
[104] *Evans* at [154].
[105] *Evans* at [168].
[106] T.R.S. Allan, "Law, Democracy, and Constitutionalism: reflections on *Evans v Attorney General*" (2016) 75(1) Cambridge Law Journal 38-61, 39. For criticism even of Lord Mance's moderate and administrative law based approach (it "does not attend to the importance of the political constitution") see R. Ekins and C. Forsyth, *Judging the Public Interest* (London: Policy Exchange, 2015), 20.

Beyond those constitutional confines, the case stands out for Lord Neuberger's judgement, which represents a new judicial attitude that solidifies the constitutional autonomy of the UKSC. First, Lord Neuberger defies the government by upholding rule of law principles that qualify as structural requirements that underpin stable democratic institutions. These are procedural restraints that citizens would rationally accept in order to safeguard the background conditions of their democratic sovereignty. A court can only protect the political rights of individuals from arbitrary interference by the executive if the decision by a court is "final and binding"[107] and not subject to executive override. Second, Lord Neuberger bases his judgement on judicial authority dating back to 1841.[108] In Rosanvallon's phraseology, Lord Neuberger's reconstruction of legal history dating back to the mid-nineteenth century evokes the common law as collective memory. Similar to a constitutional court, the UKSC emerges as "dialogical partner" and "public reasoner" that challenges the political branches to engage with its reasons and arguments based on certain community promises that have stood the test of time.[109] The crucial difference is that it does not have the final say on the substance. In its response to *Evans*, the Independent Commission on Freedom of Information did not attack the UKSC's decision, but recommended that "the government should legislate to put beyond doubt that it has the power to exercise a veto over the release of information under the Act".[110] For present purposes, the normative concern (the validity of judicial decisions) coupled with the structural condition (rule of law), the institutional condition (impartiality and independence), and the temporal condition (precedent) justify to legitimise the exercise of judicial review.

[107] *Evans,* Lord Neuberger at [115].
[108] *Evans,* Lord Neuberger at [53-57].
[109] C. Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford: Oxford University Press, 2013), 3.
[110] Independent Commission on Freedom of Information Report, 01 March 2016, Recommendation 13.

Tenuous in *Evans,* the timeless quality of principles of justice is clearer in the seven-member decision by the UKSC in *Unison*.[111] In this case, employment tribunal fees introduced by the Lord Chancellor using delegated legislation were deemed unlawful. The UKSC distinguishes the principle of imposing fees on the basis of primary legislation from the effect of the fees imposed, which was to render unaffordable a person's right to access courts and tribunals. Lord Reed, who delivered the unanimous judgement, approaches the case by linking the Lord Chancellor's power to impose fees to "constitutional principles which underlie the text", the most important one being the constitutional right of access to justice.[112] Access to courts is inherent in the rule of law – although this is, as Lord Reed caustically points out, "not always understood" by the government.[113] A common misconception is that courts and tribunals provide a service that is of benefit only to the "users" who appear before them and who should, therefore, pay to use the service, rather than to society as a whole. Speaking to that mistaken belief, Lord Reed delivers an object lesson on the rule of law and on the relationship between Parliament and the courts. In particular, he stresses that without the right of access to the courts

> …laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.[114]

Lord Reed's reasoning connects to structural requirements, to enduring principles, and to the court as a representational body ("public service"). Decisions like *Donoghue v*

[111] *R. (Unison) v. Lord Chancellor* [2017] UKSC 51.
[112] *Unison* at [65].
[113] *Unison* at [66].
[114] *Unison* at [68].

Stevenson[115] are not simply of value to the individual bringing the claim, but also to the common law for clarifying or establishing legal principles of general importance:[116] "[e]very day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established".[117] Lord Reed then cites historical documents, such as ch.40 of Magna Carta 1215[118] and passages from Sir Edward Coke's *Institutes* and Sir William Blackstone's *Commentaries* on the right of court access.[119] He also relies on judicial precedent from the 1980s and 1990s, i.e. on cases decided on common law grounds prior to the passing of the Human Rights Act 1998. Lord Reed thereby reconstructs common law history and collective memory in the manner suggested by Rosanvallon. It is a deliberate move to address the legality of court fees "under English law".[120] (Lord Reed has form in privileging the common law over the ECHR[121] or EU law[122] – cases, which according to one commentator, mark a turn to "autochthonous constitutionalism").[123]

It is important to note that the enabling primary legislation in *Unison* "contains no words authorising the prevention of [judicial] access". In the absence of clear and express statutory authorisation, the UKSC unanimously deems the delegated legislation ultra vires on the grounds that it effectively prevents individuals from having access to justice.[124] As with the recommendation by the Independent Commission on Freedom of Information after *Evans*,

[115] [1932] A.C. 562.
[116] *Unison* at [69].
[117] *Unison* at [70]
[118] At [74]: "We will sell to no man, we will not deny or defer to any man either Justice or Right".
[119] *Unison*, at [74, 75].
[120] *Unison*, at [65].
[121] *Osborn v Parole Board* [2013] UKSC 61, [2014] 1 A.C. 1115; *A v BBC* [2014] UKSC 25, [2015] 1 A.C. 588.
[122] *R (HS2 Action Alliance Ltd) v The Secretary of State for Transport* [2014] UKSC 3, [2014] 2 All E.R. 109; *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 W.L.R. 583.
[123] S. Stephenson, "The Supreme Court's renewed interest in autochthonous constitutionalism" [2015] Public Law 394-402; see also R. Masterman and S. Wheatle, 'A common law resurgence in rights protection?' (2015) 1 European Human Rights Law Review 57-65.
[124] *Unison*, at [87, 98].

the real test would be if Parliament re-enacted the tribunal fees as an Act of Parliament. Would the UKSC so confidently employ its constitutional arsenal to defy Parliament's arrogation of power? On the one hand, Lord Reed invokes *ex p Leech*[125] and *Daly*[126] to claim somewhat cryptically that even statutory authorisation to curtail access to courts would be subject to implied common law constraints.[127] On the other hand, Magna Carta and the common law notwithstanding, such a move would be interpreted as an unprecedented and insubordinate rejection of the doctrine of parliamentary sovereignty.[128]

To summarise, the UKSC turns the respective appeals in *Evans* and *Unison* into constitutional argument. *Evans* concerns the legality of an executive decision by the Attorney General, whilst *Unison* involves an executive order by the Lord Chancellor. The UKSC could have decided both cases by using the traditional "bottom-up" methods and vocabulary of administrative law. Instead, the court steps into the breach with the modus operandi of a constitutional court. As in *HS2,*[129] the UKSC alludes to background constitutional questions not in order to resolve them, but because they are "too important to pass without mention".[130] Both judgements are landmark rulings for resting upon structural requirements (access to justice, judicial review, and the rule of law), and drawing on a timeless account of justice from Magna Charta to "the names of people who brought cases in the past" and who are immortalised in legal rules and principles. By asserting that courts provide a special "public service" that is of "value to society" as whole,[131] and citing support for that claim dating back to 1215, Lord Reed also makes out the unspoken representational function of courts.

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[125] *R. v. Secretary of State for the Home Department, ex p Leech* [1994] Q.B. 198.
[126] *R. (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26; [2001] 1 A.C. 532.
[127] *Unison*, at [80, 88].
[128] M. Elliott, "Unison in the Supreme Court: Tribunal Fees, Constitutional Rights and the Rule of Law", https://publiclawforeveryone.com, 26 July 2017.
[129] *R. (HS2 Action Alliance Ltd) v The Secretary of State for Transport* [2014] UKSC 3; [2014] 2 All E.R. 109.
[130] *HS2*, at [208], per Lord Neuberger and Lord Mance.
[131] *Unison* [68]; [71].

The final case exposes a lack of institutional confidence when pushed to the brink by primary legislation. *Nicklinson*[132] provides evidence for claims made by all three scholars discussed in this article, but also contains a contemporary restatement of the case against judicial review. Tony Nicklinson had been the victim of a stroke that had completely paralysed him. He was able to communicate by moving his head and eyes. To avoid self-starvation, which is long, painful, and distressing, his preferred way of dying lay in receiving a lethal drug. The injection would either be administered by another person or by a digital eye-blink machine that had been invented by an Australian doctor.

The judicial review proceedings dealt with the compatibility of domestic law relating to assisted suicide with the European Convention on Human Rights (ECHR). Although the Suicide Act 1961 decriminalised suicide, it retained, under s.2, the crime of assisting suicide. Mr Nicklinson applied to the High Court for (i) a declaration that it would be lawful for a doctor to kill him or to assist him in terminating his life, or, if that was refused, (ii) a declaration that the current state of the law in that connection was incompatible with his right to a private life under Art.8 ECHR. When the High Court refused to grant the declarations, Mr Nicklinson refused all food and medical treatment, and subsequently died of pneumonia.

Nine Justices heard the appeal in the Supreme Court. The full range of attitudes within the UKSC towards judicial activism was on display. Five "interventionist" Justices (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) held that the UKSC in principle had the authority to issue a declaration under s.4 HRA that s.2 of the Suicide Act 1961 was incompatible with Art.8 ECHR.[133] Of those five judges, three deemed the absolute ban on assisted suicide to be proportionate due to the absence of "a physically and administratively feasible and robust system" that facilitated assisted suicide, and due to a

[132] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] 1 A.C. 657.
[133] *Nicklinson* at [76, 191, 299, 326].

general concern for the protection of the weak and vulnerable.[134] They found that the time was not right for a s.4 declaration, but suggested that the door remained open for a future and successful application.[135] Only Lady Hale and Lord Kerr would have issued the declaration on the grounds that the universal ban on assisted suicide breached Art.8 ECHR (private and family life).[136] The four "reserved" Justices (Lord Clarke, Lord Sumption, Lord Reed and Lord Hughes) opted to defer to Parliament on the question of compatibility.

The UKSC was aware that its decision hinged on two of the central and controversial questions in UK constitutional law today. First, should the UKSC create, recognise, and give effect to a new right to a dignified death by regulating assisted suicide? Second, are judgements about assisted dying more suitable for Parliament as the elected and representative organ of the constitution, the domestic courts, or the European Court of Human Rights?[137] The UKSC denied the creation of a right to die and lay the matter at Parliament's door.[138] The ratio decidendi was attacked from several quarters as "a new threat to the effective protection of human rights within a domestic context".[139] However, the court's ratio does not capture the extraordinary range of judicial reasoning relied on in this case.

Lord Sumption resolutely upholds parliamentary process as "a better way" of resolving controversial questions in the context of moral and social predicaments.[140] Since any change to the absolute prohibition on assisted suicide would place vulnerable people at

[134] Lord Neuberger at [120]; Lord Mance at [188].
[135] Lord Neuberger at [118], Lord Mance at [190], Lord Wilson at [202].
[136] One factor that helps explain why no declaration was issued in the current proceedings is Lord Falconer's *Assisted Dying for the Terminally Ill Bill* 2013, which was being actively considered by Parliament at the time of the UKSC's decision.
[137] See generally E. Wicks, "The Supreme Court Judgment in Nicklinson: One Step Forward on Assisted Dying; Two Steps Back on Human Rights" (2014) 23 (1) Medical Law Review 144–156, 145.
[138] *Nicklinson* at [114], per Lord Neuberger and at [202], per Lord Wilson.
[139] Wicks, "The Supreme Court Judgment in Nicklinson", 155; See also R. English, '"No precedent? Then set one!" – Nicklinson right to die case', UK Human Rights Blog, 20 August 2012.
[140] *Nicklinson* at [232]

risk, this case was "a classic example of the kind of issue which should be decided by Parliament".[141] Courts are conceived narrowly as law-applying and conflict-resolving institutions: "the legislative function is committed to Parliament and courts must not usurp it".[142]

As an aside, Lord Sumption's position was unsurprising and had already been set out in an extracurial public lecture,[143] in which he explored the question how far judicial review should go before it trespassed on the proper function of government and the legislature in a democracy. Sumption seeks bright lines between judicial review on the one hand, and the business of government and law-making on the other. He adopts a Bickelian account of procedural or electoral democracy that allows him to criticise minimally-legitimate courts for breaching those boundaries by making policy decisions based on merit that ought to be the preserve of Parliament and politically accountable ministers.[144] Sumption concedes that there needs to be some sort of supervision of individual rights, which he views as "claims against the claimant's own community".[145] But he regards parliamentary scrutiny as "generally perfectly adequate" in the area of policy-making. By contrast, judicial review of political questions "has no legitimate basis in public consent, because judges are quite rightly not accountable to the public for their decisions."[146] For Sumption, courts are technical-legal bodies, not political and certainly not representational ones.

Returning to *Nicklinson*, some Justices were again drawn to broader constitutional questions. Lord Neuberger devotes a considerable part of his judgement to rejecting the

[141] *Nicklinson* at [230].
[142] Lord Hughes at [259; 267].
[143] J. Sumption, "Judicial and political decision-making: the uncertain boundary - the FA Mann Lecture" (2011) 16(4) Judicial Review 301-315. See also Lord Sumption, "The Limits of Law", 27th Sultan Azlan Shah Lecture, Kuala Lumpur , 20 November 2013; Lord Sumption, "Anxious Scrutiny", Administrative Law Bar Association Annual Lecture, 4 November 2014.
[144] See also the contributions made by Policy Exchange and the Judicial Power Project.
[145] Sumption, "Judicial and political decision-making", 309.
[146] Sumption, "Judicial and political decision-making", 312-313.

argument that courts are not institutionally competent to decide a case such as *Nicklinson*. In so doing, he builds up a principled case for judicial independence. Lord Neuberger reiterates the *Osborn-Kennedy*[147] line of cases according to which domestic courts are competent to decide complex questions, like assisted suicide, autonomously, taking Strasbourg and national case law into account.[148] He begins by acknowledging the moral arguments for and against permitting applicants to be assisted to kill themselves, and recognises the value of personal autonomy as a feature that ultimately supported the applicant's case.[149] He then cites cases predating the HRA to illustrate that courts are well versed in making morally contentious decisions: "… the courts have been ready both to assume responsibility for developing the law on what are literally life and death issues, and then to shoulder responsibility for implementing the law as so developed".[150]

Lord Neuberger concludes by asserting that the fact that Parliament had recently enacted a statute "cannot automatically deprive the courts of their right, indeed their obligation, to consider the issue".[151] He highlights two constitutional qualities of the courts. First, Lord Neuberger draws on their institutional competence: judges' "relative freedom from pressures of the moment" better places them to take "difficult or unpopular decisions".[152] Second, and possibly with Lord Sumption in mind, Lord Neuberger appears to recognise a representational function: "[a]lthough judges are not directly accountable to the electorate, there are occasions when their relative freedom from pressures of the moment enables them to take a more detached view".[153]

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[147] *Osborn v Parole Board* [2013] UKSC 61; [2014] 1 A.C. 1115; *Kennedy v Charity Commission* [2014] UKSC 20; [2015] A.C. 455.
[148] *Nicklinson* at [70-76].
[149] *Nicklinson* at [94-97].
[150] *Nicklinson* at [98].
[151] *Nicklinson* at [100].
[152] *Nicklinson* at [104].
[153] *Nicklinson* at [104].

Paragraph 111 of Lord Neuberger's judgement is perhaps the most striking in the decision. He lays the groundwork for a momentous decision by recognising the gravity of the interference with the applicant's Art. 8 ECHR rights; by identifying the hypocrisy of official attitudes towards assisted suicide; by outlining the court's similar approach under the common law; and by noting that "no compelling reason has been made out for the court simply ceding any jurisdiction to Parliament".[154] In the final analysis, however, Lord Neuberger deems it "institutionally inappropriate at this juncture" for the UKSC to issue a s.4 declaration.[155] Yet the tenor of his judgement is undoubtedly progressive. It cements the UKSC's growing institutional independence, competence, and detachment; and it certainly paves the way for judicial intervention in future cases.[156]

Lord Mance, in his judgement, observes that the considerable latitude given to assisted suicide at the international level creates scope for both Parliament and the courts to assess the compatibility of domestic law with human rights. Reiterating his position of "relative institutional competence" in an earlier case,[157] Like Lord Neuberger, Lord Mance rejects the orthodox notion that the legislator's choice is necessarily final.[158] The judiciary can claim greater expertise on ex ante principles, such as personal liberty and access to justice. And like Lord Neuberger, Lord Mance also ascribes a representational role to courts: "… while the legislature is there to reflect the democratic will of the majority, the judiciary is there to protect minority interests, and to ensure the fair and equal treatment of all".[159]

Lord Mance, with the majority of the court, ultimately refers the issue to Parliament on grounds of constitutional propriety and due to the "sensitive, controversial, and emotive

[154] *Nicklinson* at [111].
[155] *Nicklinson* at [116].
[156] At the time of writing the High Court had begun to hear Mr Noel Conway's challenge to the blanket ban on assisted suicide.
[157] *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 [130].
[158] *Nicklinson* at [163] per Lord Mance.
[159] *Nicklinson* at [164] per Lord Mance.

nature of the assisted dying debate".[160] However, he also concludes his judgement with a strongly worded rebuke of Lord Sumption's deferential position. Lord Mance stresses the court's "constitutional role" in addressing a variety of public and private interests. While judges are bound by the formal constraints of legal principle, reasoning, and precedent, they also need to be alert to structural conditions: "very little, if any, judicial decision-making, especially at an appellate level, is or ought to be separated from a consideration of what is just or fair".[161] As a representational organ, courts need to consider the social risks to, and moral convictions of, the wider public in addition to the values of individual autonomy and dignity.[162]

Assessing *Nicklinson* is complicated by the full panoply of judicial responses. The view of Lord Hughes that assisted suicide "is very clearly a decision which falls to be made by Parliament"[163] stands in contrast to Lord Neuberger's concern that "such an approach would be an abdication of judicial responsibility".[164] Yet in addition to deciding the case and differing over a s.4 declaration of incompatibility, the judges also reflect on the constitutional role and institutional competence of the UKSC. In that respect at least the judgment is more self-assured. First, as the highest appellate court, the UKSC ensures that cases are decided on the basis of coherent and consistent rules and principles. The Justices turn to personal autonomy, personal liberty, and access to justice, to define the freedom and equality of autonomous citizens living in a constitutional democracy. In that sense, courts are the custodians of individual justice. Second, the UKSC ensures the coherence of electoral

[160] Wicks, 'The Supreme Court Judgement in Nicklinson', 152.
[161] *Nicklinson* at [191].
[162] Lord Mance cites with approval Lord Bingham's dicta in *A v Secretary of State for the Home Department* [2005] 2 A.C. 68 at [42]: "…the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic".
[163] *Nicklinson* at [267].
[164] *Nicklinson* at [112].

democracy (statutory law) with structural conditions (individual rights, constitutional principles, judicial precedent). It befits the representational role of courts that gives effect to legislative intent *and* articulates the people's sense of justice. In that respect, courts are the custodians of the common law as collective memory. Finally, while *Evans* and *Unison* are a reminder that domestic courts have the power to review the actions of members of the executive to ensure that their conduct is consistent with the authorising legislation or constitutional principle, all three cases reinforce the view that Parliament's judgement over complex social and moral matters is not necessarily determinative or conclusive. The decisions underline the courts' representational role as the custodians of the rule of law and the constitution.

CONCLUSION

How should courts respond in cases involving constitutional principle and fundamental rights? Amidst constant reminders that the doctrine of sovereignty has not disappeared, the cases examined here show that consensus about automatic deference to Parliament or other public bodies is crumbling. The UKSC decides fundamental rights issues independently and authoritatively, although not always consensually. *Evans* reveals how the judges themselves were torn between deciding this case either with reference to rival constitutional principles or administrative law technique. *Nicklinson* exposed similar disagreement over the correct protection of human rights.

Nonetheless, the cases suggest an approach to judicial review that falls between US-style strike-down powers and deference to legislative intent. At their most interventionist, judges operate not as drivers, but as mechanics; not armed with a map, but with the tools of constitutional doctrine; and tasked not with steering, but with keeping the machinery of

democracy humming.[165] Instead of invalidating the statute on constitutional grounds, the judges could even give the machine "a jolt designed to nudge the machine back into working order, a good whack with the judicial wrench".[166] The corrective method allows the UKSC to articulate the meaning of the UK constitution independently from politics but without usurping parliamentary supremacy.

The UK constitution gives rise to complex questions on which the UKSC Justices may not agree, but which they also can no longer evade. The cases discussed are not isolated ones, and they foreshadow a more assertive and astute approach to judicial review by the UKSC. An honest discussion of the court's work is needed to recognise these questions as compelled by the UK constitution, and to understand the heightened role of the UKSC as mandated by constitutional democracy.

[165] Metaphor borrowed and adapted from C. J. Peters, *A Matter of Dispute: Morality, Democracy, and Law* (Oxford: Oxford University Press, 2011), 224.
[166] Ibid.