Constitutional Logic

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Ultra vires means 'beyond [the agency's] legal powers'. To say that an agency has acted *ultra vires* is to say nothing of the legal source of the powers, or the source of the legal limits to the powers. But in English public law, the mystique of parliamentary sovereignty has given the Latin a special aura and a special meaning. Lawyers and judges generally take the phrase to mean 'beyond the powers *that Parliament intended* the agency to have'. It is only a strange way of using a Latin phrase, you may think. But it corresponds to what academics call 'the *ultra vires* doctrine'—the view that the constitutional justification for judicial review of the exercise of statutory powers is that the courts are giving effect to limitations that were *imposed by Parliament* when it granted the power.

Suppose that a statute authorizes a police authority to dismiss a chief constable if it considers him unfit (as in *Ridge v Baldwin* [1964] AC 40). The statute does not say whether the authority must give the chief constable a hearing. The court quashes a dismissal made without a hearing, on the ground that the authority failed in its legal duty to act with natural justice. Is the court giving effect to a duty imposed by the statute? Or is the court imposing a duty in the exercise of its own power at common law—a jurisdiction over the administration of justice which gives it power to impose the rule of law on the exercise of powers in public law?

Requiring a hearing was a good way of controlling the power of the authority in *Ridge v Baldwin*: it created an obstacle to arbitrary use of that power by making the process of its exercise more open, and by requiring the authority to listen to what Ridge had to say. It forced the authority to treat Ridge decently: as someone who had something to say on the matter of whether he was unfit, and as someone who was entitled to know what was said of him to his superiors. And requiring a hearing was a paradigmatically *legal* way of controlling the use of the power. The question of how to proceed was one that the court could answer without usurping the authority's power to decide whether Ridge was fit to be a police chief. So fairness and the rule of law counted in favour of the decision. Those considerations are justiciable, and the appropriate remedy (the nullification of the authority's decision) was within the judicial function. It seems that the House of Lords' decision was a just use of judicial power to check the arbitrary use of executive power. Does it need any other justification?

According to the '*ultra vires* doctrine', the decision needs another justification, based on the lawmaking power of Parliament. That controversial theory has been popular with some English academic lawyers. It resonates with some of the language of the judges, who often say that they are giving effect to the will of Parliament when they impose duties on the authorities who exercise statutory powers. But do the judges have any good reason for saying so if, e.g., they are requiring a hearing when the statute does not say that a hearing should be given?

It seems that some traditional proponents of the '*ultra vires* doctrine' have thought that all legal duties must be created by Parliament. It may be the baleful influence of John Austin's theory that law is the command of a 'sovereign'.[1] Mix that idea with the English

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[1] See John Austin, *The Province of Jurisprudence Determined* (1861) edited with an introduction by H.L.A. Hart (London: Weidenfeld and Nicholson, 1954), Lecture VI.

lawyer's slogan that Parliament is 'sovereign',[2] and the unwary can conclude that all legal duties are made by the communication (explicit or implicit) of the will of Parliament.

Those confusions may have influenced some theorists. But Mark Elliott does not suffer from them. His skilful and sophisticated book traces the involutions of the academic debate between the '*ultra vires* theory' (that judicial control of the exercise of statutory powers is justified by the intention of Parliament) and the 'common law theory' (that it is justified by the courts' own constitutional responsibility for the rule of law). Elliott elaborates and defends what he calls the 'modified *ultra vires* doctrine'.[3] The theory he calls the 'traditional *ultra vires* doctrine' held that when Parliament conferred a statutory power on the authority to dismiss the police chief, it intended that the authority should give a hearing first. That intention, implicit in the legislation, is the constitutional justification for the court to quash a decision made without a hearing. Elliott's 'modified *ultra vires* doctrine' holds that there is no such 'direct' link between parliamentary intention and the grounds of judicial review. Yet he still says that 'to divorce judicial review from [legislative] intention altogether is to render the supervisory jurisdiction unworkable in terms of constitutional theory' [30]. He concludes that in requiring agencies to respect the rule of law, 'the courts are fulfilling the intention of a Parliament which legislates for a constitutional order in which the rule of law is fundamental' [162]. The intention that he ascribes to Parliament is that the statutory powers that it confers are to be exercised in accordance with the constitutional principle of the rule of law. And that general intention is the constitutional justification for the judges to elaborate and develop the requirements of the rule of law, and to impose them on the executive.

Elliott takes the view that the courts do have their own inherent power to give effect to the constitutional principle of the rule of law by imposing duties on the exercise of prerogative and other non-statutory powers. But he argues that they would be acting contrary to the will of Parliament if they imposed duties on the exercise of statutory powers. In his view, the principle of constitutional logic that rules out the common law theory is not that Parliament alone can impose a duty on a public authority. It is only that judges must not act inconsistently with an Act of Parliament. And, he says, that is what the court would be doing in a case like *Ridge v Baldwin*, if it imposed a *common law* requirement of a hearing on the exercise of a statutory power.

In section 1 and in the Note at the end of this article I address Elliott's argument that, as a matter of logic, judges cannot impose common law duties on the exercise of statutory powers without acting inconsistently with the legislation. But that does not undermine Elliott's argument: the unsoundness of that argument of logic actually rescues the distinction he draws between his 'modified' theory and the 'traditional *ultra vires* theory', and makes room for his further argument: that there are constitutional reasons to view the courts as giving effect to the legislation in judicial review of the exercise of statutory powers. But I argue in section 2 that it is the common law of the constitution, and not Parliament, that gives the courts the responsibility of imposing the requirements

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[2] But to Austin, the sovereign was more complex than simply 'Parliament', because in his view the members of the House of Commons were in a habit of obedience to their electors. He thought that the real sovereign was the King, the members of the House of Lords, and the electors of the House of Commons (see *ibid.,* Lecture VI).

[3] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001). I will refer to Elliott's book by page numbers in brackets. Various essays on both sides of the debate between the 'common law theory' and the '*ultra vires* theory' are collected in Christopher Forsyth, ed., *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000). For a reply to Elliott's argument by two proponents of the 'common law theory', see Paul Craig and Nicholas Bamforth, 'Constitutional Analysis, Constitutional Principle and Judicial Review' [2001] *Public Law* 763.

of the rule of law on the exercise of statutory powers. In section 3, I allege that the *ultra vires* theory, even in Elliott's sophisticated modification, shows the influence of a popular misconception of the role of Parliament in the United Kingdom constitution.[4]

1. The logic argument

Elliott's central claim is that in judicial review of the exercise of a statutory power, it would be inconsistent with the constitutional power of Parliament for a court to impose a duty that was not imposed by the legislation. If Parliament competently gave the authority the power to dismiss the police chief without a hearing, it would be unconstitutional for a court to take away that power.

Elliott points out that the 'common law theory' must say that Parliament neither imposed the duty to give a hearing (because then there would be no need for a common law duty), nor authorized the authority to dismiss a police chief *without* a hearing (because then the court would be acting contrary to Parliament's will by requiring a hearing). But, he says, Parliament's grant of power to the authority *must* (that is, it must as a matter of logic) either impose a duty to give a hearing, or else confer the power to decide without a hearing. The argument may be paraphrased as follows:

> Parliament conferred the power.
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> If Parliament conferred the power, it must *ipso facto* have imposed all legal limits to the power, so that a power conferred by Parliament must either include or exclude, e.g., the power to decide without a hearing.
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> The court cannot take away a power that Parliament conferred.
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> Therefore, the court cannot impose a common law duty to give a hearing: either Parliament conferred a power to decide without a hearing (and then the court would be acting contrary to an Act of Parliament in imposing the duty), or Parliament did not confer that power (and then the court would not be imposing a common law duty, but would merely be giving effect to a limit that Parliament set on the power).[5]

The logic argument is unsound, because the second premise is false—for a reason that has been pointed out before.[6] A particular way of exercising a power may be neither authorized nor prohibited by the authority who grants the power. When Parliament confers a legal power on an official, it may require that the power be exercised only after a hearing, *or* it may provide that the power may be exercised without a hearing, *or* it may neither impose a duty to give a hearing, nor confer a power to decide without a hearing.

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[4] Note that a complete reply to Elliott's argument would have to explain how the other, more remarkable grounds of judicial review in English law relate to statute and to the common law (those grounds are error of law, failure to exercise discretion, 'unreasonable' (in a variety of special senses) exercise of discretion, and incompatibility with the European Convention on Human Rights, under the Human Rights Act 1998 c.42). I do not have space to do that here, or even to explain why it can be done in a way that would not contradict what I say here.

[5] See [94-95]: '*once Parliament has created a power*, it must either include or omit the competence, for example, to adopt an unfair decision-making procedure. This follows as a matter of logic. …[T]he legislative provision creates the competence and therefore must, conceptually, mark the limits of that competence. …[A]dministrative action taken under statutory power must logically fall either within or outside the scope of the competence actually conferred.'

[6] E.g. by Lord Justice Laws in 'Illegality: The Problem of Jurisdiction', in M.Supperstone and J.Goudie (eds.), *Judicial Review* (London: Buterworths, 1997) at 4.17-4.18. See below, note 22.

In the third case, it would not be inconsistent with an Act of Parliament for a court to impose a duty that Parliament did not exclude. Nor is the court necessarily giving effect to the intention of Parliament in doing so. In the *Ridge v Baldwin* situation, if the court imposed a duty to give a hearing that was not imposed by Parliament, the court did not thereby act inconsistently with the legislation. Parliament enacted that "The watch committee ... may at any time... dismiss any borough constable whom they think …unfit".[7] The court did not say that the committee could not exercise that power. The proposition that the committee had to give a hearing before dismissing the chief constable is logically consistent with the proposition that the committee could dismiss the chief constable. The court would only contradict the legislation if it prohibited the committee from dismissing constables, or acted in some way that frustrated its power to do so. [For an explanation of the logic behind these claims, see the Note at the end of this article.]

It may seem that Elliott's 'modified *ultra vires* theory' is undermined, because the logic argument is unsound. If the courts can impose a duty to give a hearing that was not created by the legislation, *without acting contrary* to the legislation, then the 'common law theory' can portray judicial review as the judicial imposition of a set of standards that are consistent with the lawmaking power of Parliament. But ironically, the logic argument would actually be fatal to Elliott's theory if it succeeded. His 'modified *ultra vires*' theory would collapse into the 'traditional *ultra vires*' theory that he opposes. He rejects the traditional theory on the ground that it cannot account for the constantly developing details of the grounds of judicial review. It is 'highly unsatisfactory and implausible', he says, to argue that every change in the grounds of judicial review (such as the recent developments in the doctrine of legitimate expectations in English law) corresponds to and is justified by a change in the intention of Parliament [125-126].[8] Instead, he claims only that there is 'some connection' between the grounds of judicial review and legislation [97]. The connection is that Parliament has the intention 'that the rule of law should be upheld' [111]; but Parliament leaves it to the courts to elaborate the detailed requirements of the rule of law. In his view it is the courts' task to develop and to specify those requirements, and by doing so they give effect to 'Parliament's constant intention that public officials should respect the rule of law.' [127]

But the logic argument is too strong for Elliott's purpose of arguing against the common law theory, because it would make anything but the traditional *ultra vires* theory necessarily false. According to the logic argument, either Parliament granted a power to the committee to dismiss the chief constable without a hearing, or it did not. Every intricate detail of every duty properly imposed in judicial review is related directly to (it is logically entailed by) the limits of the power that Parliament granted. For *any* description of a way of acting, no matter how intricately detailed, and no matter how recently the courts have adopted it as a description of a prohibited or permitted exercise of power, the logic argument claims that either Parliament granted the authority power to act in that way, or else the authority lacks power to act in that way.

So it is only because the logic argument is unsound, that there is room for Elliott to argue that there are constitutional reasons to agree with his modified theory. He finds those reasons in the presumption 'that Parliament intends to legislate in conformity with the rule of law' [110].

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[7] Municipal Corporations Act, 1882: section 191(4).

[8] Cf. his claim that the traditional theory is committed to a 'fiction': 'that the complex law of judicial review can be related directly to parliamentary intention' [98].

2. The presumption of parliamentary intention

Is the courts' supervisory jurisdiction a way of giving effect to the intention of parliament that the legal powers it gives should be exercised in accordance with the rule of law? Elliott says that even if his logic argument does not succeed, that only means that we can either presume that Parliament is neutral about whether the courts should impose the rule of law on public authorities (a presumption which he takes to be necessary for the common law theory), or we can presume that Parliament intends that the courts should take such a role (which is the approach he bases his theory on) [95].

In fact, the common law theory does not need to presume that Parliament is neutral about the rule of law. In order to say that the common law imposes duties on the exercise of statutory power, it is not necessary to presume anything at all about Parliament. The third option (aside from saying that Parliament imposed a duty on the authority to give a hearing, or saying that Parliament conferred a power to decide without a hearing) is not that Parliament is neutral or indifferent, but that Parliament acted on no view of the matter at all. The third category is *not* neutrality with regard to the rule of law; it is no imposition of duty. That is, the common law theory need not presume that Parliament has any general attitude at all (neutral, favourable, hostile or other) to the judicial review standards imposed by the courts.

But it may seem that Elliott is right to say that in English law there is an 'interpretive presumption' that Parliament intends that statutory powers should be exercised in accordance with the rule of law [110-111]. And indeed the judges often mention such a presumption.[9] It is the 'principle of legality' that Lord Steyn and Lord Hoffmann discussed in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115. The principle is that a general power conferred either by statute or delegated legislation will be treated as not conferring the power to infringe certain basic rights (such as, in Simms' case, the right of a prisoner to communicate with a journalist in attempting to challenge his conviction). Lord Steyn called it 'a presumption of general application operating as a constitutional principle' (at 130).

So the courts do talk as if they assume, without Parliament saying so, that when Parliament confers statutory powers it does not intend to authorize public authorities to use them contrary to the principles of the rule of law that underlie the grounds of judicial review. The courts are right to conclude that Parliament did not have *that* intention—but in fact, that does not amount to a presumption at all; there is simply no reason to think that Parliament intended to empower an authority to act contrary to the rule of law. Is there any reason to presume (i.e., to assume without Parliament saying so) that Parliament *did* intend that the authorities *should* act in accordance with the rule of law? Lord Hoffmann seemed to think so when he explained the principle of legality in *Simms:*

> In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. (at 131)

It may be right to act on a presumption *either* because there is some reason to believe in the truth of the presumption, *or* because there is some reason to act as if the conclusion is true without any reason to believe that it is true. Which sort of presumption is the principle of legality?

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[9] See, e.g., *Boddington v British Transport Police* [1999] 2 AC 143 at 161 (Lord Irvine), discussed by Elliott at [123].

Should the courts assume that Parliament intends to promote the rule of law *because that generally is* Parliament's intention? That would be a mistake. Parliament sometimes acts to promote the rule of law, and Parliament sometimes acts contrary to the requirements of the rule of law, and we cannot say anything very much more general than that.[10] There is no general reason to believe that Parliament at Westminster does not intend to act contrary to the rule of law. Saying that shows no disrespect to the institution, I hasten to add. The British constitution entrusts to Parliament an overriding legal authority to decide what the constitutional ideal of the rule of law requires, and to decide under what circumstances it is necessary to depart from the rule of law. Every constitution does the same to some extent, because the requirements of the rule of law (while perfectly straightforward in some respects) are so vague and open-ended. Certainly the Canadian Constitution puts certain requirements of the rule of law out of reach of Parliament (such as the requirement of a trial on criminal charges).[11] But neither the Canadian Constitution nor any other that I know of gives the courts a general jurisdiction to interfere with legislation on the ground that it fails to live up to the ideal of the rule of law.

So there is no general reason to believe that when Parliament passes legislation, it intends to promote the rule of law—although it often does so. But, you may say, there is a very good reason, unless Parliament tells them otherwise, for the courts to act as if the conclusion is true without any reason to believe that it is true. The reason is the value (to the community, and to the people whose interests are affected by arbitrary uses of statutory power) of the constitutional ideal of the rule of law. So it may seem that the courts should presume that Parliament intends that public authorities should exercise their powers in accordance with the rule of law. Yet, since it is not necessarily inconsistent with legislation for courts to impose the rule of law on the exercise of statutory powers (above, section 1), the courts do not need to presume anything about Parliament's intention in order to justify the imposition of duties such as the duty to give a hearing in *Ridge v Baldwin*. The constitution demands that they impose those duties, unless Parliament acts to prevent it.

Still, there is no particular harm in speaking of that constitutional principle obliquely (as Lord Steyn and Lord Hoffmann do), as a 'presumption' that Parliament intends that statutory powers should be used in accordance with the rule of law. By speaking of it in that way, the judges emphasize their comity with Parliament. Contrary to Elliott's argument, the fact that courts presume that Parliament intends that statutory powers should be used in accordance with the rule of law does not give any role to the intention of Parliament—not even to a general intention to promote the rule of law. The reason is that to act on a presumption that Parliament intended such-and-such is *not* to act because Parliament intended it. It is to act for the reason that supports the presumption, unless Parliament expresses an intention to the contrary.[12] In this respect, the principle of

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[10] Prominent examples of the latter sort of act include the War Damages Act, 1965 (retrospective abolition of common law right to compensation for war damage), the Children and Young Persons Act, 1933, s.53(1) (sentence of detention during Her Majesty's pleasure for murder by a person under the age of eighteen years), the Criminal Justice and Public Order Act 1994, c.33, s.63(1) (vaguely defined police power of prior restraint against outdoor concerts), and the Anti-terrorism, Crime and Security Act, 2001, s.23 (power to detain a foreign national indefinitely without trial or charge on reasonable suspicion of being an 'international terrorist').

[11] The Human Rights Act 1998, s.4, gives the British courts power to declare a statute 'incompatible' with similar requirements in the European Convention on Human Rights. A declaration of incompatibility does not affect the validity or operation of legislation, but it gives the government a 'fast-track' power to amend legislation by order to remove the incompatibility.

[12] A complete explanation of the role of Parliamentary intention would need an explanation of the nature of intention. The legislature's intention is its having decided to pursue a particular course of action in a particular way; it makes a difference to the law because the fact that the legislature has (constitutionally)

legality is like the so-called presumption of a requirement of *mens rea* in criminal offences: *regardless* of Parliament's intention (and there may be no reason to think it had any), there is good reason for a court to hold that *mens rea* is an element of a statutory offence.

3. The charm of parliamentary sovereignty

The academic debates about the *ultra vires* doctrine have often been framed as debates over the United Kingdom constitutional principle of parliamentary sovereignty. That principle, which distinguishes the constitution from those of, e.g., Canada and the United States, is that the constitution gives Parliament the power to make any law, and gives no power to courts or to anyone else to act contrary to the will of Parliament expressed or implied in statute.

But in fact, Parliamentary sovereignty is neither here nor there. The debate about the justification for judicial review of the exercise of statutory power does not depend on that principle. The debate could be carried on in just the same way in Canada or the United States—or in any constitutional regime that gives limited legislative competence to the legislature—as long as the courts review the exercise of statutory powers to give effect to duties not expressly imposed either by the legislature or by the constitution. So why is the debate a special feature of *English* public law scholarship? I think that the answer is the occult effect of the doctrine of parliamentary sovereignty.

Elliott's book has the important virtue of pointing out that the debate does *not* depend on the doctrine of parliamentary sovereignty [79-80]. Yet the charm of parliamentary sovereignty still looms over his discussion. Again and again, he phrases the question as one of 'how judicial review and parliamentary sovereignty may co-exist' [ix, see also, e.g., 32, 186, 195].

And Elliott, surprisingly, endorses one of the strangest myths of modern British constitutional lore: that it is generally the job of the sovereign Parliament *and not* the courts to control the government, but that courts have been taking over that role because Parliament has been failing in it. He speaks of 'the clear need for judicial review following the decline of political modes of executive accountability' [252], and suggests that there is a special need for justification of judicial review because supervising the government is primarily the role of Parliament.

> Judicial law-making in this area raises particularly resonant power-allocation issues, given that, historically, the supervision of the executive has primarily been a legislative function. [18]
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> [The courts'] assertion of powers of judicial review…assumes primary responsibility for a supervisory function that has traditionally belonged to the legislature. [247]

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decided upon a course of action gives other officials a reason to give effect to that course of action. The legislature expresses its legally relevant intentions in legislation. The legislature's intentions can be implicit as well as express, but its intention is implied just when it acts in a way that supports the inference that it has decided upon such-and-such a course of action. To say that it is the implied intention of Parliament, e.g., to promote the rule of law, you would need a criterion to distinguish between a good idea that Parliament would presumably not act against, and an implied intention.

The alleged history and tradition have no roots in the long constitutional development that includes such remarkable judicial inventions as the writs of *habeas corpus*, *certiorari* and *mandamus*. England has a deep-rooted history of judicial control of government which, within its scope, is not in any respect secondary to Parliament's power to control government. Perhaps Elliott has in mind the history and tradition of the first half of the twentieth century, a time in which Louis Jaffe and Edith Henderson wrote that 'the dogma of legislative supremacy has assumed obsessive proportions'.[13] In the real history and tradition of the British constitution, **Parliament and the courts each have their own supervisory functions over the government.**

The tradition of judicial supervision includes Coke's excessive claim

> ...that to this Court of King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of subjects, or to the raising of faction, controversy, debate or any manner of misgovernment (*Bagg's Case* (1615) 11 Co.Rep. 94)

The tradition includes Lord Chief Justice Holt's less extravagant decision, in *Groenvelt v Burwell* (1700) 1 Ld.Raym.454; 1 Salk.144, that *certiorari* lay to any statutory agency empowered to affect property rights,[14] and his holding that it is 'by the *common law* that this court will examine if other courts [including statutory authorities such as, in Groenvelt's case, the censors of the College of Physicians of London] exceed their jurisdiction'. The roots of the courts' authority to control government are medieval. It was only after the Glorious Revolution that constitutional politics allowed the courts to assert that authority in a reliable and creative way—but then, it was only after the Glorious Revolution that Parliament was able to exercise any reliable and creative control over the government.

The constitutional tradition gives effect (though often imperfectly) to an important constitutional principle: judges and MPs have different capacities and different opportunities to supervise the executive. Judges have special competence for controlling certain forms of misgovernment (unlawful uses of power), and Parliament has special competence for controlling other forms (the pursuit of policies that are contrary to the national interest). Of course, the difference between Parliament and the courts is that while Parliament can hold the government to account on *any* good grounds, courts can only interfere with the government on legal grounds. So while it really isn't the courts' role to interfere with executive decisions such as, e.g., the decisions to sign the European Community Treaties, it would be quite appropriate for Parliament to raise questions about unlawful behaviour by government. Unlawful behaviour could even be a good ground for a vote of no confidence. But that does not mean that controlling unlawful behaviour is a parliamentary function that courts have had to take on.

It is certainly more than three hundred years since English judges doubted their power to supervise the legality of executive action (though they have dramatically revised their view of what makes executive action unlawful). Their supervisory attitude is actually much older than the development of Parliament's power to supervise the executive. Judicial review of the legality of executive action has historically been a *central* judicial function. The idea that it is a proper judicial function has never been in conflict with parliamentary control of the executive (although conflicts have arisen when courts have

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[13] 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345, 345.
[14] See *ibid*. 363.

overstepped their judicial role[15]). And just as proper forms of judicial review are consistent with parliamentary control of the government, judicial review can never be a remedy for inadequate parliamentary control. Judges do not have any techniques to fill the constitutional vacuum left by supine backbenchers, obsessive party discipline, and a weak opposition.

These two ideas—that judicial review of statutory powers is justified by the legislation, and that judicial review of executive action is an irregular but possibly necessary intrusion on a legislative function—give Parliament a misplaced role in the United Kingdom constitution. They reflect a fascination with the remarkable position that the legislature holds in that constitution. But the courts' special responsibility for elaborating the requirements of the rule of law and imposing them on the government is older than the common law doctrine that Parliament is 'sovereign', in the sense that it has a lawmaking competence that is not limited by law. And that responsibility of the courts is not at all inconsistent with that doctrine. So there is no challenge to Parliament's sovereignty in the classic exposition of the reason why judges impose duties of natural justice on other public authorities:

> Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law shall supply the omission of the legislature. *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 194 (Byles J).

4. Conclusion

It is a striking fact that the debate between Elliott's 'modified *ultra vires* theory' and the 'common law theory' has no consequences for the content of the standards of judicial review. Some have tried to show that the 'traditional *ultra vires*' theory and the 'common law theory' support different standards of review. But the 'modified *ultra vires*' theory supports the same standards as the common law theory[16]: it claims that Parliament intends that the rule of law should be upheld when it confers statutory powers (and leaves it to judges to work out the details), while the common law theory claims that the common law gives the judges power to work out the requirements of the rule of law and to impose them on other public authorities (which is to say that the judges, in their exercise of the jurisdiction of the High Court, accept a tradition of taking it upon themselves to do so). Elliott gives a very good, succinct account of the ways in which the standards of judicial review in English law promote the rule of law [100-104]; a proponent of the common law theory could adopt the same account.

Of course, what is important in the current ferment going on in the English law of judicial review is the constitutional justification for developing legal powers and duties *this* way or *that* way. What matters to the development of the law is the way in which the judges determine and implement the vague and open-ended requirements of the ideal of the rule of law. Do the debates about the *ultra vires* doctrine matter to that? Perhaps if judges conceive of their jurisdiction as a power that they have taken upon themselves in the development of the common law, they will be more aware of what a remarkable power it is, and better prepared to use it boldly but not arrogantly? Perhaps if they view it instead

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[15] It may be argued that *R v Secretary of State for the Home Department ex part Fire Brigades Union* [1995] 2 AC 513 is an example.

[16] More precisely, holding one theory rather than the other does not in itself commit you to one set of standards of judicial review. If you accept the common law theory, you could disagree about the appropriate standards of judicial review with someone else who accepts that theory just as easily as you could disagree with someone who accepts Elliott's theory.

as a judicial power to give effect to statute, they will be better equipped to refrain from using it wilfully? I do not think that either theory will necessarily be a better help to the judges in developing the standards of judicial review. That calls for wisdom and a combination of independence and self-discipline. It does not require a judge to hold any of the theories of the constitutional basis of judicial review. That does not mean that the debate about the so-called *ultra vires* doctrine is pointless. It is a debate about a picture of the British constitution—a debate about how to explain an area of constitutional law that, on any view, the judges are responsible for.

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Note on the logic argument

The law of excluded middle is:

> 1) Either *P* or not *P*.

For '*P*' we can substitute any meaningful, unambiguous assertion.[17] Elliott's logic argument can use the law of excluded middle if it is possible to replace *P* in such a way that the 'common law theory' has to deny that an instance of (1) is true. We can use the imposition of a duty to give a hearing in *Ridge v Baldwin* to try to formulate such a replacement for *P*. But the claim that the common law theory denies is *not*, on the face of it, an instance of the law of excluded middle:

> 2) Either Parliament authorized the authority to dismiss the chief constable without a hearing, or Parliament imposed a duty on the authority to give a hearing before dismissing the chief constable.

It is true that a statute must either impose a duty to give a hearing *or not impose a duty to give a hearing*. That follows from the law of excluded middle. But it does not follow from the law of excluded middle that a statute must either impose a duty to give a hearing *or confer a power to decide without giving a hearing*. Unless, that is, *imposing a duty to give a hearing* and *not conferring a power to decide without a hearing* are identical. So the logic argument depends on establishing that identity. And it might seem that that can be done, on the basis that a public authority has a legal duty not to perform an act that is not within the power granted.[18] Consider the following, which *is*, on the face of it, an instance of the law of excluded middle:

> 3) Either dismissing the chief constable without a hearing is within the power that Parliament granted to the authority, or dismissing the chief constable without a hearing is not within the power that Parliament granted to the authority.

That is the most promising way to formulate the logic argument, because it seems that the common law theory will need to deny *both* disjuncts: if dismissing the chief constable without a hearing is within the power that Parliament granted to the authority, then the court acts contrary to the grant of power when it quashes the decision. If dismissing the

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[17] The general question of whether this principle of logic applies to the law can be ignored for present purposes, because this Note argues that the 'common law theory' is consistent with the principle. For an argument that treating statements of law as 'bivalent' is an important legal technique that does not eliminate indeterminacies in law, see Endicott, *Vagueness in Law* (Oxford University Press, 2000), chapter 4, esp. pp.72-74.

[18] Assume that there is no other relevant legal power.

chief constable without a hearing is not within the power that Parliament granted to the authority, then there is a duty to give a hearing in virtue of that fact, and there is nothing on which a common law duty could operate. The dismissal is unlawful simply because the authority had no statutory power to act without a hearing.

But (3) begs the question. To interpret it in the way that would provide a basis for the *ultra vires* doctrine, it is necessary to presuppose that the power that Parliament granted to dismiss a chief constable necessarily either includes or excludes *the power to do so without a hearing*. The logic argument cannot support the *ultra vires* theory, unless there is reason to think that that presupposition is justified.

The presupposition is not justified: the general grant of a power to dismiss neither entails nor rules out a power to dismiss without a hearing. Dismissing the chief constable without a hearing *is* dismissing the chief constable. In *that* sense, it was within the power that Parliament granted. But that sense of 'power granted' is not a conclusive grant of power, in the sense that it rules out a duty to give a hearing.

Call a grant of power 'bare' if, like the grant of power in *Ridge v Baldwin*, it is not expressed as being subject to the duties (such as duties of natural justice) that are imposed in judicial review. Call a grant of power 'categorical', if universal instantiation applies: that is, if every action that counts as an instance of the general description of authorized actions is conclusively authorized (in the case of a power to dismiss for unfitness, the power is categorical if everything that counts as a dismissal for unfitness is conclusively authorized). Call a grant of power 'defeasible' if it is subject to other considerations which may defeat a claim that a particular instance of the general description of authorized actions is itself authorized, so that universal instantiation does not apply.[19] The logic argument depends on the view that every statutory grant of power is categorical (not that there can be no duty to afford natural justice that is not mentioned in the statute, but that any such duty must be a limit set by Parliament). Assume that Parliament can grant a categorical power in this special sense. That does not give any reason to think that Parliament creates categorical power rather than defeasible power when, e.g., it gives a committee the power to dismiss a police chief. There is no reason to think that a grant of power from Parliament is necessarily categorical (unless all legal powers and obligations are necessarily created by Parliament, which Elliott rightly denies). Whether a grant of power is categorical or defeasible is a question of interpretation of the grant of power. If the grant of power is defeasible, then the imposition of a duty to give a hearing is not inconsistent with the grant of power. But the question of whether to impose such a duty is *not* a question of interpretation of the grant of power.

The common law theory can claim that a bare parliamentary grant of power is defeasible, so that when Parliament gave power to dismiss, *prima facie*, it gave power to dismiss without a hearing. But it did not conclusively grant power to decide without a hearing. So the common law theory can deal with (3) by pointing out that it is not a well-formed instance of the law of excluded middle because 'the power that Parliament granted to the authority' is ambiguous. Dismissing the chief constable without a hearing *is* within the power that Parliament granted to the authority in the *prima facie* sense that it is an instance of dismissing the chief constable. But dismissing the chief constable without a hearing *is not* within the power that Parliament granted to the authority in the conclusive

[19] Note that by calling the power 'defeasible', I do not mean that a court has power *to override the statutory power*. Rather, the court may not be overriding the power if it holds that some particular instance of the general description of the power is not lawfully authorized.

sense that would make it inconsistent with the will of Parliament for a court to require a hearing.

There is no conflict between the common law theory and the lawmaking power of Parliament. When the House of Lords in *Ridge* imposed a duty to give a hearing, it did not contradict Parliament's enactment that the authority could dismiss a constable for unfitness—because it did not say that the authority could *not* dismiss a constable for being unfit, and it did nothing to prevent the authority from doing so. The court would contradict the legislation only if it denied or frustrated the power to dismiss.

The fallacy in the logic argument is thinking that a power to dismiss entails a power to dismiss without a hearing, so that it would be contradictory to have a general *power to dismiss*, but *not* a power to dismiss without a hearing.[20] So there is no logical necessity in the *ultra vires* theory: it depends on whether to interpret statutory powers as categorical or defeasible (in the senses used here)—which raises the question of whether Parliament should be presumed to intend that powers be exercised in accordance with the courts' conception of the rule of law. On that point of interpretation see section 2, above.

[20] Elliott formulates his logic argument as a response to an argument by Lord Justice Laws that the *ultra vires* theory suffers from 'the mistake of assuming that because Parliament can authorise or prohibit anything, all authorities and prohibitions must come from Parliament. It is a *non sequitur*. It neglects what the logicians call the "undistributed middle"—an obscure, but useful, academic expression, meaning that although X and Y may be opposites, like praise and blame, they do not cover the whole field; there might be Z, which involves neither.'(Sir John Laws, 'Illegality: The Problem of Jurisdiction' in M. Supperstone and J.Goudie (eds.) *Judicial Review* (London: Butterworths, 1997) at 4.17-4.18; see Elliott at 88. But the mistake in the logic argument is not an instance of what logicians call 'the fallacy of the undistributed middle' (a fallacy of the form: all Persians are human beings; all librarians are human beings; therefore all librarians are Persians. The middle term ('human being') is not 'distributed'—i.e., neither premise refers to all the individuals that the middle term denotes. The fallacy in the logic argument is not that fallacy; it is a form of the fallacy of accident. With respect, Laws' remarks are best read as a metaphorical way of saying that 'actions that Parliament prohibited' and 'actions that Parliament authorized' are not mutually exclusive. They are contrary categories, rather than contradictory categories, for reasons explained here. Elliott rightly points out that, contrary to Laws' suggestion, his logic argument does not rely on the idea that 'all authorities and prohibitions must come from Parliament' [94]. Yet Laws' underlying point is sound: the grant of a general power to dismiss may neither prohibit nor conclusively authorize a particular dismissal.