The Prerogative and Third Source:

A Critical Analysis

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Abstract

The prerogative and 'third source' are two sources of authority for executive action in British law. This dissertation subjects these two sources of authority to critical analysis, examining their legal histories, conceptual foundations, doctrinal structures, normative shortcomings, and comparative equivalents. It demonstrates that the prerogative and third source are even more unsettled than is commonly acknowledged, and have been a site of struggle over giving effect to the perceived needs of the state. The prerogative does not stretch back into the mists of time, but was actively shaped and developed by judges. The third source or something like it – the notion of some further common law authority for executive action where such action is not unlawful – did not first appear in the late 1970s, and was relied upon (at least in modified form) in at least as early the nineteenth century. The prerogative and third source are often given one-sentence definitions, when mentioned in case law and commentary, but the major attempts to define the prerogative and third source are full of undesirable ambiguity. That is both a cause and consequence of significant indeterminacy in the case law on the prerogative and third source. From a normative perspective, the prerogative and third source also fall short of values supposedly upheld by the British legal order: they are not subject to structured scrutiny or circumscribed by an authoritative text. But adopting a single codified constitution does not eliminate ambiguity and indeterminacy, as the experiences of Australia and the United States demonstrate. A promising response to these problems is to seek comprehensive legislative codification of the prerogative and third source, though this will not be a panacea to the problems of executive over-reach, and will not extinguish judicial discretion in determining the limits of executive action.

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Introduction

In 1774, through the stroke of a pen, Lord Mansfield affirmed the authority of the British Crown to make law for "conquered" colonies, after the Crown had imposed a tax on exports from Grenada.[1] A century later, a New Zealand court fashioned authority enabling a council to widen a street in Dunedin, though no statutory power allowed the council to do this.[2] Fifty years on, the House of Lords concluded that police protecting strike-breakers in a Welsh industrial dispute could charge fees for their services, despite the absence of any statutory authority.[3] In the early years of the twenty-first century, British courts wrestled with the scope and limits of executive authority, in two high-profile '*Miller*' cases, in which Gina Miller successfully challenged two Prime Ministers' attempts to bypass Parliament to accelerate the United Kingdom's departure from the European Union.[4]

At the heart of these diverse controversies are two forms of authority for executive action: the prerogative and 'the third source'.[5] The definition of each form of authority is elaborated over the course of the dissertation; the meaning of each has not been stable over time. In short, the prerogative is a set of subject-matter areas in which the courts have recognised the executive branch of government may act without statutory foundation; the third source is the view that the executive can do anything that is not prohibited by law.

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[1] *Campbell v Hall* (1774) 98 ER 1045.

[2] *Solicitor-General v Corporation of the City of Dunedin* (1875) 1 NZ Jur (NZ) 1.

[3] *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270 (HL).

[4] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; *R (Miller) v Prime Minister* [2019] UKHL 41, [2020] AC 373. Generally this thesis uses 'British' law as shorthand for the law of England and Wales.

[5] This form of authority has been given multiple labels; the thesis adopts Harris's term: BV Harris, 'The "Third Source" of Authority for Government Action' (1992) 108 LQR 626.

The argument of this thesis is that the prerogative and third source are even more unsettled than is commonly acknowledged, where by 'unsettled' it is meant that the prerogative and third source are lacking in order and stability. Few scholars have investigated in detail the histories of the prerogative and third source, which are far more complex than is often understood. Many judges and commentators do not go beyond one-sentence definitions of the prerogative and third source;[6] when reviewed the prerogative and third source are shown to have highly unstable conceptual foundations. The doctrine and normative standing of the prerogative and third source have received more scholarly attention. But this thesis shows the doctrine is even more indeterminate than is widely accepted, including in areas that appear to have been clarified. The prerogative and third source fall short of normative values upheld by the British legal order, even when counter-arguments are considered in their best light. Hence the prerogative and third source are 'unsettled' historically, conceptually, doctrinally, and normatively.

This thesis also demonstrates that the law on the prerogative and third source has been a site of struggle over giving effect to the perceived needs of the state. This area of law is best understood by grasping the political and economic contexts out of which it has emerged. Historical analysis (Chapter One) highlights how the the development of capitalism and imperialism prompted claims for expanded executive power, how judges sometimes enabled and allowed these claims, and how and why judges did not always yield to executive demands. Conceptual analysis (Chapter Two) reveals that academics have attempted to bring order to the prerogative and third source, but have failed repeatedly to rationalise the law coherently – in part because the law has responded, in uneven ways, to social conditions and historical developments. Doctrinal analysis (Chapter Three) brings into sharp relief the ambiguity in the contemporary law of the prerogative and third source, demonstrating that

[6] See Chapter Two.

such ambiguity has enabled further contestation over giving effect to the perceived needs of the state. The thesis's approach to understanding the prerogative and third source in historical context, to note connections between case law and broader struggles over the state's direction and structure, mean it would not be apt to assess the prerogative and third source against timeless normative yardsticks. Rather, the prerogative and third source can only be assessed against the standards of particular periods – and this informs the approach taken in Chapter Four.

The prerogative and third source's deeply political character, and relationship to struggles over the needs of the state, shapes the possible consequences of efforts to reform this area of law. The experiences of the United States of America and Australia illustrate that a single written constitution in the United Kingdom is unlikely to 'resolve' historical, conceptual, doctrinal, or normative difficulties (Chapter Five). This thesis suggests that comprehensive legislative codification is preferable, at least for the United Kingdom in this historical moment. But Chapter Six highlights that legislative reform does not dissolve the struggle over the perceived needs of the state, merely bringing another actor – the legislature – more centrally into that struggle. Chapter Six reinforces the view that the state itself is not homogeneous, and has contained different fractions (including within the executive) that have jostled to advance competing conceptions of state priorities. Comprehensive codification in legislation is nevertheless a defensible way forward; but it must be recognised that it will not 'settle', once and for all, this deeply unsettled area of law and politics.

Demonstrating that the prerogative and third source have been, and will continue to be, a site of struggle over giving effect to the perceived needs of the state *reinforces* that the prerogative and third source are even more unsettled than is commonly acknowledged – since to be 'unsettled' is also to be unresolved. The ongoing contestation over the prerogative and third source, and the way the prerogative and third source's structure invites that ongoing contestation, mean the prerogative and third source are unlikely to be entirely 'resolved' or

'settled', even via comprehensive codification. However, the way the prerogative and third source have been a site of struggle over the perceived needs of the state also *explains why* the prerogative and third source are even more unsettled than is commonly acknowledged.

As is discussed further below, the thesis draws on critical legal studies work to highlight that the prerogative and third source are lacking in order and stability; critical legal studies theorists have presented and developed useful tools for analysing indeterminacy and ambiguity in law.[7] But work in critical legal studies can sometimes imply that such indeterminacy has no pattern to it: that "law is an indeterminate array of substantially contingent political outcomes".[8] This thesis goes beyond critical legal studies to show that indeterminacy is not entirely contingent in the law on the prerogative and third source: it is connected to struggles over the needs of the state, including particular struggles in the early development of capitalism, and struggles over the expansion of imperialism, in the United Kingdom. To make this broader connection, a broader range of theoretical perspectives is integrated, including the perspectives of legal historians,[9] historians,[10] Marxist legal theorists,[11] theorists of the state,[12] and more doctrinally-focused lawyers.[13] Scholars of particular relevance

[7] Rob Hunter, 'Critical Legal Studies and Marx's Critique: A Reappraisal' (2021) 31 Yale Journal of Law and the Humanities 389, 411.

[8] ibid.

[9] See eg William Stubbs, *The Constitutional History of England in its Origin and Development* (3rd edn, Clarendon Press 1887).

[10] See eg Joanna Innes, *Inferior Politics: Social Problems and Social Policies in Eighteenth Century Britain* (OUP 2009).

[11] See eg Evgeny Pashukanis, *Law and Marxism: A General Theory* (first published 1924, Pluto Press 1987).

[12] See eg Nicos Poulantzas, *State, Power, Socialism* (Patrick Camiller tr, Verso 1978).

[13] See eg Robert Craig, 'A simple application of the frustration principle: prerogative, statute and *Miller*' (2017) PL 25 (Brexit Special Extra Issue).

to this thesis's argument and approach are discussed below; an explanation is also given of how their work can be integrated in a methodologically coherent manner.[14]

With the overall structure of the argument set out, it is worth explaining how each chapter's method and structure deepen this argument, and how the thesis makes a major contribution to the scholarly literature. The first chapter, 'Themes in the Legal History of the Prerogative and Third Source', challenges the view that the prerogative has a timeless character, and the assumption that the third source is a recent arrival in the law. Without overstating the importance of the prerogative, it documents links between the growth of the prerogative and the development of the British state, and comments on the role of the judges in this process, particularly in the seventeenth century. The third source's history can be traced earlier than the late twentieth century, contrary to standard accounts, as is revealed by colonial case law, policing cases, administrative law, and the Ram memorandum.

Three methodological features of this chapter bear mentioning. First, the chapter pays attention to social conditions surrounding judicial decisions (especially economic trends and political dynamics). It draws on a method articulated by Ntina Tzouvala, which involves "look[ing] for slippages, inconsistencies and paradoxes ... as entrances to the deeper logic of the text".[15] I share Tzouvala's consciousness of "the problems that occur when we link ... the textual to the material",[16] but avoid or mitigate these problems through careful textual analysis and engagement with historians' work. Like Tzouvala, my view is "the risks involved in this exercise are worth taking",[17] and that a richer portrait of the context can provide a better

[14] The diversity of perspectives is a strength, rather than a weakness, of the thesis's approach. The different perspectives allow a rich portrait of the context surrounding cases to be sketched; and the perspectives reveal common, recurring themes (in particular highlighting the importance of the struggle over giving effect to the perceived needs of the state).

[15] Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (CUP 2020) 9.

[16] ibid 16.

[17] ibid. A full account of the meaning of "material" is not possible due to constraints of brevity, but I take Tzouvala's view of the "material" to be broadly comparable to my focus on political and economic

understanding of legal history. Second, while I assume that the legal record may not always contain the range of influences relevant to judicial reasoning, I do not view judges' reasoning as entirely determined by prevailing economic relations. Economic and political forces do not always push in one direction;[18] reasoning is not always entirely explicable by those forces; and the role of agency should not be ignored. I refer to the work of Philip Selznick and E.P. Thompson on these points.[19] Third, the history of the British empire is seen as a key part of British legal history, following Anson's injunction to connect the working of the executive in the United Kingdom to the activities undertaken as part of empire[20] and Thomas Poole's resistance to an "island story" of the history of the executive.[21] Some mention is made of theorists who have analysed the structure of imperialism, such as Brenna Bhandar and Glen Coulthard,[22] to comment on the relationship between law and imperialism. These methodological choices are important to the overall argument. The imperial context, sometimes overlooked by scholars of the prerogative and third source, provides further evidence of the prerogative and third source's unsettled character, and is an example of struggle over giving effect to the perceived needs of the state. (Neither this chapter nor the thesis as a whole sets out to 'solve' the problem of imperialism, but insists that imperial activities have always been relevant to British law.) The push-and-pull of context and judicial

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context. Marx in one account defines the "material relations of life" as the "economic structure of society", encompassing relations of production and forces of production: Karl Marx, *Later Political Writings* (Terrell Carver ed, CUP 2012) 159 (from 'A Contribution to the Critique of Political Economy: Preface').

[18] Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 MLR 567, 593.

[19] Philip Selznick, "'Law in Context" Revisited' (2003) 30 Journ L & Soc 177; EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin 1977).

[20] William Reynell Anson, *The Law and Custom of the Constitution* (5th edn, Clarendon Press 1922) 45.

[21] Thomas Poole, *Reason of State: Law, Prerogative, and Empire* (CUP 2015) 9–10.

[22] Brenna Bhandar, 'Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony' (2015) 42(2) Brit J of Law & Soc 253; Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014).

agency highlights how the prerogative and third source came to be so unsettled, and is itself a constitutive part of that struggle.

Chapter Two, 'The Conceptual Basis for the Prerogative and Third Source', follows the historical analysis of Chapter One, since a premise of the chapter is that the prerogative and third source cannot be understood apart from their histories. Chapter Two considers Blackstone and Dicey's definitions of the prerogative.[23] The chapter highlights shortcomings in both accounts, but notes their dominance in scholarship and case law. It addresses treatments of the third source by Bruce Harris, Adam Perry, and William Wade,[24] underscoring the limitations of each. The chapter closes with revised accounts of the prerogative and third source.

The chapter resists the tendency in scholarship and case law on the prerogative and third source to provide one-sentence definitions of these concepts. It (re)reads the definitions offered in a fuller context of these scholars' work, to understand how approaches to the prerogative and the third source are situated within understandings of law, state, and society. That contextual approach to scholarship is consistent with the approach taken to case law in Chapter One. The chapter views each account of the prerogative and third source as an effort to rationalise the law. The direction of the argument is informed by Duncan Kennedy's work on Blackstone, which notes that "legal thinking can be a mechanism for denying

[23] William Blackstone, *Commentaries on the Laws of England: Book I of the Rights of Persons* (gen ed Wilfrid Prest, OUP 2016); Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (first published 1885, 8th edn, Macmillan 1915).

[24] BV Harris, 'The "Third Source" of Authority for Government Action' (1992) 108 LQR 626; BV Harris, 'The "Third Source" of Authority for Government Action Revisited" (2007) 123 LQR 225; BV Harris, 'Government "Third Source" Action and Common Law Constitutionalism' (2010) 126 LQR 373; Adam Perry, 'The Crown's Administrative Powers' (2015) 131 LQR 652; HWR Wade *Constitutional Fundamentals* (Stevens 1980); Sir William Wade and Christopher Forsyth *Administrative Law* (OUP 2004, 9th ed); and HRW Wade 'Procedure and Prerogative in Public Law' (1985) 101 LQR 180.

contradictions",[25] and that categories can provide "a false sense of the orderliness of legal thought".[26] The work of Blackstone, Dicey, Harris, Perry, and Wade – to different degrees – is an effort to resolve contradictions in the prerogative and third source. Chapter Two argues that these attempts do not succeed, including due to shaky distinctions, ambiguities, and category errors. The accounts given of the prerogative and third source towards the end of the chapter are a sketch of a more historically grounded approach to these concepts, a different approach from work by Bruce Harris and Adam Perry. The reading of these accounts in Chapter Two illuminates the way scholars have attempted, in vain, to bring order to this unsettled area of law.

Chapter Three, 'The Law on the Prerogative and Third Source in England and Wales', describes some key features of the law on the prerogative and third source. It addresses the *Miller* cases,[27] which have endeavoured to clarify the law of the prerogative, but the chapter examines other less widely discussed aspects of the law: including which prerogatives exist, how they are determined, and how limits discussed in the *Miller* cases relate to earlier doctrine. The section on the third source shows that the notion of a further form of executive authority governing surveillance, which arises in *Malone v Metropolitan Police Commissioner*,[28] can be traced at least to the nineteenth century. It discusses recent cases on the third source, including cases on policing and natural resource extraction often omitted from other accounts.

Like Chapter One, Chapter Three focuses on background social conditions of cases wherever relevant, and offers close analysis of reasoning. The aspiration of the chapter – and the thesis – is to draw on critical legal theory in order to produce an account that remains

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[25] Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 Buff L Rev 205, 214.

[26] ibid 215.

[27] See n 4.

[28] *Malone v Metropolitan Police Commissioner* [1979] Ch 344.

comprehensible, and useful, to more orthodox constitutional law scholars.[29] This chapter in particular is informed by critical legal studies' analysis of indeterminacy.[30] Some work in critical legal studies can be regarded as nihilistic or destructive; the chapter aims to be unambiguously constructive by offering a clearer overview of the doctrinal position (even if that overview reveals a messy area of law). The chapter deals carefully with judicial reasoning, and engages with some doctrinal scholars' analysis of decisions. It supplements 'orthodox' treatment of the case law with a more fine-grained portrait of historical and social background, which is sometimes left out of doctrinal analysis dealing with decisions primarily on the basis of what is on the face of the law report. The context shows how the doctrine is situated within a broader struggle over giving effect to the perceived needs of the state; close analysis of reasoning drives home that the prerogative and third source are highly unsettled areas of law. The chapter provides a broader overview of the law of the prerogative than recent articles on the *Miller* cases; the account of the law of the third source is more up-to-date than accounts given by Bruce Harris;[31] and the contextual approach offers a richer understanding of the law than that provided by textbook accounts.

Chapter Four examines part of the case against the prerogative and third source: why it is in tension with supposed tenets of the British legal order. The first three chapters

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[29] I take critical legal theory to be theoretical perspectives on law offering systemic critiques of its construction, operation, and orthodoxies. I understand it as a broad category that includes work of critical legal studies scholars, post-structuralist legal theorists, and Marxist legal theorists. Critical legal studies, with its focus on indeterminacy, is a subset of critical legal theory, but critical legal theory is not reducible to critical legal studies. (Critical legal studies has a particular commitment to "not taking [law] at face value" and "understand[ing] what [is] beneath the surface of legal ... principles": Juhana Salojärvi, 'A Counter-Culture of Law: Jurisprudential Change and the Intellectual Origins of the Critical Legal Studies Movement' (2019) 59 AJLH 409, 409. But other forms of critical legal theory offer different explanations of why it is important to go "beneath the surface of legal … principles.")

[30] Hunter (n 7) 394.

[31] BV Harris, 'The "Third Source" of Authority for Government Action' (1992) 108 LQR 626; BV Harris, 'The "Third Source" of Authority for Government Action Revisited" (2007) 123 LQR 225; and BV Harris, 'Government "Third Source" Action and Common Law Constitutionalism' (2010) 126 LQR 373.

illuminate the prerogative and third source from historical, conceptual, and doctrinal perspectives, while showing the prerogative and third source are beset with contradictions and ambiguities; the fourth chapter sets out why there is a strong basis for reforming this area of law. It is not unusual to find normative criticisms of the prerogative and third source: Margit Cohn, for example, observes that non-statutory executive authority is inconsistent with values of participation, clarity, and accessibility.[32] This chapter builds on that critique by constructing and developing two powerful arguments against the prerogative and third source: namely, that they are not subject to structured scrutiny, and are not circumscribed by an authoritative text. These arguments cannot be well-rebutted, and the positive case for the prerogative and third source does not stand up to scrutiny in light of the prevailing values of the British legal order.

The principal method adopted in this chapter is immanent critique: critique proceeding from values upheld in the existing legal order, rather than from claims that the prerogative and third source violate timeless norms.[33] This is compatible with, and demanded by, the methodological orientation of earlier chapters: it would be odd for a thesis focused on contextual interpretation of historical case law, scholarship, and contemporary doctrine to set out benchmarks for the assessment of the prerogative and third source that are true for all time. Nevertheless the chapter, and the thesis, is not agnostic on the merits of the prerogative and the third source. This is a critical analysis of the prerogative and third source: critical in the methodological sense that critical legal theory is invoked, and in the substantive sense that the thesis builds an argument that finds fault in the highly unsettled prerogative and third

[32] Margit Cohn, 'Judicial Review of Non-Statutory Executive Powers after *Bancoult*: A Unified Anxious Model (2009) PL 260, 265.

[33] See further David L Harvey, 'Introduction' (1990) 33 Sociological Perspectives 1; Karl Marx, *Early Writings* (tr Rodney Livingstone and Gregor Benton, Penguin 1992) 208; Robert J Antonio, 'Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought' (1981) 32(3) The British Journal of Sociology 330–345; and Dan Sabia, 'Defending Immanent Critique' (2010) 38(5) Pol Theory 684–711.

source. Immanent critique informs the kind of fault found in the prerogative and third source: fault rooted in the values of contemporary society. The approach taken differs from the critique offered by Cohn, and others commenting on the normative shortcomings of the prerogative and third source. The normative contradictions described here pave the way for Chapters Five and Six, which consider reform options.

Chapter Five offers comparative analysis in considering the merits of codifying the prerogative and third source via a single written constitution. The United States and Australia are considered, because their legal orders have been heavily influenced by British constitutional traditions, and their constitutional trajectories yield valuable lessons about what can happen to prerogative- and third source-like concepts following introduction of a codified constitution. Analysis of the United States shows a codified constitution can divert the site of dispute, from the common law to a constitutional text; it reveals how third source-like arguments can reappear in different forms, and how a constitutional text is not all-controlling of outcomes. In Australia, the prerogative has crept back into the law, despite not being mentioned in the Constitution; a version of the third source has arguably arisen, and a possible 'fourth source' has emerged in the form of nationhood-based powers. The experiences of these jurisdictions suggest a codified constitution may not resolve the tensions identified in the law of the prerogative and third source.

The chapter aims to follow good practice when engaging in comparative constitutional legal scholarship: care is taken to understand distinctive historical and political contexts; and the chapter broadly cleaves to the functionalist claim, articulated by Mark Tushnet, that "different constitutional provisions [can] serve the same function in different constitutional systems".[34] The chapter draws on other methodological precommitments.

[34] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 YLJ 1224, 1228. It also draws on Vicki Jackson's notion of contextualised functionalism: Vicki C Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and Andras Sajo, *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 54, 72.

Some 'reading against the grain' is required[35] to relate concepts in the United States and Australia to the prerogative or third source. The risks of this are highlighted, and caution is exercised, for example when classifying nationhood-based powers in Australia. In this chapter, it becomes clear that particular modes of judicial reasoning recur in relation to authority for executive action: arguments grounded in custom, the normative merits of an activity, and the nature of the state or nation. There is some similarity in this approach to Duncan Kennedy's analysis of 'a semiotics of legal argument'.[36] Finally, the analysis of the relationship between legal text and executive action is continuous with the approach in earlier chapters. Legal texts – whether judicial decisions or codified constitutions – are limited in their capacity entirely to explain legal outcomes. Social context shapes how texts are interpreted. Legal texts, and law in general, rarely only constrain the executive; they can also enlarge executive power. That detailed focus on modes of judicial reasoning, understood within context, builds on comparative work by Margit Cohn.[37]

The sixth chapter considers another reform proposal, reflected in the title, 'Putting the Prerogative and Third Source on a Statutory Foundation?' While the reform efforts of New Labour in the 2000s have attracted occasional scholarly comment,[38] no attempt has been made to offer a high-level analysis of piecemeal efforts to put the prerogative (or third source) on a statutory foundation. The chapter reviews the New Labour reforms, sketching a

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35 Walter Benjamin, *Illuminations* (first published 1955, tr Harry Zorn, The Bodley Head 2015) 248 (in 'Theses on the Philosophy of History').

36 Duncan Kennedy, *Legal Reasoning: Collected Essays* (Davies Group, 2008) 87–152. Kennedy describes "familiar arguments" (at 108), develops a typology, and describes how these arguments are often used. Chapter Five does not necessarily share every element of Kennedy's approach, for example his interest in how familiar arguments often appear in pairs.

37 Margit Cohn, 'Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural-Institutional Context' (2015) Int'l & Comp LQ 65.

38 See eg BV Harris, 'Replacement of the Royal Prerogative in New Zealand' (2009) 23 NZULR 285, 304.

taxonomy (of the kind that does not exist in the literature) of five choices for reformers undertaking piecemeal codification. The review reveals the value judgments made in undertaking reforms, likely conflicts between different fractions of the state, and tendency to preserve executive authority even in the course of legislative reform. The next part of the chapter analyses the work of David Gladstone, Bruce Harris, and Anne Twomey.[39] Building on their work, conclusions are drawn about the merits of comprehensive over piecemeal codification. The chapter underscores that even efforts to reform the prerogative and third source have been, and are likely to be, highly unsettled: ambiguous in effect and partial in scope.

The chapter draws on analysis of statutory language, undertakes close reading of law reform documents, and reviews relevant scholarship. One of the aims of the chapter is to take seriously the legislature as an actor in the struggle to give effect to the perceived needs of the state. Chapter Five and Chapter Six are informed by Marco Goldoni and Michael Wilkinson's work on "the material constitution", which pays attention "to the underlying material context ... and the dynamics of constitutional change."[40] I share Goldoni and Wilkinson's view that this is "not grasped merely by supplementing judicial with political analysis ... [and] by exposing the significance of parliamentary authority", but also "by properly grappling with the deeper social context in which formal constitutional development is embedded."[41] Across

[39] David Gladstone, 'What shall we do with the Crown prerogative?' (1998) 4 JLS 1; BV Harris, 'Replacement of the Royal Prerogative in New Zealand' (2009) 23 NZULR 285; Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (CUP 2018); Anne Twomey, 'Prerogative versus Parliament: What can be done? Does the prerogative need to be more tightly regulated, and how might that be done?', UCL Constitution Unit, 23 October 2019, <https://www.youtube.com/watch?v=bdOyaTsuieU> accessed 18 August 2021; Anne Twomey, 'Should we codify the royal prerogative?', UCL Constitution Unit, 1 November 2019, <https://constitution-unit.com/2019/11/01/should-we-codify-the-royal-prerogative/> accessed 18 August 2021.

[40] See n 18, 568. Goldoni and Wilkinson do not define the term "material" in their article. While their definition of "material" may differ slightly from Tzouvala's (n 15), as with Tzouvala's reference, I take the reference to "material" to be broadly comparable to my focus on political and economic context.

[41] ibid 569.

the chapters legal texts – whether cases, treatises, or legislation – are shown to be best understood in the context of economic trends, relevant political activity, and the priorities of individual actors. That approach illustrates, in the sphere of the prerogative and third source, the role played by law in reproducing and reconfiguring key elements of British state and society. The conclusion comments on this point.

The chapters can be read as standalone essays on history, concepts, doctrine, norms, codified constitutions (in comparative context), and legislative reform – but they constitute a coherent argument. The chapters develop what it means to say the prerogative and third source are 'highly unsettled': showing their histories have not followed a straightforward progression; highlighting that no conceptual analysis has successfully fixed the meaning of the prerogative and third source; revealing doctrinal ambiguity and normative tensions; and demonstrating that no reform efforts are likely to 'settle' the problems of the prerogative and third source. Part of the reason for this highly unsettled character is that the prerogative and third source have been a site of struggle over giving effect to the perceived needs of the state.

It is not unusual to find legal research, including analysis of the prerogative and third source, that combines different methods: for example, research integrating historical, doctrinal, and normative analysis.[42] But self-conscious discussion of the risks and advantages of that approach is rarer. There is now a burgeoning field of work on multimethods and mixed methods in social science.[43] To the extent it is appropriate to apply insights from social science inquiry to law, this thesis is better described as informed by a multimethod, rather than a mixed-methods, approach: multiple methods are employed, but quantitative and qualitative

[42] See eg Harris, 'Replacement of the Royal Prerogative' (n 38).

[43] Sharlene Nagy Hesse-Biber and Burke Johnson (eds), *The Oxford Handbook of Multimethod and Mixed Methods Research Inquiry* (OUP 2015).

methods are not combined.[44] The value of that approach is it can produce greater breadth of understanding, and assist in argument-building from different vantage points.

One danger is methods are deployed without the skillset required; I address this by drawing on my training in history, political philosophy, and public policy as well as careful use of materials from other disciplines. Another danger is theoretical incoherence: that a 'pick and mix' approach is taken to methods underpinned by different views of the world.

The methods in this thesis, along with the presuppositions and reasoning of each chapter, are compatible. The methods share three starting points. First, claims of timeless truths about the prerogative and third source are treated with caution. Second, attention is paid to the fuller economic, social, and political context surrounding legal texts. Third, reasoning still matters: it reveals how people explain the exercise of power, and particular kinds of reasoning (the creation of indeterminacy, for example) preserve or expand the exercise of power. These three starting points reinforce why the thesis as a whole is a "critical analysis" of the prerogative and third source. The thesis offers "analysis" of the prerogative and third source: it aspires constructively to improve understanding of these legal forms, by offering a more detailed account than has hitherto been provided of these legal forms' history, conceptual foundations, doctrine, normative shortcomings, comparative equivalents, and reform prospects. But it is "critical": it casts skepticism on claims of timeless truths about the prerogative and third source; goes beyond the surface of legal texts; and draws attention to ambiguities and contradictions in the prerogative and third source. These common methodological starting points enable the thesis to overcome the risk of theoretical incoherence that otherwise might arise in the use of multiple methods.

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[44] Albert Hunter and John D Brewer, 'Designing Multimethod Research' in Hesse-Biber and Johnson (eds), *Oxford Handbook* (n 32) 187–202, 187. However, "mixed methods" are defined in different ways and are not always associated with mixed use of quantitative and qualitative methods.

The relationship of this thesis to the work of Margit Cohn warrants discussion; Cohn identifies important lines of inquiry that this thesis pursues. Cohn says there has been "consistent stretching" of the prerogative historically[45] and queries the view of courts as "valiant fighters",[46] points taken forward in Chapter One; interrogates doctrinal limits on the prerogative and third source,[47] a theme explored in Chapter Three; highlights normative problems with non-statutory executive powers,[48] as Chapter Four does; raises how non-statutory executive powers have been dealt with in other jurisdictions,[49] probed by Chapter Five; and describes New Labour's statutory reform of the prerogative, investigated in detail in Chapter Six.[50] But the way this thesis approaches those inquiries is distinct from Cohn's project; the thesis supplies different answers; and the thesis asks questions not raised by Cohn.

The thesis shares Cohn's view that the prerogative and third source are beset by "internal tension",[51] but has a particular explanation for why this is: because they represent a site of struggle over the perceived needs of the state. This situating of the prerogative and third source within a broader social, economic, and political context answers Cohn's call for further analysis of the "political economy" of the prerogative and third source.[52] Cohn largely

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45 Margit Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25 OJLS 97, 108.

46 ibid 103.

47 Cohn (2009) n 32.

48 ibid 265.

49 Cohn (2015) n 37.

50 Margit Cohn, *A Theory of the Executive Branch: Tension and Legality* (OUP 2021) 276–277. This book was published as the dissertation was being finalised.

51 Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' (2016) 29 Can JL & Juris 321, 344–349. See also Cohn (2021) (n 50).

52 ibid 349. Cohn herself offers some discussion of political economy in the second half of Chapter Nine of her 2021 book (n 50).

accepts Blackstone and Dicey's prerogative definitions,[53] while this thesis challenges those definitions in Chapter Two. Cohn points to conceptual problems with the third source,[54] but does not develop the point; Chapter Two of the thesis elaborates on the conceptual difficulties in existing definitions of the third source. This thesis refers to the prerogative and third source as forms or sources of authority for executive action, rather than as 'non-statutory executive powers',[55] for reasons explained in Chapter Two. Chapter Three offers a wider view of the doctrinal landscape than Cohn, and no attempt is made to resolve tensions in the case law through advocacy of a model, 'unified' or otherwise.[56] This thesis avoids a focus on rendering the case law more orderly through reconstruction; it highlights, especially through considering Dicey and Blackstone's work, that such an exercise can tend to legitimate case law rather than help understand the origins of tensions and contradictions. Cohn nods to normative failings of the prerogative and third source,[57] and Chapter Four echoes some of Cohn's concerns; but Chapter Four develops arguments against the prerogative and third source, roots the arguments in existing norms of the British legal order, and considers counter-arguments at greater length. The analysis in Chapter Five is more systematic in its treatment of United States case law than Cohn's 2015 article and 2021 book,[58] and offers detailed coverage of Australian case law, even if the inquiry shares Cohn's intuition that legal texts rarely settle underlying ambiguities. Chapter Six charts territory largely uncovered by Cohn's work: while

[53] Cohn (2015) (n 37) 72–73.

[54] Cohn (2005) (n 45) 111.

[55] Compare n 40.

[56] Compare Cohn (2009) (n 32).

[57] Cohn (2005) (n 45) 103. Cohn does develop this critique a little in Chapter Nine of her 2021 book (n 50), though the argument does not substantially develop the position laid out in her 2005 article.

[58] Cohn (2015) (n 37); see n 50.

Cohn touches on efforts to reform the prerogative,[59] she has not examined at length legislative attempts to codify the prerogative,[60] or evaluated in detail piecemeal and comprehensive codification.

In some senses, this thesis takes forward Cohn's project: its historical inquiry is more extensive; it develops points made by Cohn about doctrine, norms, and comparative law; and it offers conceptual dissection, and analysis of piecemeal and comprehensive codification, not found in Cohn's work. But in one important respect the thesis is more confined than Cohn's work: it does not aspire to build a theory of the executive.[61] Building a theory of the executive is a particular aim of Cohn's 2021 book.[62] That book is the most up-to-date, full length treatment of the executive in the English-speaking world. Focusing on the executive in the United Kingdom and the United States, Cohn's book sets out a general model or the theory of the executive, which claims that the executive is characterised by "internal tension": a "volatile fusion of submission and dominance".[63] Its argument is that "fuzzy law" enables the tension wherein the executive is subject to law and dominant beyond the law.[64] Cohn examines different examples of fuzzy legality, including fuzzy legality generated by constitution, statutes, and executives; "unilateral, non-statutory executive power" (which includes the prerogative and third source in the United Kingdom) is a further example of such fuzzy legality, examined at some length by Cohn.[65] Cohn argues that fuzzy executive power is

[59] See eg Cohn (2009) (n 32) 265.

[60] Cohn's 2021 book does comment briefly on New Labour's "lengthy and incomplete" reform programme: n 50, 276–277.

[61] Compare Cohn (2016) (n 51) 322–323.

[62] See n 50.

[63] ibid 27.

[64] ibid 59.

[65] ibid 101–136.

inconsistent with the rule of law[66] and ideals of deliberative democracy.[67] After noting that fuzziness is inevitable, she considers some political factors producing and maintaining fuzziness, including open-ended constitutional frameworks, legal concepts (such as the prerogative) being fuzzy from the outset, tendencies towards power enhancement, and the view on the part of politicians that other priorities are more important.[68] Cohn concludes that anxious and active review of executive power is justified to address these problems; she considers and rejects counter-arguments about how this might expand the power of the judiciary.[69]

A theory of the executive requires analysis of the prerogative, third source, and statutory authority for executive action.[70] This thesis's focus provides only a partial basis for such theorising. Observations are made about the executive, but these are tied to the struggle in which the executive and other actors are engaged over whether and how to give effect to the perceived needs of the state.

Cohn's book overlaps in part with the arguments made in this thesis: in particular, Cohn's claim that fuzziness surrounds the law of the executive bears a resemblance to the notion that the prerogative and third source are highly unsettled; as well, her (relatively brief) discussion of political factors producing fuzziness intersects with the view that the prerogative and third source are a site of struggle over the perceived needs of the state. But there are also important differences between Cohn's book and the lines of reasoning pursued in this thesis. The concept of "fuzziness", which Cohn borrows from a form of set theory in the study of

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[66] ibid 257–262.

[67] ibid 265.

[68] ibid 272–287.

[69] ibid 289–320.

[70] Cohn endeavours to provide case studies of legislative fuzziness in her sixth and seventh chapters (n 50), but it is difficult to provide an exhaustive map of statutory executive power in any book.

mathematics,[71] is – by Cohn's own admission – "itself ... fuzzy".[72] The notion of the prerogative and third source being highly unsettled captures not just the sense in which the prerogative and third source lack order and stability (historically, conceptually, normatively, and doctrinally) but also the sense that the prerogative and third source are subject to active and ongoing contestation by those seeking to expand the scope of executive power. Cohn's partial discussion of how fuzziness is the "product of politics"[73] allows some recognition of this point. However, Cohn's discussion – while rich and informative – does not extend to how the judiciary have played a significant role in preserving the unsettled character of the prerogative and third source (a point developed in Chapters One, Three, and Five of this thesis);[74] nor does Cohn consider the role of jurists in struggles over giving effect to the needs of the state (in contrast with the analysis in Chapter Two below).[75]

Perhaps because Cohn does not dwell on the role of the judiciary in contributing to unsettled executive authority, Cohn's solution to the problems she identifies is a stronger role for the judiciary, and she does not discuss comprehensive legislative codification of the prerogative and third source (as is discussed in Chapter Six). As well, Cohn is less concerned with the role of historical, economic, and political context in producing "fuzzy" executive power or the highly unsettled prerogative and third source.[76] This thesis suggests that such

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[71] ibid 67.

[72] ibid 291.

[73] ibid 278.

[74] Cohn admits that she does not believe courts have been generally active in shaping fuzziness (ibid 290), but does not dwell on this point at length.

[75] Cohn appears to accept Blackstone and Dicey's definitions of the prerogative: ibid 108–109.

[76] Cohn openly acknowledges that she puts to one side the claim that the needs of governance may well require open-ended legal provisions: ibid 269. This thesis engages more squarely with a version of that claim: that the prerogative and the third source are highly unsettled so that they can continue to be sites of contestation over giving effect to the perceived needs of the state. That requires a more context-sensitive analysis, to chart how legal debates about the prerogative and third source intersect with moments of broader struggle over the structure and direction of state action.

context shapes, but does not dictate, the actions of a wide range of legal actors: including the judiciary, academics, the executive, and legislators. As a result of her narrower focus, Cohn makes little comment on how the prerogative and third source (or other forms of executive power) fit into broader economic and political systems.[77] This thesis makes some observations (in particular in Chapter One) on how claims for the prerogative and third source were made as capitalism and imperialism expanded in the United Kingdom; it also refers to how the prerogative and third source have been invoked in recurring subject-matter areas, such as policing and surveillance. These common subject-matter areas are noted in the conclusion of the thesis. Overall, Cohn's book and this thesis are complementary, but distinct, projects.

Aside from Margit Cohn's work, this thesis is informed by, but builds upon, work by Bruce Harris, Thomas Poole, and Anne Twomey. Harris is the leading scholar of the third source,[78] and has reflected on prerogative case law[79] and reform.[80] The thesis provides a more up-to-date account of British case law than Harris's analysis; a longer historical treatment of the prerogative and third source; more fine-grained normative assessment; and a comparative focus, and detailed discussion of reform, that Harris does not provide. Chapters Two and Six suggest revisions to Harris's conceptual thinking and reform proposals, respectively.

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[77] Cohn has admitted in a roundtable that her book is best described as "a theory of contemporary executives" that should not "be transposed ... onto alternative political climates such as the pre-administrative state or earlier versions of budding democracies": this seems to acknowledge the value of further historical and contextual analysis. See Margit Cohn, 'Book Roundtable on Margit Cohn's *A Theory of the Executive Branch: Tension and Legality*, Part 4: Tension and Legality – Response to Commentators, Int J Const L Blog, 25 July 2021, <http://www.iconnectblog.com/2021/07/book-roundtable-on-margit-cohns-a-theory-of-the-executive-branch-tension-and-legality-part-4-tension-and-legality-response-to-commentators/> last accessed 18 August 2021.

[78] See n 31.

[79] See eg BV Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 CLJ 631.

[80] See Harris (n 38).

Thomas Poole has developed an account of the prerogative and its normative limitations, including comments on the third source;[81] his book, *Reason of State: Law, Prerogative, and Empire*, examines British constitutional change through the lens of 'reason of state'.[82] Poole does not offer a full account of the prerogative and third source in light of historical, conceptual, doctrinal, and normative concerns; nor does he focus at length on reform. His book centres key texts and intellectual history relevant to 'reason of state'. This is an illuminating inquiry, connected to this thesis's attempt to understand struggles over the perceived needs of the state, which (like this thesis) views imperial activities as pertinent to British law. But Poole's project has a different aim, and different conclusions follow from it: his goal is to unearth a liberal 'reason of state' tradition within British intellectual history and to illuminate the British constitution,[83] rather than to understand the prerogative and third source, or their role in struggles over the perceived needs of the British state.

Anne Twomey has discussed British[84] and Australian[85] case law on executive action; analysed reserve powers of heads of state in Westminster systems, drawing on analysis of the prerogative;[86] and evaluated prerogative reform.[87] As with Poole's work, the path of Twomey's

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[81] Thomas Poole, 'The Strange Death of Prerogative in England' (2017) LSE Law, Society and Economy Working Papers 21/2017, 6, <http://eprints.lse.ac.uk/87575/1/Poole_Strange%20Death_Author.pdf> accessed 18 August 2021.

[82] Thomas Poole, *Reason of State: Law, Prerogative, and Empire* (CUP 2015).

[83] ibid 17.

[84] Anne Twomey, '*Miller* and the Prerogative' in Mark Elliott, Jack Williams and Alison L Young (eds) *The UK Constitution after* Miller: *Brexit and Beyond* (Hart 2018) 69–90.

[85] Anne Twomey, 'Pushing the Boundaries of Executive Power: *Pape*, The Prerogative and Nationhood' (2010) 34 MULR 313.

[86] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (CUP 2018).

[87] Anne Twomey, 'Prerogative versus Parliament: What can be done? Does the prerogative need to be more tightly regulated, and how might that be done?', UCL Constitution Unit, 23 October 2019, <https://www.youtube.com/watch?v=bdOyaTsuieU> accessed 18 August 2021; and Anne Twomey, 'Should we codify the royal prerogative?', UCL Constitution Unit, 1 November 2019,

analysis crosses over with the analysis that follows, but its direction of travel is different. Twomey does not analyse the prerogative and third source together, or review all prerogatives (including from historical, conceptual, doctrinal, normative, and reform perspectives), or situate the prerogative and third source within a struggle over the perceived needs of the state. Nevertheless her insights on Australian case law and reform are valuable; this thesis acknowledges her scholarship but moves beyond it, particularly in Chapters Five and Six.

If the work of Margit Cohn is this thesis's sibling, publications by Bruce Harris, Thomas Poole, and Anne Twomey represent its closest cousins. There are other distant relatives of this thesis: scholarly contributions relevant to parts of this thesis, if not its whole. These include the work of Adam Perry, discussed in Chapter Two;[88] Paul Craig on the prerogative's history and doctrine, mentioned in Chapters One and Three;[89] and Timothy Endicott on normative dimensions, referred to in Chapter Four.[90] None of these distant relatives examines the prerogative and third source in the round, with a focus on history, concepts, doctrine, norms, and reform. This thesis has a life of its own, independent of these family connections. Its significant and substantial contribution is not only to offer historical investigation, conceptual analysis, and assessment of legislative codification hitherto not provided in the literature; it also probes aspects of the case law on the prerogative and third source not fully discussed, provides an account of normative shortcomings that is more

<https://constitution-unit.com/2019/11/01/should-we-codify-the-royal-prerogative/> accessed 18 August 2021.

[88] Adam Perry, 'The Crown's Administrative Powers' (2015) 131 LQR 652.

[89] Paul Craig, 'Prerogative, Precedent and Power' in Christopher Forsyth and Ivan Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays in Honour of William Wade QC* (OUP 1998) 65–89; Paul Craig, '*Miller*, Structural Constitutional Review and the Limits of Prerogative Power' (2017) PL 48; Paul Craig, 'The Supreme Court, Prorogation, and Constitutional Principle' (2020) PL 248.

[90] Timothy Endicott, 'Was *Entick v Carrington* a Landmark?' in Adam Tomkins and Paul Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart 2015) 109–130; Timothy Endicott, '"This Ancient, Secretive, Royal Prerogative"', UK Constitutional Law Blog, 11 November 2016, <https://ukconstitutionallaw.org/2016/11/11/timothy-endicott-this-ancient-secretive-royal-prerogative/> accessed 18 August 2021.

focused and extensive than other assessments, and examines comparative materials that pinpoint how indeterminacy in the law on the prerogative and third source re-emerges in the United States of America and Australia despite the adoption of codified constitutions. The contextual approach, attentive throughout to the interrelationship between law and politics, and the different perspectives on the prerogative and third source drive home how unsettled the prerogative and third source are, and how the prerogative and third source are illuminated by understanding them in the context of struggle over giving effect to the perceived needs of the state.

Scholars and judges alike have relegated the prerogative and third source to matters of marginalia in British constitutional law. They are a "residue",[91] a "mundane constitutional anomaly",[92] "administrative".[93] Without overstating the importance of the prerogative and third source, this thesis queries such descriptions. It asks whether the consignment of the prerogative and third source to the edges of the British constitutional story has obscured important insights. And it finds that when the prerogative and third source are inspected carefully, and not just dismissed as marginalia, they may point the way towards a fuller and better story being told about law, power, and the state in the United Kingdom.

[91] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (first published 1885, 10th edn, Macmillan 1959) 420.

[92] Cohn (n 45) 100.

[93] Adam Perry, 'The Crown's Administrative Powers' (2015) 131 LQR 652.

Chapter One:

Themes in the Legal History of the Prerogative and Third Source

Academics, judges, and commentators tell a standard story about the history of the prerogative and the third source.[94] The narrative attached to the prerogative is that it has ancient origins.[95] The prerogative, on this view, is first found in the deep mists of medieval history – and it is implied that the prerogative has persisted, in an unbroken way, until the present day. The narrative attached to the third source is that it has relatively recent origins. The standard story is that the third source was created as a source of authority in *Malone v Metropolitan Police Commissioner*,[96] developed by academics, and given a more stable place in the law of England and Wales by judgments in the 2000s and 2010s.[97]

This chapter tests these orthodox narratives,[98] using them to explore aspects of the legal history of the prerogative and third source, or how the prerogative and third source are addressed through law. The first section of the chapter isolates early references to the prerogative, in the thirteenth century up until the Tudor period. The second section of the chapter illustrates that judges played an important role in developing the prerogative,

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[94] See discussion of "stock stories" in JM Balkin and Sanford Levinson, 'The Canons of Constitutional Law' (1998) 111 HLR 963, 987; Gerald P Lopez, 'Lay Lawyering' (1984) 32 UCLA Law Rev 1, 5.

[95] See eg *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, 549; or the claim by Lord Windlesham in 1971 House of Lords debates, cited in *R (on the application of Munir) v Secretary of State for the Home Department* [2012] UKSC 32, [2012] 1 WLR 2192, [25].

[96] [1979] Ch 344.

[97] See eg BV Harris, 'The "Third Source" of Authority for Government Action' (1992) 108 LQR 626 and BV Harris, 'The "Third Source" of Authority for Government Action Revisited' (2007) 123 LQR 225.

[98] These narratives are "origin myths": Elizabeth Fisher and Sidney A Shapiro, *Administrative Competence: Reimagining Administrative Law* (CUP 2020) 20.

particularly in the seventeenth century. Judges did not discover the prerogative's ancient lineage; they affirmed and shaped prerogatives. The third section of the chapter reinforces the point about judges' role, by examining key cases in British colonies in the eighteenth and nineteenth century. The fourth section of the chapter examines how functions of the British legislature, executive, and judiciary shifted over time, prompting changes in the prerogative. The fifth section of the chapter turns to the third source. There are seeds of third source-type reasoning in nineteenth and twentieth century case law, and the Ram memorandum; and comparisons between the Crown and persons paved the way for the third source of authority.

Legal histories of the prerogative and third source are more complex and nuanced than orthodox narratives would suggest. Change over time is a constant theme, and the judicial branch of government historically wielded significant power in approving and modifying the shape of the executive. A key methodological feature of this chapter is attention to the context surrounding legal developments, with some attempt being made to "link the textual to the material".[99] It is informed by Philip Selznick's view that "legal norms and institutions are conditioned by culture and social organization", "by intellectual history", and by "underlying realities of class and power"; accordingly, "the legal order is far less ... self-sufficient" than is often portrayed.[100]

This methodological approach raises the question: what aspects of context are relevant? The chapter focuses on prevailing intellectual norms, relevant economic developments, and political imperatives when understanding context. Relevant economic developments and political imperatives include the changing imperial character of the British state. The focus on these aspects of context allows the legal history of the prerogative and third source to be situated within a wider struggle over the perceived needs of the state. Such

[99] Tzouvala (n 15).

[100] Philip Selznick, "'Law in Context" Revisited' (2003) 30 Journ L & Soc 177, 177.

a focus demands sensitive treatment of political and economic history, legal history, and political theory; and careful attempts to connect context to judicial reasoning. The chapter resists the view that context entirely determines legal outcomes. Following Selznick, the chapter acknowledges there are "law-related and law-generating realities of social life" that make "some changes likely if not inevitable":[101] it is possible for citizens, lawyers, judges, and academics to exercise agency in that context. To understand the extent of agency, close analysis is offered of judicial reasoning. These methodological choices enable a richer understanding of the prerogative and third source's history than has been offered in the existing literature. That understanding provides a basis for demonstrating in Chapter Two that conceptual accounts of the prerogative and third source cannot be articulated without full reference to the history of these concepts.

The early days of the prerogative

The prerogative has not been in place since the beginning of time. Several factors make it difficult to isolate when the prerogative came into existence legally. First, 'the prerogative' has meant different things at different times, and has sometimes been used loosely. Second, the history of the prerogative has often been discussed in sweeping terms. Relatedly, those in the executive relying on the prerogative, and judges reviewing it, have avoided confronting fundamental questions about its nature and origins. The problem has been exacerbated by

[101] ibid 178.

treatise-writers drawing from each other's work.[102] As William Stubbs notes, "the history of prerogative is one long story of assumption and evasion".[103]

The term 'prerogative' does not obviously feature in Bracton's *On the Laws and Customs of England*, the thirteenth-century book that might be described as the first comprehensive summary of the laws of England, at the time of the consolidation of the common law.[104] But Bracton's writing prefigures the emergence of the prerogative in two ways. He refers to areas of royal action that would become prerogatives, such as the granting of pardons. Bracton uses terms such as "the king's grace" to describe actions taken under what would now be called the prerogative.[105] Moreover, he writes of how the king can be at once superior to subjects while following the law. Bracton notes that "[t]he king has no equal within his realm" and "[s]ubjects cannot be the equals of the ruler", though the king must not refuse to be "[subject] to established laws ... lest his power remain unbridled."[106] Such lines might appear contradictory. But this apparent contradiction – that the Crown holds a superior position to its subjects, but remains within the strictures of law – is the basis of the law of the prerogative: a legal framework for managing the Crown's elevation over its subjects.

Colin Rhys Lovell uses the word 'prerogative' in his description of the thirteenth century, though it is not clear it has the same meaning as the notion of the prerogative as

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[102] Chitty's work on the prerogative is derivative of Blackstone's. Chitty writes, powers "are wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and dispatch. Were they placed in many hands, they would be subject to many wills ...": Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Butterworth 1820) 3. (He cites Blackstone below this passage, but does not place quotation marks around the words quoted above.) Compare William Blackstone, *Commentaries on the Laws of England: Book I of the Rights of Persons* (gen ed Wilfrid Prest, OUP 2016) 260.

[103] William Stubbs, *The Constitutional History of England in its Origin and Development* (3rd edn, Clarendon Press 1887) 541.

[104] Henry de Bracton, *Bracton on the Laws and Customs of England* (first published 1268, Selden Society/Belknap Press of Harvard University Press 1968).

[105] ibid 396.

[106] ibid 33.

authority for executive action in particular subject-matter fields. Lovell notes in the thirteenth century the monarchy "lost many of the personal connotations it had once had and became the impersonal 'crown' or 'government'".[107] Lovell points out that "[s]tatutes were originally the ultimate expression of prerogative kingship."[108] He remarks that, "[h]istorically, Parliament was as much a creation of the royal prerogative as of the royal courts, their common law, and the great statutes."[109] Lovell's use of the term 'royal prerogative' suggests he believes Parliament was the product of particular executive authority. But he does not unpack this statement, only noting that Parliament "originated at the royal command of a strong monarch".[110] That the term 'prerogative' had multiple, or divergent, meanings at this time and after is confirmed when Lovell reports that in the fifteenth and sixteenth centuries, new courts were described as "prerogative", "intimating that they were illegal and agents of tyranny".[111] If Lovell is right, the term 'prerogative' had no single agreed meaning for an extended period, and could be used to describe general exertions of executive power.

Maitland's work demonstrates how executive authority, and the scope of the prerogative, shifted through the fourteenth century. He points out: "men of the thirteenth century ... had not clearly marked off legal as distinct from moral and religious duties."[112] This explains, in part, the use of 'prerogative' during this time: the prerogative as a legal notion (though it might not have represented a 'duty') was not often clearly marked off from its use as a moral idea. Maitland observes, "the line between what the king could do without a

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[107] Colin Lovell, *English Constitutional and Legal History: A Survey* (OUP 1962) 120.

[108] ibid 139.

[109] ibid 157.

[110] ibid.

[111] ibid 274.

[112] FW Maitland, *The Constitutional History of England: A Course of Lectures* (CUP 1908) 101.

parliament, and what he could only do with the aid of parliament, was only drawn very gradually, and it fluctuated from time to time."[113] Explicit discussion of the prerogative's scope and nature was rare. Maitland adds: "the more we study our constitution ... the less do we find it conform to any such plan as a philosopher might invent in his study."[114]

Stubbs observes that in the fourteenth century the prerogative began to be defined more sharply. Stubbs writes: "prerogative during this [fourteenth] century is put upon its defence and compelled to formulate its claims, reserving however a salvo of its own indefeasible omnipotence that will enable it to justify any amount of statecraft."[115] Stubbs notes that executive practices settled into norms, and the legal form of the prerogative emerged out of this process. The "prerogative was not in its origin a figment of theorists," Stubbs says. "It grew out of certain conditions of the national life ..."[116] However, uncertainty remained. Specific claims were made by the Crown in the fourteenth century, writes Stubbs, "but ... beyond the definite claims there extends the region of undefined prerogative."[117]

In the fifteenth century, subject-matter fields became associated with the prerogative – and there was questioning of the prerogatives' metes and bounds, even if answers to those questions were not clear. Renewed questioning partly arose because of an increasingly assertive parliament.[118] There was significant disagreement in the fifteenth century about the Crown's right to dispense with, or suspend, laws – disagreement that would come to a head in events in the seventeenth century. Sir John Fortescue's *De Laudibus Legum Angliae*

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[113] ibid 196.

[114] ibid 197.

[115] Stubbs (n 103) 541.

[116] ibid 542.

[117] ibid 542–543.

[118] Lovell (n 107) 196.

(*Commendation of the Laws of England*) makes three pertinent references. When discussing the raising of expenses, he says: "Nor is this against the king's prerogative, by which he is exalted above his subjects, but rather this is to him a prerogative."[119] Endowment of the Crown "cannot be against the king's prerogative", but "shall be to the king a greater prerogative".[120] When discussing bodies of advisors, Fortescue writes that a council "may in no thing restrain [the Crown's] power, liberty, or prerogative."[121]

Holdsworth notes, "the view which the law took of [the king's] prerogative determined the new theory of the English state which was emerging in the sixteenth century."[122] This was a transition period, between feudal conceptions of the Crown and notionally different, sharpened accounts of prerogative authority. Holdsworth writes of this period: "For [the Tudor kings'] most arbitrary acts they always endeavoured to get a legal sanction," he writes.[123] The law followed the king: arbitrary acts came first, and "legal sanction" later.

In the *Case of the Duchy of Lancaster*, decided in 1562, a distinction was drawn between the Crown's natural body and body politic, as part of an emergent sense of the Crown constituting an abstract form beyond individual personalities. Old notions of feudal privileges set out in the fourteenth century Praerogativa Regis were "no longer ... a complete statement of the law",[124] and the "the idea of kingship" began to guide judicial explanations of Crown

[119] John Fortescue, *De Laudibus Legum Angliae* (first published 1476, CUP 2012) 95.

[120] ibid 121.

[121] ibid 140.

[122] WS Holdsworth, 'The Prerogative in the Sixteenth Century' (1921) 21 Colum L Rev 554, 554; MJ Braddick, *State Formation in Early Modern England, c. 1550-1700* (CUP 2000).

[123] ibid 555.

[124] ibid 558.

power.[125] This idea of kingship had to be filled in through reference to social and political needs. Holdsworth summarises a late sixteenth century work by Richard Hooker, *Of the Laws of Ecclesiastical Polity*, which charted how "Tudor sovereigns had succeeded in their efforts to adapt medieval institutions and ideas ... to the needs of the modern state".[126]

This overview of sources from, and about, the thirteenth century until the end of the Tudor period shows 'the prerogative' started to enter legal and political discourse and play a role in shaping state activity. It is difficult to pinpoint a precise moment when the word began to refer to an executive authority for action over particular subject-matter areas. Nevertheless the nature of references to the prerogative shifted through the fourteenth and fifteenth centuries. Disputes over law-making and dispensing with laws resulted in sedimentation of executive practice, giving rise to claims of prerogative power. Agency was exercised in conflicts over the prerogative in this period – in contrast to contentions that the prerogative grew organically out of the mists of the medieval past. Locating the prerogative within the context of conflict underscores the way the prerogative responded to social conditions, and was far from inconstant.

The role of judges in shaping and approving the prerogative

The period from the Stuart years through to the nineteenth century represented a period of relative systematisation of the prerogative, through the treatise-writing of Staunford, Hale, Blackstone, Bacon, and Chitty.[127] These commentators were themselves bringing order to case

[125] ibid 562.

[126] ibid 568.

[127] William Staunford, *An Exposition of the King's Prerogative, Collected out of the Great Abridgement of Justice Fitzherbert, and Other Old Writers of the Lawes of England* (Company of Stationers 1607); Matthew Hale, *The Prerogatives of the King* (first published 1676, Selden Society 1976); William Blackstone, *Commentaries*

law that had been developed by judges in the same period, at a time when the prerogative was central to constitutional conflict.[128]

Four seventeenth century cases illustrate the judicial role in these developments: *Saltpetre*, *Ship Money*, and *Thomas v Sorrell* and *Godden v Hales*. The *Saltpetre* case approved a prerogative for the Crown to dig for saltpetre for the defence of the realm, which appeared to have no precedent.[129] Saltpetre was an ingredient in gunpowder: "a crucial link in the chain of chemistry and power", like "modern oil or uranium."[130] As David Cressy writes, increased efforts were made to "improve supplies of saltpetre" between the 1560s and 1640s, "in the formative era of the early modern state".[131] From the mid-sixteenth century, digging for saltpetre within English counties had begun, and "Tudor governments assumed to themselves the responsibility as well as the right to collect saltpetre in the national interest."[132] Later, the need for saltpetre would drive the East India Company, which provided its first shipment of saltpetre in 1624 from Bengal "for the service of the state".[133] "[S]altpetremen" during this time "were notorious ... for their venality, rapacity and oppressive abuse", causing distress to tenants and operators of wagons and carts.[134]

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on the Laws of England: Book I of the Rights of Persons (gen ed Wilfrid Prest, OUP 2016), originally written as lectures in 1753; Matthew Bacon, *A New Abridgement of the Law* (first published 1768, A Strahan 1832); Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Butterworth 1820).

128 Martin Loughlin, *Foundations of Public Law* (OUP 2010) 379.

129 *The Case of the King's Prerogative in Saltpetre* (1606) 77 ER 1294–1297.

130 David Cressy, 'Saltpetre, State Security and Vexation in Early Modern England' (2011) 212 Past & Present 73, 75.

131 ibid 75–76.

132 ibid 90.

133 ibid 107–108, citing *Cal. State Papers, Colonial, East Indies, 1622–4*, at 202, 240, 276. By 1757 Great Britain controlled 70% of the world's saltpetre: ibid 109.

134 ibid 109.

Against this backdrop, the question of whether the Crown had the authority to dig for saltpetre, including on private land, became a contested point. Privy Councillors defended the right to dig for saltpetre in 1601, saying "[t]he benefit of making saltpetre and gunpowder within this land is so infinite", and referring to "her highness's prerogative royal" as justifying it.[135] Whether there was such a prerogative came before the courts in *Saltpetre*. The move to affirming the prerogative to dig for saltpetre in the reasoning is slippery. It is said: "by the common law, every man [sic] may come upon my land for the defence of the realm ... as, for saving of a city or town or town, a house shall be plucked down if the next be on fire."[136] No consideration is given to whether the position of an individual and the position of the state is different legally. The taking of saltpetre is said to be "for the necessary defence and safety of the realm"; and is "an incident inseparable to the Crown".[137]

It is not clear why the taking of saltpetre is legally "inseparable" from the Crown; it does not follow from saltpetre's importance for the defence of the realm that the Crown has a prerogative to take it. Despite the judges' insistence that the prerogative must serve a public benefit,[138] the judges strain to affirm this prerogative. They observe that the prerogative can only be used for defending the realm, saying it was for this "purpose only [that] the law gave to the King this prerogative."[139] It was not some impersonal "law" that granted the prerogative to dig for saltpetre; no authorities were cited to support this prerogative's existence, and gunpowder was a "relatively recent invention".[140] Judges authorised the executive to exercise

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[135] ibid 90.

[136] See n 129, 1295.

[137] ibid.

[138] ibid.

[139] ibid.

[140] Cressy (n 130) 100.

this prerogative – enabling military expansion, economic activity, and freedom for saltpetremen.[141]

Cressy notes it was "[o]nly when this right" to dig for saltpetre "was challenged" that governments "need[ed] to cloak it in theory".[142] The *Saltpetre* case provided room for further expansion of executive action. As Holdsworth observes, "The idea of an inseparable prerogative [discussed in *Saltpetre*] was ... a vague idea; but because it was vague it was capable of development."[143] He adds:[144]

> ... this want of precision enabled the prerogative lawyers of the seventeenth century to deduce from their statements concerning these particular absolute or inseparable prerogatives, the theory that the king had, inseparably attached to his person, a general absolute prerogative to act as he pleased which he could use whenever he saw fit.

Some thirty years later, in *Ship Money*, judges again affirmed the existence of a prerogative that served the needs of the state in relation to war. Charles I's government found itself strapped for revenue.[145] The East India Company's profits were declining "catastrophically".[146] There was a need for naval protection of English traders, for example in the Mediterannean, especially given "complaints that in the struggle for markets England was being out-traded."[147]

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[141] Ivor Jennings states there is "no [explicit] mention of the prerogative" in the case, suggesting the executive authority to dig saltpetre might be grounded not in "a prerogative right" but some other authority – perhaps the third source (though Jennings does say this): WI Jennings, 'The Right of Angary' (1927) 3 CLJ 49, 49.

[142] Cressy (n 130) 90.

[143] Holdsworth (n 122) 560.

[144] ibid 561–562.

[145] Christopher Hill, *The Century of Revolution: 1603-1714* (Norton 1980) 13.

[146] ibid 38.

[147] ibid.

One answer to this threat to government finances was an expansion of 'Ship Money', a levy on port towns to raise revenue for defence and commercial protection. From 1635 the levy was extended by the Crown to inland counties to cover the cost of merchant ships levied for royal service as well as ship-building.[148] Under a decade after the 1628 Petition of Right claimed no tax could be compelled without an Act of Parliament, John Hampden and others challenged the levy's legality.[149] According to Christopher Hill, Hampden – a Member of Parliament and part of the Buckinghamshire elite – was not driven only by principle but also by political strategy.[150]

By a 7–5 majority, the judges conclude – despite the absence of authority – that the executive has a prerogative to raise money from subjects to fund ships for war.[151] Sir Francis Weston bases his view on custom.[152] It is difficult to understand how custom is a sufficient foundation for a prerogative's existence; if so, repeated Crown action might legitimise a prerogative. Sir Edward Crawley defends the prerogative on the basis of a "right of sovereignty".[153] But he does not explain what the limits of this right are, or why raising money for war falls within it. Sir Thomas Trevor concludes, "[t]his kingdom hath been always monarchical", without setting out any chain of reasoning from the fact of monarchy to particular prerogatives.[154] For Sir George Vernon, it is enough that "the king may dispense with any law in cases of necessity."[155] Sir John Finch grounds his judgment in the "law of

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148 Poole (n 82) 31.

149 Hill (n 145) 13.

150 ibid 39–40.

151 *R v Hampden* (1637) 3 State Tr 826 ['*Ship Money*'].

152 ibid 1075.

153 ibid 1087.

154 ibid 1126.

155 ibid.

nature, which is, that every thing in nature ought to defend itself" – but offers no evidence of this being a law.[156] Sir John Brampston admits no precedents support the decision, but says there are "[d]angerous consequence[s] for judges ... to rely too much upon precedents."[157]

Not all of the judges in *Ship Money* side with the Crown. Five dissent, insisting no prerogative exists. But even these judges leave legal footholds for the executive to develop its authority. Sir Richard Hutton says, "there are some inseparable prerogatives belonging to the Crown", invoking the *Saltpetre* concept. He does not list these prerogatives.[158] The strong impression left after reading the judgments in *Ship Money* is of a judicial branch of government providing legal scaffolding for the executive to achieve its ends. In so doing, in cases such as *Saltpetre* and *Ship Money*, the judges leave a legal edifice standing that expands executive power, enabling development of the fiscal-military state.[159]

Judges engaged in a similar enterprise in *Thomas v Sorrell* and *Godden v Hales*, where they gave legitimacy to the prerogative to dispense with laws.[160] *Thomas v Sorrell* was the major initial case authorising the existence of the prerogative to dispense with laws, though it was said that the executive may only dispense with certain statutes, not the common law.[161] The decision was validated in *Godden v Hales*, which concerned Test Acts essentially excluding

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[156] ibid 1224.

[157] ibid 1245.

[158] ibid 1194.

[159] This is a phrase widely used by historians; see eg Joanna Innes, *Inferior Politics: Social Problems and Social Policies in Eighteenth-Century Britain* (OUP 2009) 2.

[160] *Thomas v Sorrell* (1673) 89 ER 63; *Godden v Hales* (1686) 89 ER 1050.

[161] *Thomas v Sorrell* (n 160) 67.

Catholics from public office.[162] In *Godden v Hales* judges (with two dissenting) approved of James II's general authority to dispense with laws, holding:[163]

> ... that the Kings of England were absolute Sovereigns; that the laws were the King's laws; that the King had a power to dispense with any of the laws of Government as he saw necessity for it; that he was sole judge of that necessity ...

As Dennis Dixon observes, there was a strong reason why some of the judges appeared to be compliant: James II had purged the judiciary of judges opposed to expansive prerogative authority, sending a direction to the judges that their positions would be under threat if they did not support the dispensing power.[164] Dixon says, "without purging the judiciary, James would have lost [in *Godden v Hales*] by at least seven to five on the vote of the judges serving as of January 1686."[165] (The Bill of Rights would shortly limit the effect of these decisions.) The context surrounding *Godden v Hales* shows the extent to which the courts could be steered towards conclusions supporting the imperatives of the state. While it shows the executive at its most expedient, it forms part of a narrative of judges playing a role in legitimating the expansion of executive activity via prerogative in the seventeenth century.

These cases show a sharpening of definition around aspects of the law of the prerogative, in response to economic and social developments as the English state expanded in the sixteenth and seventeenth centuries. This calls to mind Pashukanis' claim that while legal forms can stay "for a long time ... with minimal internal differentiation", a "period of

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[162] Dennis Dixon, '*Godden v Hales* Revisited – James II and the Dispensing Power' (2006) 27 JLH 129, 136–137.

[163] *Godden v Hales* (n 160) 1051.

[164] Dixon (n 162) 149.

[165] ibid.

gradual development" can bring law to "its maximum differentiation and definition" as it serves economic functions.[166]

Saltpetre and *Ship Money* show the needs of the expanding fiscal-military state informing judicial reasoning, highlighting the relevance of Pashukanis' statement that "[o]nly the development of trade, and of the money economy, make the juridical ... interpretation of the phenomenon of power possible."[167] Stephen Sedley has commented on the "acquiescence of many of the judges in the despotism of the later Stuarts", and how this "led ... George Trevelyan to treat Bacon's metaphor of lions under the throne as an image of servility rather than of vigilance."[168] Decisions in this period helped legitimate an expansion of the executive.

In the seventeenth century, one theme is striking: elision in reasoning between what the Crown *does* and what the Crown *can do* legally. Custom is mentioned in *Ship Money* as a foundation for the prerogative. A reference to individual practice in defending the realm is used to explain the prerogative to dig for saltpetre. Notions of 'kingship' and 'inseparable' prerogatives perform a similar role. In Pashukanis' words, "[t]he natural changes into the juridical imperceptibly."[169]

This is not to say that throughout this period decisions of the courts were uniformly in favour of the Crown. Judges were more than mere puppets of the executive or regurgitators of social forces. The political strategy of Hampden in *Ship Money* highlights the way courts could be forums for struggle over state power during this time, including between different sections of the ruling class. On one view, *Saltpetre* involved a clash between two sets of

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[166] Evgeny Pashukanis, *Law and Marxism: A General Theory* (first published 1924, Pluto Press 1987) 71; see also Niklas Luhmann, *The Differentiation of Society* (Columbia UP 1982), 122–137.

[167] Pashukanis (n 166) 136.

[168] Stephen Sedley, *Lions under the Throne: Essays on the History of English Public Law* (CUP 2015) 131.

[169] Pashukanis (n 166) 124.

powerful interests: the state seeking to secure saltpetre for military expansion, and private land-owners defending their property.

Judges responded to this struggle in courtrooms in different ways, and dissents were forthright, with judicial constraints on executive authority also imposed through Sir Edward Coke's decisions in *Prohibitions del Roy* and *The Case of Proclamations*.[170] In *Prohibitions del Roy*, a case not explicitly mentioning the prerogative, Sir Edward Coke observes: "the King cannot take any cause out of any of his Courts, and give judgment upon it himself."[171] Sir Edward Coke insists on the supervisory role of the courts, concluding the King "should be under the law."[172] The prerogative is addressed in *The Case of Proclamations*. It was argued by the Lord Chancellor that where "there is no ... precedent", latitude should be granted to the King "according to his wisdom, and for the good of his subjects".[173] Sir Edward Coke resists this view.[174]

E.P. Thompson, in *Whigs and Hunters* (discussing aspects of the law of the eighteenth century), gives one explanation of how to understand the judicial scaffolding of executive power and the efforts by the judiciary to limit that power. Thompson rejects the view that the law has always been a "pliant medium to be twisted this way and that by whichever interests already possess effective power."[175] Key judicial decisions, says Thompson, can tend to come

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[170] *Prohibitions del Roy* (1607) 77 ER 1342 and *The Case of Proclamations* (1611) 77 ER 1352, respectively.

[171] *Prohibitions del Roy* (n 170) 1343.

[172] ibid.

[173] *The Case of Proclamations* (n 170) 1353.

[174] ibid 1353–54.

[175] EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin 1977) 262.

down on the side of the powerful. "But," he writes, "if too much of this is true, then the consequences are plainly counterproductive."[176] He elaborates:[177]

> The essential precondition for the effectiveness of law ... is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.

He adds: "in the sixteenth and seventeenth centuries the law had been less an instrument of class power than a central arena of conflict."[178]

While E.P. Thompson does not have the prerogative specifically in mind, his observations are relevant to the history of the prerogative in these years. Judges did much to uphold executive power and serve the needs of the state. But judicial practice in response to assertions about the needs of the state was not always one-sided. The law had to display an independence from gross manipulation – even if that was hardly maintained in *Godden v Hales* – and seem to be just. That helps to explain dissenting judgments, reasoning in *Prohibitions del Roy* and *The Case of Proclamations*, and decisions across this period in the life of the prerogative where the law sometimes coincided with the needs, and not just the appearance, of justice.[179]

The prerogative and imperial law

The prerogative was restricted as a consequence of the Glorious Revolution. The malleability of the prerogative in the hands of judges was on show in a different arena in the eighteenth,

[176] ibid 263.

[177] ibid.

[178] ibid 264.

[179] See also Perry Anderson, *Lineages of the Absolutist State* (Verso 2013) 8.

nineteenth, and early twentieth centuries: namely, the law of modern British imperialism – the legal apparatus surrounding and supporting Britain's economic and military expansion into the Caribbean, India, southern Africa, the Pacific, and elsewhere.[180] In *Burmah Oil v Lord Advocate*, Lord Reid says "there is practically no authority between [1688-89] and 1915" on "the law regarding the royal prerogative and the consequences of its exercise".[181] This is arguably true of case law in Britain, but is inaccurate if a broader view of the United Kingdom is taken, which includes decisions in British colonies.[182] As Anson writes, "Our task is not done until we have made out the nature of the connexion between the component parts of the United Kingdom, and the working of the central executive in the United Kingdom and throughout the Empire."[183]

As noted, the seventeenth century was a period of significant change in British political and legal cultures. This change was undergirded by shifts in economic conditions. Braudel describes the disappearance of a feudal system in the English countryside, which informed an apparent move away from feudal legal ideas that influenced the law of the prerogative; "the leasing of rural property to capitalist tenant-farmers"; a division of labour between landowners, tenants, and wage-labourers; and greater taxes on peasants.[184] This was a key period in the development of capitalism in Britain. There was a drive across Europe for new commodity markets.[185] Infrastructure was established to support the growth of the

[180] This builds on Poole (n 82) 11–12.

[181] [1965] AC 75 (HL), 99.

[182] Superior court decisions in British colonies were of persuasive authority in British courts; Privy Council decisions were binding on all colonial courts: TO Elias, 'Colonial Courts and the Doctrine of Judicial Precedent' (1955) 18 MLR 356, 361.

[183] William Reynell Anson, *The Law and Custom of the Constitution* (5th edn, Clarendon Press 1922) 45.

[184] Fernand Braudel, *Civilization and Capitalism, 15th-18th Century: Volume 2 – The Wheels of Commerce* (tr Sian Reynolds, Harper and Row 1979) 281–282.

[185] The East India Company secured a charter from Queen Elizabeth in 1600: Poole (n 82) 134.

national economy in Britain, including the establishment of long-term national debt in the 1690s[186] and the 1694 creation of the Bank of England.[187] The drive for new markets was a foundation for invasion of overseas territory, which would bring widespread destruction and genocide of Indigenous peoples (despite ongoing resistance).

The prerogative was an important legal form in this process. The legal position established by courts (set up by the British) was that the same prerogatives affirmed in the United Kingdom would subsist in colonies.[188] This was justified with reference to the unity of the Crown.[189] Five points capture how imperial prerogatives were used and expanded.

First, the powers of British colonial officials were – initially, in theory – circumscribed (in most cases) by charters or statutes establishing British control, and instructions to governors.[190] This gave limited latitude for action by colonial officials, leading to their resorting to the open-ended prerogative to justify activities. Colonial officials were not always diligent in finding lawful authority for activities; but where authority was sought, the prerogative was a convenient crutch. W.F. Craies notes:[191]

> As colonial legislatures are limited to some extent not only by the statutes or charters under which they are constituted, but also by the power of reservation of their statutes ... there is a disposition to have recourse to the old weapon of the prerogative ...

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[186] ibid 106.

[187] Fernand Braudel, *Civilization and Capitalism, 15th-18th Century: Volume 3 – The Perspective of the World* (tr Sian Reynolds, Harper and Row 1979) 355 and 356.

[188] EB Greene, *The Provincial Governor in the English Colonies of North America* (Harvard UP 1898) 92; Thomas Pownall, *The Administration of the Colonies* (2nd edn, Dodsley & Walter 1765) 39–40.

[189] Herbert Vere Evatt, *The Royal Prerogative* (Sweet & Maxwell 1987) 136, first completed in 1924.

[190] ibid 92–94.

[191] WF Craies, 'The Right of Aliens to Enter British Territory' (1890) 6 LQR 27, 27.

The prerogative was needed, second, because many British colonies developed infrastructure through proactive state action, often displacing Indigenous peoples and taking Indigenous land in the process. The prerogative proved a pre-eminent legal resource for scaffolding that action. In New Zealand and Australia, Herbert Evatt notes, "there has been a very great extension of state enterprise into ... fields formerly occupied exclusively by private persons".[192] It is less clear which specific prerogatives were relied upon to justify infrastructure projects.

Thirdly, relatedly, colonial officials exploited an ambiguity in British law (discussed in Chapter Three) around whether prerogatives disappear due to disuse. Because there was no authority denying that prerogatives could be revived, colonial officials were, at best, canny – and, at worst, opportunistic – in excavating older prerogatives to justify far-reaching action. "Naturally," Greene writes, "the question was constantly arising as to whether a particular power was or was not an essential part of the royal prerogative."[193] He adds: "often old powers of the [C]rown which had ceased to have practical meaning at home were revived".[194]

Fourthly, the emergence of a 'necessity' test for determining the availability of prerogative authority in colonies – especially in Australia – made the scope of colonial prerogatives elastic. Evatt explains that in *Toy v Musgrove*, Kerferd J of the Supreme Court of Victoria holds that "all the Prerogatives necessary for the safety and protection of the people, the administration of the law, and the conduct of public affairs in and over Victoria ... have passed as an incident to the grant of self-government."[195] This apparently wide statement might seem circumscribed by reference to existing prerogatives. However, this reading is challenged by what Higinbotham CJ says: namely, that the touchstone is that the Victorian

[192] Evatt (n 189) 122.

[193] Greene (n 188) 92.

[194] ibid 93.

[195] Evatt (n 189) 110; (1888) 14 VLR 349, 410.

government can "do all acts and ... make all provisions that can be necessary and that are in its opinion necessary or expedient for the reasonable and proper administration of law and the conduct of public affairs, and for the security, safety, or welfare of the people of Victoria."[196] While Higinbotham CJ does not make reference to the prerogative, he uses the initial statement about necessary prerogative powers as a basis to expand colonial executive power. That such a broad position became regarded as authoritative, at least in Australia, is confirmed by later writings. The Australian academic Pitt Cobbett notes the Governor "is invested ... not indeed with all the powers of the Crown in relation to that particular community ... but with all such as are necessary and proper to the conduct of the local government."[197] Keith echoes this position:[198]

> ... [t]he real question is how much the Crown must be deemed to have vested in [the Governor] of the prerogative. The answer can only be that given by Mr Higinbotham, all the power necessary for the conduct of the Executive Government of the Colony, and the only criterion must be found in that idea.

Evatt observes that this necessity test "has something of the merits of vagueness", allowing flexibility.[199] But the necessity test "also has many of the disadvantages [of vagueness]", creating the risk of abuse of power.[200] The key slippage here or 'prerogative creep' here – from colonial executives being able to use prerogatives legally available to the British executive, to

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196 ibid 110–111; *Toy v Musgrove* (1888) 14 VLR 349, 376–377. The decision would be reversed by the Privy Council ([1891] AC 272), but the Privy Council expresses no view on the extent of the prerogative.

197 Pitt Cobbett, *Government of Australia* (unpublished manuscript, Sydney University Law School) 152; in: Evatt (n 189) 112.

198 Arthur Barradale Keith, *Responsible Government in the Dominions* (Clarendon Press 1912) 115; quoted in Evatt (n 189) 112.

199 Evatt (n 189) 113. Dicey viewed British "constitutional flexibility" as important for the imperial project: Dylan Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 OJLS 751, 754–755.

200 Evatt (n 189) 113.

colonial executives being able to use whatever prerogatives were necessary for government – enabled expansion of the prerogative. Harrison Moore concludes that the prerogative "is mainly an instrument for increasing and effectuating the powers of self-government".[201]

Fifthly, there was ambiguity surrounding what prerogatives existed in the United Kingdom to govern colonial policy. On occasion, seemingly new prerogatives were affirmed by courts. An example is the prerogative for the United Kingdom executive to make law for certain colonies, established in *Campbell v Hall*.[202]

Campbell v Hall concerned whether the British Crown or executive had acted lawfully, via a 1764 letters patent, by imposing a 4.5% custom duty on exports from Grenada. British overseas trade had been growing substantially.[203] In the third quarter of the eighteenth century, there was a sharp increase in the British slave trade, in part because slave plantation owners derived higher incomes from the production and sale of sugar, tobacco, rice, and other staples (due to higher domestic sugar consumption in Britain).[204] Land-owners in the Caribbean acquired greater purchasing power from sugar sales, and made increased purchases of labour and raw materials.[205] This was a period of significant military activity: Great Britain was officially and unofficially at war with rival empires for 52 out of the 77 years between 1739

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[201] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Partridge & Co, 1910), 86; quoted in Evatt (n 189) 27.

[202] (1774) 98 ER 1045.

[203] David Richardson, 'The Slave Trade, Sugar, and British Economic Growth, 1748-1776' (1987) 17 Journal of Interdisciplinary History 739, 739.

[204] ibid 744–748.

[205] Richardson (n 203) 761–763.

and 1815.[206] As part of military activity, there was a push for increased taxation.[207] The United Kingdom also took control of Grenada from the French in 1763 after the Seven Years' War.

The question in the case is whether the British executive could lawfully impose this duty on exports in colonies, it being accepted that the executive could not levy a tax domestically without the consent of Parliament. The letters patent imposing the duty invoked the prerogative: "we have thought fit, and our Royal will and pleasure is, and we do hereby, by virtue of our prerogative Royal order, direct and appoint ... an impost or custom of four and an half per cent".[208]

Lord Mansfield finds that "the King (and when I say the King, I always mean the King 'without the concurrence of Parliament') has a power to alter the old and to introduce new laws in a conquered country", though this is subordinate to the King's "own authority in Parliament" and "he cannot make any new change contrary to fundamental principles".[209] There is no mention of the legal system of Indigenous or colonised peoples in Grenada or elsewhere. Lord Mansfield observes that law-making for Gascony, Guienne, and Calais must have been "under the King's authority",[210] assuming the legality of such authority (conflating historical and judicial precedent). He draws on one slender reference in *Calvin's Case* ("if a King … come to a kingdom by conquest, he may change and alter the laws of that kingdom"),[211] and "the authority of two great names" (Sir Philip Yorke and Sir Clement

[206] Michael Duffy, 'Contested empires, 1756–1815', in Paul Langford (ed.), *The Eighteenth Century* (OUP 2002) 213, 213.

[207] ibid 220–221.

[208] See n 202, 1047.

[209] ibid 1048.

[210] ibid.

[211] (1608) 77 ER 377; ibid 1049.

Worge),[212] but does not consider whether the proposition in *Calvin's Case* was a necessary part of the decision or whether it needed to be adjusted in light of the 1689 Bill of Rights. Lord Mansfield accepts that no case provides definitive support for the prerogative, but puts weight on no objection having ever been raised (a fact that might be explained by ignoring Indigenous objections or overlooking the difficulties Indigenous peoples might have faced in mounting legal challenges). "It is not to be wondered that an adjudged case in point is not to be found …" says Mansfield; "[n]o question was ever started before but that the King has a right to a legislative authority over a conquered country."[213] He adds: "no book, no saying, no opinion has been cited; no instance … produced, where a doubt has been raised …"[214] Lord Mansfield finds the prerogative exists, though he decides that because of a technicality (the inconsistency of two letters patents) the prerogative was not exercised lawfully. The effect of the decision was to ease the burden on Caribbean exporters, including plantation owners, while affirming a far-reaching capacity for the Crown to make laws for its colonies.

This prerogative, built on foundations of sand, was relied upon in numerous later cases.[215] Lord Mansfield's decision expanded the power of officials in the United Kingdom, and across the British empire. If one part of colonisation is the imposition of a group's will

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[212] ibid.

[213] ibid.

[214] ibid.

[215] See *West Rand Central Gold Mining v The King* [1905] 2 KB 391 (KB); *The King v The Earl of Crewe* [1910] 2 KB 576 (CA); *In re Southern Rhodesia* [1919] AC 211 (PC); *Abeyesekera v Jayatilake* [1932] AC 260 (PC); *Sammut v Strickland* [1938] AC 678 (PC); *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273 (CA); *Winfat Enterprise v Attorney-General of Hong Kong* [1985] AC 733 (PC); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 (PC), [32] (Lord Hoffmann), [82] (Lord Rodger), and [146] (Lord Mance). Cases may also not reflect the full use of the prerogative: Mark Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (OUP 2011) 3; Stuart Banner, *Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska* (Harvard UP 2007) 5.

on another,[216] Lord Mansfield's decision was a constituent part of colonisation; it also enabled further colonisation in other places and periods. What is in evidence here is a tendency Priyamvada Gopal describes in her analysis of anti-colonial solidarity: a pattern where imperial practice in the United Kingdom's colonies prefigures shifts in practice in the United Kingdom. "[W]hat was done in the colonies was coming home to roost," she writes.[217] Michel Foucault describes this as the "boomerang effect colonial practice can have on the juridico-political structures of the West."[218] One decision emerging out of facts in Grenada shaped law in the United Kingdom. That law was applied in Sri Lanka, South Africa, and elsewhere, often by British courts. A loop of legality formed around the British imperial project.

This section has provided by no means a comprehensive history of the British law of imperialism; there remains further work to be done on mapping the principles and precedents that underpinned British imperial expansion.[219] The prerogative was stretched and refashioned in the United Kingdom's domestic legal history, and across the history of the United Kingdom understood broadly – in networks forged via Britain's imperial project.[220] Indeterminacy in judicial reasoning proved a hook for the prerogative's development to serve the needs of the British state. In Daniel Hulsebosch's words, cited by Thomas Poole, "Overseas expansion

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[216] Bianca Elkington, Moana Jackson, Rebecca Kiddle, Ocean Ripeka Mercier, Mike Ross, Jennie Smeaton, and Amanda Thomas, *Imagining Decolonisation* (BWB 2020) 8.

[217] Priyamvada Gopal, *Insurgent Empire: Anticolonial Resistance and British Dissent* (Verso 2019) 366.

[218] Michel Foucault, *'Society Must Be Defended': Lectures at the College de France, 1975-1976* (David Macey tr, Penguin Books 2003) 103. The concept was originally developed in Aimé Césaire, *Discourse on Colonialism* (first published 1950, Monthly Review Press 2000).

[219] See on this Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003) 5. Hussain writes about *Campbell v Hall*: ibid 24.

[220] Thomas Poole discusses *East India Company v Sandys*, a 1683 case where judges affirmed the power to grant exclusive trading charters. "The lead judge ... had already established himself as Rottweiler to the king": Thomas Poole, *Reason of State: Law, Prerogative and Empire* (n 82) 135–137.

and the English constitution developed simultaneously and reciprocally, each structuring the other".[221]

The prerogative was one of the "legal forms and techniques", in Brenna Bhandar's words,[222] which were part of the arsenal of empire.[223] Glen Coulthard writes that in settler-colonial societies, "power – ... interrelated discursive and nondiscursive facets of economic, gendered, racial, and state power – has been structured into a relatively secure or sedimented set of hierarchical social relations that continue to facilitate the *dispossession* of Indigenous peoples of their lands and self-determining authority"; the foregoing analysis shows the law of the prerogative was one part of that edifice.[224] The law of the prerogative – alongside other legal forms[225] – was constitutive of modern British imperialism, which was (as Patrick Wolfe writes) "a structure not an event".[226] This wider history of a changing prerogative rebuts claims that the prerogative stretched back to some unspecified origin, deep in the mists of time.

Changes in the executive, legislature, and judiciary over time

[221] Daniel J Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (University of North Carolina Press 2005) 15, cited in Thomas Poole (n 82) 101.

[222] Brenna Bhandar, 'Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony' (2015) 42(2) Brit J of Law & Soc 253, 255–256, fn 7. Sol Picciotto suggested to me that the term 'legal form' implies that *social* rather than *legal* practices constitute power.

[223] This phrase recalls: Denise Ferreira de Silva, *Towards a Global Idea of Race* (University of Minnesota Press 2007) xviii. Legal doctrines such as the prerogative allowed for the extension of empire, and sustained it; see Pashukanis (n 166) 130.

[224] Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014) 7–8; Hussain (n 219) 135; Sally Engle Merry, 'Review Essay: Law and Colonialism' (1991) 25(4) Law & Society Review 889–922.

[225] Those include the doctrine of discovery: Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) Journal of Genocide Research 387, 392.

[226] ibid 388.

Another theme complicating the simple story about the prerogative's deep, unbroken history relates to the changing role of the executive, legislature, and judiciary over time in the United Kingdom. The prerogative's nature and functions shifted considerably, as the coordinates of executive, legislative, and judicial power moved.

Colin Lovell notes that following 1066 the king was regarded as a legislator. Statutes were, by the thirteenth century, acts of the king.[227] The 1292–1525 period saw early law reports, and treatises by figures such as Bracton and Fortescue, as the need for systematisation of law grew, partly in response to economic developments. A parliament of sorts gathered in 1258 with the Provisions of Oxford, and a 24 person committee established to "make ordinances", though this committee was not the exclusive law-making body.[228] Lovell underscores that Parliament was an outgrowth of the executive and judiciary – "as much a creation of the royal prerogative as of the royal courts, their common law, and the great statutes".[229] It began as a body with largely advisory functions. Lovell describes how parliaments had judicial functions by the end of the twelfth century: controlled by royal clerks and justices, it was "primarily a court of justice".[230]

Parliament grew in power, according to Lovell, over the fourteenth century. Peers exercised judicial functions as the "High Court of Parliament",[231] but at the time of the death of Edward III, parliamentary power "was, at least potentially, considerable."[232] Parliamentary

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[227] Lovell (n 107) 139.

[228] ibid 125.

[229] ibid 157.

[230] ibid 167.

[231] ibid 187.

[232] ibid 191.

grants were needed for Henry V to renew the Hundred Years' War in the early 1400s, and local elections were supervised by Parliament. Parliament still did not have complete and exclusive law-making powers – the Statute of Proclamations of 1539 allowed the king to issue proclamations with the force of law if Parliament could not assemble – but Parliament grew in size. There was a consolidation of these trends from the outset of the Stuart period, in spite of the turbulence of the interregnum and years in the seventeenth century without a parliament. Lovell says courts were subservient to the executive in this period: "During the years when Charles I ruled without Parliament," he writes, "the courts consistently upheld his various devices to raise money."[233] There was a "readiness" amongst judges to "uphold and enhance [royal] powers".[234]

As already noted, the period from the second half of the seventeeth century onwards saw a British executive playing a greater role in trade and military expansion, as part of the British imperial project. As Braddick writes,[235] these developments increased the size of the military and bureaucracy, entities now considered part of the executive, though they have always been an awkward fit in that category. This was the time of early writing that might be characterised as proposing a separation of powers. Thomas Poole points out that James Harrington published *The Commonwealth of Oceana* in 1656, almost a century before Montesquieu, and spoke of "the senate proposing, the people resolving, and the magistracy executing."[236] Interestingly, Harrington's trifecta omits the executive.

Joanna Innes offers a fine-grained account of shifts in local government and the British state in the eighteenth century. Innes documents strong links between central and local

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[233] ibid 328.

[234] ibid 404.

[235] MJ Braddick, *State Formation in Early Modern England, c. 1550-1700* (CUP 2000) 423.

[236] Thomas Poole, *Reason of State* (n 82) 87.

government, sometimes mediated by circuit judges, who came into contact with "local officers" and "carried out an important part of the work of government in their own persons."[237] Local government is another sphere of activity that sits awkwardly within the executive in contemporary categorisations of the branches of government, scrunched in with the military and security services (to say nothing of the police) because scholars are wedded to Montesquieu's tripartite vision of government and local government cannot be regarded as part of the legislature or judiciary.

Innes claims "central government became increasingly polyarchic" or "multi-centred" during the eighteenth century.[238] The Privy Council retained power, but decision-making was devolved elsewhere; specialised departments such as the Treasury developed more expansive policy; Parliament became "a more important part of the machinery of government than it had been theretofore",[239] including by functioning as an investigative body.[240] There was recording by secretaries of state of "correspondence relating to the pardoning process", part of the prerogative; Innes notes this resulted in the executive being "drawn into some aspects of penal practice" traditionally associated with the judiciary, including imprisonment.[241] This was a century of "reconfiguration of government."[242]

Any talk of 'legislative', 'judicial', and 'executive' functions must be historicised. Few functions have stayed constantly attached to individual branches of government across British constitutional history. The constituent parts of these branches changed over time, new

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[237] Joanna Innes, *Inferior Politics: Social Problems and Social Policies in Eighteenth Century Britain* (OUP 2009) 25.

[238] ibid 50.

[239] ibid 51.

[240] ibid 59.

[241] ibid 51–52.

[242] ibid 55.

functions arose, and functions were swapped across branches, in response to political needs. The executive exercised law-making (what might now be called 'legislative') functions through the thirteenth century and quasi-judicial functions in the eighteenth century. An inchoate legislature resolved disputes, called itself a court, and exercised what would now be called 'judicial' functions in the thirteenth century onwards. The judiciary did not exercise powers we would now regard as 'judicial', especially in the seventeenth century. This changing backdrop had implications for the the prerogative. The prerogative has been, on occasion, the foundation for the legislature and the judiciary. As the courts were taking shape, the prerogative was not (and could not be) overseen by the courts as was done in the twentieth and twenty-first centuries.

The prerogative was not only shaped by the changing distribution of governmental functions – judicial decisions about it also influenced the dividing lines between the branches of government. The prerogative became, especially in the twentieth and twenty-first centuries, a device for delineating power within the British constitution. Judges delimiting the scope of the prerogative played a constitution-defining role in determining when government action required legislation.

Paul Craig echoes these points,[243] noting that courts and Parliament have been active in reviewing and restraining executive power, especially prerogative power. He highlights the dynamic relationship between courts, legislature, and executive, too: early seventeenth century cases such as *Prohibitions del Roy* and *The Case of Proclamations* constricted executive power, and bolstered parliamentary power by requiring that executive action be authorised by Parliament. *Attorney-General v De Keyser's Royal Hotel*[244] ('*De Keyser*') involved a judicially defined limit on the prerogative, which upheld the significance of statutes (and by extension, the legislature) over

[243] Paul Craig, 'Prerogative, Precedent and Power' in Christopher Forsyth and Ivan Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays in Honour of William Wade QC* (OUP 1998) 65–89.

[244] [1920] AC 508 (HL).

prerogatives where statutes 'covered the ground' of a prerogative. Parliament also modified prerogatives by defining the manner and form of their exercise. Craig concludes that the "prerogative is properly regarded as being at the centre of our legal and political history": a sphere of law, which – as it expanded and contracted – transformed the powers of other branches of government, and the British constitutional settlement.[245] The prerogative created a hydraulic relationship between executive and legislature: pulling downwards on the scope of executive power could increase legislative power, and vice-versa. This underscores the constitutional significance of judicial decisions about the prerogative.

The prerogative had no unbroken history, reaching back into the shimmering mists of time.[246] Judges played an active role in creating and refashioning prerogatives, at times to suit the needs of the British state. Parliament cut down and contoured the prerogative. With this myth disposed of, we can turn to the third source.

A more complicated history of the third source

This section does not attempt a full history of 'the third source' – the notion that the executive has the authority to act where so acting is not prohibited by law. The analysis below suggests that what is now described as the third source has existed since prior to the decision in *Malone v Metropolitan Police Commissioner*[247] and has a deeper history than is sometimes acknowledged. The purpose is not to legitimate the third source by reference to pedigree. Rather, the purpose is to contextualise the conceptual, doctrinal, and normative analysis that follows in this thesis,

[245] ibid 89.

[246] See also Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (OUP 1999) 77, 78.

[247] [1979] Ch 344.

and to contribute a more nuanced view of the history of non-statutory authority for executive action.

There is now, in case law and in academic discussion, a division of non-statutory authority for executive action into two categories – the prerogative and the third source. The prerogative comprises a closed list of subject-matter categories, and the third source provides further authority for executive action in the space outside of these subject-matter categories. In contrast, historically, Dicey's definition of the prerogative is as "nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[248] Dicey's view (discussed in Chapter Two) is that the prerogative covers all of the space for lawful authority for executive action away from statute. Blackstone does not express his definition of the prerogative in the same way, but Dicey's view has been relied upon as the leading definition in several cases.[249] This indicates why it is unlikely one would find references to the third source (or cognate terms) in historical case law: conceptually, the prerogative was likely to have been regarded, at least by some and for a period, as including the third source. Furthermore, early case law – in particular, the decision in *Entick v Carrington*[250] – may have forestalled development of third source reasoning, by requiring positive law authorisation for executive action, though there is lively debate over the correct interpretation of *Entick v Carrington*.[251]

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[248] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (first published 1885, 10th edn, Macmillan 1959) 420.

[249] For example, in *Burmah Oil v Lord Advocate* [1965] AC 75 (HL), Lord Reid, Viscount Radcliffe, Lord Hodson, and Lord Upjohn refer to Dicey's definition (n 408).

[250] (1765) 19 St Tr 1029.

[251] See, in particular, Timothy Endicott, 'Was *Entick v Carrington* a Landmark?' in Adam Tomkins and Paul Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart 2015) 109–130 and Adam Tomkins, 'The Authority of *Entick v Carrington*' in Adam Tomkins and Paul Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart 2015) 161–184. An important statement is Lord Camden's, in *Entick v Carrington* (1765) 19 St Tr 1029, 1066, that "If it is law, it will be found in our books. If it is not to be found there, it is not law." Lord Camden says at 1066: "the judges ... are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law." The reference to common law principles and statute might be said to be a basis for

So was there evidence of something like the third source, historically regarded as part of the prerogative, prior to *Malone*? Such evidence can be found in colonial case law; *Glasbrook Brothers v County Council of Glamorgan*[252] and related case law on policing; 'the Ram doctrine'; administrative law decisions; and *Town Investments v Department of the Environment*.[253] These are illustrations of a longer history of the third source.

The first illustration arises out of nineteenth century events in New Zealand.[254] *Solicitor-General v Corporation of the City of Dunedin*[255] concerns whether Dunedin council had the power to purchase land, widen streets, and refer a dispute about this to arbitration. Māori had occupied the region for centuries before European arrival in New Zealand in the eighteenth century. The main street of Dunedin, Princes Street, changed from "little more than a dirt rack lined with small wooden shops" in 1861[256] to a street of "ornate stone structures" due to a gold rush.[257] By 1870 the street was "the city's financial district", containing the post office and stock exchange.[258] A major public works scheme had also been launched by Treasurer

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affirming the third source. On the other hand, Lord Camden says at 1066 "the silence of the books is an authority against the defendant".

[252] [1925] AC 270 (HL).

[253] [1978] AC 359 (HL).

[254] To delimit a manageable research inquiry into the third source early New Zealand law reports, which largely date from the 1860s until 1900, were noted for further investigation where references possibly relevant to the 'third source' were identified, and then read in full.

[255] (1875) 1 NZ Jur (NZ) 1.

[256] *Te Ara: The Encyclopedia of New Zealand*, 'Princes Street, Dunedin, 1861 (1st of 2)', <https://teara.govt.nz/en/photograph/23503/princes-street-dunedin-1861> accessed 18 August 2021.

[257] *Te Ara: The Encyclopedia of New Zealand*, 'Princes Street, Dunedin, around 1870 (2nd of 2)', <https://teara.govt.nz/en/photograph/23504/princes-street-dunedin-around-1870>, accessed 18 August 2021.

[258] National Library of New Zealand, 'Princes Street, Dunedin', <http://natlib.govt.nz/records/22829828> accessed 18 August 2021.

Julius Vogel, in part from wealth acquired from Māori land confiscated through war in the 1860s.[259] Pressure then arose to widen Princes Street in Dunedin.

The Otago Municipal Corporations Ordinance 1865 gave the Corporation of the City of Dunedin limited statutory powers. Eight years later the council decided it wanted to acquire the frontage of a reserve and add it to the street. Nothing is said about underlying Māori interests in the land or whether Māori stood to be affected by this acquisition. But it is claimed by the three citizen-plaintiffs (curiously represented by the Solicitor-General) that the council's acts were "unauthorised by law".[260]

Justice Williams holds the council has a power to purchase land implied in its statutory power to "acquire" land, but insists that "[i]ndependently ... of the Ordinance ... a Corporation has at common law power to buy land."[261] Provisions "contain no express or implied prohibition to widen streets."[262] The "correct view" is "that, if the widening of the street will be for the public benefit, then the Corporation have the power to widen ..."[263] However, he finds that for the council to buy land on the valuation of third persons would be an "improvident arrangement" and issues an interlocutory injunction.[264] Justice Williams protects the plaintiffs' property while extending the powers of the council, in a manner that could support later executive action.

Several features of Williams J's approach resemble third source-type reasoning. First, he refers to a "common law power to buy land"; one of the terms in twentieth century

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[259] Brian Easton, *Not in Narrow Seas: The Economic History of Aotearoa New Zealand* (VUP 2020) 140–158.

[260] *Solicitor-General v Corporation of the City of Dunedin* (1875) 1 NZ Jur (NZ) 1, 4.

[261] ibid 15.

[262] ibid 15.

[263] ibid.

[264] ibid 16–18.

jurisprudence used for the third source, as noted in Chapter Three, is 'common law powers'.[265] Second, Williams J underscores the absence of an express or implied prohibition to widen streets, as the basis for his conclusion that there is a power to widen streets.[266] Thirdly, Williams J surveys statutes, looking for reasons why there might not be authority for the council's action.

It cannot be credibly argued that Williams J was affirming a prerogative. Williams J refers to the law on the prerogative when addressing a preliminary argument, noting: "In the Colony, the prerogatives of the Crown, unless limited ... are the same as in England".[267] Justice Williams deliberately does not ground the council's authority to purchase land or widen streets in the prerogative, speaking of a "common law power" and the absence of express or implied legal prohibition. It could be contended that Williams J's reasoning on the council's authority involved interpreting the scope of the council's powers as a creature of statute, and was not about executive action. This case and others are not clear about whether local government is part of the executive. However, the decision cannot be regarded as a case about interpretation of statutory powers, given Williams J's express reference to a "common law power" being exercised by the council.

Fifty years later, a case about the role of the police in a Welsh mining strike points to something like the third source being used as authority for executive action: *Glasbrook Brothers Ltd v Glamorgan County Council*.[268] The years leading up to *Glasbrook Brothers* had seen heated industrial conflict, especially in Welsh mines. In 1910–11 police and troops were mobilised in

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[265] See n 747.

[266] See n 724.

[267] *City of Dunedin* (n 260) 14.

[268] [1925] AC 270 (HL). The legal record provides "little hint of the vast human story unfolding": Melanie L Williams, 'Coercion and the Labour Contract: Revisiting Glasbrook Brothers and the Political Fiction of Lewis Jones' (2012) 8(1) International Journal of Law in Context 1, 10.

Tonypandy to quell industrial action protesting miners' working conditions.[269] In 1921, the year of the events in *Glasbrook Brothers*, transport and rail unions refused to strike in solidarity with miners on 'Black Friday',[270] and the Trades Union Congress (TUC) was set up.

On 7 July, a strike was underway at a coal mine owned by the Glasbrook Brothers. Safety men were encouraged to join the strike.[271] On 9 July no safety men turned up to work. The colliery's agent, Mr James, asked the police for protection to induce the safety men back to work. Because it was a "special duty", the Glamorganshire Constabulary requested that a requisition be signed.[272] Mr James signed this document. Some of the safety men crossed the picket line and attended work. In August the dispute ended, but when the mine-owners were asked to pay the police, Glasbrook Brothers refused. The Glamorgan council brought an action against the mine-owners insisting the sum was paid.

All five Law Lords agreed on a basic principle, from *Glamorgan Coal Company v Glamorganshire Standing Joint Committee*:[273] the police should not charge for performing essential duties necessary to protect people and property from violence. By a 4–1 majority the House of Lords concludes the police can charge where they are not performing tasks necessary for protection of property or personal safety; by a 3–2 majority the Law Lords decide the charging in this case was lawful.

The Lord Chancellor says it has "always been recogni[s]ed" that it is possible for the police to charge when not performing core duties of protection,[274] and the practice has been

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[269] ibid 5–6.

[270] History Today, 'Black Friday, 1921', <https://www.historytoday.com/archive/black-friday-1921> accessed 18 August 2021.

[271] *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270 (HL), 274.

[272] ibid 275.

[273] [1916] 2 KB 206.

[274] ibid 278.

carrying on for "upwards of sixty years".[275] It is "not illegal or against public policy"; no statute expressly allows the practice, but some support can be found in other statutes.[276] On the facts, he finds the police garrison was not necessary for the protection of life and property: other options were available. Viscount Finlay is in the majority on both points. He says: "[f]or a long series of years it has been the practice to supply special police protection on the promise of payment",[277] and "the Legislature has never interfered with this practice."[278] There is no "substantial argument on the ground of public policy against such payments."[279]

Lord Blanesburgh and Lord Shaw affirm the general principle relating to police charging, completing the majority of four on this point. Lord Blanesburgh says payment for services is "only legitimate in exceptional circumstances".[280] To hold no payment of police is ever possible would be an "extreme position", which would be "highly inconvenient".[281] However, Lord Blanesburgh expresses concern that payment for police services could "readily become ... injurious to the general interest".[282]

Lord Shaw concludes the power to charge was legitimately exercised: he acknowledges "the peril of the safety men" and "a serious danger to property" but claims the protection in question was not a "police necessity".[283] Lord Blanesburgh dissents on this point, saying "without a force of police ... [the employers] could not have induced these safety men" to go

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[275] ibid 277.

[276] ibid 280.

[277] ibid 285.

[278] ibid 286.

[279] ibid.

[280] ibid 307.

[281] ibid 306–307.

[282] ibid 307.

[283] ibid 288–289.

to work.[284] He is joined in dissent when applying the law to the facts by Lord Carson, who states, "the supplying of the garrison ... was an essential and necessary part of the protection which the police were bound to supply."[285] He is the only Law Lord to raise doubt about whether the police should be able to charge for services. "Can the rich man buy greater protection than the poor man [sic]; or are all to be equally entitled to protection in the eye of the law?" he asks.[286]

The reasoning is contorted at best. The judges reinterpret a statement in *Glamorgan Coal Company v Glamorganshire Standing Joint Committee* that the police cannot charge when exercising general duties as implying a power for the police to charge when exercising non-essential duties. Three Law Lords lean heavily on limited police evidence to claim that police protection for the safety men, which enabled them to return to work, did not involve protection of life or limb. They rely on existing practice about police charging but do not explain why practice renders the police conduct lawful. The closest the Law Lords come to such reasoning is Lord Blanesburgh's claim that to hold the police conduct to be unlawful would be "highly inconvenient".[287] Convenience is not a secure basis for legality. Finally, the Law Lords repeat there are no policy reasons why police charging for services should be unlawful, but never confront Lord Carson's policy argument that charging could create inequality of access to the police on the basis of who is able to pay for services.

Glasbrook Brothers can be read as an example of early third source-type reasoning. The words 'third source' do not appear in the speeches. But what is prominent is 'negative reasoning' in determining whether the police had authority to charge for their services: an

[284] ibid 303.

[285] ibid 296.

[286] ibid 298.

[287] ibid 307.

orientation that involves disposing of arguments against the existence of executive authority, rather than seeking positively to establish executive authority on the basis of common law or statute. The argument is put to the Law Lords that the police "are not entitled, except in the cases specifically provided for by statute, to make a charge for police services."[288] That overall approach is rejected by the Law Lords. They accept there is no statutory authority for charging for services. The reasoning is underpinned by a series of double-negatives: "I find myself unable to subscribe to the extreme position that [these] arrangements ... are necessarily ... illegal", says Lord Blanesburgh;[289] the Lord Chancellor holds the police conduct is "not illegal", adding that "public policy does not forbid" the police's actions.[290]

Some Law Lords place weight on quasi-statutory bases for the police power to charge. It could be argued that the case does not properly involve executive authority, since it involves the police or the council, both at the edges of 'the executive'.[291] But it is not clear what branch of government the police or council form part of, if not the executive, and it is implausible to suggest they are not a part of any branch of government. It could be argued that the case is about general common law powers of the police to keep the peace and protect the public, rather than third source authority. However, this reasoning was available to the Law Lords, and they did not invoke general common law powers. Even if this was a case involving general police powers, it is not clear there is a difference between general police common law powers and the third source, given the third source constitutes a set of common law powers.

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[288] See the Lord Chancellor at 277.

[289] ibid 306.

[290] ibid 279. Melanie Williams observes that this rhetorical device may suggest the court is standing back from the political controversies: Williams (n 268) 13.

[291] In this case and *City of Dunedin*, parties appear on behalf of others. The Solicitor-General represents the citizens in *Cty of Dunedin*; the council represents the police in *Glasbrook Brothers*. This proxy-like quality in the legal dispute defuses and depoliticises more direct conflicts.

The case reveals judges playing a far-reaching role in affirming broad executive authority in third source-type cases. Melanie Williams offers one interpretation of this: "confirming that a garrison of police can effectively be hired to challenge ... a workforce ... is a deeply political finding."[292] The decision may have "naturalised" the role of police in intervening in mining strikes, an issue that would recur in the United Kingdom's history.[293] As in *Saltpetre* and *Ship Money*, the decision in *Glasbrook Brothers* had significant economic consequences – a coal mine is kept open through police protection of safety men, and a strike is broken – as well as arguable economic causes.

Constraints of brevity prevent a full analysis of police powers case law. But *Glasbrook Brothers* raises questions about the legal foundations of such powers. While police powers in the United Kingdom are now extensively regulated by statute,[294] the police have previously been granted authority by the common law. For example, the power of police to arrest without warrant anyone wilfully obstructing a police officer in execution of their duty under certain circumstances is grounded in the common law in *Wershof v Metropolitan Police Commissioner*.[295] Other police powers have been affirmed in tort cases: *Robson v Hallett* asserts that the police have an "implied licence" to enter a gate, go up steps, and knock on a door, and reasonable time to leave where that implied licence has been revoked.[296]

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[292] Williams (n 268) 12.

[293] ibid 6.

[294] AW Bradley, KD Ewing, and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 398.

[295] (1979) 68 Cr App R 82, 94.

[296] [1967] QB 939. In reasoning reminiscent of *Malone* (n 28) Lord Parker CJ writes, "I am quite satisfied that these three police officers, like any other members of the public, had implied leave and licence to walk through that gate …": *Robson v Hallett* [1967] QB 939 (CA) 950–951. See also Diplock LJ, 953–954.

In part because of the compartmentalisation of law in academic analysis (producing splits between constitutional law and tort law, but also between 'policing law' and other fields), there has been little questioning of the constitutional basis of police powers.[297] If police powers are not derived from statute, and are granted by the common law, it appears difficult to deny that such powers are a form of proto-third source authority for executive action, assuming the police are a part of the executive. Common law police powers are a form of authority for lawful executive action given by the common law.

Another illustration of the third source emerging in law prior to the 1970s – alongside the *City of Dunedin* and *Glasbrook Brothers* (and related police powers) cases – is the use of the Ram memorandum. Most discussions of the third source mention the Ram memorandum in passing, but few subject it to close analysis or connect it to a broader history.[298] Sir Granville Ram, First Parliamentary Counsel, wrote the memorandum in 1945, after the election of the Attlee Labour Government during consideration of the Ministers of the Crown (Transfer of Functions) Bill.[299]

The 'Ram doctrine' has been said to mean that the Crown can do anything a natural person can do,[300] or that the Crown can do anything not prohibited by statute law.[301] Careful analysis of the memorandum and its interpretation is needed to understand its proper meaning.

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[297] One exception is the thoughtful discussion in: Gavin Phillipson, 'Searching for a Chimera? Seeking Common Law Rights of Freedom of Assembly and Association' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart 2020) 141–166, in particular at 163–165.

[298] Two exceptions are: Anthony Lester and Matthew Weait, 'The use of ministerial powers without parliamentary authority: the Ram doctrine' (2003) PL 415, 417–425; Andrew Blick, *The Codes of the Constitution* (Hart 2016) 35–37.

[299] Lester and Weait, 'The use of ministerial powers' (n 298) 417.

[300] KM Hayne, 'Government Contracts and Public Law' (2017) 41 MULR 155, 161, fn 20.

[301] Cheryl Saunders, 'The Concept of the Crown' (2015) 38 MULR 873, 880, fn 33.

The memorandum, released publicly in 2003, begins by distinguishing "between what is legally possible and what is permissible having regard to established practice", a useful distinction given how much practice and legality have been elided in the history of the prerogative and third source.[302] Under the heading of 'Legal Position', Ram contrasts ministers of the Crown and statutory corporations. Statutory corporations are limited by terms of their authorising statute. But ministers "may, as an agent of the Crown, exercise any powers which the Crown has power to exercise, except so far as he is precluded from doing so by statute."[303] He says "the governing principle is that express statutory provision is not necessary to enable a Minister to exercise functions".[304] A caveat is needed: "although a Minister may do anything which he [sic] is not precluded from doing, he will only be able to pay for what he does if Parliament votes him the money."[305] Ram concludes by saying legislation "is not legally necessary to authorise an extension of the existing powers of a Government Department except where such an extension is precluded by a previous statute either expressly or by necessary implication".[306]

The Ram memorandum – an opinion, not a doctrine – concerns ministers and departments, not sources of authority for lawful action of the Crown. It argues ministers and departments can exercise their powers as long as not precluded by statute. The memorandum is ambiguous, verging on circular, when describing the scope of those powers: the Crown

[302] I use the version annexed to the House of Commons Joint Committee on Statutory Instruments' Eighth Report, at Appendix 3, <https://publications.parliament.uk/pa/jt200708/jtselect/jtstatin/47/4713.htm> accessed 18 August 2021.

[303] ibid [1].

[304] ibid.

[305] ibid [2].

[306] ibid [8].

"may exercise any powers which the Crown has the power to exercise", writes Ram. Nothing is said of common law limits.

References by the civil service to the memorandum through the twentieth century are scarce. Lester and Weait say "the legal advice was given" on a "limited basis", but transformed into "official doctrine in Whitehall".[307] Stephen Sedley says the opinion was "recycled, in the words of the Treasury's submission to the Constitution Committee, as a proposition that 'ministers can do anything a natural person can do, unless limited by legislation.'"[308] The Constitution Select Committee notes the Ram memorandum may have "subsequently ... acquired" a particular "status" within government.[309] By the early 2000s, one commentator was told "all civil servants" knew of the Ram doctrine, though the Ram memorandum was not publicly available.[310]

The Ram memorandum was given the elevated status of a doctrine, and ascribed a wider meaning – with the claim that ministers and departments can do anything not precluded by statute later interpreted to mean ministers and departments can do anything a natural person can do, as long as not prohibited by legislation.

The Ram memorandum is not identical in wording to what would become known as the third source. But the memorandum uses 'negative reasoning,' defining what officials can do by reference to what they are not prohibited from doing. Until full historical records of civil service practice after 1945 are released no conclusion on the use of the Ram doctrine can be secure. But the doctrine emerging out of the memorandum helped normalise third source-

[307] Lester and Weait (n 298) 417.

[308] Sedley, *Lions under the Throne* (n 168) 136, citing the report of the HL Select Committee on the Constitution, 'The Pre-emption of Parliament' (2013) 55.

[309] HL Select Committee on the Constitution, 'The Pre-Emption of Parliament' (2013) 16.

[310] Lester and Weait (n 298) 415, fn 2: the authors note Rebecca Jay made these comments in an unpublished paper presented at a 2002 seminar, 'Privacy: Lost or Found?'.

type reasoning. It could even be said that the Ram doctrine (applying to ministers and officials) formed part of the third source itself. On this view, the failure to correct misunderstandings of the Ram memorandum and unwillingness to limit the expansion of its scope were key to the third source's genesis, and meant statements made in *Malone v Metropolitan Police Commissioner*[311] were not out of step with practice or common interpretations of executive authority.

There is another seed of third source-type reasoning visible in misinterpretations of the Ram doctrine: the comparison between the Crown or executive and a natural person. The analogy arises repeatedly within the case law already considered. The claim is made in *Saltpetre* that "by the common law, every man [sic] may come upon my land for the defence of the realm ... as, for saving of a city or town or town, a house shall be plucked down if the next be on fire."[312] This is used to justify the Crown's ability to come onto land for saltpetre. In *Ship Money*, Sir John Finch refers to a "law of nature, which is, that every thing in nature ought to defend itself".[313] This grounds the claim that the Crown's collective right of self-defence extends to imposing levies for ship money. The connection in the case law between different entities – an individual and the Crown – might be considered surprising, given that over time the Crown was constituting a more elaborate apparatus and given the growing understanding of the office of the Crown as distinct from the King or Queen as individual. But the analogy was one rhetorical foundation for claims to extend the authority of the Crown, which could be revisited as new circumstances arose.

Administrative law and the law of the third source are often treated as parallel streams. Various interconnections warrant further exploration. One relates to administrative law

311 [1979] Ch 344.

312 *Saltpetre* (n 129) 1295.

313 *Ship Money* (n 151) 1224.

decisions on the fettering of discretion. In *R v The Inhabitants of Leake*,[314] a question arose about whether commissioners applying a statutory discretion to develop drainage could set aside land for use as a highway or road. Justice Parke and Denman CJ do not begin by asking whether there is legal authority for the commissioners' action. They ask whether it would be inconsistent with statutory powers to set aside land for use in the way proposed. They conclude there is no inconsistency.[315]

Although the point is not squarely considered, there seems to be an assumption that public bodies' lawful authority goes beyond what is granted by statute. This "incompatibility" test has been applied in case law.[316] It might be possible to reinterpret this case law as concerning what is incidental to the statute. But it appears that the courts sanction action by executive bodies that does not have a statutory (or prerogative) foundation, as long as it is not incompatible with statutory powers; that sanction lends limited support to the view that third source powers were being recognised prior to the *Malone* decision of the late 1970s.

Finally, *Town Investments v Department of Environment*, a case reported a year before *Malone*, is relevant to discussions of the executive and the third source.[317] The Crown had claimed the benefit of a rent freeze in premises that it controlled, but which were being used by the American navy. The judgment does not discuss what activities were being undertaken in the premises; only that "agencies of the United States of America ... made payment to the British government" for the premises' use.[318] The question was whether a tenancy maintained by the Crown was a "business tenancy" under rent freeze legislation.

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[314] (1833) 5 B & Ad 469.

[315] ibid 482 and 285. Littledale J dissents.

[316] Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) 956–961.

[317] [1978] AC 359 (HL).

[318] ibid 390.

Two points in the judgment are important. First, the Law Lords note that where members of the executive are acting, they should be considered to be acting in their capacity as members of the executive, and public law should apply.[319] Other judgments, prior to *Town Investments* and after, have reasoned in a way that accepts readily that executive actors have the legal status of private individuals.[320] Secondly, the judgments assume that members of the executive have lawful authority to execute leases. Authority to do this is not derived from the rent freeze legislation. Lord Diplock says he does "not find it necessary ... to trace the history of the practice of taking grants of freehold or leasehold interests of land required for government purposes",[321] noting statutes authorised such practice in the nineteenth century. But he does not claim there is authorising legislation.

The case is another example of courts evading the foundational question of the origin of the executive's authority to act. That no Law Lord posed this foundational question may, however, show a judicial willingness to accept neither positive statutory authority nor prerogative authority is needed for all executive action. The case may show acquiescence in third source-type activity – though the point is never conclusively confirmed.

This analysis of case law involves 'reading against the grain'[322] to highlight where judges have proceeded on unarticulated assumptions or adopted views of the law consistent with what would later become known as the third source of executive authority. The aim has been to show that judges adverted to the possibility that the executive can act without statutory or prerogative authority prior to the late twentieth century. The review has not made

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[319] Lord Diplock says courts should be slow "to displace the ordinary concepts of public law" (ibid 382); Lord Morris (395), Lord Simon (400), Lord Kilbrandon (402).

[320] See *Malone* (n 28).

[321] *Town Investments* (n 317) 381.

[322] Walter Benjamin, *Illuminations* (first published 1955, tr Harry Zorn, The Bodley Head 2015) 248 (in 'Theses on the Philosophy of History'): "A historical materialist ... regards it as his [sic] task to brush history against the grain."

the case for the third source's existence. It might be thought that supplying overlooked precedents buttresses arguments about the third source's pedigree. But there is another possible implication, pointing in the opposite direction. The repeated failure of judges to pose the question of whether the executive can act without statutory and prerogative authority, or to provide compelling answers, leaves the third source on slippery ground in the present, without transparently reasoned precedents or a stock of arguments to underpin the third source's operation.

Conclusion

This chapter has not purported to provide an exhaustive history of the case law on the prerogative and third source. The aim of the chapter has been, instead, to highlight recurring themes in the histories of the prerogative and third source.

The analysis helps to puncture the myth that the prerogative had a long and unbroken history, going back into the (ill-defined) mists of time; and the myth that the third source emerged in recent decades with no antecedents. The history of these legal doctrines is complex and unsettled, and has involved interplay with economic, social, and political conditions. Key developments in capitalism and imperialism have prompted struggles over giving effect to the perceived needs of the state, and the prerogative and third source have been one site of that struggle. This broader context is important for the prerogative and third source case law, which did not arise out of a vacuum. But the chapter has also aimed to take judicial reasoning seriously, by paying close attention to the arguments used – whether based on custom, comparisons between the Crown and natural persons, or inconvenience, public benefit and expedience – to justify the development of sources of executive authority.

Chapter Two:

The Conceptual Basis for the Prerogative and Third Source

The first chapter of this thesis highlighted the historical malleability of the prerogative, and the way early third source-type reasoning was used historically. This chapter throws light on the concepts of 'the prerogative' and 'the third source', reviewing prominent efforts to define them. It shows how unstable these concepts are – how ambiguous and incomplete attempts at definition have been. The conceptual instability of the prerogative and third source has reflected and reinforced doctrinal instability discussed in Chapters One and Three.

It might seem odd that analysis of the concepts of 'the prerogative' and 'the third source' did not appear at the outset of the dissertation. But as will become clear, some historical context is necessary before discussing the meaning of these concepts.

The chapter considers prominent definitions of 'prerogative' and 'third source' powers. It focuses on Blackstone and Dicey's accounts of the prerogative, which have received extensive attention from academics and judges. Some comments are made on why Blackstone and Dicey's accounts have become canonical. There have been fewer attempts to illuminate the metes and bounds of the third source. The focus is on the first academic to sketch the concept, Bruce Harris, and on Adam Perry's work; Perry's is the most analytically intricate attempt to understand the third source and position it in relation to the prerogative.[323] Some observations are also made on relevant commentary by William Wade.

[323] Value judgments will always have to be made – due to constraints of brevity – about which accounts of key legal concepts merit consideration and which can be omitted.

The chapter focuses on 'the prerogative' or 'the third source' as legal concepts: what 'the prerogative' or 'the third source' mean in legal contexts,[324] such as where legal advisors invoke 'the prerogative' or 'the third source', barristers make submissions, or judges write judgments. These legal definitions are narrower than definitions used in other domains. Nevertheless passing reference is made to the prerogative in political theory, and comparisons between the state and persons (relevant to the third source) away from law.

A key theme is that scholars' attempts to define the prerogative and third source are shaped by historical context, and scholars' views of state and society. This is a reminder that the prerogative and third source are best understood not as isolated concepts in constitutional law, but as forms of authority nested in struggles over the state and its functions. To bring out this point, an effort is made to resist analysing one-sentence definitions of the third source and the prerogative, and to read articles and treatises fully, where appropriate with references to political and economic context. A further conclusion, which differentiates the analysis from much other literature on the prerogative and third source, is that leading definitions of the prerogative and third source lack clarity and coherence when subject to close inspection. To reach this conclusion, the chapter addresses the stability of distinctions, anachronisms, and ambiguities. Some of the instability in the reasoning arises from scholars attempting to rationalise, and even legitimate, a legal order that has not been completely coherent.[325] It follows from these conclusions that revised accounts of the prerogative and third source should be sketched with caution. The final part of the chapter offers working definitions of the prerogative and third source that can be deployed for the remainder of the dissertation.

[324] I bracket a fuller explanation of what 'legal' in 'legal contexts' means, due to constraints of brevity.

[325] For a similar argument about the way that legal thinking can provide an illusory sense of order about the law, see: Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 Buff L Rev 205, 214.

But it is emphasised that working definitions will always be historically grounded and shaped by case law.

Chapter One's historical analysis provides the background that enables these conclusions to be drawn. The working definitions sketched are useful to later analysis (including for drawing connections to related concepts in other jurisdictions in Chapter Five), and the conceptual instability in the prerogative and third source is relevant to discussions of doctrinal indeterminacy in Chapter Three. This chapter's conceptual analysis provides an additional perspective on how the prerogative and third source are highly unsettled areas of law, an argument introduced in Chapter One and developed in Chapters Three and Four.

The prerogative in political theory

Chapter One recounted how prerogative-like notions were prefigured in Bracton's work in the thirteenth century, and how the meaning of the prerogative was sharpened from the fourteenth century onwards. The prerogative was referred to by political theorists and legal treatise writers, at least by the early modern period. Political theorists deployed the concept as part of a broader set of ideas about the state, and its different branches.[326] Two significant works of political theory touch on the prerogative, both from the seventeenth century. The first is Robert Filmer's *Patriarcha*, written in 1680.[327] *Patriarcha* gives an account of the supreme power of kings (and he does focus only on kings) over parliaments, the courts, the law, and the people.

[326] Pasquale Pasquino, 'Locke on King's Prerogative' (1998) 26 Political Theory 198–208.

[327] Robert Filmer, *Patriarcha* (Walter Davis 1680).

Filmer claims the power of kings is derived from God, and is akin to the powers of fatherhood. In the course of Filmer's account, he says "the prerogative of a King is to be above all Laws".[328] He notes: "some are afraid of the name of prerogative, yet … the case of subjects would be desperately miserable without it."[329] He describes other powers and instruments (including statutes) as emanations of kingly power. The Court of Chancery is "a branch of the king's prerogative"; "general pardons … are but the bounty of the prerogative."[330]

The prerogative, in Filmer's worldview, is not simply a source of authority for the Crown. It is a description of the political position that follows from the King's relationship to God. The prerogative is a fact necessitated by Christian doctrine. Filmer insists it is beneficial ("subjects would be desperately miserable without it") and regards it as having wide scope. These positions are echoed in the case law discussed in Chapters One and Three.

John Locke's approach to the prerogative is sketched in *Two Treatises of Government*, in which Locke responds to Filmer. The prerogative is not an entirely political concept for Locke; he situates it within a view of law and government. "[T]he good of the society requires that several things should be left to the discretion of him [sic] that has the executive power," writes Locke of societies where legislature and executive are separate.[331] The executor of the laws "has by the common law of Nature a right to make use of [power] for the good of the society", says Locke, until at least the legislature can be assembled.[332] Some things cannot be provided for in the law, and "it is fit that the law themselves should in some cases give way

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328 ibid 99.

329 ibid.

330 ibid.

331 John Locke, *Two Treatises of Government* (first published 1689, Thomas Tegg 1823) 175.

332 ibid.

to the executive power."[333] He calls the "power to act according to discretion for the public good, without the prescription of the law and sometimes even against it" prerogative. It involves some licence being given to the executive "where the law was silent", says Locke (in a line suggesting a third source-like view, as discussed further below);[334] and there can be "no judge on earth" of the rightfulness of its use.[335] Locke's view of the prerogative is as a kind of extra-legal authority – an authority to act beyond, and outside of, the law – with no oversight of courts or others. The assumption that the prerogative can only be used for public good has appeared in case law discussed in Chapter One, and will reappear in Chapter Three.

Blackstone's account of the prerogative

Sixty-four years after John Locke published *Two Treatises of Government*, William Blackstone gave the lectures that became *Commentaries on the Laws of England*. One sentence from Blackstone about the prerogative has often been cited in case law and commentary.[336] It is important to put this sentence into context, and understand Blackstone's broader views: in particular, how the prerogative forms part of a broader understanding of law, the constitution, and the state.

Preliminary comments

333 ibid.

334 ibid.

335 ibid 178–179.

336 See eg Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 ICON 146, 146; fn 3.

A Tory in his politics,[337] Blackstone gave his 1753 lectures during a "a predatory phase of agrarian and commercial capitalism" in the eighteenth century,[338] when the law was "elevated … to a role more prominent than at any other period of our history."[339] Against that background, Blackstone provides a "general map of the law".[340] Law, for Blackstone, is "a rule of action dictated by some superior being."[341] He unpicks four elements of law. It is connected to rules and so must be permanent, uniform, and general. It pertains to civil conduct. It is prescribed by an external sign and notified. It emanates from the supreme power in a state, the legislature.[342]

Blackstone's account of law is backed by an account of the purpose of government. Though Blackstone acknowledges there was never a social contract, government was created to "keep … society in order".[343] Government should be judged against three criteria: wisdom, goodness, and strength or power.[344] Three forms of government – aristocracy, democracy, and monarchy – are associated with wisdom, goodness, and strength or power, respectively. Blackstone claims the British constitution is uniquely admirable because it combines these forms in the king (strength), the House of Lords (wisdom), and the House of Commons

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337 Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (OUP 2008) 308.

338 EP Thompson, 'Eighteenth-Century English Society: Class Struggle without Class?" (1978) 3 Social History 133, 139.

339 ibid 144. In this period, the state was weak "in its bureaucratic and rationalizing functions", but strong "in breaking open the paths for commercial imperialism … and in facilitating the accumulation and movement of capital": 162.

340 William Blackstone, *Commentaries on the Laws of England: Book I of the Rights of Persons* (gen ed Wilfrid Prest, OUP 2016) 35.

341 ibid 39.

342 ibid 39–46.

343 ibid 48.

344 ibid.

(goodness).[345] He is positive about the British constitution to the point of being triumphalist: "the constitutional government of this island is so admirably tempered," Blackstone proclaims, "… that nothing can endanger or hurt it."[346] The state is defined as "a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man", which requires it "to act by one uniform will."[347]

The prerogative: rationales and limits

Blackstone discusses the laws of England, including the "king's prerogative." Civil liberty is protected in England partly by limiting the prerogative through "bounds so certain and notorious."[348] He says he will demonstrate that prerogative powers "are necessary for the support of society; and do not intrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil* [liberties]."[349] Blackstone notes that it was long thought the prerogative could not even be discussed. But times have changed. He then offers his oft-quoted definition:[350]

> By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. It signifies, in its etymology, from pre and rogo, something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any

[345] ibid 51.

[346] ibid.

[347] ibid 52.

[348] ibid 230.

[349] ibid (emphasis in original).

[350] ibid 232.

> of his subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer.

He draws a distinction between "direct" and "incidental" prerogatives.[351] Direct prerogatives "spring from the king's political person", whereas incidental prerogative "bear always a relation to something else, distinct from the king's person"; these prerogatives are "exceptions, in favour of the crown, to those general rules … established for the rest of the community."[352] Blackstone gives, as examples of indirect prerogatives, the rule that the king can never be a joint tenant and the rule that no costs shall be recovered against the Crown.

Blackstone discusses prerogatives relating to royal character, royal authority, and royal outcome. Such prerogatives are "necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government; without all of which it is impossible to maintain the executive power in due independence and vigour."[353] Blackstone acknowledges (differing from Locke) that the prerogative can be dangerous – that its "enormous weight … if left to itself" can spread "havoc and destruction" – but observes that "when balanced and bridled … its operations are then … equable and regular".[354]

Blackstone supplies additional rationales for prerogatives. Blackstone writes, "it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation."[355] Blackstone says by powers ascribed to the king or queen "people are led to consider him in

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[351] ibid 232–233.

[352] ibid 233.

[353] ibid.

[354] ibid.

[355] ibid 234.

the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government."[356]

Remedies for abuse of the prerogative, and fields of prerogative

Blackstone discusses remedies that people have against the Crown where prerogative action goes wrong. "[T]he prerogative of the Crown," submits Blackstone, "extends not to do any injury."[357] He adds a further qualification: the king (or queen) may act pursuant to their prerogative "unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary."[358] Expanding on this, he says (citing Locke) that given the prerogative is concerned with "the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner."[359]

Blackstone appears to believe that prerogative action makes up the entirety of executive power; it is "the exertion" of the authorities and powers of the royal prerogative that comprises "the executive part of government."[360] These powers are "wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch"; if placed in multiple hands and wills, the disunity would "create weakness in a government",

[356] ibid.

[357] ibid 239.

[358] ibid 243.

[359] ibid 244.

[360] ibid 242.

producing "more time and delay than *the exigencies of state* will afford".[361] Without prerogatives, "the power of the crown would … be but a name and a shadow, insufficient for *the ends of government*."[362]

Turning to particular prerogatives, Blackstone discusses the prerogative in foreign affairs, where "[w]hat is done by the royal authority … is the act of the whole nation".[363] Blackstone discusses the provision of ambassadors and their immunities, the treaty-making prerogative, and the prerogative to make war and peace. He accepts the war prerogative can be abused, noting the need to prevent "wanton or injurious exertion of this great prerogative."[364] Blackstone can be understood as describing one bundle of foreign affairs prerogatives, or summarising four prerogatives, concerning diplomacy, treaty-making, war, and merchants. Blackstone then considers six domestic prerogatives, relating to: the military, the seas (including the ability to erect beacons and lighthouses), justice (including the power to erect courts), honour, commerce, and the church. The prerogative over the seas extends to the power of prohibiting the export of arms or ammunition out of the kingdom, a power Blackstone says is "vested in his majesty, by statutes 12 Car.. II. C. 4 and 29 Geo. II. C. 16".[365] Blackstone says the church prerogative exists because "of divinity [rather] than law".[366]

Evaluating Blackstone's account

[361] ibid 242–243 (emphasis added).

[362] ibid 243 (emphasis added).

[363] ibid 245.

[364] ibid 250.

[365] ibid 255.

[366] ibid 269.

Blackstone believes the prerogative is what "the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity." It is "singular and eccentrical": it comprises "rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects." But he also draws a distinction between direct prerogatives, springing from the nature of the Crown, and incidental prerogatives, exceptions to general rules justified by reference to the good of the community. He endorses Locke's view of the prerogative, holding that prerogative is a discretionary power of acting for the public good, where the positive laws are silent.

One central problem with Blackstone's account is his claim that prerogative powers are those that "the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects". This is trivially true: the effect of prerogative powers is they elevate what the British monarch is able to do, legally, in contrast with others. However, the definition does not offer any means of discriminating between the powers that the Monarch should "[enjoy] alone, in contradistinction to others." Why the power to erect beacons or courts, and not others? The definition is accurate, but over-broad. It picks one feature shared by prerogative powers. That feature does determine how to cordon off the fields of prerogative power.

A second problem is Blackstone's distinction between direct and incidental prerogatives. Direct prerogatives flow from the Monarch's person; incidental prerogatives relate "to something else, distinct from the king's person". This is not a firm basis for the distinction. Direct prerogatives do not flow in a value-free way from the nature of the Crown; they rely on some prior conception of what the Crown should do. It is hard to know what unifies the incidental prerogatives. Blackstone says they relate "to something else, distinct from the king's person" – but what this is remains mysterious. Incidental prerogatives appear

to be a miscellaneous collection of further powers. Blackstone provides no principle to explain why these prerogatives are 'incidental'.

Allocation of particular powers to the prerogative – whether by judges or others – involves constitutional considerations. It involves a value judgment that it is appropriate for powers to be assigned to the executive, as opposed to the legislature or other actors. This raises a third problem with Blackstone's account: there is rarely any explanation of why the executive should be delegated functions of the state.

Blackstone says "the right of making war … is vested in the sovereign power."[367] But he gives no explanation for why the right of making war is "vested" in this way. "The coining of money is in all states the act of the sovereign power," writes Blackstone.[368] The stamping of money "is the unquestionable prerogative of the Crown," Blackstone goes on.[369] But the grant of this function to the Crown is not beyond question. When he describes the prerogatives relating to the church, Blackstone resorts to a different justification, saying the prerogatives are "a matter rather of divinity than of law."[370] In some instances, Blackstone enlarges on the value of fields of state activity: regulating public marts is convenient for the neighbourhood. There is a slippage, however, in Blackstone's account between justifying state action and justifying prerogative power: it does not follow from the desirability of state action that action should be undertaken by the executive, under the prerogative.

Fourthly, Blackstone's account of the prerogative is anachronistic in light of developments in British constitutional law. Blackstone regards the prerogative as covering the ground of executive action. "[T]he exertion" of the royal prerogative makes up "the executive

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[367] ibid 249.

[368] ibid 267.

[369] ibid 268.

[370] ibid 269.

part of government", writes Blackstone, appearing to ignore executive power exercised through statute.[371] Partly due to this perspective, Blackstone appears to have no room for any 'third source' of executive power (though it might be said that he acknowledges that his reference to the Crown's having rights and capacities in common with others is a reference to a proto-third source). As well, Blackstone's account reflects a monarch-centric view of the executive. He notes prerogative powers are "wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch".[372] Little reference is made to the broader apparatus of executive government, which had begun to develop at the time of Blackstone's writing. It rings odd to contemporary ears to claim prerogative powers are "placed in a single hand". These anachronisms give more reason to conclude that Blackstone's account can no longer be relied upon to explain prerogative power.

Dicey's approach to the prerogative

Over a century later, in 1885, Albert Venn Dicey published *An Introduction to the Study of the Law of the Constitution*. Dicey's lectures were given at a time of resurgent British nationalism and imperialism;[373] Dicey was committed to the British Empire, as well as "individual liberty secured through laissez-faire government."[374] His writing on the prerogative has been cited

[371] ibid 242.

[372] ibid.

[373] EJ Hobsbawm, *Nations and Nationalism since 1780* (CUP 2014) 105 and VI Lenin, *Imperialism: The Highest Stage of Capitalism – A Popular Outline* (first published 1917, Penguin 2010; see especially Chapter Six, 'Division of the World Among the Great Powers'). Dicey was fond of a dictum of William James: "We must learn to be content with everything – even with ourselves"; see Mark D Walters, 'Dicey on Writing the *Law of the Constitution*' (2012) 32 OJLS 21, 27 (fn 42).

[374] Dylan Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 OJLS 751, 761.

by numerous judges and scholars.[375] As with Blackstone's work, Dicey's discussion of the prerogative is rarely put into context, or related to broader views about law and the state. A single sentence definition of the prerogative is often invoked without fuller explanation.

Dicey's project

Dicey claims he seeks neither to attack nor to defend the British constitution, but to explain it.[376] The task is not easy – British constitutional law "is a sort of maze in which the wanderer is perplexed by unreality ..."[377]

Dicey then critiques Blackstone's work, with a focus on Blackstone's discussion of the prerogative. Blackstone does not accurately capture the scope or exercise of executive authority, according to Dicey.[378] Dicey says certain prerogative powers listed by Blackstone (such as erecting courts) are no longer exercised by the Monarch:.[379] Dicey alleges that Blackstone "exaggerate[s] the power of the Crown", and "obscures or conceals the true extent of the powers, both of the King and of the Government."[380] There is a need, Dicey writes, to examine history and practice – to avoid "the formalism of lawyers".[381]

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[375] See eg *Burmah Oil Co v Lord Advocate* [1965] AC 75 (HL), 117 (Viscount Radclffe); Thomas Poole, 'United Kingdom: The Royal Prerogative' (n 336) 146.

[376] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (first published 1885, 8th edn, Macmillan 1915) 4. This was the last edition prepared by Dicey.

[377] ibid 7.

[378] ibid 9.

[379] ibid 10.

[380] ibid.

[381] ibid 11. At 17 Dicey reveals his own blinkered view of the world, when saying it would not be possible for a Cherokee Indian to distinguish between taxation and representation. In the late

Dicey understands British constitutional law as "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state."[382] He elaborates on three features of the British constitution: the sovereignty of Parliament, the rule of law, and the relationship between laws and conventions. He does not, unlike Blackstone, offer commentary on general law.

References to the prerogative in early parts of Dicey's book

Dicey notes, in Chapter IV on the rule of law, that "royal supremacy has now passed into that sovereignty of Parliament," hinting at a shift in power over time.[383] Dicey argues here that use of the law instead of "wide, arbitrary, or discretionary powers of constraint" is one component of the rule of law.[384] Dicey associates wide discretionary power with prerogative power – hinting at his discomfort with prerogative power – when he writes that the use of regular law "excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government."[385] The passage suggests Dicey views arbitrariness, prerogative, and wide discretionary authority as related, if not identical, concepts.

Dicey claims there is greater use of wide discretionary authority in other jurisdictions in Europe. He adopts a parochial line in Chapter VIII, when discussing martial law; he notes, "in England the rights of citizens as against each other are (speaking generally) the same as

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nineteenth century, Indigenous peoples around the world – for example, in New Zealand – were engaging with colonial legal systems and frequently making such distinctions.

382 ibid 22.

383 ibid 179.

384 ibid 184.

385 ibid 198.

the rights of citizens against any servant of the Crown."[386] The same triumphalist view of the British constitution arises in Chapter XII on *droit administratif* in France. The idea "that the government, and every servant of the government, possesses … a whole body of special rights, privileges, or prerogatives as against private citizens" is "alien to the conceptions of modern Englishmen", Dicey claims.[387] Dicey does consider whether the law of the prerogative involves a body of special rules.[388] But he contends that "advocates of the prerogative did not … intend to … invade the ordinary private rights of citizens."[389]

Dicey appears to suggest there ought to be no ability for the executive to act in the absence of statute or prerogative power. He writes:[390]

> The rigidity of the law constantly hampers … the action of the executive, and from the hard-and-fast rules of the strict law, as interpreted by the judges, the government can escape only by obtaining from Parliament the discretionary authority which is denied to the Crown by the law of the land.

Dicey acknowledges that requiring statutory authorisation of executive power is no guarantee that the executive will not abuse its power via statute. He notes some critics might consider statutory authorisation of executive power "a merely formal" solution: "at best only a substitution of the despotism of Parliament for the prerogative of the Crown."[391] Dicey says placing the government, "even when armed with the widest authority", "under the supervision … of the Courts" is a safeguard against such abuse of power.[392]

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386 ibid 281.

387 ibid 332.

388 ibid 365.

389 ibid.

390 ibid 406.

391 ibid 408–409.

392 ibid 409.

Chapter XIV, conventions, and the prerogative

In Chapter XIV Dicey begins by examining conventions: "rules for determining the mode in which the discretionary powers of the Crown … ought to be exercised."[393] In the course of unpacking conventions, Dicey examines "discretionary powers of the Crown", and this takes him to the prerogative. For Dicey, the discretionary powers represent "every kind of action which can legally be taken by the Crown, or by its servants, without the necessity for applying to Parliament for new statutory authority."[394] Dicey sees the discretionary powers of the Crown as equivalent to non-statutory executive authority. "The discretionary authority of the Crown," writes Dicey, "originates generally, not in Acts of Parliament, but in the 'prerogative' – a term which has caused more perplexity to students than any other expression referring to the constitution."[395] What follows is Dicey's oft-quoted sentence on the prerogative: "The 'prerogative' appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[396] Dicey repeats that the prerogative is "the name for the remaining portion of the Crown's original authority", and adds: "[e]very act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative."[397]

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393 ibid 418.

394 ibid 419.

395 ibid 420.

396 ibid.

397 ibid 421.

In Chapter XV Dicey observes: "the real executive government of England is the Cabinet," he says.[398] He suggests that prerogative authority is being whittled away over time, talking of "the survival of prerogative powers".[399] One of his theses is that the prerogative has become residual because of the rise of Parliament, a trend he welcomes: the development of parliamentary sovereignty "has put an end to the arbitrary powers of the monarch."[400] This claim veers towards over-statement, but highlights two themes in Dicey's work: his belief in the value of parliamentary sovereignty, and pride in the British legal order.

The limitations of Dicey's approach

Dicey makes several welcome comments. He underscores that the prerogative has changed over time – and makes the important point that by the end of the nineteenth century, executive power rested primarily with the Cabinet, rather than the Monarch. He acknowledges uncertainty surrounding the term 'prerogative'.[401] But his account has three shortcomings.

First, Dicey frames his account of the prerogative against a backdrop of a British constitution committed to equality of treatment – but this account distorts the legal relationship between the people and the government, historically and today. Dicey claims that the view that "the government, and every servant of the government, possesses … a whole body of special rights, privileges, or prerogatives" is alien to British law.[402] No mention is

[398] ibid 457.

[399] ibid 459.

[400] ibid 466.

[401] ibid 420.

[402] ibid 332.

made of notions of deference (which have borne different labels historically), often applied in order to provide special protection to some acts of government.[403] Executive prerogatives, discussed by Dicey, also allow the government to have additional authority (or to claim additional protection) over certain subject-matter fields or in certain contexts. This understanding is no longer accurate, if it ever was – reflecting an overly triumphalist or parochial view of the British constitution.

Second, Dicey's definition of the prerogative shares the problem discussed in Blackstone's account: it does not explain how particular prerogatives have come to be affirmed and maintained under British law. Dicey sees the prerogative as "the residue of discretionary or arbitrary authority" – with the word "arbitrary" revealing he is uneasy about the prerogative's very existence – "which at any given time is legally left in the hands of the Crown."[404] On one view, this description is admirably honest about the lack of an inner logic in the list of prerogative powers.[405] But Dicey does not articulate how particular prerogatives were arrived at.

For Dicey, "[e]very act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative."[406] This explanation is vague: it leaves mysterious how it is determined whether an executive act is "lawfully" done.

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[403] See eg Bruce Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 CLJ 631, and TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 CLJ 671. Dicey's claim can be compared with Maitland's statement just several years later that it is inherent in the notion of the prerogative that the interests of government are elevated. "'Prerogativity' is exceptionality": William Maitland, *The History of English Law before the Time of Edward I* (2nd ed, CUP 1898–1899) 512.

[404] Dicey (n 376) 420.

[405] Laski writes that the prerogative would be "perhaps less arid if it possessed the further merit of logical arrangement": Harold Laski, 'The Responsibility of the State in England' (1919) 23 HLR 447, 455.

[406] Dicey (n 376) 421.

Moreover, Dicey leaves no room for the notion of the 'third source'.[407] For Dicey, all executive power must be exercised under an Act of Parliament or under the prerogative: there are two sources, not three. The absence of any attempt to account for non-statutory executive authority beyond the prerogative is a further reason Dicey's account is an unsatisfactory basis for explaining the prerogative today.

The dominance of Blackstone and Dicey

Blackstone and Dicey's accounts are ambiguous, inaccurate in describing the law, and unhelpful in explaining the prerogatives. Why have they received such attention?[408]

Blackstone and Dicey's texts on the British constitution undoubtedly add to understanding of the British legal landscape. Second, repeated references in the case law at the highest level make it harder to ignore their accounts, especially when the accounts are described as "classic", "the best known", or by "learned" writers.[409] Third, the focus on these

[407] See also: "... the definition is incomplete. For one thing, it does not distinguish prerogative from third-source power ..."; in Thomas Poole, 'The Strange Death of Prerogative in England' (n 81) 4.

[408] Blackstone's definition of the prerogative is cited by the Supreme Court in *Miller (No 1)*; Dicey's account of the constitution features in the same judgment: *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 ['*Miller (No 1)*'], [40], [43], and [160]. For other references to Blackstone and Dicey in prerogative cases, see Lord Dunedin in *Attorney-General v De Keyser's Hotel* [1920] AC 508, 526 (Dicey referred to as "a learned constitutional writer"); *Burmah Oil v Lord Advocate* [1965] AC 75, 150 per Lord Pierce, and Lord Reid at 99, Viscount Radcliffe at 117 (Dicey's definition), Lord Hodson at 137 (Dicey, "that learned constitutional writer", invoked), and Lord Upjohn at 165; *Laker Airways v Department of Trade* [1977] QB 643 (CA), 705; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 per Lord Fraser (Dicey described as offering "the best known definition") and at 416 per Lord Roskill (who talks of Dicey's "classic statement" and says it has "the weight behind it not only of the author's own authority but also of the majority of this House in *Burmah Oil*"); and *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26 (QB), 54 per Purchas LJ.

[409] See n 408.

jurists' accounts can avoid messier explanations of how the prerogative has been shaped by social conditions, and struggles over giving effect to the perceived needs of the state.

But there are some less orthodox, more challenging reasons why Blackstone and Dicey have become regarded as part of the 'canon' of constitutional law thinking on the prerogative. Their work is laudatory of the British constitutional order, to the point of being nationalistic and triumphalist. Quotation of their pithy definitions, and approval of their approaches, can be a shield against engagement with difficult questions about the prerogative and the British constitutional order.[410] Endorsement of Blackstone and Dicey's project can help sustain myths about British legal exceptionalism, which have served various purposes in imperialism.[411] Finally (knowingly or unknowingly), reliance on Blackstone and Dicey reflects and entrenches the centring of Oxford legal training within British legal culture.[412] If Blackstone and Dicey are part of the canon of constitutional law thinking on the prerogative, there may be good reason to rethink that canon.[413]

Bruce Harris's account of 'the third source'

410 There is occasionally more critical judicial engagement with their work: see Lord Reid's reservations about Dicey's approach in *Burmah Oil* (n 181).

411 See further Dylan Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 OJLS 751–780; and Dylan Lino, 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context' (2018) 81 MLR 739–764.

412 Blackstone and Dicey studied and taught at the University of Oxford; both were the Vinerian Professor of English Law at All Souls College. Of the eight twentieth century Law Lords discussed, who cited Blackstone and/or Dicey approvingly, four (Lords Radcliffe, Hodson, Fraser, and Roskill) studied at Oxford. It is not inconceivable to suggest that the curriculum of a university like Oxford might privilege its own past graduates and fellows (such as Blackstone and Dicey), and that this might lead to graduates giving more weight in citation to academics from thei *alma mater*.

413 There has been some discussion of the canon of constitutional law scholarship in the United States: see, e.g., JM Balkin and Sanford Levinson, 'The Canons of Constitutional Law' (1998) 111 HLR 963–1024. Apart from the canon of British constitutional law thinking being disproportionately represented by Oxford academics, the canon is disproportionately dominated by white men.

It is possible to trace non-legal antecedents to the third source, just as the prerogative's history in political theory can be discussed as part of understanding the legal concept of the third source. Equations of the state or executive to the individual have a long history. Hegel regards the state as an individual (on the basis of a complex chain of reasoning involving claims about freedom, individual will, and universality),[414] a proposition criticised by Marx.[415] But it is not until 1992 that the concept of the third source is named and fully developed by Bruce Harris in an article, 'The "Third Source" of Authority for Government Action'.[416] This article was influential on courts[417] and prompted further commentary on sources of executive authority distinct from statute and the prerogative. Harris develops his account of the third source across three articles, which situate the third source within a broader understanding of the purpose of government.

Harris notes the two oft-discussed sources of executive authority in British law are statute and prerogative. The third source is the executive's freedom to act as long as it is not prohibited by law.[418] He gives examples: when the executive distributes written information, enters into contracts, or establishes bodies. The third source is different from the prerogative: whereas the prerogative can be used to override legal rights, the third source cannot override competing rights. The third source is practically restrained in the sense that the government

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414 Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (TM Knox tr, first published 1821, OUP 2015) 174: "the state is an individual ..." See 184: "This ultimate self in which the will of the state is concentrated is, when thus taken in abstraction, a single self and therefore is *immediate* individuality."

415 'Critique of Hegel's Doctrine of the State' in Karl Marx, *Early Writings* (Rodney Livingstone and Gregor Benton tr, Penguin 1975) 76–92.

416 BV Harris, 'The "Third Source" of Authority for Government Action' (1992) 108 LQR 626.

417 See eg *R (on the application of New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358, [28] (Lord Sumption).

418 Harris (n 416) 626. Harris initially says the prerogative "includes" the third source.

(a term Harris prefers to the executive) can only do that which is physically possible. Harris points to other limits: for example, the executive cannot make law, according to the "decided authorities", since that is the job of the legislature.[419]

Harris does not rely on the government having the capacity of a natural person and corporation sole for this position, noting the analogy has been doubted in the case law.[420] But he repeatedly says the government should be able to do what a natural person is free to do, subject to the constraints outlined above. He relies on normative argument to justify the existence of the third source, observing that without the third source, the government would be hindered if "it needed to act quickly or in unforeseen circumstances".[421] Harris says the alternative position would be undesirable: there would have to be "either increased quantities of very detailed legislation, or increased conferment on the executive of broad statutory authorisations" that "might not be very different" from the third source.[422] On risk of abuse of executive power, Harris says there are sufficient constraints on the third source: public opinion, parliamentary oversight, and judicial supervision via tort law and judicial review.[423] He adds, the government is "incapable of affecting those interests of legal persons which are protected by legal rights".[424]

In the second of Harris's trio of articles, he describes the third source as "[t]he residuary freedom which the government has to act where not legally prohibited".[425] He

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[419] Harris (n 416) 634.

[420] ibid 635.

[421] ibid 649.

[422] ibid.

[423] ibid 637.

[424] ibid 651.

[425] BV Harris, 'The "Third Source" of Authority for Government Action Revisited" (2007) 123 LQR 225, 225.

observes that "common law powers" is a misleading phrase, because prerogatives are also common law powers.[426] Harris reiterates the arguments of principle in favour of the third source. He points to the difficulty of requiring statutory authorisation of all executive action, and notes the third source "meets the practical day-to-day needs of government."[427] He concludes by calling for a "need for an ongoing constitutional conversation" about an aspect of British law that Harris acknowledges is "uncertain, unclear" and "sits uncomfortably with the democratic constitutional ideal."[428]

In a third article in 2010, Harris discusses how common law rights might limit third source action.[429] He goes on, when critiquing Sir William Wade's approach to the third source (discussed below), to say the third source by its nature "does not affect any interests of other legal persons which are protected by legal rights."[430] He discusses the development of proportionality in judicial review, implying proportionality could be used to determine with greater clarity whether the third source is being used to interfere impermissibly with legal rights. It is clear that the establishment of common law rights as limits on the third source is important to help shore up the third source's legitimacy. Harris writes that the third source "may be perceived in a far less threatening light by those critics concerned as to its potential to allow abuse of government power" if common law rights jurisprudence is developed.[431]

It is difficult to distinguish doctrinal and conceptual evaluation in relation to the third source. Nevertheless it is possible to make three critical comments.

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426 ibid 226.

427 ibid 237.

428 ibid 250.

429 BV Harris, 'Government "Third Source" Action and Common Law Constitutionalism' (2010) 126 LQR 373.

430 ibid 379.

431 ibid 396.

The first relates to undesirable ambiguity. Harris describes the third source, in the title of his 1992 article, as a source of *authority* for government action. Leaving aside the slight imprecision in what Harris means by government,[432] it is not always clear what Harris means by authority. He says initially the third source is a freedom, suggesting the freedom for the government to act is *the basis* for this authority – but not identical to the authority itself. He also notes government action of this kind "has the potential to be described as an exercise of 'power'".[433] It is not a power in the sense that it can interfere with or modify legal rights.[434] But it is a power in that the third source can lead to "effective control or influence over individual legal persons or a section of the community."[435] So: the authority for government action represented by the third source is neither the same as a power or a freedom.

What, though, does it mean for the freedom to be an "authority" for government action? By "authority" for government action it appears he means something like a *lawful basis* for that action. At one point Harris refers to "recognition of the third source as providing authority for [g]overnment action", which suggests that the third source itself gives that authority. A possible interpretation, which we return to below, is that the existence of the third source gives the courts a decisive reason to conclude that executive action has a lawful basis.

In his 2007 article, Harris introduces more ambiguity by talking about the third source as the "residuary freedom which the government has to act where not legally prohibited".[436]

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[432] Harris notes he has used 'government' rather than 'Crown' or 'state' "for reasons of convenience" in fn 1 of his 2007 article: (n 425) 225.

[433] Harris 1992 (n 416) 628.

[434] ibid. There are subtle differences between interfering and modifying and overriding; these are not unpacked.

[435] Harris 1992 (n 416) 629.

[436] Harris 2007 (n 425) 225.

It is not clear what work "residuary" is doing here. It recalls Dicey's description of the prerogative as a "residue of discretionary or arbitrary authority" (giving weight to the possibility that the third source is a strategic retooling of the prerogative). "Residue" implies a basis for action *left over* once other bases for action have been reviewed. What is most likely is that "residuary" is used by Harris to indicate that the third source does not relate to a large number of areas of activity. Interpreting Harris least charitably, the word "residuary" is used not as a precise description of the third source's scope but rhetorically: to ease people's worries by suggesting the third source has only a marginal effect.

Harris's account of the third source contains, secondly, elements that lack full and convincing justification. In his 1992 article, he describes the third source as the "freedom which the government has to do anything that is not prohibited by law."[437] He says after *Malone*, it is clear the government can interfere "with the liberties or activities of individuals where those interests are not protected by legal rights."[438] The position at the end of the 1992 article is: the government can do anything under the third source that is not prohibited by law; that includes affecting interests and liberties not protected by legal rights. By his 2007 article, however, Harris articulates the limits differently. He notes courts have recognised "the government's freedom to do that which is not legally prohibited or in conflict with the legal rights of others".[439] The phrasing is disjunctive: rather than conflict with legal rights being a subset of the general category of prohibitions by law, it is a distinct limit.[440] In the 2010 article, Harris adds that common law rights might provide a further limit.

[437] Harris 1992 (n 416) 626.

[438] ibid 633.

[439] Harris 2007 (n 425) 230.

[440] ibid 225.

Is Harris merely following the cases? The case law on the third source does not draw this distinction. It could be that Harris is recalling the notion that the third source is not a power "in the narrow sense", a point he raises in his 1992 article: he could be indicating that by definition, the third source can never be used to interfere with legal rights.[441] But Harris gives no definitional argument. Perhaps Harris means through this modified phrasing to incorporate the argument of his second article relating to common law rights. However, then the limit would be more correctly expressed as "the government's freedom to do that which is not legally prohibited, where what is 'legally prohibited' includes interference with certain established common law rights." It might be that Harris is following a doctrinal limit on prerogative powers, discussed in the next chapter; interestingly, though, as has already been noted, Harris seems to believe (in a view not quite consistent with current law) that the prerogative "may override … rights".[442] There is a lacuna in Harris's account in relation to how the third source is limited by "legal rights". He is not specific about what "legal rights" are (is this equivalent to common law rights and rights in the Human Rights Act 1998?). His language varies in how he describes the limit: at times he says the third source might not interfere with these rights; elsewhere he speaks of the third source not being able to override or modify or be in conflict with these rights. Harris does not explain why legal rights provide a limit on third source action where they are not a subset of what is prohibited by law.

Lastly, the comparison between the government and private individuals is conceptually flawed. The problem with this comparison has been raised in Chapter One. Harris resists the view that the government has the legal capacity of a natural person, although he rejects it not out of principle but because case law has in a "surprising conclusion" found

[441] Harris (n 416) 629.

[442] ibid 627.

that the government "does not have legal personality".[443] Harris relies on a looser analogy between government action and private individual action. Sometimes the analogy is drawn explicitly: in his 2007 article, Harris says there are different views about "whether the government, *like an individual,* has the freedom to do that which is not legally prohibited or contrary to the legal rights of others."[444] The comparison is not just unpersuasive as a matter of principle; it is a category error. The government, even when carrying out seemingly innocuous tasks such as distributing information, never has the same relationship to other people as private individuals. It has a different power, a different standing, and a different image in the eyes of the community; it is a constitutional actor, with a different set of norms and laws applying to it, as affirmed by *Town Investments v Department of the Environment.*[445] It may seem that a government's position is similar to the position of private individuals when an individual representative of the government is carrying out apparently unthreatening tasks such as printing pamphlets. But we should not be seduced by the superficial similarity. An analysis more sensitive to power should lead us to reject conclusively the comparison between governments and individuals.

Adam Perry's account of Crown 'administrative powers'

The most sophisticated development of the notion of 'the third source', building on Bruce Harris's work, is by Adam Perry. Perry examines the conceptual basis of third source and

[443] Harris (n 416) 635.

[444] Harris (n 425) 225.

[445] See n 317.

prerogative powers. He begins by considering accounts of third source powers, which he labels 'administrative powers'.

Perry rejects the 'residual freedom' account, which is what he calls Bruce Harris's approach. Harris says, according to Perry, the Crown has a power to do anything that is not prohibited: because the Crown is permitted to do anything not prohibited by law. Perry has no constitutional objection to this, since he says it is "simply an analytic truth", based on the definition of a prohibition: where there is no prohibition an individual is permitted to act.[446] But Perry does not agree the Crown has a power to do anything that is permitted. While the Crown may be permitted to do anything not prohibited, it does not follow that it has the power to do anything, where power is understood in its technical sense (the ability or capacity to perform an act): the Crown does not have the power to fly to Jupiter.

Perry dismisses 'the common law account' of the third source. This account is presumed by several Court of Appeal decisions; the account claims third source powers are granted by the common law and limited by what a natural person can do. He infers that the focus on what a natural person can do is derived from the assumption that the Crown is a corporation. Perry, however, says the Crown is unlike many corporations. Moreover, the common law account fails to distinguish between legal powers (the ability to alter a person's legal position by performing an act, along with a "decision or intention" to bring that change about)[447] and non-legal powers. Not all third source powers are legal powers, says Perry: they do not affect rights. One example is the power to circulate written material. If these were legal powers, the law could strip the Crown of these powers, and Perry says "it is difficult to imagine what change in the law would make it impossible for the Crown to, for example, maintain a

[446] Adam Perry, 'The Crown's Administrative Powers' (2015) 131 LQR 652, 656.

[447] ibid 660. Note that "decision" and "intention" are not equivalent.

list."[448] Non-legal powers exist, argues Perry, not because of the grant of these powers through the law, but because of "our willingness as a community to attribute ordinary acts to the Crown".[449] The common law account claims the basis of third source powers is the common law, when the basis is partly the common law and partly social recognition.

Perry's prefers the view that third source powers comprise 'legal administrative powers', granted by the common law and extending to what a natural person has a common law power to do, and 'non-legal administrative powers', granted by the community and bounded by the "conditions under which we are willing to make such attributions."[450]

Perry claims prerogative powers derive from custom, whereas third source powers have a different derivation. But Blackstone's claim that prerogatives are exclusive to the Crown does not distinguish prerogative from the third source, says Perry. Third source legal powers can be exclusive to the Crown. Exclusivity helps to distinguish only third source powers of a 'legal' character from prerogative powers. Perry notes that prerogative and third source powers could be distinguished by reference to subject matter: prerogative powers "are usually constitutional in character", whereas third source powers tend to be "administrative", though this "boundary … is not always clear."[451] Finally, prerogatives are powers over subjects to change their legal positions without their consent: these powers are authorities. In contrast, common law powers are "powers the Crown has over itself", ways it can change its own legal position, in a manner that affects the rights of others only with their consent.[452]

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[448] ibid 663.

[449] ibid.

[450] ibid 667.

[451] ibid 668.

[452] ibid 669.

The first move of Perry's that warrants interrogation is his relabelling of the third source as "administrative powers". Perry does not initially explain this. It seems Perry adopts this label to imply such powers are innocuous: he describes them as "unglamorous".[453] But third source powers can be particularly pernicious, since they are capable of being used, for example, to undertake surveillance, as noted in Chapter Three. Perry is slightly self-serving in describing the third source as "administrative powers". Perhaps the term is shorthand, just as 'administrative law' represents a not entirely accurate shorthand for a complex body of law. But labels matter. Since Perry is attempting to redescribe third source powers he must be aware of the connotations of his chosen term. Towards the end of the article, Perry acknowledges he has not explained why he uses 'administrative'.[454] But he merely contrasts constitutional with administrative acts. This does not clarify the meaning of 'administrative'.

Perry's approach to the terms 'power' and 'powers' creates more confusion than clarity. Perry attributes to Bruce Harris the position that "[i]f the Crown is permitted to perform an act, then the Crown has a power to perform that act", and divides administrative powers into legal and non-legal powers (terms that are slightly imprecise).[455] Perry quibbles with the position he ascribes to Harris. But Bruce Harris is careful not to use the language of 'power' and 'powers' in this narrow sense. He refers to the third source as a source of authority for executive action, and in his 2007 article as a residuary freedom for the executive. (Dicey, too, defines the prerogative as a residue of *authority*.) Harris is concerned with what executive action is lawful.

Lawfulness, not the nature of powers, is the right starting point for discussions of the third source. If Crown activity is unlawful, whether the Crown has the practical ability to carry

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[453] ibid 652.

[454] ibid 668.

[455] ibid 655.

that activity out is not relevant: the Crown will not be legally empowered to carry out that activity. The distinction between legal powers and non-legal powers *supplements* our understanding of the third source, but does not help with understanding the meaning and limits of the third source itself.

Perry appears uncomfortable with the notion that the common law grants to the executive all of its authority to act. If this were the case, Perry says, "the law could strip the Crown of these powers." "Yet," Perry continues, "it is difficult to imagine what change in the law would make it impossible for the Crown to, for example, maintain a list."[456] Perry is again running together physical and legal impossibility, and asking the wrong question. The law cannot make it physically impossible for the Crown to do something. But the law can make it *legally* impossible (more simply, unlawful) for the Crown to maintain a list, for example a list of British academics engaged in teaching critical race theory. This question is one we should focus on, since the third source as a concept is not designed to assist us in understanding what the Crown physically can do. Perry accepts the force of this point: "Does it not follow [if the Crown is a legal entity] that the Crown owes all its powers to the law? Yes – if the Crown is indeed a creature of the law, then everything it does is only possible because of the law."[457] Perry admits that "[i]n that loose sense, the law is the source of all of the Crown's powers."[458] But he says "this is not an interesting or informative statement …."[459] It is only uninteresting or uninformative *for the purposes of Perry's inquiry*, which is charting an unhelpful course by moving in the direction of powers rather than legality.

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[456] ibid 663.

[457] ibid.

[458] ibid.

[459] ibid.

Perry ought to have slightly modified the proposition he considers when discussing 'the common law account'. It is not just the law, or the common law, that grants the executive the authority to act. The constitution grants the executive its authority to act. Judges act through the common law to give effect to that constitution. This sharpens Perry's account of community recognition as the basis for how acts are attributed to the Crown. Perry attempts to explain how it is determined that acts are attributed to the Crown. That exercise does not engage the meaning of 'administrative powers' or the third source of authority for executive action; it engages the meaning of the Crown or the executive. The meaning of the Crown or the executive is delimited by the constitution, which provides social recognition for the attribution of acts to a broader governmental body.[460] The existence and extent of the third source of authority for executive action is a constitutional question.

Finally, Perry's closing observations should be queried. Perry is right that, if the third source exists, Dicey is wrong: "there are non-statutory powers that are not prerogative powers."[461] But Perry says prerogatives "are usually constitutional in character", while third source powers are generally administrative. It is hard to know what Perry means by 'constitutional' – is the historical prerogative over commerce 'constitutional'? Moreover, it is not clear how much weight Perry seeks to place on this point, since he maintains only that these powers "are usually constitutional", noting it is "only a rough distinction".[462] The last distinction Perry draws is between prerogatives the Crown has over its subjects (i.e. powers that can change legal positions without their consent) and administrative powers over itself (i.e. powers that generally affect only the Crown's legal position, and change others' position only with their consent). This distinction is difficult to sustain. The executive authority to

[460] It could be said that the constitution's durability rests in part on social recognition.

[461] Perry (n 446) 667.

[462] ibid 668.

contract – which, if lawful at all, may be derived from the third source – affects the position of others, and not only with their consent. For example, the decision by the government to contract with a private prison provider affects the legal position of not just the private prison provider, but all individuals who have to enter the prison under the different conditions provided by a private prison.

William Wade's comments on the prerogative and "the ordinary powers of the Crown"

Before an attempt is made to sketch a different kind of conceptual explanation, it is worth analysing the work of one other scholar who comments on the prerogative and the third source (albeit not using the latter term): William Wade. Wade writes some years before Harris and Perry, and is an obvious influence on Harris's work (as well as being influenced by Blackstone).[463] It is most appropriate to deal with Wade's account briefly, since Wade does not provide a fully-fledged theory of the prerogative or third source across any of his writing, whether in his Hamlyn lectures, textbook account, or other articles.[464] It is best to consider Wade following more extensive discussion of Harris and Perry (and of Blackstone and Dicey): his work shares some of their limitations, and fuller analysis of those limitations helps to see the gaps and problems in Wade's work.

Wade's commentary – developed as key case law was decided in the 1970s, 1980s, and 1990s – offers an elaboration of Blackstone's position, albeit with greater emphasis on the meaning of 'power' and a fuller account of what would become known as the third source.

463 See eg Harris (n 416) 645.

464 HWR Wade *Constitutional Fundamentals* (Stevens 1980) (Wade's Hamlyn lectures); Sir William Wade and Christopher Forsyth *Administrative Law* (OUP 2004, 9th ed); and HRW Wade 'Procedure and Prerogative in Public Law' (1985) 101 LQR 180. The 9th edition of Wade and Forsyth's textbook was the final edition published before Wade's death.

While Wade is critical of "[t]he Blackstone-Bagehot-Dicey era … of self-satisfaction" and is generally vigilant about the shortcomings of the British constitution, he too can lapse into complacency, for example when noting that "in the course of constitutional history the Crown's oppressive powers have been stripped away", leaving the prerogative "a much-attenuated remnant"[465] that has "ceased to be a significant source of administrative power as against the citizen."[466] But he does not resile from criticising case law, objecting to the "free and easy" approach to the prerogative in decisions, which he attributes partly to the influence of Dicey.[467] Wade says courts have described as prerogative "every power of the Crown which is not statutory".[468] This, he argues, is incorrect.

Wade's preferred definition of the prerogative has two parts. First, the prerogative "consists of legal power", which he defines as "the ability to alter people's rights, duties or status under the laws of this country".[469] He also articulates this as being a question of whether an activity "produce[s] legal effects at common law".[470] Second, mirroring Blackstone, Wade says the prerogative's "etymology means that it should be some special power possessed by the Crown over and above the powers of an ordinary person, and by virtue of the Crown's constitutional position."[471] He does not specify in what sense, or for what reason, this power is held "by virtue" of the Crown's "constitutional position". The relevant inquiry is into

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[465] Wade and Forsyth *Administrative Law* (n 464) 215.

[466] ibid 216. He admits at 215: "there are a still few prerogative powers which can have unwelcome legal effects on individuals".

[467] Wade 'Procedure and Prerogative' (n 464) 194.

[468] Wade and Forsyth *Administrative Law* (n 464) 216.

[469] Wade *Constitutional Fundamentals* (n 464) 46.

[470] Wade 'Procedure and Prerogative' (n 464) 193.

[471] Wade *Constitutional Fundamentals* (n 464) 47–48.

whether a power is "unique to the Crown and not shared with other persons".[472] Wade insists that the prerogative does not exhaust the extent of the executive's authority for lawful action. The Crown can also "[exercise] its ordinary powers as a natural person", contends Wade.[473] Examples include the power to appoint ministers, or to set up a board.[474] Wade is sketching an early version of what would be called the third source; he notes elsewhere that disputes about this area of activity properly "belong to private law".[475]

Wade's account represents a bridge between the work of Blackstone and Dicey, and the thinking of Harris and Perry. The account is not entirely a reiteration of Blackstone's work, given the focus on powers and the powers shared by the Crown with ordinary people; Wade's account is also notable for acknowledging the importance of a constitutional allocation of authority. But while Wade avoids some of Dicey's mistakes, his account shares some of the failings of those of Blackstone, Harris, and Perry – and Wade introduces further missteps.

Like Blackstone, Wade provides some explanation of what unifies the prerogatives (legal powers possessed uniquely by the Crown) but the explanation is over-inclusive: it does not account for what unites the collection of prerogatives affirmed by the courts. If the prerogative represented all legal powers capable of being possessed uniquely by the Crown, a much longer list of areas of action would be classified as prerogative. Like Harris whose work would follow, Wade makes a category error in equating liberties (or capacities or powers) of individuals and of government, and does not consider at length whether the government and individuals are differently positioned when exercising such liberties. Like Perry, Wade pays

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472 Wade 'Procedure and Prerogative' (n 464) 193.

473 Wade *Constitutional Fundamentals* (n 464) 48.

474 ibid.

475 Wade 'Procedure and Prerogative' (n 464) 196.

much attention to what is and is not a legal power, but this reaps few theoretical rewards: the courts have focused on what activities are lawful, not on what activities constitute the genuine exercise of a power; his analysis seems a step removed from the legal concepts of the prerogative and third source analysed by the courts. Wade might respond that the courts should be *more* focused on what constitutes exercise of a power. It is not clear, however, what the pay-off of this approach is: it could reorganise what is considered prerogative and what is thought to be a 'third source' activity. But it would produce the oddity, identified by Harris, that some third source action (namely, action producing no legal effects) would be hived off and could fall out of the purview of judicial review.[476]

There are further ambiguities and contestable claims in Wade's commentary. He notes the prerogative is a "legal power which appertains to the Crown but not to its subject".[477] The word "appertains" does a lot of work in this sentence, and is vague, without further explanation. Elsewhere, he argues that issuing or denying passports has no legal effects and cannot be regarded as an exercise of the prerogative.[478] This seems highly questionable, given the denial of a passport can result in statelessness and other grave consequences,[479] and points to the perils of using the term "power" as a hook on which to hang a definition.

Revised accounts of the prerogative and the third source

[476] Harris (n 416) 645. Wade might respond, as Harris notes at 645, that the political process can provide sufficient accountability for such activity; but it is not clear, at least without more careful analysis, that political accountability would be adequate.

[477] Wade and Forsyth *Administrative Law* (n 464) 216.

[478] Wade *Constitutional Fundamentals* (n 464) 51.

[479] Lucia Zedner 'Citizenship Deprivation, Security and Human Rights' (2016) 18 EJ Mig & Law 222–242.

Both the prerogative and the third source provide authority for action by the executive branch of government. What does *authority* mean? It means where action is taken by the executive under the prerogative or the third source, the courts have a decisive reason to conclude that such executive action has a lawful basis. This does not mean courts will conclude that such action is lawful in the final analysis; executive action might have a lawful basis but be unlawful for other reasons. It means executive action is not unlawful from the outset. It is best to use the word 'authority', rather than 'power', which is liable to confuse. Another way of saying this is to say, as Poole does, that the prerogative is an "authority claim".[480]

The prerogative is one particular source or form of authority for executive action. Its contours have shifted over time. It is a set of subject-matter categories that the courts have recognised as areas within which the executive can act without statutory authorisation.[481] Where the prerogative is relied upon because the executive action occurs within one of these subject-matter pigeonholes, particular legal limits apply; these limits have changed over time. Rules pertaining to when and under what circumstances the executive can be sued, or bound by statutes, are different in character from the prerogative; these are sometimes described as privileges or immunities,[482] and should not be conflated with the prerogative. The courts have affirmed that the executive has prerogative authority in certain subject-matter areas. The final affirmation of the prerogative authority to act has not come from the executive's own assertion of power (since the legality of that assertion has to be validated by courts) or from

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480 Poole (n 81) 8. See also discussion of "authority claims" in: Janet McLean, 'The Authority of the Administration', in Elizabeth Fisher, Jeff King, and Alison Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (OUP 2020) 45.

481 David Hume suggests in the eighteenth century that the prerogative is "a limited set of defined executive powers .... rather than a catch-all and extra-legal category": Thomas Poole, *Reason of State: Law, Prerogative and Empire* (CUP 2015) 119, citing David Hume, *The History of England, vol. 5* (first published 1778, Liberty Fund 1983) 329.

482 Adam Tomkins, 'Crown Privileges' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (OUP 1999) 171.

custom. It has come from courts making a constitutional judgement: a judgement about how power should be distributed within the state.[483] Chapter One illustrates the far-reaching role played by judges in making those judgements.

What has united the subject-matter categories that the courts, in performing a constitutional role, have determined should comprise prerogative authority? Blackstone's claim the executive "enjoys alone" the authority does not helpfully discriminate between the subject-matter areas. Locke's unifying principle – that the prerogatives involve the executive acting for "the public good" – is over-broad, since other subject-matter areas not part of the prerogative (such as taxation or law-making) might reasonably be regarded as part of the public good. The most honest and accurate conclusion is that no timeless inner logic draws together prerogative categories. The prerogative categories represent attempts by the court to determine in what areas of action the executive ought to be able to act without statutory authorisation. In making these determinations, the courts have been guided by a range of concepts, including the public good, their view of the nature of the executive, and the needs of the state.

The third source purports to provide a further source or form of authority for executive action in the absence of statute. If the third source is part of the law of a jurisdiction, it allows that the executive has authority to act as long, and insofar, as that act is not prohibited by statute or the common law. Action taken under the third source of authority is not confined to administrative activities. Whether the third source is limited by common law rights or other constraints depends on the law of a particular jurisdiction. There is no reason why the third source of authority, if a part of the law, cannot be used to touch or engage human rights;

[483] Decisions about the scope of the courts' inherent jurisdiction – eg *Cape Intermediate Holdings v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38, [2019] 3 WLR 429 – also involve constitutional judgment. It is noteworthy that Margit Cohn appears to share the view that at least the prerogative is derived from the constitution, when she refers to it as "one form of constitution-generated fuzziness": n 50, 306.

whether that is lawful depends on the human rights law of that jurisdiction. It may be, for example, that the law of a jurisdiction indicates that rights can only be limited proportionately. The third source need not be based on a comparison between the government and a private individual (even if that comparison has figured in the third source's doctrinal history). Indeed, the third source should not be grounded in this analogy.

The third source is not necessarily residuary. Its scope and existence turn on the law of a jurisdiction. A codified constitution can set out the third source's existence and scope in a single document: in theory, a codified constitution could make clear there are only two sources of authority for executive action – statute and the prerogative. Alternatively, as is the case in jurisdictions without a single codified constitution (such as the United Kingdom and New Zealand), the courts – in helping to expound the constitution through their judgments – might affirm the existence of the third source. It is a matter of constitutional judgement.

Whereas the prerogative is a closed set of subject-matter categories – 'closed' in that the courts cannot add to the list of categories they have affirmed – the third source (if it is affirmed to exist in a jurisdiction) is a more free-ranging form of authority, which allows the executive to act as long, and insofar as, that act is not prohibited by statute or common law. The prerogative is more specifically defined and (relatedly) more constrained than the third source. Put another way, the prerogative provides legal authority for particular areas of action undertaken by the executive. The third source, if affirmed in general, provides authority for the executive to act in all areas not closed off by statute or the common law.

One of the aims of this chapter is to sketch the most illuminating understanding of the third source, assuming the third source is considered by courts (or by a codified constitution) to form part of the law of a jurisdiction. However, that conceptual account should not be taken as an endorsement of the third source as a legal concept. (It is not the purpose of this chapter to affirm or reject the prerogative or third source, but rather to describe the prerogative and third source in an honest way, so that further analysis of the

prerogative and third source is possible in the remainder of the thesis.) It should be clear to readers of the thesis as a whole that an unmistakeably skeptical perspective is adopted towards the third source (and the prerogative). Chapter One and Chapter Three highlight the third source's shaky historical foundations and doctrinal instabilities, respectively; Chapter Four pays attention to the ways in which the third source falls short of normative standards supposedly upheld by the British legal order.

Conclusion

The aim of this chapter has been to investigate 'the prerogative' and 'the third source' as legal concepts. This inquiry has revealed conceptual instability in prominent accounts of the prerogative and the third source. That conceptual instability is an important contextual feature in the history of the prerogative and third source, discussed in Chapter One, and the contemporary doctrinal position outlined in the next chapter.

There is one further implication of the analysis. An attempt has been made to return to the work of prominent commentators, such as Blackstone and Dicey, because – at least when it comes to their descriptions of their prerogative – it is rare to find judges, or even academics, reading their work in full. Too often, a single sentence definition of the prerogative is parachuted into writing without fuller context. What emerges from a fuller analysis of Blackstone and Dicey is their accounts of the prerogative contain unnecessarily parochial language, unstable distinctions, frustrating vagueness, and explanations of law that are at best anachronistic and at worst inaccurate. The attention and reverence that is commanded by the work of Blackstone and Dicey is no longer warranted, if it ever was.[484] Blackstone and Dicey

[484] Blackstone and Dicey's work has been the subject of criticism. Bentham was highly critical of Blackstone: Philip Schofield, 'The "Least Repulsive" Work on a "Repulsive Subject": Jeremy Bentham

should not be the starting – or stopping – points for those seeking to understand the prerogative today. Academic hero-worship should be avoided when attempting to understand the third source, too. Putting doyens of British constitutional law to one side can help reinforce the point made by William Stubbs of the prerogative's origins, which remains resonant today in relation to the prerogative and third source: this area of law is much less "a figment of theorists" and far more a product of "certain conditions of the national life ..."[485] – a product of ongoing struggles over giving effect to the perceived needs of the British state.

on William Blackstone's *Commentaries on the Laws of England*' in Anthony Page and Wilfrid Prest (eds) *Blackstone and His Critics* (Hart 2018) 23–40.

[485] See n 116.

Chapter Three:

The Law on the Prerogative and Third Source in England and Wales

This chapter asks: what is the state of the law of England and Wales, as at 2021, on the prerogative and the third source? Just as early case law on the prerogative and third source was beset with vagueness, and leading conceptual accounts are full of ambiguities, so too the contemporary doctrine is shot through with indeterminacy.

The chapter begins by asking what prerogatives remain in existence. This question cannot be answered without inquiring into whether prerogatives can fall into disuse; the second section of the chapter addresses that question. The third section explores the limits on the prerogative outlined in *R (on the application of Miller) v Secretary of State for Exiting the European Union* ['*Miller (No 1)*'].[486] The fourth section of the chapter asks whether two of the limits in *Miller (No 1)* are reconcilable with past case law. The fifth section examines a further limit on the prerogative introduced by *R (on the application of Miller) v The Prime Minister* ['*Miller (No 2)*'].[487] The sixth section examines other aspects of the law of the prerogative. The seventh section of the chapter addresses whether the third source of authority for executive action forms part of the law of England and Wales. The *Malone* decision is analysed in historical context in the eighth section, and the case law following *Malone* is discussed in the ninth section. The tenth section sets out possible limits on the third source.

This chapter develops two central themes in this thesis: that the prerogative and third source are even more unsettled than is commonly acknowledged; and that the law of the

[486] [2017] UKSC 5, [2018] AC 61 ['*Miller (No 1)*'].

[487] [2019] UKSC 41, [2020] AC 373 ['*Miller (No 2)*'].

prerogative and third source should be understood as situated within an ongoing struggle over giving effect to the perceived needs of the state. Certain cases on the prerogative and third source have already been the subject of scholarly debate.[488] To show the prerogative and third source are even more unsettled than is commonly acknowledged, this chapter does not repeat other scholars' analysis, but underscores that foundational questions remain unanswered. It interrogates parts of the law that might be taken to be settled, such as two of the limits set out in *Miller (No 1)*.[489]

To illustrate that the prerogative and third source are part of a longer history of disputes about giving effect to the needs of the state, the historical context underlying cases is elaborated: for example, background to *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* ['*Northumbria*'];[490] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* ['*Bancoult*'];[491] and *Malone v Metropolitan Police Commissioner* ['*Malone*'].[492] This requires integrating historical materials with close textual analysis, to draw out references to 'public benefit', 'national importance', and cognate concepts.

Through contextual doctrinal analysis, interconnections between these two themes become clear. The law on the prerogative and third source is highly unsettled because it is sometimes fashioned in an ad hoc way, as part of a "legal facade" constructed to give effect

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488 See eg Mark Elliott and Amanda Perreau-Saussine, 'Pyrrhic Public Law: *Bancoult* and the Sources, Status and Content of Common Law Limitations on Prerogative Power' (2009) PL 697; Satvinder S Juss, '*Bancoult* and the Royal Prerogative in Colonial Constitutional Law' in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart 2017) 239; Mark Elliott, Jack Williams, and Alison L Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart 2018); Paul Craig, 'The Supreme Court, Prorogation, and Constitutional Principle' (2020) PL 248.

489 [2017] UKSC 5, [2018] AC 61.

490 [1989] QB 26.

491 [2008] UKHL 61, [2009] 1 AC 453.

492 [1979] Ch 344.

to the perceived needs of the state, in Lord Hoffmann's words.[493] And the highly unsettled character of the law on the prerogative and third source preserves ongoing contestation about giving effect to the needs of the state.

The focus is on these themes, rather than encyclopaedic coverage of the case law; not every relevant decision is unpacked here. Not every academic debate about the law of the prerogative and third source is discussed, though some important debates are mentioned. Constraints of brevity dictate a more selective approach, but this approach also follows from the thesis's methodological starting points. The analysis does not endeavour to reconstruct the law on the prerogative and third source in its best light; rationalising the law in this way may result in insufficient analysis of the law's gaps and ambiguities. The aim is to understand the prerogative and third source from historical, conceptual, doctrinal, and normative vantage points; and how the prerogative and third source operate within broader historical and political contexts. This chapter's doctrinal analysis contributes to a more rounded understanding of the prerogative and third source, building on the historical and conceptual analysis of the first two chapters; with these perspectives understood, Chapter Four can take up whether the prerogative and third source are consistent with values purportedly upheld by the British legal order.

The law on the prerogative

What prerogatives form part of the law of England and Wales?

[493] *Bancoult* (n 491) [10].

Stating the prerogatives that are part of the law of England and Wales is like stating the elements of the British constitution: everyone agrees on the first few, and then commentators and judges trail off in their descriptions, mentioning illustrative examples rather than an exhaustive list.

Bradley, Ewing, and Knight's textbook notes: "it is not possible to give a comprehensive catalogue of prerogative powers."[494] The text refers to powers relating to the legislature, the judicial system, foreign affairs, treaties, war and the armed forces; powers for patronage, appointments, and honours; immunities and privileges; the prerogative in times of emergency; and miscellaneous prerogatives now "largely regulated by statute".[495]

Similar descriptions appear in other leading textbooks and sources. An early version of Le Sueur and Sunkin's textbook, *Public Law*, observes not only that it is difficult to construct a list of prerogative powers; "there is", quite simply, "no comprehensive list of them."[496] The book offers "illustrations".[497] The latest edition omits that observation but does not present an exhaustive list.[498] Fenwick and Phillipson's work notes "[n]o definitive list exists",[499] and refers to the Public Administration Select Committee's report on the prerogative, which claims the prerogative "include[s]" eleven prerogatives.[500] Fenwick and Phillipson cite a

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494 AW Bradley, KD Ewing, and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 258.

495 ibid 259–265.

496 Andrew Le Sueur and Maurice Sunkin, *Public Law* (Longman 1997) 271.

497 ibid 271–277.

498 Andrew Le Sueur, Maurice Sunkin, and Jo Eric Khushal Murkens, *Public Law: Text, Cases, and Materials* (4th edn, OUP 2019) 301–332.

499 Helen Fenwick and Gavin Phillipson, *Text, Cases and Materials on Public Law and Human Rights* (3rd edn, Routledge 2011) 559.

500 ibid 560.

memorandum by the Treasury Solicitor's Department for this Committee, listing 12 prerogatives in domestic affairs and five foreign affairs prerogatives.[501]

The law is plainly uncertain. It is not clear which prerogatives remain. But it is also unclear how to characterise the prerogatives that were ever available. The prerogative of mercy appears in some textbooks and not others; a prerogative in times of emergency is described in Bradley, Ewing, and Knight's textbook but not in other texts. How the prerogatives are described even where there is agreement is different from source to source, with implications for scope. Bradley, Ewing, and Knight discuss "powers relating to" subject matter fields. Fenwick and Phillipson talk of prerogatives pertaining to "international diplomacy and law". The Public Administration Select Committee is more granular in dividing this area into eight prerogatives.

The House of Lords in *Council of Civil Service Unions v Minister for the Civil Services* has affirmed that "the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent."[502] A further point of uncertainty in the law is the appropriate judicial method for determining whether a prerogative exists. Whether the prerogative requires longstanding executive practice, or merely has to be affirmed by courts, is not clear. And if no longstanding practice has to be demonstrated, what is required for the prerogative to be established in the first case where its existence is contested? In *Burmah Oil*, Lord Reid notes: "the proper approach is a historical one: how was [the prerogative] used in former times and how has it been used in modern times?"[503] However, this statement about

[501] ibid 561.

[502] *Council of Civil Service Unions v Minister for the Civil Services* [1985] AC 374, 398 (Lord Fraser).

[503] *Burmah Oil v Lord Advocate* [1965] AC 75 (HL), 101.

the "proper approach" does not explain what kind of past use or modern use is necessary or sufficient to establish that a prerogative exists.[504]

The *Northumbria Police Authority* decision, regarding the legality of executive provision of plastic bullets and CS gas to police, is a case where the judges had to consider the existence of the prerogative to keep the peace within the realm.[505] The judges' approach is far from methodical.

The 1970s saw "a wave of racist attacks and murders" experienced by black communities, with discontent growing due to "perceived … police indifference and failure to protect black people".[506] During a period of growing unemployment and insecurity,[507] the New Cross fire occurred in January 1981. A slow police response to the fire, combined with longstanding "policies [that] had blighted the futures of working-class youth",[508] resulted in confrontations between police and protesters in spring 1981. Politicians whipped up racial tensions.[509] The Home Secretary in Margaret Thatcher's government sought to make available plastic bullets and CS gas to police in May 1981 via a central store. The Northumbria police

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[504] As this dissertation was finalised, David Kershaw published a novel argument, claiming prerogatives are best regarded as delegations to the executive through the Bill of Rights 1689: David Kershaw, 'Revolutionary Amnesia and the Delegated Nature of Prerogative Power', UK Const L Blog, 8 October 2020, available online at <https://ukconstitutionallaw.org/2020/10/08/david-kershaw-revolutionary-amnesia-and-the-delegated-nature-of-prerogative-power/> accessed 18 August 2021. This is inconsistent with how courts have determined the existence of prerogatives, and the words of the Bill of Rights do not provide significant guidance in delineating the range of prerogatives currently in existence.

[505] *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26, 42.

[506] Cecily Jones, 'New Cross Fire', in David Dabydeen, John Gilmore, and Cecily Jones (eds), *The Oxford Companion to Black British History* (OUP 2007).

[507] Stuart Hall, 'From Scarman to Stephen Lawrence' (1999) 48 History Workshop Journal 187–197.

[508] Jenny Bourne, '"May we bring harmony"? Thatcher's legacy on "race"' (2013) 55 Race & Class 87, 88.

[509] See eg Enoch Powell's speech in: House of Commons, 'Civil Disturbances', *Hansard*, 16 July 1981, vol 8, 1397–1503.

were concerned this could cause serious injury. The question in the case was whether the Home Secretary had a prerogative to order this supply.[510]

Croom-Johnson LJ concludes: "… I have no doubt that the Crown does have a prerogative power to keep the peace, which is bound up with its undoubted right to see that crime is prevented …"[511] The power is affirmed with little consideration of the risks of extending police authority. In Purchas LJ's view relevant authority is found in statute, and that "is sufficient to dispose of this appeal".[512] It is enough that "[t]he continued existence of prerogative has never been questioned".[513] He concludes: "the prerogative powers to take all reasonable steps to preserve the Queen's peace remains [sic] unaffected by the Act ..."[514] This does not settle the question of whether the prerogative ever existed. Nourse LJ is more transparent, saying: "[r]eferences in reported cases and authoritative texts to a prerogative of keeping the peace within the realm are admittedly scarce."[515] But he contends: "It is only by a process of piecemeal decision over a period of centuries that particular powers are seen to exist or not to exist ..."[516] He argues, tenuously, that the scarcity of references to this prerogative "does not disprove that it exists" and "may point to an unspoken assumption that

[510] Helen Beynon, 'Prerogative to supply plastic baton rounds and CS gas to the police' (1987) PL 146, 146.

[511] *Northumbria* (n 505) 44.

[512] ibid 51.

[513] ibid.

[514] ibid 55.

[515] ibid 56.

[516] ibid 58.

it does."[517] Nourse LJ says, "I decline to hold that a power so valuable to the common good no longer exists."[518] But Nourse LJ has not established that the power ever existed.

The decision rests on shaky foundations.[519] The closest the Court of Appeal comes to a methodology is Nourse LJ's line that through "a process of piecemeal decision over a period of centuries", "particular powers are seen to exist or not to exist". But how these powers come to be "seen to exist or not to exist" is mysterious.[520]

Another significant case where comments are made on determining the existence of a prerogative is *Bancoult*.[521] The Chagos Archipelago had been claimed as a French colony, when it became occupied by the Chagossians; it was ceded to the United Kingdom in 1814. In 1964 the United Kingdom allowed the atoll of Diego Garcia in the Chagos Islands to be used as a United States military base, at a time when "[i]n the aftermath of the Cuban missile crisis and the early stages of the Vietnam War, the United States felt vulnerable without a land based military presence in the Indian Ocean."[522] The United States did not want sovereignty over Diego Garcia to be transferred to a non-aligned government, and so though the Chagos Islands had been "administered as part of" Mauritius,[523] with Mauritius' independence imminent, the United Kingdom passed the British Indian Ocean Territories Order 1965, establishing a new colony.[524] The British Government made the territory available to the

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517 ibid.

518 ibid.

519 Robert Ward, 'Baton Rounds and Circulars' (1988) 47 CLJ 155, 156.

520 See also Conor Gearty, 'The Courts and Recent Exercises of the Prerogative' (1987) 46 CLJ 372, 374.

521 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453.

522 ibid [6].

523 ibid [4].

524 ibid [6].

United States for defence purposes for at least 50 years; when the US Defence Department said it required Diego Garcia in 1971, the United Kingdom expelled the population of Diego Garcia.[525] Lord Hoffmann notes the 1971 Immigration Ordinance "was part of the legal façade constructed to defend this claim".[526] In 1998 one of the Chagossians, Mr Bancoult, launched a judicial review of the 1971 Ordinance; the Divisional Court found the Ordinance had been ultra vires.[527] The Government said it would accept the ruling; but in 2004 an Order was passed blocking resettlement. Mr Bancoult, amongst other things, challenged the legality of the 2004 Order.

The majority finds the Government's actions were not unlawful, and the Court offers commentary on aspects of the law of the prerogative. As well as applying the decision in *Campbell v Hall*, and restating principles about the prerogative's reviewability (discussed below), Lord Bingham and Lord Mance note the inquiry required when determining whether a prerogative exists (and its extent). Lord Bingham observes that "courts must conduct an historical inquiry to ascertain whether there is any precedent for the exercise of the power in the given circumstances."[528] Lord Mance comments: "in determining the scope of the royal prerogative, the courts will look for guidance to its previous mode of exercise."[529]

Lord Bingham does not explain whether "precedent for the exercise of the power" means a judicial decision, or past political exercise of the prerogative. Lord Mance is clearer that any "mode of exercise" is relevant; however, he does not specify what kind of past mode of exercise will influence the scope of a prerogative. His comment risks restating the obvious

[525] ibid [7]–[9].

[526] ibid [10].

[527] ibid [16].

[528] ibid [69].

[529] ibid [149].

– that a court can and will look to the history of a prerogative when determining its nature and limits. Moreover, Lord Bingham and Lord Mance's remarks seem in tension with each other: Lord Bingham's hard-edged claim is that the courts "must" conduct an historical inquiry, and that some precedent is a precondition to a prerogative being affirmed; Lord Mance suggests courts ought to look to history for guidance. *Bancoult* confirms that past exercise of a prerogative will be relevant to a prerogative's existence and scope; but it does not offer criteria for affirming prerogatives, or clarify what kind of historical evidence should be produced.[530]

What is tolerably certain is new prerogatives cannot be created. In *British Broadcasting Corporation v Johns*, Diplock LJ notes: "it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative."[531] Diplock LJ is not considering the suggestion of a new prerogative in the case, but whether the prerogative to create monopolies survives the Statute of Monopolies 1623, raising questions about the effect of statutory curtailment of prerogatives. Nevertheless this case has been cited approvingly for the proposition that the courts cannot create new prerogatives.[532] The proposition provides some border around prerogatives affirmed in the past. But it does not assist in determining which prerogatives exist.

Remarkably, the last lengthy treatise setting out an exhaustive list of prerogatives was published 200 years ago by Joseph Chitty.[533] Similar lists were constructed by Blackstone,

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[530] See further: Satvinder S Juss, '*Bancoult* and the Royal Prerogative in Colonial Constitutional Law' in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart 2017) 239–270.

[531] *British Broadcasting Corporation v Johns* [1965] Ch 32 (CA), 79.

[532] See eg Lord Bingham in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453.

[533] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: and the Relative Rights and Duties of the Subject* (Butterworth 1820).

Bacon, and others.[534] Such lists raise the question: what happens to prerogatives that have not been relied upon by the executive for decades or centuries?

Can prerogatives fall into disuse and, if so, how?

A high-level contrast can be drawn between two possible doctrinal positions on the prerogative falling into disuse. The first is it is not possible for prerogatives to fall into disuse. On this view, prerogatives are always available to be exercised by the executive, as long as their exercise does not infringe on other limits. This position makes identification of the prerogatives all-important. The second view is prerogatives can fall into disuse. One way to interpret 'disuse' is: if prerogatives are not used by the executive for a specified period of time it is unlawful for the executive to invoke the prerogative as an authority for lawful executive action. If the second position is correct, it is important to specify what constitutes disuse, and what period of time needs to pass for the prerogative to lapse.

Different views have been expressed on the correct position by contemporary writers. The House of Commons' 2017 briefing paper on the prerogative simply highlights key considerations for and against the positions.[535] Dicey's description of the prerogative as a residue of authority "legally left in the hands of the Crown" suggests prerogative authority

[534] William Blackstone, *Commentaries on the Laws of England: Book I of the Rights of Persons* (gen ed Wilfrid Prest, OUP 2016); Matthew Bacon, *A New Abridgement of the Law* (first published 1768, 7th edn, A Strahan 1832).

[535] House of Commons Library, 'The Royal Prerogative', Briefing Paper, Number 03861, 17 August 2017, 7.

has become whittled down over time, perhaps by falling into disuse.[536] But this may simply mean that statutes have filled space previously taken up by the prerogative.

Twentieth and twenty-first century public law did not inherit a settled view on the point. The issue does not appear to have been raised until *Burmah Oil v Lord Advocate*,[537] which concerned the legality of British executive action demolishing oil pipelines and other properties in Burma during the Second World War following Japanese invasion. It was argued that the action was taken under the prerogative; the question was whether the exercise of the prerogative entailed a right to compensation for companies suffering loss. There is one revealing passage in the Law Lords' speeches. Lord Reid observes: "The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute."[538]

No other Law Lord speaks directly to this point. Viscount Radcliffe says, "The war prerogative is … by its very nature something which takes an unconscionable time to die," but does not appear to rule on whether prerogatives can fall into disuse – he is noting that it has continued to be invoked over the centuries, as statutes have come and gone.[539] Viscount Radcliffe describes some prerogatives in the past tense, as if they no longer exist[540] but does not say anything about the lapsing of the prerogative. Overall, *Burmah Oil* offers some support for the notion that prerogatives exist in perpetuity, and do not become obsolescent.[541]

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536 Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (first published 1885, 8th edn, Macmillan 1915) 420.

537 [1965] AC 75 (HL).

538 ibid 101.

539 ibid 122.

540 ibid 114.

541 The Government passed a War Damage Act the following year, abolishing the right to compensation for certain damage to property with retrospective effect. The Lord Chancellor says: "in the last war ... we could not possibly afford to compensate everybody to the full": House of Commons, 'War Damage Bill', 13 April 1965, *Hansard*, vol 265, 289–351, 341. This perhaps shows that where the courts do not shape the law of the prerogative to serve the needs of the state, Parliament can intervene to clarify the proper interpretation of the needs of the state.

There is little extended discussion of the question in other cases since *Burmah Oil*. The closest the courts have come to a test case is *Northumbria*. Lord Justice Croom-Johnson appears to use the notion of the Crown as fountain of justice to justify the existence of the prerogative to keep the peace, saying this prerogative "is bound up with [the Crown's] undoubted right to see that crime is prevented and justice administered."[542] The case might support the proposition that prerogatives cannot fall into disuse, since the prerogative of the Crown as fountain of justice seems to be described as "undoubted" – though the Court of Appeal does not explicitly consider disuse, and what is "undoubted" is the Crown's "right", which might be distinguishable from its prerogative.

It seems implausible that contemporary courts would hold that the executive retains a prerogative as peculiar as the "prerogative in swans and royal fishes",[543] or a prerogative as broad as the one asserting that the Crown is the fountain of justice. One possibility is courts would accept prerogatives have not dropped out of the law merely because of disuse, and would hold that prerogatives have been eclipsed by statute or limited for other reasons. But it remains difficult to believe that courts would leave open the door to these prerogatives reviving. A more likely scenario is courts might conclude that, although new prerogatives cannot be created, old prerogatives can be adjusted. Such a conclusion might make best sense of repeated judicial pronouncements about the scope of the prerogative being reduced over time.[544] Courts might lean on Lord Sumner's pronouncement in *De Keyser* that "the prerogative adjusts itself to new discoveries".[545] Courts might say a 'new discovery' is the evolution of social norms (indeterminate as this is). If the courts opt for this course, they ought to explain

[542] *Northumbria* (n 505) 44.

[543] Matthew Bacon, *A New Abridgement of the Law* (first published 1768, 7th edn, A Strahan 1832) 387.

[544] *Miller (No 1)* (n 486), [41]: "those prerogative powers ... were progressively reduced ...".

[545] See *De Keyser* (n 408) 565.

the evidence of social evolution needed to justify an adjustment of the prerogative. It might be that courts would add that disuse is not a reason for the prerogative to disappear, but reflects a widespread view that the prerogative is no longer serving its purpose. Regardless, prerogative disuse is an area of doctrine in a lamentable state of ambiguity.

What are the limits on the exercise of the prerogative?

The United Kingdom Supreme Court ruled on the limits on the prerogative in *R (on the application of Miller) v Secretary of State for Exiting the European Union* [(*Miller (No 1)*'].[546] The majority judgment appears clear in setting limits on the exercise of the prerogative. But that clarity comes into question the more we probe the precedents and principles underpinning the reasoning in *Miller (No 1)*, as well as the decision in *Miller (No 2)*.

A referendum was held in 2016 on whether the United Kingdom should leave the European Union in which a majority of 52% voted to leave. The government, in the face of significant public debate, sought to give effect to the referendum without passing legislation. *Miller (No 1)* was a challenge to whether the executive could rely on the prerogative to trigger Article 50 of the Treaty of the European Union to facilitate the United Kingdom's exit from the EU. By an 8–3 majority, the Supreme Court found the prerogative could not be so used.

The majority sets out some limits on the prerogative at [48]. First, the majority notes prerogatives can be "curtailed or abrogated … by express words or, as has been more common, by necessary implication" through statute.[547] Second, the majority observes, "unless

[546] See n 486.

[547] ibid [48].

primary legislation permits it, the … prerogative does not enable ministers to change statute law or common law."[548]

The majority qualifies this second limit by noting that an exercise of prerogative power can have legal consequences, in two situations: "where it is inherent in the prerogative power that its exercise will affect the legal rights or duties of others" and where "the effect of an exercise … is to change the facts to which the law applies."[549] In its first qualification the Court notes the prerogative can affect rights where a prerogative has always had such consequences; this makes outlining the contours of prerogatives all-important. The second qualification involves the claim that the exercise of prerogative can affect how the law applies, rather than the content of the law.

In purporting to apply the law, the majority reveals more about the limits on the prerogative. The majority notes the European Communities Act 1972 "has a constitutional character".[550] The majority states: "[i]t would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone."[551] The majority acknowledges the prerogative can be used to "affect domestic legal rights", but the exceptions outlined earlier in the judgment "do not apply".[552] In response to the claim that the prerogative had been neither expressly or impliedly abrogated by the 1972 Act, the majority implies a different approach is necessary. "[T]he proper analysis," says the majority, "is that [given the

[548] ibid [50].

[549] ibid [52]–[53].

[550] ibid [67].

[551] ibid [81].

[552] ibid [84].

special character of the 1972 Act], unless that Act positively created such a power [for the executive to withdraw] in relation to those Treaties, it does not exist."[553]

A further principle set down in *Miller (No 1)* is that where the executive seeks to enact far-reaching constitutional changes, there is a need for a statute positively to affirm the authority to enact such changes. It is not clear why the Court would refer to something like a 'statutory prerogative' here, instead of referring to the need for general legislative authority to enact constitutional changes.[554] The better view is that the Court is saying that if the prerogative is authority for action in the absence of statute, the prerogative can no longer operate in instances where the executive sets out to undertake fundamental constitutional change. This is an outgrowth of the first and second limits on the prerogative: it could relate to situations where rights are affected, and is in some ways a modification of the *De Keyser* principle, concerning the interaction between statute and prerogative. It can also be described as a separate limit on the prerogative.[555]

Lord Reed's dissent understands there to be not two or three limits on the prerogative, but one: "the Crown cannot alter the common law or statute by an exercise of the prerogative."[556] He considers the Act has not curtailed prerogative power by express words or necessary implication.[557] Lord Carnwath's dissent argues that executive triggering of Article

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[553] ibid [86].

[554] The Court says (ibid [86]): "rather than the Secretary of State being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the proper analysis is that unless [the] Act positively created such a power in relation to those Treaties, it does not exist." It would be odd if the Court were to be taken to be declaring that prerogatives can be created by statute: a position that does not appear to have a basis in past decisions (see, however, n 367). The phrase "such a power" should be regarded as a slip, in which the Court intended to refer to "a legislative power".

[555] Paul Craig, '*Miller*, Structural Constitutional Review and the Limits of Prerogative Power' (2017) PL 48, 68.

[556] *Miller* (n 486) [168].

[557] ibid [194].

50 is defensible because of the possibility of parliamentary accountability.[558] Lord Carnwath supports Lord Reed's view that the 1972 Act does not expressly or impliedly curtail the prerogative. Lord Hughes' judgment views the case as a clash between two rules: first, the executive cannot change an Act of Parliament or the common law; and second, the making and unmaking of treaties is a matter of foreign relations within the competence of government. He argues the first rule is not engaged.[559]

The literature on *Miller (No 1)* is extensive. Not every point raised by this literature is addressed here, due to constraints of brevity; the focus of this chapter is on the general law on the prerogative and third source.[560] But it is worth addressing the claims that *Miller (No 1)* does not introduce a novel limit on the exercise of the prerogative, and that such a limit is indefensible. These claims have received significant attention, and bear on the characterisation of the prerogative's limits.

Robert Craig argues that "*Miller* [*No 1*] is a paradigm example of the application of the frustration principle": the view that the prerogative cannot be exercised "in a way that frustrates the intention of Parliament in any Act."[561] Craig suggests the attempt by judges to write the decision accessibly obscured the clarity of the principle put forward, and led to a mistaken interpretation of *Miller (No 1)* as having laid out a novel limit on the prerogative.[562] The problem with this interpretation is it is difficult to reconcile with the text of the decision.

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[558] ibid [255].

[559] ibid [277]–[283].

[560] This chapter does not discuss the EU law dimensions of the *Miller* judgment, in part because the status and effect of the European Communities Act 1972 (while relevant to the application of the limits on the prerogative) are less likely to arise in future cases on the prerogative than other matters of general application.

[561] Robert Craig, 'A simple application of the frustration principle: prerogative, statute and *Miller*' (2017) PL 25 (Brexit Special Extra Issue), 36.

[562] ibid.

It does appear from the reasoning of the judges that their objection to the exercise of the prerogative was based on the attempt to use the prerogative to enact constitutional change. The Court holds it would be inconsistent with principle for "such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone."[563] The "fundamental legal change" is what "justifies the conclusion", says the Court.[564] The Court nods to the fact that "ministers cannot frustrate the purpose of a statute or a statutory provision", when elaborating why the prerogative cannot be used to change statute or common law.[565] But it is not this language of frustration, or the purpose of the statute (or intention of Parliament), that is focused on in the Court's application of its principles – and that choice of focus does not seem guided only by the effort to render the decision accessible to a wide audience. "We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone," writes the Court;[566] that this is the basis for the decision is confirmed by the Court's statement that "the main difficulty with the Secretary of State's argument is that it does not answer *the objection based on the constitutional implications* of withdrawal from the EU."[567] It is therefore defensible to describe the Court as introducing a further limit: that the prerogative cannot be used to enact far-reaching constitutional change. The metes and bounds of this limit will be worked through in future cases.[568]

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563 *Miller (No 1)* (n 486) [81].

564 ibid [83].

565 ibid [51].

566 ibid [82].

567 ibid [81] (emphasis added).

568 I also differ on this point from Jack Williams, who concludes somewhat summarily that the claim that *Miller (No 1)* introduces a novel limit can be "readily dismissed": Jack Williams 'Prerogative Powers after *Miller*: An Analysis in Four Es' in Mark Elliott, Jack Williams, and Alison L Young (eds) *The UK Constitution after Miller: Brexit and Beyond* (Hart 2018) 39, 53. Gavin Phillipson makes a more nuanced set of points: that the Court must have been referring to changes to legal rules of the constitution, rendering the case merely a subset of the general limit on the prerogative being exercised to change

Other scholars, especially Mark Elliott, have argued that the limit is indefensible: Elliott says the limit "lacks support in authority, imports … a novel and highly imprecise criterion … and rests upon normative constitutional foundations that are unarticulated and arguably absent."[569] It is not desirable to enter fully into this debate here, especially since the purpose of this chapter is to describe some key points of doctrine and pinpoint significant areas of indeterminacy (particularly those not highlighted by previous scholarship), rather than to reconstruct and legitimate the case law. Two points will suffice.

First, there is some force in Elliott's reasoning. The Court offers little guidance about what constitutes "far-reaching" or "major" or "fundamental" constitutional change; there are shades of difference between each of these terms, which are used interchangeably. However, Elliott is wrong to the extent that he implies that such ambiguity is anomalous in the law on the prerogative; as is clear by the end of this chapter, uncertainty exists across many parts of the law in this area. As well, as Phillipson observes, "some uncertain[t]y is nearly always generated by constitutional innovation."[570]

Secondly, while the Court in *Miller (No 1)* does not point to specific authority or normative foundations underpinning the novel limit on the prerogative, it is not impossible to recover relevant authority and plausible normative foundations for this limit. There is some basis for this principle in Lord Parmoor's statement in *De Keyser*, drawing on Bacon, that the

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the law; and that the case involved the European Communities Act being "rendered a dead letter", such that the 'constitutional change' argument was parasitic on the purpose of a statute being frustrated: Gavin Phillipson, 'EU Law as an Agent of National Constitutional Change: *Miller v Secretary of State for Exiting the European Union*' (2017) 36 Yearbook of European L 46, 78. The Court itself does not confine its statements to "legal" parts of the constitution, and Phillipson's explanation does not fully account for why the judges in *Miller (No 1)* place so much weight on the change to *constitutional* arrangements. For Phillipson, the reference to the constitution may simply drive home how bold the attempt is to change the law using the prerogative (ibid 76). However, the Court is seised by the "constitutional implications" of the executive's actions (see especially n 567); it is therefore tenable to construe the Court as setting out an independent third limit on the prerogative.

[569] Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76 CLJ 257, 258.

[570] Phillipson (n 568) 80.

prerogative may be "taken away or abridged … where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong."[571] Blackstone indicates the prerogative cannot be exercised in an unconstitutional manner.[572] Gavin Phillipson offers a more developed normative foundation, noting that the limit on prerogative respects the separation of powers and honours the need for a distinctive process to govern constitutional amendment; to deny this limit may be to take too casual (and too executive-centric) an approach to constitutional amendment, undermining the special status of the constitution.[573] Arguments discussed in Chapter Four also offer potential normative foundations: the fact that the prerogative is not subject to structured scrutiny or a circumscribing text may make it an inapt legal tool to rely on to undertake far-reaching constitutional change. Readers may find these arguments more or less convincing; the key point is courts (and scholars) are not incapable of supplying normative foundations or supporting authorities for the limit in *Miller (No 1)*, even if that limit is phrased in uncertain terms.

Pressing harder on Miller (No 1)*: are the first two limits set out in* Miller (No 1) *reconcilable with earlier doctrine?*

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[571] This category is not exactly analogous to far-reaching constitutional change, but Lord Parmoor clearly envisages that the prerogative should not be used in areas of fundamental concern, where longstanding public interest underpins a statute. It is not far from that proposition to the claim that the prerogative cannot be used to enact fundamental legal change, or far-reaching constitutional change. See *De Keyser* (n 408) 575; see also Paul Craig, '*Miller*, Structural Constitutional Review and the Limits of Prerogative Power'" (2017) PL (Brexit Special Extra Issue 2017) 48, 69–70.

[572] See n 364.

[573] Phillipson (n 568) 81–92. Alison Young notes that, while Elliott is right that no single legal authority captures this principle, relevant constitutional principles (such as parliamentary sovereignty and the separation of powers) have underpinned recent case law developments: Alison L Young, '*R (Miller) v Secretary of State for Exiting the European Union*: Thriller or Vanilla?' (2017) 42 EL Rev 280, 294–295.

The propositions set out in *Miller (No 1)* raise at least two further questions. First, how legally well-founded is the claim that the prerogative cannot be used to alter legal rights or duties unless that is inherent in a prerogative power (a qualification of the second limit)? Second, where statutes cover the field of a prerogative and 'curtail' it, does 'curtail' mean a prerogative is temporarily suspended or permanently abolished? Pressing on these questions reveals indeterminacy beneath the surface of the law of the prerogative.

In *The Case of Proclamations*, relied upon in *Miller*, it is said that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm", and that "the King hath no prerogative, but that which the law of the land allows him".[574] However, the judgment also observes, when considering the limits of the Crown's power to issue proclamations, that "we do find divers precedents of proclamations which are utterly against law and reason, and for that reason void".[575] This suggests a more radical limit on the prerogative: that the prerogative cannot be exercised in a way that is "against reason".

There is little evidence, in this judgment or later, that the prerogative cannot be used to affect rights (except where that might be inherent in the prerogative).[576] This rights-based limit seems more modern than has been acknowledged. In *Saltpetre*, the limit on the Crown's ability to dig for saltpetre was not articulated in terms of rights. It was said there that "the ministers of the King who dig for saltpetre are bound to leave the inheritance of the subject

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[574] See n 170, 1353–1354.

[575] ibid 1353.

[576] The claim that the prerogative cannot be used to diminish rights was a major feature of the claimants' submissions in the High Court in *Miller (No 1)*: *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768, [2017] All ER 158. The argument is modified in the Supreme Court, perhaps out of an acknowledgment that it is difficult to square with authorities (such as *Burmah Oil*, above n 181). See the transcription of argument: [74].

in so good plight as they found it".[577] The substance of the position might seem equivalent to the notion that the prerogative cannot be used to affect rights. However, the limit is stated in terms of public benefit, rather than private right: the Crown is told it cannot build bridges into houses not because that infringes on rights, but because "that doth not extend to public benefit."[578] A defence of property is given, which might sound like a defence of the right, but the justification is framed in terms of public good.[579] The judgment suggests rights can be violated where this is necessary: "for the commonwealth, a man shall suffer damage". Perhaps this case is best regarded as an example of the caveat articulated in *Miller*: a case where rights can be affected if that is inherent in the exercise of the prerogative. But this caveat is not laid out in *Saltpetre*.

There is little discussion of rights as a limit on the prerogative in *Ship Money*.[580] Sir Edward Crawley says it is the Crown's "prerogative and right of sovereignty … to defend the realm, and to maintain his subjects [sic] liberties", but does not explain why the restriction on subjects' liberties in the *Ship Money* case is justified. Sir John Finch, then Chief Justice, recognises the central tension: "If equally weighed, in the one balance we may put the regal power … in the other the privileges and liberties of the subject …"[581] But he finds for the King, without explaining why the liberties of the subject can be overridden. He raises the objection "that it is against the freedom of the subject" for the Crown to issue a charge, but concludes: "the king may impose just charges towards the necessary defence of the whole

[577] *The Case of the King's Prerogative in Saltpetre* (1606) 77 ER 1294, 1295.

[578] ibid.

[579] ibid.

[580] R *v Hampden* (1637) 3 State Tr 826.

[581] ibid 1189.

kingdom."[582] He adds, in a comment hard to reconcile with *Proclamations*: "all private property must give way to the public".[583]

In the dissents there is some semblance of the claim that the prerogative cannot be used to interfere with rights. It could be said these dissents represent a more accurate statement of the law (especially since Parliament responded by impeaching some of the judges in the majority and overturning the decision).[584] Sir George Crooke says the charge for ship money is against common law, "which gives a man [sic] a freedom and property in his goods and estate."[585]

Overall, the qualification of the second limit on the prerogative set out in *Miller* has a patchier pedigree than is suggested. It is not mentioned in *Saltpetre*, finds support in *Proclamations* (though *Proclamations* appears to set out the limit in broader terms, noting the prerogative cannot be used "against reason"), and is not easily squared with judgments in *Ship Money*. There are two important implications of the discussion. First, it should not be presumed that the rights-based limit on the prerogative has existed for centuries. Second, one finds little assistance in the case law to resolve ambiguities in this aspect of the limit set out in *Miller*. How does one decide whether "it is inherent in the prerogative power that its exercise will affect the legal rights or duties of others"? Is the prerogative, where such an effect on rights is "inherent", able to violate these rights, or simply to "affect" those rights? Can rights only be limited proportionately?

Another limit on the prerogative discussed in *Miller* is that the prerogative can be eclipsed by statute expressly or by necessary implication. This test is accepted by the majority

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[582] ibid 1229–1230.

[583] ibid 1231.

[584] It might also be said that *Ship Money* (n 580), affirming the Crown's prerogative to charge its subjects, was overtaken by the 1688/9 Bill of Rights.

[585] ibid 1129.

and dissenting judgments.[586] What is unclear is whether a prerogative eclipsed by statute is temporarily suspended – and capable of being revived when that statute is repealed – or permanently abolished. The majority in *Miller* switches between the language of "statutory curtailment" and "abrogation".[587] "Curtailment" has a stronger suggestion of temporary effect than "abrogation", which implies more permanent removal.[588] The majority holds that where "prerogative powers are curtailed by legislation, they may sometimes be reinstated by the repeal of that legislation, depending on the construction of the statutes in question."[589] This suggests in some circumstances the prerogative might be capable of being only temporarily restricted; but it does not offer guidance on what these circumstances are, whether prerogatives can be permanently eclipsed, or the correct legal default position.

The case law has considered, but not resolved, the point. In *Attorney-General v De Keyser's Hotel*, Lord Dunedin notes the prerogative is curtailed when a statute covers the same ground but does not say whether this is only for the length of time the statute is in force.[590] Lord Atkinson says – resisting the notion that a prerogative is "merged" in a statute – that "when such a statute … is passed, it abridges the Royal Prerogative *while it is in force*".[591] He also talks of the prerogative being "in abeyance".[592]

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[586] *Miller (No 1)* (n 486), [48] and [194].

[587] See eg ibid [48].

[588] The Oxford English Dictionary defines 'abrogate' as 'To repeal (a law, established usage, etc.); to abolish authoritatively or formally; to annul, to cancel …': <http://www.oed.com/view/Entry/598?rskey=AdnmUE&result=2#eid> accessed 18 August 2021.

[589] *Miller (No 1)* (n 486) [112].

[590] *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, 526.

[591] ibid 539 (emphasis added).

[592] ibid 540.

Lord Moulton appears to have a different view. He says the increasing number of statutes dealing with the executive in war-time have "indicated unmistakably that it is the intention of the nation that the powers of the Crown … should be exercised in the equitable manner set forth in the statute, so that the burden shall not fall on the individual, but shall be borne by the community."[593] The suggestion is a major statute, or a series of statutes, can reflect a constitutional move towards an area of activity being occupied by the legislature rather than the executive; the upshot is a statute could permanently abolish a prerogative. It could be said that judges are grounding this approach in something like the separation of powers, by discerning a trend in favour of legislative control of a subject-matter area. If this is the position, it is not clear what sufficient evidence would be of this constitutional move in the direction of legislative over executive control of a subject-matter area.

Lord Sumner says a statute can "abate the prerogative … if not absolutely, at least for so long as the statute operates", which is equivocal on the point or possibly weakly in favour of a statute having only temporary effect.[594] Lord Parmoor says the history of the prerogative involves a "reduction of the discretionary power of the executive … under a series of statutory enactments", which might imply that statutes over time permanently narrow the scope of the prerogative.[595] But Lord Parmoor then says the Defence Acts in the case have not "abated, abridged or curtailed" the prerogative, indicating he is noncommittal on the point. Overall, in *De Keyser*, one can find authority for both positions – that statutes temporarily curtail, or permanently abolish the prerogative – and equivocal statements.

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[593] ibid 554.

[594] ibid 561. Lord Sumner cites *New Windsor Corp v Taylor* [1899] AC 41 (HL) in a footnote, a case about a corporation's right under prescription to take customary tolls, when an Act is passed and then repealed. It decides that a statute permanently ends the corporation's right to take tolls. Lord Sumner may be suggesting that statutes permanently abolish the prerogative where they cover the same ground.

[595] ibid 568.

Later cases do not add much clarity. In *British Broadcasting Corporation v Johns*, Diplock LJ says: "the Crown's claim to a general prerogative right to the monopoly of any activity was denied and circumscribed by the Statute of Monopolies …"[596] The effect of this statement is unclear. As Gavin Phillipson points out, in *R v Secretary of State for the Home Department, ex p Fire Brigades Union* Lord Browne-Wilkinson refers to the prerogative being "extinguished" expressly or by necessary implication, which appears to suggest that Lord Browne-Wilkinson considers statutory overlap permanently abolishes the prerogative – but the point is not dwelt upon at length.[597]

Some expert commentary has engaged with this point, endeavouring to interpret the unsettled case law. Much of this commentary has revolved around the Fixed-term Parliaments Act 2011; the analysis below avoids entering into debate about the meaning of that Act, instead extracting statements from commentary that are relevant to the wider legal question. Gavin Phillipson considers that the Fixed-term Parliaments Act "straightforwardly abolished the former prerogative of dissolution", and he points to compelling textual evidence, including the statement in the Explanatory Notes that "[t]he Queen does not retain any residual power to dissolve Parliament."[598] Phillipson's position is that the prerogative is at least capable of being permanently abolished when statute covers the field.

Robert Craig helpfully highlights the starting point under s 16 of the Interpretation Act 1978: that an Act does not "unless the contrary intention appears … revive anything not in force or existing at the time at which the repeal takes effect."[599] Craig contends that

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[596] [1965] Ch 32 (CA), 79.

[597] [1995] UKHL 3, [1995] 2 AC 513 (HL), 552; cited in: Gavin Phillipson, 'A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament' (2016) 79 MLR 1019, 1073 (fn 44).

[598] ibid 1074.

[599] Robert Craig, 'Restoring Confidence: Replacing the Fixed-term Parliaments Act 2011' (2018) 81 MLR 480, 494.

(assuming the Act applies to the prerogative) if statutes covering the same ground permanently abolished the prerogative, this statutory provision would not be necessary.[600] He argues that the provision shows it is possible for prerogatives to be revived under some circumstances.[601] Craig finds the view that the prerogative could be permanently abolished "unpersuasive",[602] as it is inconsistent with the position that Parliament cannot create prerogative or common law,[603] and entails committing to a self-embracing view of parliamentary sovereignty frowned upon in case law.[604] Craig prefers an 'underground' view: prerogatives will always sit beneath statutes, capable of being revived.[605] Craig does not, however, deal with all judicial statements pointing to a contrary conclusion,[606] address the separation of powers-type justification for permanent abolition sketched above, or consider how his conclusion is reconcilable with statements in the case law to the effect that the scope of the prerogative has narrowed, seemingly irreversibly, over time.[607]

The House of Lords Constitution Committee, in its September 2020 report on the Fixed-term Parliaments Act, notes that Carl Gardner and Robert Craig suggest that the prerogative could be revived, while Gavin Phillipson and Philippe Lagassé are of the opposing view (albeit that Lagassé's argument appears confined to whether the dissolution prerogative

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600 ibid.

601 ibid.

602 ibid 495.

603 ibid 498.

604 ibid 499.

605 ibid 496.

606 He refers at 495 to a statement of Lord Atkinson in *De Keyser*, but does not explain Lord Moulton's different views, discussed above (n 594).

607 See eg Lord Parmoor in *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 (HL), 568; or Lord Bingham's claim in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2008] UKHL 61, [2009] 1 AC 453, [69].

had been permanently abolished).[608] It concludes that "the balance of legal opinion" is that the dissolution prerogative would not be revived if the Fixed-term Parliaments Act was repealed with no further provision made for the effect on the prerogative; it says "there is certainly … dispute" and recommends "creating a new statutory power" to avoid legal challenge.[609]

The House of Lords Public Administration and Constitutional Affairs Committee published its report on the Fixed-term Parliaments Act several days later, and expresses the legal position differently. It claims there was a "clear consensus" that bare repeal of the Act would not revive the prerogative.[610] It cites concerns raised by legal experts, including Gavin Phillipson and Alison Young, about the complicated legal consequences of repeal.[611] It records different ways the prerogative can be abolished or put into abeyance, before turning to the position under the Fixed-term Parliaments Act.[612] The Committee cites several individuals involved with drafting the Act as saying the Act intended to abolish the prerogative; but the Committee also quotes scholars, including Robert Craig, who claim this is not legally possible.[613]

In 2021 the Government introduced the Dissolution and Calling of Parliament Bill. The second of six clauses declared that "powers relating to the dissolution of Parliament and the calling of a new Parliament … exercisable by virtue of Her Majesty's prerogative … are

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608 House of Lords Select Committee on the Constitution, 'A Question of Confidence? The Fixed-term Parliaments Act 2011', 12th Report of Session 2019–21, HL Paper 121, 12–13 (printed 2 September 2020, published 4 September 2020).

609 ibid 13–14.

610 House of Commons Public Administration and Constitutional Affairs Committee, 'The Fixed-term Parliaments Act 2011', Sixth Report of Session 2019–21 (printed 8 September 2020), 15.

611 ibid.

612 ibid 15–16.

613 ibid 17.

exercisable again, as if the Fixed-term Parliaments Act 2011 had never been enacted." The third clause purported to render these "powers" non-justiciable.[614] The Joint Committee on the Fixed-term Parliaments Act reported in March 2021, calling the instruction to the courts to act as if the Fixed-term Parliaments Act had never been passed a "novel approach".[615] Different views are again expressed on the effect of the legislation;[616] the Committee concludes the Bill is "sufficiently clear to give effect to the Government's intention of returning to the constitutional position … before the passing of the Fixed-term Parliaments Act".[617] Legal uncertainty would only be relevant if the matter came before the courts;[618] the Committee raises doubt about whether the ouster clause would be effective.[619] At the time this dissertation was completed, the Bill had not yet passed. If the Bill is passed, the Act comes before the courts, and the courts uphold the revival of the dissolution prerogative, questions will arise about whether other prerogatives – considered superseded by statute – can be similarly revived.

The legal effect of a statute on an underlying prerogative – where the statute covers the same ground – is unsettled. The *legal effect* of a statute on an underlying prerogative is unclear, as is *how* those legal effects are secured via statute. On *legal effects* there are at least three possible positions where a statute covers the same subject-matter field: that the prerogative is always permanently abolished, never capable of revival;[620] that the prerogative

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[614] See <https://bills.parliament.uk/publications/41467/documents/206> accessed 18 August 2021.

[615] House of Commons/House of Lords, 'Joint Committee on the Fixed-Term Parliaments Act: Report', Session 2019–21 (printed 18 March 2021), 30.

[616] ibid 32.

[617] ibid 34.

[618] ibid.

[619] ibid 47.

[620] But this is difficult to reconcile with n 589.

is permanently abolished, depending on the statute in question, but capable of revival under some circumstances; and that the prerogative is always temporarily curtailed, capable of revival under some circumstances. On *how* such an effect is secured: what remains unclear is if permanent abolition depends on statutory construction, what level of clarity is needed to secure permanent abolition of the prerogative?[621] If the prerogative is sometimes or always temporarily curtailed (the third position), what is needed upon repeal of a statute to effect its revival? Could courts give policy reasons why revival of a prerogative is not possible? These key questions remain unanswered.

The further limit(s) on the prerogative articulated in Miller (No 2)

By mid-2019, after *Miller (No 1)* and legislation was passed triggering Article 50, the United Kingdom still had not left the European Union. Following various delays, the deadline was extended to 31 October. Boris Johnson became Prime Minister in July. He said repeatedly the United Kingdom would leave the European Union on 31 October. In late August Johnson announced he had advised the Queen to prorogue Parliament, which she did; the planned prorogation would result in Parliament returning on 14 October, shortly before the deadline for withdrawal from the European Union, and appeared to be a step taken to push Parliament into securing agreement on his Brexit deal. Litigation was brought challenging whether the advice given to the Queen was a lawful exercise of the prerogative.

[621] Philippe Lagassé holds the second position – that the prerogative can be permanently abolished or temporarily curtailed – but contends that "an express statement of abolition" is needed for permanent abolition: n 610, 16.

Lady Hale and Lord Reed jointly delivered the unanimous judgment of the Supreme Court.[622] The judgment says whether a prerogative power exists, and its extent, are pre-eminently justiciable. The judgment distinguishes between that inquiry, and the inquiry into the lawfulness of a "particular exercise of the power within its legal limits", which may be non-justiciable.[623] The common law is the reference point for the limits of the prerogative, and within the common law "the fundamental principles of our constitutional law" are relevant.[624] The Court observes that the UK's constitution has some enforceable principles that the courts need to make "effective".[625] The judgment says the rule in *De Keyser* was articulated to protect one such principle: parliamentary sovereignty. It states this "foundational" principle would "be undermined" if the prerogative could be used to prorogue Parliament indefinitely. The second principle discussed is parliamentary accountability. Executive accountability to Parliament allows for reporting and explanation, according to the Court, and means "citizens are protected from the arbitrary exercise of executive power."[626] Parliamentary accountability should not be limited by prorogation. The judgment cites *R (UNISON) v Lord Chancellor* for the proposition that the extent of frustration of a relevant principle "must have a reasonable justification",[627] unless a statute expresses otherwise. The Court uses this to frame the limit on the prerogative: "a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament

622 *R (Miller) v Prime Minister* [2019] UKHL 41, [2020] AC 373 [*Miller '(No 2)'*].

623 ibid [37].

624 ibid [38].

625 ibid [39].

626 ibid [46].

627 ibid [49], citing [2017] UKSC 51, [2017] 3 WLR 409.

to carry out its constitutional functions".[628] The judgment adds that courts will intervene "if the effect is sufficiently serious" to justify this exceptional act.[629]

The Supreme Court says courts must bear in mind that prorogation decisions and advice fall within the Prime Minister's responsibility and may include "matters of political judgment"; this requires "sensitivity … and … a corresponding degree of caution".[630] With these standards set out, the judgment notes there are no reasons for the case to be non-justiciable. The "mode of exercise … within … lawful limits" of prerogative power is not being challenged.[631] The prorogation in this case "had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account."[632] The Government "must be accorded a great deal of latitude" in considering whether there is reasonable justification.[633] But five weeks has never been needed to put together a legislative agenda. The memorandum from the Prime Minister's Director of Legislative Affairs gave no alternative explanation. Accordingly, it is "impossible … to conclude" on the basis of evidence submitted "that there was any reason – let alone a good reason" for a five week prorogation.[634] The decision was unlawful.

The judgment in *Miller (No 2)* is far from the most tendentious reasoning encountered in the law of the prerogative. The Supreme Court makes a significant intervention to constrain executive authority. But there remain major areas of indeterminacy.

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628 ibid [50].

629 ibid.

630 ibid [51].

631 ibid [52].

632 ibid [55].

633 ibid [58].

634 ibid [61].

The Supreme Court has been developing jurisprudence on principles forming part of the United Kingdom constitution in recent years. In *R (Evans) v Attorney-General*,[635] Lord Neuberger engaged in constitutional exegesis similar to that which is done in *Miller (No 2)*, setting out principles such as the fact that a decision of a court is binding between the parties and cannot be set aside by anyone, including the executive. *Evans* concerns disclosure of correspondence between the Prince of Wales and government departments. Just as the Court in *Miller (No 2)* describes parliamentary sovereignty as an overarching principle, Lord Neuberger refers to the rule of law as the umbrella concept underneath which other principles are nestled.[636] Lord Neuberger uses constitutional principles to reject an available interpretation of the statute before the Court.

Courts have long made pronouncements about constitutional commitments in the UK. In *Evans* and *Miller (No 2)*, these pronouncements have developed into constitutional principles, with the rule of law, the separation of powers, and parliamentary sovereignty elaborated in particular detail. Arguably the unanimous judgment in *Miller (No 2)* establishes something close to a freestanding cause of action for breach of constitutional principle, adopting the structure of human rights reasoning. The first question is whether a constitutional principle has been interfered with (or frustrated) by government; the second is whether the interference can be reasonably justified.[637] Such a cause of action could apply to constitutional principles such as parliamentary sovereignty and the rule of law.

Whether this new cause of action has been established is not spelled out. Some of the legal standards introduced are vague. The Court says nothing about what constitutes "reasonable justification" for interference with a constitutional principle, perhaps because

[635] [2015] UKSC 21, [2015] AC 1787.

[636] ibid [51]–[59].

[637] Compare Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale LJ 3094.

there is no need thanks to the absence of any justification. This malleable phrase gives leeway to government legal advisors, lawyers, and judges. The Court had limited time to prepare the judgment, delivered five days after the multi-day hearing. The Court may have been concerned not to set out extraneous detail when not disciplined by arguments in the case. Nevertheless some cautious elaboration of the content of "reasonable justification" would not have been impossible. Such elaboration would have added clarity to the Court's reasoning and reduced the risk of giving governments excessive flexibility.

Another ambiguity concerns what it means for actions to be "sufficiently serious" to warrant judicial intervention. The Court does not consider explicitly whether the prorogation satisfies this test.[638] Open-ended legal tests are common in judicial reasoning. But it is not a complete (or robust) answer to a claim of undesirable ambiguity to point to other examples of ambiguity in case law. All that proves is that ambiguity is widespread in the common law, not that such ambiguity is defensible. Terms such as "reasonable" and "serious" are particularly open-ended, and for the Supreme Court to introduce these touchstones for legality with little guidance gives rise to a risk of abuse of power.

The Court does not capitulate to arguments about deference that contend that the existence of politicians or a partisan dispute renders a case non-justiciable; nor does it illegitimately abandon, as some scholars have argued, a distinction between the existence and scope of a prerogative, and the manner of a prerogative's exercise. David Tomkins has castigated the Court for "engaging in review of the *manner* of the exercise of a prerogative by declaring that it was merely engaging in review for the … *existence* and *scope* of the asserted prerogative."[639] In a more nuanced contribution Aileen McHarg develops a similar argument,

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[638] Arguably the Court alludes to it when discussing "exceptional" circumstances: [57].

[639] David Tomkins, 'The *Anisminic* of Justiciability?', Judicial Power Project/Policy Exchange, 30 September 2019, online at http://judicialpowerproject.org.uk/dr-david-tomkins-the-anisminic-of-justiciability/, accessed 18 August 2021 (emphasis in orginal).

noting the Court's "reasoning appears to collapse the distinction between review of the *scope* of prerogative power and review of its exercise, since any constraint on the exercise of power can potentially be recast as a limit on its scope."[640] This argument simplifies the legal position. It is defensible for a court to inquire into whether the prerogative has been lawfully exercised in accordance with limits on the prerogative.[641] That inquiry involves asking whether the prerogative has been exercised in a *lawful manner*, as noted in *GCHQ*:[642] that is, whether the exercise of the prerogative exceeds the prerogative-specific limits on executive action, or is unlawful on the usual grounds of judicial review (though these may be adjusted depending on context). To say as much is not to "recast" limits on the exercise of the prerogative as limits on the prerogative's scope: the judicial determination of the lawful limits on the prerogative in a particular case is *constitutive* of the proper scope of the prerogative. Hence the Court in *Miller (No 2)* does not abandon some longstanding distinction. It undertakes an orthodox inquiry: shuttling between the particular application of the prerogative, and the general understanding of the prerogative's scope, to arrive at a conclusion about whether the actions of the executive fall within the prerogative, properly described and defined by its legal limits. The Court is right to say it is "not concerned with the mode of exercise of the prerogative

640 Aileen McHarg, 'The Supreme Court's Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?' (2020) 24 Edin L R 88, 93.

641 Lord Drummong Young's clear statement in the Inner House of the Court of Session rejects the view "that the courts have no jurisdiction to consider whether a power has been lawfully exercised": *Cherry v Advocate General* [2019] CSIH 49, 2019 SLT 1097, [102]. The findings of the Divisional Court and Outer House below in *Miller (No 2)* that the prorogation decision was non-justiciable were not based on the view that a judicial determination would involve improper inquiry into the manner of exercise of the prerogative. They were based on the view there were no legal standards against which the manner of the prerogative's exercise could be judged: see *Miller v Prime Minister (No 2)* [2019] EWHC 2381 (QB), [54]–[57]; *Cherry, Petitioner* [2019] CSOH 70, 2019 SLT 1071, [26].

642 See eg *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), 417 (Lord Roskill noting that citizens should not be deprived of the "right of the challenge to the manner of its exercise which he would possess were the source of the power statutory").

power within its lawful limits"; the Court's ruling concerns clarification of those lawful limits, and a judgement that the executive's action has exceeded those limits.[643]

Though the court's approach to non-justiciability is defensible, its approach to deference is less robust. The literature on deference in public law is voluminous;[644] that is even more reason why the Court's approach could have been more structured. The Court peppers the judgment with references to the need for caution. The judgment says advice to prorogue "falls within the area of responsibility of the Prime Minister" and may involve "matters of political judgment".[645] It is difficult to know how much weight to give matters of political judgment if an error of law has been made. It is unclear how "sensitivity" informs a judgment of whether a justification is reasonable.

There are several available interpretations of how the reasoning in *Miller (No 2)* is to be squared with the limits on prerogative power in *Miller (No 1)*.[646] The first is that *Miller (No 2)* supplies an overarching explanation – parliamentary sovereignty – for the limits in *Miller (No 1)*. In *Miller (No 2)* the Court claims the two limits described in *Miller (No 1)* are derived from parliamentary sovereignty.[647] The further limit in *Miller (No 1)*, that far-reaching constitutional change can be secured through statute and not prerogative, could also be explained in terms of this principle.

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[643] *Miller (No 2)* (n 487) [52]. As discussed further below, I depart from Jack Williams' suggested approach (n 718) to "extent" of prerogative. As noted below, I am of the view that it is entirely appropriate for "extent" to refer to the scope within which a prerogative (properly described) can be lawfully exercised, in light of the legal limits on prerogative action.

[644] See eg Cora Chan, 'A preliminary framework for measuring deference in human rights reasoning' (2016) 14 ICON 851.

[645] *Miller (No 2)* (n 487) [51].

[646] Theodore Konstadinides, Noreen O'Meary, and Riccardo Sallus, 'Supreme Court Judgment in *Miller/Cherry*: Reflections on its Context and Implications', UK Constitutional Law Blog, 2 October 2019, <https://ukconstitutionallaw.org/2019/10/02/theodore-konstadinides-noreen-omeara-and-riccardo-sallustio-the-uk-supreme-courts-judgment-in-miller-cherry-reflections-on-its-context-and-implications/> accessed 18 August 2021.

[647] See n 487, [41].

But what should be made of the discussion of constitutional principles and reasonable justifications? It appears the Court introduces another limit: the prerogative cannot be used to frustrate or prevent compliance with a constitutional principle without reasonable justification (with courts only intervening if the effects are sufficiently serious). These two words – "frustrate" and "prevent" – are used interchangeably in the judgment.[648] This could be a source of confusion: it seems easier to frustrate a principle than to prevent its operation. Nevertheless the limit on the prerogative is relatively straightforward; frustrating compliance with a constitutional principle triggers the need for reasonable justification.

A third interpretation is that the Supreme Court in *Miller (No 2)* is only laying down a limit on the prerogative to prorogue Parliament. The Court's discussion of constitutional principles is tethered to this prerogative. The Court does not attempt a more general statement of a limit on prerogatives, or link its reasoning to *Miller (No 1)*. Notions of 'reasonable justification' might be limited to this prerogative.

At the time of writing this third available interpretation seems abstruse. It would be odd if *Miller (No 2)*, with its wide-ranging review of the prerogative and the constitution, had no bearing on prerogative cases beyond prorogation. The most defensible view is that the first and second interpretations of *Miller (No 2)* apply. The Court has added a fourth limit on prerogative powers.

To say the Court has introduced a further limit, or that there is indeterminacy in reasoning, is not the same as saying the decision represents an illegitimate exercise of judicial power – an issue contested in academic commentary.[649] It is not useful for the purposes of

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[648] See ibid [33], [42], [50], [51].

[649] Much of this has been published by Policy Exchange's Judicial Power Project. At the time of *Miller (No 2)*, Policy Exchange had close links to Boris Johnson's Government; see Harry Lambert, 'Who's in charge inside No 10: the maverick advisers running Britain', *New Statesman,* 4 March 2020, <https://www.newstatesman.com/politics/uk/2020/03/whos-charge-inside-no-10-maverick-advisers-running-britain> accessed 18 August 2021.

this chapter to recount all of that commentary: not all of it relates to the prerogative. In general, the claims of judicial over-reach themselves over-reach, by making arguments that would invalidate a greater range of cases where the common law is developed by judges; if these arguments are to succeed they should at least address such wider implications.

Stephen Laws' claim that the decision involves unjustified "lawmaking with retrospective effect" is an argument against all development of the common law by judges.[650] Law-making via the common law involves judges adjusting the law in a way that results in the law taking a different form from earlier understandings (and in most such cases, if parties have been advised well they will be aware of legal uncertainty). Though initially Laws makes the point more baldly, he says courts should not change the law in this way "without good reason and sensitivity to the injustice stigmatising conduct as unlawful when that is not what it would have been reasonable to expect when it took place".[651] It is not plain that the Supreme Court acted without good reason or sensitivity, given the risk of the prerogative to prorogue being abused. It seems implausible to say it would not have been reasonable to expect the Prime Minister's actions to be found to be unlawful.[652]

Critics have argued the Supreme Court is wrong to turn conventions such as parliamentary accountability into hard-edged principles.[653] The Court in *Miller (No 2)* develops

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[650] Stephen Laws, 'The Supreme Court's unjustified lawmaking', Judicial Power Project (Policy Exchange), 4 October 2019, <https://judicialpowerproject.org.uk/stephen-laws-the-supreme-courts-unjustified-lawmaking/> accessed 18 August 2021.

[651] ibid.

[652] Legal commentators suggested prorogation would be unlawful as early as June 2019: see, for example, Sam Fowles, 'Can the PM prorogue Parliament to deliver a no-deal Brexit?' LSE Blog, 12 June 2019, <https://blogs.lse.ac.uk/brexit/2019/06/12/can-the-pm-prorogue-parliament-to-deliver-a-no-deal-brexit/> accessed 18 August 2021.

[653] Stephen Tierney, 'Turning political principles into legal rules: the unconvincing alchemy of the *Miller/Cherry* decision', Judicial Power Project (Policy Exchange), 30 September 2019, <http://judicialpowerproject.org.uk/stephen-tierney-turning-political-principles-into-legal-rules-the-unconvincing-alchemy-of-the-millercherry-decision/> accessed 18 August 2021; Richard Ekins, *Parliamentary Sovereignty and the Politics of Prorogation* (Judicial Power Project/Policy Exchange, London, 2019), <https://policyexchange.org.uk/wp-content/uploads/2019/09/Parliamentary-Sovereignty-and-the-Politics-of-Prorogation3.pdf> accessed 18 August 2021; John Finnis, *The Unconstitutionality of*

jurisprudence on common law constitutional principles. But the argument that a court should not turn generally accepted political expectations into legal rules applies with equal force to the development of key features of administrative law: the requirement for decisions to avoid *Wednesbury* unreasonableness, to respect natural justice, and so on. These were norms of conduct expected of the executive shaped into more sharply defined administrative law duties. For Tierney, Loughlin, Ekins, and Finnis's criticisms to stand up to scrutiny, they would have to explain why developments in administrative law are different or similarly illegitimate. They do not do this.

This is not to say there is nothing of merit in these critical accounts. Tierney is right that some of the constitutional principles are amorphous.[654] But, as Paul Craig notes, at least some critics – especially in claiming the prorogation advice ought to have been non-justiciable – seem overly sanguine about the risks of abuse of power by the executive under cover of prerogative.[655] The discussion in Chapter One shows there is little reason for complacency.

The upshot is it is defensible to say that four limits on prerogative exist: no prerogative can be used to change the law; a statute can curtail the prerogative, expressly or by necessary implication; a prerogative cannot be used to enact far-reaching constitutional change; and a prerogative cannot frustrate or prevent compliance with a constitutional principle without reasonable justification.

In an important article on the *Miller (No 1)* judgment, Jack Williams sets out a framework of "four Es", suggesting that key inquiries relating to the prerogative concern existence, extent, exclusion by statute, and exercise. He argues that the first of the four limits

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the Supreme Court Prorogation Judgment (Judicial Power Project/Policy Exchange, London, 2019), <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf> accessed 18 August 2021; Martin Loughlin, 'A Note on Craig on *Miller; Cherry*' (2020) PL 278.

654 Tierney (n 653).

655 Paul Craig, 'The Supreme Court, Prorogation, and Constitutional Principle' (2020) PL 248, 264.

described above is properly considered a question of "extent", whereas the second is a matter of exclusion by statute.[656] For Williams, three principles concern the "extent" of the prerogative: the prerogative cannot be used to change the law, the prerogative cannot affect or remove common law rights on the domestic plane, and under the Bill of Rights 1688 the prerogative cannot be used to suspend or dispense with the law.[657] Meanwhile, "exclusion" entails the principle that the prerogative can be expressly or impliedly excluded by statute, and the "frustration" principle (which says the prerogative cannot frustrate the purpose of a statute).[658] The difference between extent and exclusion is 'exclusion' concerns an "external constraint (originating from statute)", whereas 'extent' "alter[s] the very nature of the prerogative power".[659] Williams says principles governing the 'extent' of the prerogative are "inherent delimitations";[660] principles on 'exclusion' constitute "an *ex post facto* limitation".[661]

It is possible to quibble with whether there exists a separate 'frustration principle', a question I return to below. The Bill of Rights' prohibition on suspending or dispensing with laws is also better understood as removing a prerogative hitherto in existence, rather than as a limit on the prerogative. Leaving aside these points on the accuracy of doctrinal description, the central problem with Williams' account is the instability of his conceptual categories. It should be obvious that 'exclusion' does not exclusively concern "external constraint (originating from statute)" when one of Williams' example of principles of 'extent' is derived

656 Jack Williams 'Prerogative Powers after *Miller*: An Analysis in Four Es' in Mark Elliott, Jack Williams, and Alison L Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart 2018) 39–68.

657 ibid 43–47.

658 ibid 47–50.

659 ibid 49.

660 ibid 43.

661 ibid 54.

from the Bill of Rights 1688: which Williams admits is a statute (albeit a constitutional statute, in Williams' view).[662]

Moreover, little is gained by speaking of "delimitations" as distinct from "limitations", or limits that are more or less "inherent". The restriction on the use of the prerogative to change the law, and the capacity for statutes to curtail the prerogative expressly or by necessary implication (as well as the two further limits set out in *Miller (No 1)* and *Miller (No 2)*), are general limits on the prerogative. The word 'extent' (with its implication of variable reach) should be reserved to describe how exercises of the prerogative may involve a range of action within some defined scope. The key to comprehending 'extent', properly understood, is correctly describing the prerogatives in existence and their scope – as discussed earlier in this chapter. 'Extent' therefore adds more alliterative than analytical value to Williams' framework. Judicial inquiries into the prerogative involve determining whether a prerogative exists, properly describing that prerogative, and ascertaining whether the exercise of the prerogative has exceeded the limits on the prerogative; that summary of the key questions to be answered is preferable to Williams' claim that the 'four Es' represent separate and distinct required inquiries.[663]

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[662] ibid 46.

[663] The reference in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), 398 to how courts "will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent" (per Lord Fraser) is a reference to the need to describe and characterise prerogatives correctly, and then to determine whether their exercise has broached any legal limit. Lord Bingham cites this statement in *Bancoult* (n 491) but his conclusion, in the minority in *Bancoult*, is not based on a judgement of extent: it involves a finding at [71] that no prerogative existed at all to make the order in council in question, and in the alternative that key parts of the Order in Council were unlawful on ordinary judicial review grounds (see [72]–[74]). Lord Mance also uses the heading "scope of the prerogative power", before [143], but his analysis focuses on the proper characterisation of the prerogative and the applicability of any limits on the prerogative: he says at [143] that "the question [is] whether the scope of the prerogative legislative power is subject to any relevant limit". His conclusion at [160] is that the inhabitants of the British Indian Ocean Territories' right to enter and be present – their right of abode – is a limit on the prerogative in question in the case. He writes, "the royal prerogative to legislate in relation to BIOT did not extend to enacting legislation aimed at depriving BIOT of its inhabitants' right to enter and be present there ..."

Another question raised in the literature is whether 'the frustration principle' constitutes a limit on the exercise of the prerogative, a point developed by Robert Craig.[664] Craig argues that the "leading case establishing the frustration principle is *Fire Brigades Union*",[665] and that *Laker Airways v Department of Trade*[666] provides further support for it.

The decisions relied on by Craig are best understood as examples of the first and second limits: that the prerogative cannot be used to change the law, and that statutes can curtail the prerogative. *R v Secretary of State for the Home Department, ex p Fire Brigades Union*[667] concerns the Secretary of State's decision not to bring into force a statutory scheme for criminal injuries compensation and to set up an alternative scheme under the prerogative, against the backdrop of concerns about cost.[668] The three judges in the majority make clear the case is not governed by the decision in *De Keyser*.[669] As well, comments about how the prerogative should not be exercised in a way that frustrates the will of Parliament[670] appear to show something like 'the frustration principle' at work.

But these remarks are made in the course of the Law Lords elaborating on a broader principle: that the prerogative cannot be used to change the law. Soon after making a point about frustrating the will of Parliament, Lord Browne-Wilkinson says: "It is for Parliament, not the executive, to repeal legislation."[671] Lord Lloyd finds the executive is "repudiating the

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664 Robert Craig, 'A simple application of the frustration principle: prerogative, statute and *Miller*' (2017) PL 25 (Brexit Special Extra Issue), 33.

665 ibid.

666 [1977] QB 643 (CA).

667 *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] UKHL 3, [1995] 2 AC 513.

668 ibid 576.

669 ibid 554 (per Lord Browne-Wilkinson) and 573 (per Lord Lloyd).

670 Lord Browne-Wilkinson at 552 and Lord Nicholls at 576.

671 ibid 552.

power conferred on them by Parliament": taking action to annul the effect of the law.[672] Lord Nicholls says the Home Secretary has in effect "'written off' the statutory scheme."[673] The judgments do not mention a distinct 'frustration principle'.

Laker is an example of the *De Keyser* limit in operation. Laker Airways, a competitor to British Airways, had been issued a licence under the Civil Aviation Act for trans-Atlantic air travel, only for the Secretary of State to announce abruptly that the service could not be allowed to start. Lord Denning MR finds the Secretary of State acted unlawfully. His language is not always precise, but he indicates his objection to the Secretary of State's action lies in the way the prerogative is used to cut across a field covered by statute when he asks, "Can he displace the statute by invoking a prerogative?"[674] The link between *De Keyser* and the the case is clearer in the judgment of Roskill LJ, who says "[t]he relevant principles upon which the courts have to determine whether prerogative power has been fettered by statute were exhaustively considered by the House of Lords in *Attorney-General v De Keyser Royal Hotel Ltd*", cites five passages from *De Keyser*, and notes: "… the principles to be applied are plain and further citation of authority is superfluous."[675] He observes that the 1971 Act is an "elaborate code"[676] and concludes that prerogative and statutory authority cannot "march side by side".[677] Lord Justice Lawton makes reference to rights being taken away, but clarifies that the basis of his reasoning is the limit in *De Keyser* when he says the statutory provisions "regulate all aspects of the revocation of licences" and that "[b]y necessary implication" (the language of *De Keyser*)

[672] ibid 572.

[673] ibid 578.

[674] See n 408, 707.

[675] ibid 719–721.

[676] ibid 721.

[677] ibid 722.

the Act "should be construed to prevent the Secretary of State from rendering licences useless".[678]

Robert Craig argues that "the treaty prerogative itself was not put into abeyance" in *Laker* and that it is wrong to suggest that *De Keyser* was the basis for the decision.[679] Craig is correct that the judges in *Laker* do not displace the entirety of the treaty prerogative. But the *De Keyser* limit does not necessarily operate in an all-or-nothing way. A statute can 'cover the field' for particular purposes: the treaty prerogative can be partially superseded by statute. It is true, in fairness to Craig, that the line between the first and second limits on the prerogative described above can be fuzzy. The blog written by Nick Barber, Tom Hickman, and Jeff Hickman in advance of the initial *Miller* case – which Craig cites as supportive of the 'frustration principle' being a separate limit – does not aid in supplying clear analysis. It describes "[o]ne of the earliest limits on the prerogative" as the view that the prerogative "could not be used to undermine statutes; where the two are in tension, statute beats prerogative".[680] But this does not disaggregate the first and second limits; both are examples of the prerogative and statute "in tension".

The cases invoked by Craig do not, then, support his conclusion. Craig's notion of the 'frustration principle' is most appropriately understood as an example of reasoning used on the way to the conclusion that the prerogative cannot be used to change the law. Actions taken to frustrate the will of Parliament represent efforts to repudiate proper operation of the law. Craig acknowledges there is no great distance between his view of the 'frustration

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[678] ibid 729. Margit Cohn also argues that the *Laker* case is an example of the *De Keyser* limit in operation: n 50, 123.

[679] Craig (n 664) 36.

[680] Nick Barber, Tom Hickman, and Jeff King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', UK Constitutional Law Association, 27 June 2016, <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/> accessed 18 August 2021.

principle' and the first limit described when he notes (summarising *Miller (No 2)*) that "the frustration of statutory intention in effect 'changed' the law".[681] Craig's generative argument sharpens our understanding of the first and second limits described above, even if it ultimately does not displace the view that four limits exist on the prerogative as a matter of British law.

Other aspects of the law of the prerogative

Two further brief points should be raised, relating to reviewability and abuse of prerogative power.

The *GCHQ* case arose out of a Thatcher government direction that members of the Government Communications Headquarters could no longer be a member of a trade union.[682] One question raised was whether the decision by the Minister for the Civil Service to block trade union membership was immune from judicial review, in light of government claims that national security motivated the ministerial decision. A majority of three Law Lords states that acts taken by the executive under the prerogative are in principle subject to judicial review on the usual grounds.[683] That position is restated by Lord Browne-Wilkinson in *Fire Brigades Union*,[684] and confirmed by all judges in *Bancoult*.[685] It has been suggested that there may be exceptions to this starting point depending on the subject-matter of the prerogative, where a

[681] Craig (n 664) 39.

[682] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

[683] Lord Scarman at 407; Lord Diplock at 410; Lord Roskill at 417.

[684] *Fire Brigades Union* (n 620) 553.

[685] *Bancoult* (n 491) [34], [71], [105], [122], [141].

court finds particular executive activity to be non-justiciable.[686] That a particular area of activity pertains to national security seems a possible basis for a finding of non-justiciability, as *GCHQ* demonstrates.[687] But courts have not yet clarified which categories of prerogative activity are likely to be non-justiciable, notwithstanding occasional comments by judges.[688] Conclusions on justiciability of the prerogative are likely to be determined by the usual rules governing justiciability, rather than prerogative-specific rules; unfortunately rules on justiciability themselves lack clarity, making it difficult to predict how the law on the justiciability of the prerogative is likely to develop.[689]

Blackstone makes reference to the prerogative being "abused to the public detriment", making the prerogative "unconstitutional"[690] – and this notion of abuse of prerogative ghosts in and out of the case law. In *Fire Brigades Union*, Lord Browne-Wilkinson considers "whether the Secretary of State's decisions were unlawful as being an abuse of power."[691] Lord Lloyd and Lord Nicholls also use the language of 'abuse of power'.[692] Several judges refer to 'abuse

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[686] *Council of Civil Service Unions* (n 642) 418 (Lord Roskill); *Fire Brigades Union* (n 667) 553 (Lord Browne-Wilkinson); *Bancoult* (n 491) [105] (Lord Rodger).

[687] See *Council of Civil Services Union* (n 642) 412 (Lord Diplock); 407 (Lord Scarman).

[688] See eg ibid 418 (Lord Roskill). The Divisional Court notes in *Miller (No 2)* that the courts have accepted the justiciability of decisions on the grant of pardons, the refusal of passports, and diplomatic foreign relations: *Miller v Prime Minister* [2019] EWHC 2381 (QB), [36]. It was suggested that more latitude might be granted to the executive in relation to the usual rules on fettering of discretion where a prerogative is exercised in *R (on the application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697, [62]; but this is perhaps better considered a case about a flexible approach to deference, rather than non-justiciability.

[689] See eg Chris Finn, 'The Concept of "Justiciability" in Administrative Law' in Matthew Groves and HP Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP 2007) 143–157. Lee traverses Australian and British administrative law.

[690] Cited in *Laker Airways* (n 408) 705.

[691] *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] UKHL 3, [1995] 2 AC 513 (HL), 554.

[692] ibid, 572 and 576, respectively.

of power' in the Supreme Court hearing – but not judgment – in *Miller (No 1)*.[693] Judges regularly venture speculative thoughts in hearings and are not committing themselves to positions on the law on the basis of such comments. But these references may express a principle underpinning the limits on prerogative power. Or 'abuse of power' may be a reference to the conventional concept of the executive exceeding its powers within administrative law. The position remains unsettled.

It is not just that the law on the prerogative is unclear. The law is beset by ambiguity and lacunae; much of it cannot be stated with precision. This is unsatisfactory, given the importance of the prerogative in the British constitution and the extent of executive action taken under it.

The law on the third source

Is the third source a part of British law?

The third source has been mentioned once by the United Kingdom Supreme Court, in *R (on the Application of New London College Ltd) v Secretary of State for the Home Department*.[694] The majority

[693] Lord Carnwath says whether there is an "abuse of power" is a "distinction [that] might be worth investigating": *Miller (No 1)* (n 486) transcript, 5 December 2016, <https://www.supremecourt.uk/docs/draft-transcript-thursday-161208.pdf> accessed 18 August 2021, 28. Lord Reed mentions one "way of looking at it" is whether a power is "abusively exercised": *Miller (No 1)* (n 486) transcript, 6 December 2016, <https://www.supremecourt.uk/docs/draft-transcript-tuesday-161206.pdf> accessed 18 August 2021, 114. See also Lord Carnwath's allusion to "an important difference between whether you have the power and whether you are abusing the power": *Miller (No 1)* (n 486) transcript, Thursday 8 December 2016, <https://www.supremecourt.uk/docs/draft-transcript-thursday-161208.pdf> accessed 18 August 2021, 19–20.

[694] [2013] UKSC 51, [2013] 1 WLR 2358.

judgment, given by Lord Sumption, examines a challenge to the administration of the Immigration Rules. One key argument that Lord Sumption considers is that the Secretary of State had no statutory authority to vet sponsors as part of a system of immigration control. The case was decided against the backdrop of growing political hostility towards migrants.[695]

When considering this question, Lord Sumption says: "[i]t has long been recognised that the Crown possesses some general administrative powers to carry on the ordinary business of government which are not exercises of the royal prerogative and do not require statutory authority", quoting one of Bruce Harris's articles.[696] He accepts the "extent of these powers and their exact juridical basis are controversial", indicating "the analogy with a natural person" might be inapt at least "in the case of public or governmental action" as opposed to "purely managerial acts". But he says the "question does not need to be resolved on these appeals" because statutory authority for the Secretary of State's actions includes "ancillary and incidental administrative powers not expressly spelt out in the Act."[697]

Lord Carnwath's separate judgment finds the Secretary of State had incidental powers rendering the actions lawful.[698] He observes that "[n]o authority was cited", and "none exists", for the proposition that "there is some alternative, unidentified source of such powers, derived neither from the prerogative nor from any specific provision in the Act." He adds the

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[695] James Kirkup and Robert Winnett, 'Theresa May interview: "We're going to give illegal migrants a really hostile reception"', *The Telegraph*, 25 May 2012, <https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html> accessed 18 August 2021; Nadine El-Enany, *(B)ordering Britain* (Manchester UP, 2020) 7.

[696] See n 694 [28].

[697] ibid.

[698] ibid [33].

appellant "did not seek to rely on a possible 'third source' of powers, by reference to the controversial line of authority mentioned by Lord Sumption" and "was wise not to do so".[699]

It can be said neither that this judgment says nothing of relevance on the third source, nor that it offers a clear statement. Lord Sumption leads his assessment of arguments of principle with mention of the third source, even if his statements are obiter dicta.[700] His claim that "some general administrative powers" have "long" been recognised suggests a solid basis in authority. Lord Sumption's view (joined by Lord Hope, Lord Clarke, and Lord Reed) seems to be that the third source provides lawful authorisation for some executive activities, though the view cannot be taken to be law because Lord Sumption decides the case on other grounds. Lord Carnwath is unmistakably skeptical. He makes clear he would not have accepted the third source as a basis for executive action had the point been argued. The Supreme Court has not conclusively affirmed or denied the existence of the third source.

Which of these views, Lord Sumption's or Lord Carnwath's, is correct? To answer this it is necessary to consider nine recent cases, understood in context.

Malone *in historical context*

Malone is about surveillance. The legal history of surveillance in the United Kingdom is relevant to understanding *Malone*, the prerogative, and the third source. A House of Commons parliamentary committee was set up in 1844 to inquire into "the state of the law in respect of the detaining and opening of letters at the general post office".[701] Letter-opening was the

[699] ibid [34].

[700] (To the extent there is a stable distinction between ratio decidendi and obiter dicta.)

[701] House of Commons, 'Report from the Secret Committee on the Post-Office; Together with The Appendix', 5 August 1844.

primary form of surveillance in this period. The committee notes the Crown began to carry letters at least by the early fifteenth century; no legal authority for this is pinpointed beyond the claim that this was "necessary … to the exercise of the functions of Sovereignty."[702] An 1844 House of Lords Committee reaches similar conclusions.[703] Both committees stop short of acknowledging that government letter-opening, or surveillance, has been done under the prerogative; its authority rests on some open-ended non-statutory discretion.

Another major report in 1957, the Birkett Report, discusses the legal authority for the executive to carry out surveillance.[704] By 1957 the focus had gone beyond letter-opening to the interception of communications, but the aim was similar to the 1844 reports: to consider "under what authority, to what extent and for what purposes this power has been exercised."[705] The Birkett-led committee admits "[t]he origin of the authority of the Executive to intercept communications is obscure".[706] The report describes three possible bases of authority. The first is the prerogative. However, "no constitutional writer when dealing with the Royal Prerogative … mentions this particular power as being a prerogative power", the committee writes.[707] The second, "an alternative view", is that the origin of the power lies "in a common law right which was not a part of the Prerogative, but which derived from an inherent power in the Crown to protect the realm against the misuse of postal facilities by ill-disposed persons." This "continues to exist" and is recognised by statutes.[708] This may be the

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[702] ibid 3.

[703] 'Report of the Committee of Privy Councillors Appointed to Inquire into the Interception of Communications' (1957), <https://www.fipr.org/rip/Birkett.htm> accessed 18 August 2021, [15].

[704] Bernard Keenan, 'Interception: Law, Media, and Techniques', London School of Economics PhD thesis (unpublished), 2017, <http://etheses.lse.ac.uk/3640/> accessed 18 August 2021, 15–17.

[705] Birkett report (n 703). The chair of the committee was William Birkett.

[706] ibid [9].

[707] ibid [23].

[708] ibid [27].

first official reference to a non-prerogative common law source of executive authority. It is similar to what would come to be called 'the third source'. The committee says there is no judicial support for this "alternative view"; Chitty rejects the possibility of any "latent prerogatives … inherent in the very nature of sovereignty."[709] The committee concludes: "it is difficult to distinguish from the first view save that the use of the word 'Prerogative' is avoided."[710] The committee mentions a third basis: that the power has been in existence "from the earliest times", and that its source need not be specified.[711]

The committee observes there has been an assumption historically that the power exercised "was in the nature of a prerogative power".[712] But neither the prerogative or the "alternative view" is a robust basis for "so important a power"; the committee "favour[s] the view that [the power] rests upon the power plainly recognised by the Post Office statutes as existing before the enactment of the statutes, by whatever name the power is described."[713] The conclusion is difficult to follow. The committee claims the power has been recognised by statutes but does not depend on those statutes; it refuses to give a name to this source. It is hard to resist the conclusion that – in the absence of statute or prerogative authority – the committee relies on further common law authority for executive action to intercept telephone messages. This reasoning prepared the ground for *Malone* twenty years later.

Antique dealer James Malone, during a trial for handling stolen property, discovered a note in evidence indicating his phone had been tapped; Crown counsel admitted it had been done on authority of a warrant from the Secretary of State. When Malone was acquitted, he

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709 Citing Chitty (n 533); see: ibid [28].

710 ibid [29].

711 ibid [30].

712 ibid [38].

713 ibid [50].

sued the Metropolitan Police Commissioner.[714] Sir Robert Megarry, Vice-Chancellor of the Chancery Division, framed the key question as whether telephone tapping by the police in aid of their functions was illegal.[715]

Sir Robert Megarry V-C observes no argument was made "that there was any prerogative power to tap telephones, and so I need say nothing of that."[716] He notes it had been submitted that "there was nothing to make governmental telephone tapping illegal".[717] Sir Robert Megarry V-C says: "England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden."[718] He indicates he is familiar with the Birkett report, saying he "should also mention another report": "[m]uch of this was read to me, and … it is plainly of much value". Sir Robert Megarry V-C states that "material on … authorisation … is particularly useful".[719]

Sir Robert Megarry V-C restates that phone tapping "does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful."[720] He admits there is no statute authorising the tapping of phones. But to say "the tapping of telephones is therefore illegal would plainly be superficial in the extreme."[721] Sir Robert Megarry V-C says there is a need "to approach these matters with

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[714] *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 349.

[715] ibid 355.

[716] ibid.

[717] ibid.

[718] ibid.

[719] ibid 359–360.

[720] ibid 367.

[721] ibid 369.

some measure of balance and common sense".[722] In a statement of what could be taken to be nakedly utilitarian method, he says: "[t]he rights and liberties of a telephone subscriber are indeed important; but so also are the desires of the great bulk of the population not to be the victims of assault, theft or other crimes."[723] Finally, he reiterates: "if … tapping can be carried out without committing any breach of the law, it requires no authorisation by statute or common law; it can lawfully be done simply because there is nothing to make it unlawful."[724]

Megarry was described later as an advocate of "judicial restraint".[725] But his judicial restraint is selectively deployed here. His extension of executive authority is obscured by repeated claims he is applying the law rather than moral standards and resisting judicial legislation.[726] The claim that neither statute nor common law authorisation is needed for the executive action to be unlawful is presented as uncontroversial, flowing from a maxim about the kind of country England is. But the state and individual are conflated, and the explanation of the correct approach to determining the legality of executive conduct would have seismic implications for the foundations of constitutional law. No longer should positive authorisation be sought for executive conduct: only illegality is to be avoided. This is argued for with reference to "balance" and "common sense". There is an argument that the case is properly interpreted as one in which statutory authority for phone-tapping was found. But Sir Robert Megarry V-C's reasoning suggests the principal reason for finding executive action to be lawful was the absence of illegality; statutes are regarded as providing parliamentary recognition of pre-existing authority. The report of the Birkett committee plainly has some

[722] ibid 377.

[723] ibid.

[724] ibid 381.

[725] Stephen Cretney, 'Obituary: Robert Edgar Megarry, 1910-2006' (2008) 153 PBA 293, 313.

[726] Sir Robert Megarry V-C (n 714) 376; see also 372.

bearing on the outcome. The report makes it difficult for the executive to argue that prerogative or statute provided firm authority for phone-tapping.[727] But it suggests an "alternative view" that Sir Robert Megarry V-C is happy to endorse, even if the authors of the Birkett report resiled from such a conclusion.

Three years later the European Court of Human Rights found James Malone's rights under the Convention had been violated.[728] Surveillance was put on a statutory footing in 1985.[729] But the "alternative view" expressed by the Birkett committee was not expunged from British law. What would later be called 'the third source' now had a foothold in the law.[730]

The post-Malone *case law*

Malone is referred to in later judgments. In *R v Secretary of State for the Home Department, ex parte Ruddock*,[731] in which Sir Stephen Sedley appeared alongside Sir John Laws, the High Court considered the Secretary of State's issue of a warrant for the interception of communications by a member of the Campaign for Nuclear Disarmament and Communist Party. The Court does not consider at length the foundation of the Secretary of State's authority. But it views the issuing of a warrant as "the exercise of a prerogative power".[732] This is in conflict with

[727] Keenan (n 704) 244: the "ambiguity of Birkett's report may have influenced the government's legal strategy in 1979."

[728] *Malone v United Kingdom* (1983) 5 EHRR 385 (ECtHR).

[729] Ian Leigh, 'A Tappers' Charter?' (1986) PL 8–18.

[730] See further DGT Williams, 'Case and Comment: Telephone Tapping' (1979) 38 CLJ 225–228.

[731] [1987] 1 WLR 1482 (CA).

[732] ibid 1497.

Malone, which resists founding the interception of warrants on the prerogative, though any contradiction is not confronted.

Malone arises again in *Marcel v Commissioner of Police of the Metropolis*.[733] The police seized documents without a warrant as part of a criminal investigation into a property development in east London. One question arising was whether the police could use these documents to assist a party in civil proceedings, going beyond what police were authorised to do under statute. Dillon LJ notes a submission based on *Malone*, but concludes that police use of documents must be confined to statutory purposes, impliedly rejecting the approach in *Malone*.[734] In response to a claim that *Malone* authorises police sharing of documents, Sir Christopher Slade says there is "another principle of English law more relevant to the particular facts of the present case", namely that search and seizure can constitute an infringement of fundamental rights.[735] Accordingly, use of documents for purposes not set out in legislation "would be an improper exercise of power".[736] (The third judge, Nolan LJ, agrees without mentioning *Malone*.) This is, at most, a challenge to the authority of *Malone*, and at least a qualification of it in cases involving interference with fundamental rights.

In *R v Somerset County Council, ex parte Fewings*, Laws J strongly queries the doctrinal existence of the third source, in a judgment on a local council's hunting ban:[737]

> For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification or which he must burrow

[733] [1992] Ch 225 (CA).

[734] ibid 258.

[735] ibid 262.

[736] ibid.

[737] *R v Somerset City Council, ex parte Fewings and others* [1995] 1 All ER 513 (HC), 524.

> in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law.

Laws J gives a principled objection to the notion that the executive can do anything that is not prohibited by law. The basis for this claim is that rules for private persons are not the same as rules for public bodies. Laws J does not directly engage with the idea of 'the third source'. Some might say Laws J's statement relates specifically to the local authorities but Laws J emphasises that his position is "true of every public body", and "necessary in order to protect the people from arbitrary interference by those set in power over them."[738]

In the *C* case the doctrinal existence of the third source arises more squarely. The case concerns the lawfulness of the Consultancy Service Index, a list of names of people deemed unsuitable to work with children. No statute authorised the maintenance of the list. The Labour Government was providing a statutory foundation for the list but it had been in operation since the 1930s without any statutory footing. In the Court of Appeal, Hale LJ (giving a judgment with which two other judges agreed) concludes the Index is lawful. She cites *Halsbury's Laws of England* for the proposition that "the Crown, as a corporation possessing legal personality, has the capacities of a natural person and thus the same liberties as the individual."[739] But Hale LJ contends that the Department's "status as a public authority brings consequences which would not apply to a private citizen. A private citizen would find it difficult to maintain such a list. … The impact of a list such as this maintained by a government department or public authority is that much more powerful because they are

[738] ibid 524; noted in: Adam Tomkins, 'The Authority of *Entick v Carrington*' in Adam Tomkins and Paul Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart 2015) 161, 166.

[739] *R v Secretary of State for Health, ex parte C* [2000] 1 FLR 627 (CA), 632.

generally so much more powerful."[740] The effect of this qualification of her earlier statement is unclear. At the very least, the qualification shows the Crown might have the same capacities and liberties as an individual – but the consequences of its action are different (with no legal consequences flowing from this). Hale LJ might have been indicating that the analogy is not entirely apt. But given that Hale LJ still finds that the executive action is lawful, and that the decision is one of the Court of Appeal, *C* provides qualified support for the position that the third source is part of the law of England and Wales.

There was a follow-up to *C* in *R v Worcester County Council, ex parte SW* ('*SW*').[741] A challenge was again made to the Consultancy Service Index, using the principle of legality[742] and claiming it should result in the "limitation upon the exercise of a non-statutory power" to avoid interference with fundamental rights.[743] Mr Sales for the Crown[744] submitted the issue had been decided by *C*. The High Court, bound by the Court of Appeal, agrees.[745] Justice Newman reinforces the approach in *C*, saying authority for maintaining the Index "derives from the capacities enjoyed by the Secretary of State … which possessing legal personality, has the capacities of a natural person."[746]

The House of Lords reviews the same question in *Hooper*, but provides little additional certainty. The Law Lords were asked: could benefits be paid to widowers, given that the Social

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[740] ibid 633.

[741] 2000 WL 108417 (HC).

[742] Citing *R v Home Secretary, ex parte Simms* [1999] UKHL 33, (2000) 2 AC 115.

[743] See n 741, [3].

[744] Mr Sales was on the Supreme Court in *Miller (No 2)*, n 251; Sales writes favourably of the third source in: Philip Sales, 'Crown Powers, the Royal Prerogative and Fundamental Rights' in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015) 361–394.

[745] See n 741, [14].

[746] ibid [22].

Security Contributions and Benefits Act 1992 only provided for paying benefits to widows? Mr Sales submitted that the Crown had power to make additional payments to widowers. The third source was not relied upon to provide the answer because there was a statutory defence for the action. But in passing the Law Lords touch on whether common law powers could ground the payment. Lord Nicholls says it is "a difficult question with far-reaching constitutional implications", on which he prefers to express "no view without fuller argument."[747] Lord Scott is similarly cautious.[748] Lord Hoffmann sees "a good deal of force in these submissions", but does not "express a concluded opinion",[749] and Lord Hope admits muted support.[750] Lord Brown is firmly opposed, claiming it would be an "abuse of power" for the Secretary of State to make extra-statutory payments.[751] At best, two Law Lords offer some support for the existence of the third source, with one Law Lord opposed, and two Law Lords offering essentially no view. But the point is not fully considered and no majority of the Law Lords speaks in favour of the third source.

The final case discussing the third source in detail is *Shrewsbury*.[752] The Court of Appeal considers reorganisation of local government, initiated in advance of statutory authorisation. The question was whether the executive could take such action before legislation was in force, raising the existence of the third source. Two judges, Carnwath LJ (later to express doubt about the third source) and Waller LJ, say they are bound by the decision in *C*. But Carnwath LJ claims the existence of the third source is "a matter of continuing academic controversy";

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747 *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 (HL), 1686.

748 ibid 1708.

749 ibid 1696.

750 ibid 1704.

751 ibid 1716.

752 *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148, [2008] 3 All ER 548 (CA).

he has "some sympathy" for the view that there was merit in "rewind[ing] the clock to a time" when there were just two sources of lawful executive action, statute and prerogative.[753] Carnwath LJ cites several cases, including *Northumbria* and *De Keyser*, in which it is not suggested there is any source of lawful authority beyond statute or prerogative. Both Carnwath LJ and Waller LJ suggest the third source can only be used for actions that provide public benefit. Richards LJ is more forthright in supporting the third source's existence, saying it may provide useful authority for the complex process of government.[754] *Shrewsbury*, alongside *C*, might be the strongest case for those claiming British law has affirmed the third source; that Carnwath LJ views a rejection of the third source as rewinding the clock implies the common law accepts the third source. However, the weight of the case is lessened by the fact that Carnwath LJ and Waller LJ consider themselves bound by *C* (implying they might arrive at a different result if they were not so bound), and by Carnwath LJ's reservations.

The case law elides three interpretations of the third source's scope. First, the third source could derive its authority from past common law decisions affirming the ability of the executive to act. The third source is contained – and constrained – by common law authority. On this view, the third source has a similar structure to the prerogative: it consists of defined subject-matter categories.[755] This would be consistent with *Entick v Carrington*.[756] Second, the third source might be available not only where there is precedent for its use, but where there are good normative reasons for that exercise. These reasons might include achievement of public benefit or governmental purposes. There is a reference in *Town Investments* to

[753] ibid 561–562.

[754] ibid 570.

[755] This view makes the third source look more like the prerogative and, by extension, like an effort to introduce new prerogatives.

[756] See above ns 250 and 251; Lord Camden claims, "if such a justification can be maintained by the text of the statute law, or by the principles of common law", executive action is lawful.

"government purposes";[757] Sir Robert Megarry's balancing of interests in *Malone* might indicate that public benefit should be established for the third source to be exercised lawfully;[758] and 'public benefit' or 'governmental purposes' are referred to, tentatively, by two judges in *Shrewsbury*.[759] The case law does not consistently refer to the need for good reasons for exercise of the third source; such reasons do not have clear limits; and any notion of 'public benefit' might be a further limit on the third source's exercise rather than constitutive of the third source. Third, it might be that third source activities are lawful as long as they are not prohibited by statute or common law. On this view, the third source is more open-ended. It can reach into any gaps in statute or common law. This is the conception of the third source more commonly assumed by proponents of it, including Bruce Harris.

Judges do not clarify what conception of the third source they have in mind in their analysis. Comparisons of the Crown to a corporation, or a natural person, do not assist in settling on which conception is assumed. This is another ambiguity, arising out of case law, to add to historical and conceptual ambiguities discussed in Chapters One and Two.

Is Lord Sumption right in *New London College* that it has "long been recognised that the Crown possesses some general administrative powers", beyond statute and prerogative? It cannot be said that the third source has "long" been recognised. Chapter One demonstrates the third source has some grounding in past case law that has not been considered relevant to discussions of the 'third source', but that is different from open recognition of the third source. There are, at most, two Court of Appeal cases before *New London College* where the third source has been recognised: *C* and *Shrewsbury*. That is not, on any measure (even if *Malone* were included), extensive recognition. However, to contend – as Lord Carnwath does in *New*

[757] See n 321.

[758] See n 723.

[759] See n 754.

London College – that no authority exists to support the third source also appears too strong. There is no Supreme Court authority conclusively establishing the third source's existence. But other authorities could be used to argue for it. Neither Lord Sumption nor Lord Carnwath is correct in their account. The notion that the government can do anything that is not prohibited by law is beginning to emerge with more clarity in the law of England and Wales. The point awaits fuller consideration by the Supreme Court.

As a coda, a 2017 High Court decision reinforces this sense of the growing emergence of 'the third source'. *Dean v Secretary of State for Business, Energy and Industrial Strategy* involved a challenge taken by an anti-fracking campaigner to the extension of a licence for exploration and development granted to three companies,[760] against the backdrop of concern about climate change and the safety of fracking.[761]

A central question was whether the authority to grant licences for exploring shale gas for fracking had its source in the Petroleum Act 1998 or a contractual power, raising the existence of the third source. Justice Holgate concludes that varying a licence is "not governed entirely by the statutory code".[762] Key to the reasoning is the fact "there is nothing in the 1998 Act to indicate that a licence … may not be varied subsequently": an example of 'negative reasoning'.[763] Justice Holgate finds that if he is wrong, the power to vary a licence "is implicit in, or incidental to, the power" in statute.[764] The case shows further evidence of support for the third source in case law. It demonstrates a willingness to find a non-statutory, non-prerogative basis for lawful executive action.

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[760] [2017] EWHC 1988, [2017] 4 WLR 158 (HC).

[761] Sara Priestley, 'Shale Gas and Fracking', House of Commons Library Briefing Paper, Number CBP 6073, 31 March 2020, 7.

[762] ibid [132].

[763] ibid [103].

[764] ibid [136]–[137].

Justice Holgate takes note of the economic advantage of finding that the executive's activities are lawful: "The petroleum resource in Great Britain, both onshore and offshore," he writes, "is a national asset which has been and remains of great importance."[765] "It must be in the national interest," he asserts, "for the Secretary of State to be able to react to such changes of circumstance by agreeing to a variation ..."[766] No authority is cited for this.

What are the doctrinal limits on the third source?

Because the doctrinal standing of the third source remains contested, there has been limited jurisprudence on the third source's limits. Three have been suggested.

First, the third source might not be capable of interfering with the rights of others. In *C*, Hale LJ takes the point to be self-evident, noting "[n]either the Crown nor a private individual may exercise their freedoms in such a way as to interfere in the rights of others without lawful authority", citing *Entick v Carrington*.[767] Lord Justice Richards makes a similar point in *Shrewsbury*.[768] The point is mentioned in *Marcel*.[769] But no detailed analysis is undertaken in *C* or *Marcel* of whether rights were interfered with in those cases. All of the uncertainties that surround the related limit on the prerogative apply to this limit on the third source. Is a proportionality exercise needed? Is it enough that a right is 'engaged'? Which rights form part of this rule?

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[765] ibid [116].

[766] ibid.

[767] *C* (n 739) 632.

[768] *Shrewsbury* (n 752) 570 (see also n 263).

[769] See n 733.

Second, in *Shrewsbury*, contrasting opinions are offered on the purposes for which the third source may be used. Carnwath LJ suggests the executive "can only exercise those [third source] powers for the public benefit, and for identifiably 'governmental' purposes ..."[770] However, he does not test the distinction in the case since the Secretary of State's actions in *Shrewsbury* were manifestly for the public benefit and identifiably governmental purposes. "I instinctively favour some constraint on the powers by reference to the duty to act only for the public benefit," writes Waller LJ, but he prefers to wait until facts can test the point before saying more.[771] Richards LJ says it is "unnecessary and unwise to introduce qualifications" of this kind; "any limiting principle would have to be so wide as to be of no practical utility," he says, "or would risk imposing an artificial and inappropriate restriction upon the work of government."[772] It cannot be said, after *Shrewsbury*, that there is a stable 'public benefit' or 'governmental purposes' limit. Comments by Carnwath LJ and Waller LJ are obiter; Richards LJ cleaves to an opposing view. The decision is that of the Court of Appeal. If it were the law that third source action must be exercised for public benefit or governmental purposes, further clarity would be needed on what 'governmental purposes' are, how 'public benefit' is assessed, and whether public benefit needs to be intended or achieved.

The third possible limit on the third source arises out of Richards LJ's judgment in *Shrewsbury*. He comments it is "not in dispute" that authority for action under the third source "may be excluded expressly or impliedly by statute".[773] Such a limit sounds uncontroversial: it is inherent in the third source that it operates in a space clear of statute. But the notion that the third source can be "impliedly" excluded by statute requires greater precision. As with the

[770] *Shrewsbury* (n 752) 563.

[771] ibid 571.

[772] ibid 570.

[773] ibid.

application of the *De Keyser* limit on the prerogative, what will be important (if the courts affirm the existence of the third source) is how willing the courts will be to exclude impliedly the existence of the third source. Will the courts exclude the third source if an attempt is made to rely upon it to undertake far-reaching constitutional change? In New Zealand, where the courts have been more willing to affirm the existence of a third source,[774] the Supreme Court has found the third source cannot be used where an Act "covers the field" (citing *De Keyser*).[775] Time will tell whether British courts follow suit.

Conclusion

This chapter has described some key aspects of the law of the prerogative and the third source in England and Wales. Three themes emerge.

First, indeterminacy in the law of the prerogative and third source is not merely occasional. The law is full of gaps, unanswered questions, and ambiguities.[776] In the sphere of executive power, where there is risk of grave misuse of power, this indeterminacy should give some pause, and we should recall what indeterminacy in the case law has enabled historically. Second, ever-higher storeys of doctrine are stacked on weak foundations. There is still no clarity about what prerogatives the executive can rely upon; and yet new rules are being built up, such as the caveat in *Miller* that a prerogative can affect rights where that is inherent in a prerogative, that rely on an understanding of what prerogatives exist. Shaky doctrinal foundations, and significant ambiguity, enable ongoing contestation over giving effect to the

[774] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305; *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729; *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1.

[775] *Quake Outcasts* (n 774) [110]–[121].

[776] Hunter (n 7) 394.

perceived needs of the state. Thirdly, there is a recurring recycling of concepts in this area of law. Whether the prerogative is associated with the 'public good', or whether the third source needs to be exercised for public benefit, arises periodically – from *Saltpetre* to *Shrewsbury*. How the prerogative and third source interact with rights and statutes is a continual concern. It may be that familiar concepts are latched on to, to provide some sense of assurance in the face of uncertainty. But invocation of these concepts without elaboration of their content often results in an illusory sense of stability.

Chapter Four:

What is (Part of) the Case Against the Prerogative and Third Source?

This dissertation has recounted how the prerogative and third source have been associated with some of the most oppressive conduct carried out by the British state. We have seen, in Chapters One and Three, how the prerogative and third source have been relied upon as part of imperialist expansion, surveillance, preparations for military activity,[777] and police powers. Relatedly, governments have turned to the prerogative and third source on matters of public controversy, such as the United Kingdom's exit from the European Union. It is no surprise that the prerogative and third source have been invoked in these ways: they provide a pathway for government action that avoids legislation, with all of its accompanying public debate, attention, and scrutiny.

One way of constructing an account of what is wrong with the prerogative and the third source is to explain why the outcomes associated with use of the prerogative and the third source are properly regarded as oppressive, and set out how the prerogative and third source have enabled or facilitated such oppression, as opposed to merely mediating or reflecting oppressive conduct. This would involve engaging with difficult theoretical questions about the relationship between legal forms and social exploitation, and the responsibility properly ascribed to law for acts of political oppression.

A different approach to building a case against the prerogative and third source is possible, however: an account that explains how the prerogative and third source violate norms the British legal order professes to uphold. On this approach, there is no need to give

[777] See further Rosara Joseph, *The War Prerogative in Practice* (OUP 2013).

a full justification for why outcomes secured through the prerogative and the third source are oppressive, or why these legal forms should be considered responsible for such oppression; all that needs to be shown is that by the British legal system's own lights – by the standards invoked by courts and leading commentators – the prerogative and the third source are deficient. Put another way, the prerogative and third source contradict the commitments of the British legal order. This approach draws on the method of 'immanent critique', deployed in critical theory. David L. Harvey explains what this entails:[778]

> ... if critical theory is to realize itself materially, it must of necessity enter into meaningful dialogue with the reifying orthodoxies of an age. ... [I]t selects some tradition, ideological premise, or institutionalized orthodoxy for analysis ... [p]rovisionally accepting the methodological presuppositions, substantive premises, and truth-claims of orthodoxy as its own ... Upon 'entering' the theory, orthodoxy's premises and assertions are registered and certain strategic contradictions located. These contradictions are then developed according to their own logic ... Thus, immanent critique 'explodes orthodoxy's truth-claims from within'.

This chapter selects standards invoked by the British legal system, provisionally accepts them, and explores contradictions between these standards and the prerogative and third source.

This adds to existing literature by approaching the prerogative and the third source through a method not explicitly adopted by commentators working in this field. It considers shortcomings shared by the prerogative and third source, an inquiry not undertaken at length by existing scholarly treatment of these topics. There is a relatively well-developed literature on the shortcomings of the prerogative from the perspective of political principles, but

[778] David L Harvey, 'Introduction' (1990) 33 Sociological Perspectives 1, 5–6, citing Theodor Adorno, *Negative Dialectics* (Seabury 1973). See also Karl Marx, *Early Writings* (tr Rodney Livingstone and Gregor Benton, Penguin 1992) 208: "we shall develop for the world new principles from the existing principles of the world". For further discussion of the method's origins and merits, see: Robert J Antonio, 'Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought' (1981) 32(3) The British Journal of Sociology 330–345; Dan Sabia, 'Defending Immanent Critique' (2010) 38(5) Pol Theory 684–711.

evaluative work of this kind on the third source is more limited; critical assessments of these two sets of powers, taken together, are even harder to find.[779]

The first part of the chapter explains how non-statutory authority for executive action, in contrast to statutory authorisations of executive action, is not subject to *structured scrutiny* and why this is of concern in light of the British legal system's professed commitments. The second part of the chapter outlines why the prerogative and third source are not *circumscribed by an authoritative text* and how this is in tension with norms upheld within the British legal order. The third part of the chapter sets out, and dismantles, a defence of the prerogative and third source in terms of the legal system's own commitments.

This is only one kind of critique of the prerogative and third source. Nevertheless it is a critique that deepens existing assessments of the prerogative and third source, adding to historical, conceptual, and doctrine observations made in Chapters One–Three. Some reference to case law is made, where cases provide evidence of a value being upheld by the British legal order, or offer relevant statements of principle. Doctrinal citations are less common in what follows, since the focus is on whether the prerogative and third source are inconsistent with the values purportedly upheld by the British legal order – an inquiry that involves a more general consideration of the nature of the prerogative and third source, and the relationship between the prerogative and third source and the values the British legal order claims to protect.[780]

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[779] Normative assessments of the prerogative include: Harold Laski, 'The Responsibility of the State in England' (1919) 23 HLR 447; BS Markesinis, 'The Royal Prerogative Re-visited' (1973) 32 CLJ 287. Normative assessments of the third source include Anthony Lester and Matthew Weait, 'The Use of Ministerial Powers Without Parliamentary Authority: The Ram Doctrine' (2003) PL 415. One of the few attempts to evaluate non-statutory executive powers jointly is: Margit Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25 OJLS 97.

[780] Case law may demonstrate values purportedly upheld by the British legal order, and several cases are invoked below as evidence of such values.

This chapter builds upon the analysis of earlier chapters. The historical, conceptual, and doctrinal analysis in the first three chapters provides a stock of resources with which this normative assessment can be undertaken. The conclusions reached here reinforce the position, already developed in those chapters, that the prerogative and third source are even more unsettled than is commonly acknowledged: this chapter demonstrates that the prerogative and third source are also *normatively* unsettled, and do not sit easily alongside the tenets of the British legal order. Understanding the normative arguments surrounding the prerogative and third source, particularly the arguments marshalled in favour of the prerogative and third source, contributes to understanding why the prerogative and third source are invoked in ongoing struggles over giving effect to the perceived needs of the state: because they can be defended as tools of efficient, undivided, practical government action.

The methods and reasoning deployed in this chapter are continuous with the methods and reasoning employed in the first three chapters. There is caution about arriving at timeless truths about the prerogative and third source, including claims that the prerogative and third source violate timeless values; for this reason, immanent critique is used, with a focus on whether the prerogative and third source are consistent with values grounded in a particular context and historical moment. Notwithstanding this critical perspective, an attempt is made to assess the cogency of reasoning for and against the prerogative and third source, including through disaggregating claims and considering potential counter-arguments. This normative assessment forms an important part of the critical analysis that underpins this thesis. The methodology is critical in orientation (in the dual sense that it adopts a skeptical orientation to the functions and structure of the prerogative and third source, and takes forward that orientation by looking beneath the surface of texts and arguments), but it seeks to provide an analysis of the prerogative and third source that breaks down the various parts of these forms of executive authority (including historical, conceptual, doctrinal, and normative dimensions) and adds constructively to understanding these areas of law.

The problem of the absence of structured scrutiny

Different branches of the British state have purported to uphold the value of structured scrutiny of the exercise of power. 'Scrutiny' here refers to inspecting and investigating the exercise of power; for scrutiny to be 'structured' it must be carried out through a methodical process that is not just ad hoc.

In *Miller (No 2)*, the unanimous judgment of the Supreme Court refers to the "vital role" played by "[s]crutiny committees" examining legislation.[781] In another case, *R (SG) v Secretary of State for Work and Pensions*,[782] in which the legality of the government's 'benefit cap' was challenged, the Supreme Court puts weight on the "detailed and vigorous scrutiny" given to the policy by both Houses of Parliament.[783]

Minutes from a 2019 Cabinet meeting, quoted in *Miller (No 2)*, show the executive keen to emphasise it would not want its actions to cut across structured scrutiny: "any messaging should emphasise", the minutes read, "that the plan for a Queen's speech was not intended to reduce Parliamentary scrutiny."[784] The 2011 edition of the Cabinet Manual, at the time of this dissertation's completion, contains a heading on 'Scrutiny of the Government',

[781] *Miller (No 2)* (n 487) [60].

[782] *R (SG) v Secretary of State for Work and Pensions)* [2015] UKSC 16, [2015] 1 WLR 1449.

[783] ibid [27].

[784] *Miller (No 2)* (n 487) [20].

under which there is an explanation of parliamentary questions, committee evidence, and parliamentary statements;[785] there are also references to pre- and post-legislative scrutiny.[786]

Parliamentary debates are peppered with references to the value of scrutiny – for example, Lord Tunnicliffe spoke in 2017 of the necessary "opportunity for structured scrutiny by, say, an appropriate Select Committee or debates in the House"[787] – and many of the operations of Parliament aspire to realise the value of structured scrutiny in their design: including through the way multiple readings of bills are held, and legislative amendments are debated.[788] Of course, often the value of structured scrutiny is invoked for particular purposes, rather than being affirmed as important in the abstract.

The prerogative and third source appear to be not subject to structured scrutiny in advance of their exercise. Prerogative legislation, to take one example, bypasses the usual scrutiny of Parliament, as was commented on following the decision in *Bancoult* (which involved a review of an Order in Council).[789] In contrast, statutory executive authorisation is debated by Members of Parliament in the House of Commons and House of Lords when it

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[785] UK Government, 'The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government' (1st ed, 2011), [5.11]–[5.17].

[786] ibid [5.24], [5.25].

[787] House of Commons, 'Publicly Funded Infrastructure Projects', *Hansard*, 2 July 2019, vol 798, <https://hansard.parliament.uk/Lords/2019-07-02/debates/83FBD86E-EEB1-4C90-8A54-5E239AA290B0/PubliclyFundedInfrastructureProjects?highlight=%22structured%20scrutiny%22#contribution-DBFB6236-3798-4286-A6E3-E3E4140A7AD2> accessed 18 August 2021.

[788] Hannah White, 'Parliamentary Scrutiny of Government', Institute for Government (2015), <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Parliamentary%20scrutiny%20briefing%20note%20final.pdf> accessed 18 August 2021.

[789] Juss (n 530) 264: "whereas full parliamentary scrutiny is applied to Acts of Parliament it is markedly absent in cases of prerogative legislation thereby robbing it of the seal of democratic approval." Juss also cites at 243–244 a comment by the Chagos Refugees Group's legal representative that "[t]here had been no debate in the House of Commons, no serious debate within government departments, and certainly no enquiry as to the welfare and needs, let alone the status, of the population" due to reliance on the prerogative. See also Lord Mance's comment on how the prerogative exercised in *Bancoult* (n 491) offered "no opportunity for democratic debate outside or within Parliament": [159].

is granted. Bills setting out executive authority can also go to select committees for detailed review and further research in the usual way.

Margit Cohn notes that the lack of structured scrutiny of the prerogative and third source brings them into tension with a related value invoked by the British legal system and other legal systems: deliberation.[790] Cohn does not elaborate on what she means by deliberation, or how non-statutory executive authority contradicts the value. But one way of developing the argument is as follows. Deliberation – considered political debate – can contribute to better governing practices. It is the subject of a voluminous literature in liberal political theory.[791] Some have claimed it is constitutive of democracy (Walter Bagehot calls democracy "government by discussion", a view often attributed to John Stuart Mill).[792] It is at least plausible that deliberation can help proponents of a course of action to understand counter-arguments and see possible flaws in a course of action.[793] The prerogative and third source are not able to benefit from these intrinsic or instrumental advantages of deliberation, since the prerogative and third source are relied upon by the executive without any prior parliamentary process.

The significant power exercised by the executive is worth noting when considering the apparent contradiction between structured scrutiny, and the prerogative and third source. While the contours of the executive have never been authoritatively determined in British law (as noted already), it is at least a plausible view that the police, intelligence and security agencies, and local government form part of the executive. These bodies can use force against

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[790] Margit Cohn, 'Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural-Institutional Context' (2015) 64 ICLQ 65. Cohn refers to deliberation at 67, 68, 101.

[791] See eg John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (OUP 2000); Amy Gutmann, *Why Deliberative Democracy?* (Princeton UP 2004); and Jon Elster, *Deliberative Democracy* (CUP 1998).

[792] Amartya Sen, *The Idea of Justice* (Belknap Press 2009), 3.

[793] This is an empirical matter that requires further evidence.

people, conduct surveillance, and remove or change services that are essential to people's lives. The potentially intrusive character of the prerogative and third source makes the absence of structured scrutiny of their exercise particularly striking.

One counter-argument is that, although prerogative and third source powers are not subject to direct legislative scrutiny, they receive indirect legislative scrutiny. Parliament implicitly accepts the metes and bounds of these powers by not intervening following judicial decisions or after being informed about how these non-statutory executive authorities are exercised. Thomas Poole has mentioned a version of this claim in relation to prerogatives: "Prerogatives owe their legal existence now to an implicit licence from a sovereign Parliament," Poole writes, "a licence that can be revoked in part or in whole at any point."[794] Another way of putting the point is: the prerogative and third source might not be subject to systematic structured scrutiny, but some occasional scrutiny does exist – for example, in response to judicial decisions – and is enough.

Two responses are appropriate. First, it is not clear that parliamentarians have detailed or broad knowledge about the prerogative or third source. When Parliament has considered these legal forms, or civil servants advising parliamentarians have considered them, a generally circumspect view of their non-statutory basis has been taken, at least of prerogative powers. A 2003 report by the Public Administration Select Committee recommended putting some prerogatives on a statutory footing.[795] A 2007 Green Paper, as part of the Governance of

[794] Thomas Poole, 'Losing our Religion? Public Law and Brexit' UK Constitutional Law Blog, 2 December 2016, <https://ukconstitutionallaw.org/2016/12/02/thomas-poole-losing-our-religion-public-law-and-brexit/> accessed 18 August 2021.

[795] House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament', 16 March 2004, <https://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 18 August 2021.

Britain programme, calls for "stronger parliamentary scrutiny and control".[796] These reports do not appear to give implicit licence to non-statutory executive authority; at best, they call such authority into question.

Second, some broad, implicit parliamentary endorsement of non-statutory executive action seems notably inferior to structured scrutiny. Structured scrutiny provides review of executive action wherever the authority to do something is set out in legislation. This does not provide review on a case-by-case basis, but – unless all areas of prerogative and third source action are set out in one piece of legislation – review can be tailored to the particular executive activity (for example, in foreign affairs). In short, the review is more focused.

Another counter-argument is that, while there is no structured scrutiny of the granting of non-statutory executive authority, there is the possibility for ad hoc legislative scrutiny where exercise of a particular prerogative or third source action causes especial controversy. Parliament can call a debate about a decision that might otherwise be taken with prerogative powers, as occurred in December 2015 when a debate was held on air strikes in Syria.[797] Alternatively, Parliament can call for a debate after non-statutory executive action has been taken. A motion was introduced into the House of Commons in December 2017 (while the Supreme Court was deciding on the appeal in *R (Miller) v The Secretary of State for Exiting the European Union*)[798] about future use of the prerogative to trigger Article 50 of the Treaty on European Union. The motion recognised "that it is Parliament's responsibility to properly

[796] Ministry of Justice, 'The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report', 2009, 2, <http://data.parliament.uk/DepositedPapers/Files/DEP2009-2493/DEP2009-2493.pdf> accessed 18 August 2021.

[797] Parliamentary opposition had also resulted in earlier government calls to launch military action in Syria to be rebuffed in August 2013 (see Nicholas Watt and Nick Hopkins, 'Cameron forced to rule out British attack on Syria after MPs reject motion', *The Guardian*, 29 August 2013, <https://www.theguardian.com/world/2013/aug/29/cameron-british-attack-syria-mps> accessed 18 August 2021.

[798] [2017] UKSC 5, [2018] AC 61.

scrutinise the Government while respecting the decision of the British people to leave the European Union".[799] We have already encountered, in Chapter Three, parliamentary committees convened to review surveillance activities (with it not being clear whether the authority to conduct surveillance was derived from prerogative or the third source or elsewhere). This is, it might be said, a safety valve that prevents abuse of power: where non-statutory executive action becomes controversial, Parliament can call debates and pass legislation to delimit the scope of the prerogative or third source in a particular case.

Ad hoc scrutiny of this kind is possible and desirable. But not every action taken under the prerogative and third source – even an activity that might have significant implications – is brought to the attention of Parliament. Parliament has multiple priorities. There may be incentives for agencies to avoid publicity in their exercise of the prerogative or third source. Even where Parliament is made aware of contentious exercises of the prerogative or third sources, unless legislation is passed, scrutiny might not be thorough or careful, given the demands on parliamentarians' time. Overall, relying on ad hoc parliamentary scrutiny appears too weak and contingent a protection, given the extent of powers wielded by the executive. The possibility of ad hoc scrutiny does not quell the initial worry that the prerogative and third source are not subject to structured scrutiny.

A final counter-argument is that the prerogative and third source can face judicial scrutiny, and that this offsets any absence of structured legislative scrutiny. As already outlined in Chapter Three, judges can decide whether a prerogative exists, or whether the third source can be relied upon. They can also consider whether prerogatives are being used to change the law or cover the same ground as the field occupied by a statute, whether prerogatives are being used to enact far-reaching constitutional change, and whether prerogatives interfere

[799] House of Commons, 'The Government's Plan for Brexit', *Hansard*, 7 December 2017, vol 618, <https://hansard.parliament.uk/commons/2016-12-07/debates/CA09D9B2-9634-41C8-8979-8B9CD82DBB8F/TheGovernmentSPlanForBrexit> accessed 18 August 2021.

with a constitutional principle without reasonable justification, which may provide the basis for a finding that exercise of the prerogative is unlawful. Judges can apply judicial review principles to ensure the prerogative and third source are exercised in conformity with the law, in line with requirements of fair process, and not unreasonably. It is arguable that these doctrinal limits can help to ensure that the executive does not over-reach (though, as noted in Chapter Three, the current doctrinal position may result in some prerogative activity being non-justiciable, thereby lessening the force of this point).

But this defence of the prerogative and third source arguably leaves no reason for Parliament to exist at all. If judicial review and judicial controls are sufficient, is there even a need for Parliament? Defenders of the prerogative and third source might say here, nodding to judicial decisions that make statements to this effect, that it is for Parliament to focus on matters of policy and for the courts to focus on lawfulness.[800] One response is the following: to parcel out legal compliance to the courts alone (regardless of how robust the doctrinal limits on the prerogative and third source are) is to give insufficient weight to the value of government compliance with the law. Government compliance with the law is a shared responsibility and should be an objective of multiple branches of government. To say the courts are the ultimate arbiters of legality[801] does not mean they should be the only branch of government concerned with ensuring government action is lawful. Moreover, having two pairs of collective eyes (legislature and judiciary) reviewing government action is better than one (the judiciary): it prevents unintended mistakes and contributes to better law-making.[802]

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[800] *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644 (Lord Diplock): "[Officers or departments of central government] are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."

[801] As Lord Diplock does (correctly) in: ibid.

[802] Margit Cohn makes a similar point, noting that passing policy decisions through multiple fora "enables ... well-rounded examination of the decision under consideration": n 50, 309–310.

Defenders of the prerogative and third source need, it appears, to give reasons why the prerogative and third source should be exempt from legislative scrutiny. These defenders then face a challenge: the areas of action covered by prerogative and third source power do not have any easily discernible logic, as discussed in Chapter Two. It has already been said that prerogative and third source powers are arranged in their current order because of relatively arbitrary historical reasons. Perhaps, it might be said, those historical reasons themselves reflect a certain logic? Perhaps these areas of power have not yet been subsumed within statute shows the particular need to avoid scrutiny in these spheres? That line of reasoning commits the fallacy found in some conservative theoretical reasoning: the assumption that because some practice has survived the passage of time it necessarily has merit. There is little inner logic in the categories covered by prerogative and third source activity, as Chapter Two noted. Judicial scrutiny is a helpful backstop for statutory executive action, but is not sufficient; the same can and should be said of the prerogative and third source. Hence the contradiction between structured scrutiny – a value invoked by the British legal system – and the prerogative and third source remains.

The lack of circumscription by an authoritative text

The British legal order also places value on power being constrained by a written text. This is illustrated by a passage in the Supreme Court's unanimous judgment in *Miller (No 2)*. The Supreme Court says in general the limits of a statutory power can be determined straightforwardly because "the power is defined by the text of a statute."[803] The value of constraining power through a text is embodied in the detailed rules surrounding the

[803] *Miller (No 2)* (n 487) [38].

introduction, amendment, and debate of legislation in the British Parliament, which shows the weight placed on refining the text of legislation (even if in practice the rules can be neglected or flouted). Parliament's own Constitution Committee has said, "Legislation is an essential tool for Government to achieve its policy aims."[804]

Dicey, part of the canon of British constitutional law (as discussed in Chapter Two), argues that "[t]he rigidity of the law constantly hampers … the action of the executive."[805] A second virtue of a statutory text, which has been highlighted, is it allows individuals and others to plan their affairs on the basis of knowledge of the law. Philip Sales, now a justice of the Supreme Court, and Richard Ekins have raised this when writing that "public standards coordinate the life of the community with that precision and stability that lends itself to peaceful and profitable social life, in which members of the community may plan their lives free from arbitrary interference."[806] Thirdly, a statutory text has been said to serve an educative function. The United Kingdom's First Parliamentary Counsel (tasked with leading the drafting of legislation) makes this point in a speech given in 2014. Quoting Bentham, Sir Richard Heaton notes that "the guiding principles of modern drafters of statute law" are "certainty, and clarity, and making law accessible to all"; indeed, he says these principles are "a rallying cry." He adds that as of 2014 people were "using legislation – reading, searching, accessing, downloading" more than ever before.[807]

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[804] House of Lords Select Committee on the Constitution, 'The Legislative Process: Preparing Legislation for Parliament', 4th Report of Session 2017–2019, HL Paper 27 [7], <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/27.pdf> accessed 18 August 2021. Though the British legal order has consistently upheld this value, as has been pointed out, a legal text is unlikely to be all-controlling of outcomes.

[805] Dicey (n 390).

[806] Philip Sales and Richard Ekins, 'Rights-Consistent Interpretation and the Human Rights Act 1998' (2011) 127 LQR 217, 218. This section is about "public standards", not legislation, but explains the value of a statutory text.

[807] Richard Heaton, 'Making the Law Easier for Users: The Role of Statutes', Institute of Advanced Legal Studies, 15 January 2014, <https://www.gov.uk/government/speeches/making-the-law-easier-for-users-the-role-of-statutes--2> accessed 18 August 2021.

The apparent contradiction between the value of a statutory text and the nature of the prerogative and third source is obvious. It almost exists by definition. It is a contradiction between statutory and non-statutory forms of authorising executive action. One aspect of the tension is pointed out in the unanimous judgment in *Miller (No 2)*, where it is noted: "Since a prerogative power is not constituted by any document, determining its limits is less straightforward."[808] But the prerogative and third source would also appear to be less accessible, less supportive of individuals' ability to plan their affairs, and less stable by virtue of not being constrained by the text. It is worth working through the apparent contradiction – as we have done in relation to structured scrutiny – to determine whether there are ways it might be resolved.

One obvious rejoinder is that prerogative and third source powers are written down, but just not in statutory form: their scope and limits are contained in judicial decisions. (As noted in Chapter Three, there is more common law concerning the prerogative than the third source, but this rejoinder in principle applies to both.) This can be labelled 'the common law rejoinder'. The common law can be accessed by the public, and can serve an educative function. Moreover, individuals affected are able to plan their affairs on the basis of the common law, which can be stable in its expression of the law. Isn't the constraining text of the common law sufficient to promote stability, planning, and accessibility?

This ignores or understates an important feature of common law reasoning: it is lengthy. Judicial decisions often run to hundreds of paragraphs and dozens of pages, especially at the appellate level (where circumscription of executive power is likely to be definitively settled). Surely, it might be said, this makes common law circumscription of non-statutory executive action less accessible, less stable, less capable of serving an educative function, than statutory circumscription of executive power? It is true that judges have to give reasons, and

[808] *Miller (No 2)* (n 487) [38].

need to provide background to contextualise their decisions. Judgments are therefore necessarily long because their function is, in part, to provide convincing justification for a decision to parties and the public. They are an exercise in persuasion as well as explanation. But this line of reasoning runs into an obvious problem: statutes can also be lengthy, and it is now common for statutes to run to hundreds of pages. Statutes, too, can be hard to read, with long lists of numbered provisions and cross-referencing that is difficult to navigate. Thus, even if there are fewer reasons inherent in the nature of statutes for them to be lengthy, emphasising the lengthiness of the common law is not a foolproof strategy for opponents of 'the common law rejoinder'.

A slightly more nuanced strategy for addressing the common law rejoinder, which claims that the common law provides a sufficiently strong textual circumscription of non-statutory executive action, involves comparing the expressive form taken by statutes and judicial decisions. It may be true that statutes can be just as lengthy as judgments; judgments can be short, and statutes can be long. But the language and conventions used are different. Statutes tend (with some exceptions) to be expressed more cleanly or crisply. Judgments generally use more legal terms of art: 'precedent', 'appeal', 'dissent' (to say nothing of Latinate terms like 'ultra vires' or 'ratio').

Again, we are in the realm of making judgments about tendencies, rather than any inherent features, of statutes and common law. These differences in the forms of expression are qualitative rather than categorical: they involve different points on a spectrum.

Nevertheless there are two reasons why there might be significant differences in the expressive form of statutes and the common law. First, they have different authors. Judgments are written by judges, who (in the British legal system) have worked for lengthy periods in the law. Statutes are written notionally by members of parliament, but in practice by parliamentary draftspeople; whether the authors are members of parliament or parliamentary drafters, these authors may be less likely to be fully acculturated in the language of law (though some may

have been trained as lawyers). Second, statutes and the common law have different presumed audiences. Judicial decisions are read primarily by lawyers, law students, and legal academics. Statutes are read by lawyers, law students, and academics – but also by politicians and members of the public. In practice statutes might not be commonly read by all members of the public. But the thought that they should be capable of being read by the public matters: it changes the form they take. So statutes may be lengthy, but generally they take a more accessible form than the common law. This means they provide a more robust basis for education and citizen planning.

Couldn't the form of expression of the common law be changed to meet this problem? Judges could be drawn from a wider pool of the population – a greater number of community lawyers, alongside commercial lawyers, for instance – to ensure they are better able to express themselves plainly and simply. Judges could continue to be trained in clear expression. They could be reminded that their assumed audience should be the public as much as it should be the legal profession. Steps have been taken in this direction, and they could go some way to minimising the differences in form between statute and common law. But differences would remain. This is, in the end, because the common law uses a different set of conventions from statute law. These conventions operate in order to ensure a decision is justified to the parties and the public; there is not the same need for justification in statute, because statutes are presumed to have greater legitimacy given they are written, revised, and passed by elected politicians.[809] Heightened justification comes at the price of lessened accessibility. What this reveals is that the common law rejoinder can be overcome. Circumscription of executive activity by statute is superior in several key respects (in terms of the logic internal to the British legal system) to circumscription of executive powers by the common law.

[809] (Of course, those in the House of Lords are not elected.)

A different version of the common law rejoinder can be reformulated, however. It could be argued that, in the sphere of executive power, whether statutes or the common law are more accessible to the public is largely irrelevant. What matters is whether statutes or the common law are more accessible to a smaller audience: the executive decision-makers whose powers are circumscribed by the law. And, the argument might go, statutes and the common law are essentially equally accessible to executive decision-makers. Executive decision-makers – such as the Prime Minister and senior civil servants – may not all be trained lawyers. But they generally have experience in the language of law because they are required to consider law in their work. Where complicated legal matters arise, including in common law reasoning, these executive decision-makers tend to have access to legal advice that translates complicated reasoning into a language intelligible to them. Thus, the common law circumscribes non-statutory executive power – in the relevant sense of circumscribing how executive officials understand the law – just as effectively as statute.

This claim is weak because to say that accessibility only matters in relation to the executive is untrue. Circumscription of executive power by authoritative law matters for multiple reasons. It matters because authoritative statements of the limits of executive power can have the effect of ringfencing executive power; to this extent how the executive reacts is clearly relevant. But it also matters because authoritative statements of the limits of executive power allow the public (including activists and campaigners) to identify examples of executive over-reach. This means whether the common law is as accessible as statutes, from the perspective of the public, remains a relevant consideration. The differently formulated rejoinder cannot simply ignore the public.

One final point can bolster both the claim that the prerogative and third source are better circumscribed by statute than common law and the related claim that mere common law circumscription of these legal forms undermines values upheld by the British legal system. The structures, rhythms, and character of statutory law-making are different from judicial law-

making via the common law. The common law is iterative.[810] It is prospective as well as retroactive: it can involve law-making with an eye to the future, but can also entail legal legitimation of past behaviour or decisions. Statute law, in contrast, tends to involve single canonical codifications of law. Of course, statute law is subject to amendments; but these are generally minor amendments – if they are major, a statute is generally passed. Moreover, sometimes statutes can be retroactive: they can rubber-stamp past behaviour. But generally they are prospective.

What these different rhythms demonstrate is that statute law is not only more accessible than common law, because of the forms of expression and conventions used in both forms of law, and therefore more appropriate for circumscribing executive power. Statute law may be structurally better suited to circumscribing executive power. Common law's iterative and retroactive characteristics make it difficult for executive decision-makers and the public to lead their lives around the contours of the law. It requires combing through law reports (even if many are available online and textbooks provide assistance). Statute law's tendency to set out the law in canonical formulations, and its generally prospective quality, make it easier for the law to be known, and for people's lives to be adapted in light of the law.[811]

Once again, it could be argued that features of statute law and common law could be tweaked to reduce the contrast in structure. The common law could seek to state the law more legislatively, as sometimes occurs in the case of landmark judgments, and judges could be reluctant to allow retroactive law-making (as they are now). But, as with the analytical moves above in relation to the forms of expression in the different types of law, these tweaks to the

[810] This does not mean that it is always incremental in its development of law; in some instances major changes of the law can occur through the common law, such as where a new duty of care is imposed or a significant area of law (such as consideration in contract law) is abolished.

[811] Statutes can require cross-referencing and single statutes are not exhaustive in covering subject-matter, which may undermine accessibility.

operation of statute law and common law do not eliminate the central contrast. Even if judges could strive to mimic statute law, the common law would retain its iterative character and its capacity to make law retroactively. This remains a further reason that counts against common law circumscription of the prerogative and third source. The problem that these legal forms are not circumscribed by an authoritative text is not nullified by the existence of common law limits on executive power.

The arguments for the prerogative and third source: instruments of necessity, flexibility, and practical action?

We have shown that the prerogative and third source fall short of honouring norms that the British legal system claims to uphold. But can a positive case for the prerogative and third source, drawing on norms upheld by the legal system, offset or mitigate these apparent contradictions? To put the point another way, are there some other considerations that remove the need for structured scrutiny or a constraining text when the prerogative and third source are relied upon?

Proponents of prerogative and third source powers generally argue that these powers are sufficiently constrained by the general law of judicial review and human rights to avoid executive over-reach.[812] They also tend to focus on the same appealing features of non-statutory executive authority. Timothy Endicott cites Blackstone's account of the prerogative with approval. As we have already encountered in Chapter Two, Blackstone notes of executive power that:[813]

[812] See eg BV Harris, 'The "Third Source" of Authority for Government Action' (1992) 108 LQR 626.

[813] Blackstone (n 361).

> This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government: and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.

This is not an argument in defence of the prerogative or non-statutory executive authority more broadly. It is an argument in favour of executive power being concentrated in one person ("in a single hand") as opposed to a broader collective ("many wills"). The argument appears to be anachronistic (as noted in Chapter Two), given that the British executive has shifted from being exercised largely by the Monarch to being exercised by the government, ministers, and various agencies. Put another way: British executive power is now placed in many hands. Blackstone's view might be thought to be a bygone justification of a bygone executive.

But Endicott is alert to this change in the position of the executive over time. He notes: "Blackstone is 250 years out of date". He insists, however, that "the value of unanimity, strength and dispatch" remains "essential in the 21st century". Endicott goes on to say that the executive today is "efficient and unified", while also being "democratic and accountable".[814] Endicott does not elaborate on this point, instead focusing the remainder of his article on why executive accountability mechanisms are sufficient. Bruce Harris, in his articles on the third source, has focused on similar virtues of third source powers. In particular he says that third source "meets the practical day-to-day needs of government".[815] A flexible

[814] Timothy Endicott, "'This Ancient, Secretive, Royal Prerogative'", UK Constitutional Law Blog, 11 November 2016, <https://ukconstitutionallaw.org/2016/11/11/timothy-endicott-this-ancient-secretive-royal-prerogative/> accessed 18 August 2021. He also refers to related matters in: Timothy Endicott, 'Lawful Power' (2017) 15 NZPIL 1–20, but this article is less focused on the merits or demerits of the prerogative in the abstract.

[815] BV Harris, 'The "Third Source" of Government Authority for Action Revisited' (2007) 123 LQR 225, 237.

legal framework, Harris argues, can help to ensure executives are nimble and responsive to changing circumstances.

We can separate and reconstruct two claims here in support of non-statutory executive activity. First, non-statutory executive authority allows government action to be efficient.[816] This is (at least part of) what Harris refers to when describing "the practical day-to-day needs of government".[817] Second, the prerogative and third source provide for *strong, undivided* executive action. If it is legitimate to reinterpret Blackstone as offering a generalised defence of the prerogative, this is the quality of executive action he refers to when he speaks of "unanimity, strength, and dispatch". Endicott echoes this claim when noting the significance of a "unified" executive.

Are these claims different from each other? It might appear that a strong, undivided executive is only valuable insofar it satisfies the need for speed in executive action: they could just be two versions of a single claim about efficient executive action. The work of Blackstone, Endicott, or Harris does not offer much assistance in determining whether the claims are distinct. However, it is at least theoretically possible to separate the claims. Strong, undivided executive action could be important for reasons other than its links to efficiency. Strong, undivided executive action might allow a clear message to be sent about a particular issue. It could help a government to be open about its motivations; this conceivably could support accountability and transparency. We can therefore tenably keep the two claims for non-statutory executive authority separate.

What is less certain is whether *efficiency* and *unanimity*, the two values underpinning these claims, are characteristics of government that have been traditionally upheld within the British legal system. Efficiency and unanimity seem capable of helping to achieve certain

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[816] See also Anne Twomey, '*Miller* and the Prerogative' in Mark Elliott, Jack Williams and Alison L Young (eds) *The UK Constitution after* Miller: *Brexit and Beyond* (Hart 2018) 69, 89–90.

[817] See also Cohn (2021) (n 50) 266.

outcomes often referred to in the British legal order: say, security or wellbeing for the population. However, efficiency and unanimity are also capable of undermining other values professed to be important within the British legal order, such as disagreement and deliberation (as already discussed in this chapter). Quick, univocal decisions are less likely to allow space for disagreement and dissent; they invariably will limit the scope for deliberation. They are values that could justify the absence of all law. As well, efficiency and unanimity are values that might easily support – and worsen – egregious government action. Efficiency can facilitate swift injustice; unanimity can facilitate boldly implemented injustice. We cannot only assess efficiency and unanimity by reference to their application to benevolent governments. There is some room for doubt about whether efficiency and unanimity are regarded, or should be regarded, as valuable within the British legal system.

It might be added that the lack of a single written constitution in the United Kingdom counts against efficiency and unanimity being constitutional values in the United Kingdom. It could be said that constitutional values in the United Kingdom ought to bear in mind the dangers of a lack of a single written constitution, including abuse of power; efficiency and unanimity, the argument might go, only add to these dangers rather than being a brake against abuse of power.

More persuasively, even if efficiency and unanimity have been regarded as valuable characteristics of governments, it is not clear that there is a necessary link between the prerogative and third source and efficiency and unanimity. Statutes framed in broad terms – which are not entirely innocuous since they might place fewer constraints on executive power – can still allow for efficient and unanimous decisions to be made by executives at a later date. Adjustments to ordinary parliamentary procedures can be made – fast-track legislation is possible, for example – to address the need for urgency in extreme cases.[818] Broadly framed

[818] Fast-track legislation is subject to criticism because it reduces the capacity for scrutiny and may undermine the quality of text circumscribing executive power. See eg House of Lords Select

legislation and fast-track legislation retain the advantages of being subject to some level of structured scrutiny and being circumscribed by an authoritative text, even if that text is drafted in an expedited manner.

A proponent of the prerogative and third source might have some obvious objections to this. Isn't it true that not all eventualities can be foreseen when a law is formulated? Doesn't this mean that it is inevitable that some powers beyond the statute are needed to allow for urgent executive action? Without powers beyond the statute, the executive is forced to return to the legislature to draft a statute, slowing down actions that might be urgent.

A strong response to these objections is available: namely, that drafting legislation has traditionally involved an exercise in some foresight. Perhaps it is reasonable to expect legislatures to consider as many future eventualities when drafting legislation. (It could also be argued that the existence of the prerogative and third source, because they allow executives to go beyond the limits of statutes, might disincentive good parliamentary law-making; but this is an empirical point that requires more evidence to be substantiated.) Law that sets out what an executive can do is arguably more univocal: it provides clarity in textual form about the scope of executive power. It provides room for speedy action while still upholding the value of government compliance with positive law.

It should be added that if the constitutional position is that an executive could only act within the limits imposed by statutes, doctrinal clarifications could be made to give some flexibility to executives to meet the practical day-to-day needs of government. In particular, as Stephen Sedley has proposed, it might reasonably be said that the executive can do anything that is "ancillary to its express powers".[819] Sedley argues that this qualification would give

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Committee on the Constitution, 'Fast-Track Legislation: Constitutional Implications and Safeguards – Volume I: Report', 15th Report of Session 2008-09, HL Paper 116-I. But it allows for some scrutiny and textual circumscription.

[819] Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015) 135.

authority for everyday executive activities such as "formation of contracts, employment of staff, procurement of supplies, holding and disposal of land and so forth …"[820] While there is some risk of executive over-reach in this qualification, and the scope of "ancillary … powers" would need to be clarified, this doctrinal clarification could give effect to the need for scrutiny and textual circumscription while allowing room for efficiency and unanimity.[821]

Might the prerogative and third source be defended, alternatively, as a necessary solution to a system plagued by too much law? A version of this argument has been raised in New Zealand.[822] There have been periodic references made to the fact that there is too much law in the United Kingdom, by which it is generally meant too much legislation; this is a concern articulated by leading figures of the British legal order. Lord Judge made a plea in 2009: "Can we possibly have less legislation, particularly in the field of criminal justice[?]".[823] He describes the length of criminal justice legislation passed in recent times, observing that this has led to confusion for judges and other actors in the legal system. The implication is that greater quantities of legislation pose undue difficulties for judges, who have to become familiar with legislation, and create challenges of interpretation by producing more conflict. It is at least theoretically possible that the prerogative and third source offer some respite from the excess of legislation. The literature on 'hyperlexis', or too much law (much of which

[820] ibid.

[821] This doctrinal position arguably receives support in *R (on the application of New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358, [28].

[822] Nick Mereu, 'Hyperlexis and the Sources of Government Authority', Unpublished Research Paper, Victoria University of Wellington Faculty of Law, 2015, <http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5117/paper.pdf?sequence=1> accessed 18 August 2021.

[823] The Rt. Hon. the Lord Judge, 'Lord Mayor's Dinner for the Judiciary: The Mansion House Speech', 14 July 2009, <http://webarchive.nationalarchives.gov.uk/20131202164909/http://judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-lord-mayor-speech-14072009.pdf> accessed 18 August 2021.

is American), points to some benefits of avoiding too much law.[824] With less law, Mila Sohoni argues, there might fewer burdens on individual liberty, less undesirable complexity, and lower costs.[825] Could use of the prerogative and third source help to secure these aims?

It is not clear that the use of the prerogative and third source necessarily advances the cause of liberty, cost, and lessened complexity (assuming these are valuable aims). The prerogative and third source have been known to threaten rights and liberties in the past, in cases already mentioned in this chapter.[826] If the use of the prerogative and third source can result in litigation (in particular due to ambiguity in the law), it is not clear that their existence might reduce costs or complexity, at least from the perspective of the government and judges.

It could be said that the third source, as distinct from the prerogative, is generally innocuous and therefore not in need of structured scrutiny or circumscription by an authoritative text. The third source plays a gap-filling role: it supplies authority for the executive to do things that are not spelled out by legislation, and do not need to be spelled out by legislation. It is a residual or residuary category, according to the writers discussed in Chapter Two. Bruce Harris gives as examples of third source action the government's entering into contracts or distributing pamphlets to the community.[827] It might be said that these activities do not threaten human rights or create any scope for improper governmental action.

There are at least three problems with this claim that the third source is innocuous, and therefore not in need of structured scrutiny or a constraining text. First, it is clear from cases, discussed in Chapter Three in particular, that the third source has not only been relied upon in areas of non-contentious governmental activity. In both New Zealand and the United

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[824] See eg Bayless Manning, 'Hyperlexis: Our National Disease' (1977) 71 NWULR 767.

[825] Mila Sohoni, 'The Idea of "Too Much Law"' (2012) 80 Fordham L Rev 1585.

[826] Notable examples of cases where non-statutory executive powers have threatened rights include *Malone* (n 714) and *Miller (No 1)* (n 486).

[827] BV Harris, 'The "Third Source" of Government Action Revisited' (2007) 123 LQR 225, 226–227.

Kingdom, the third source has been invoked successfully to justify police surveillance. In New Zealand, the surveillance in question was video surveillance; in the United Kingdom, the surveillance involved the tapping of the telephones of individuals suspected of committing crime.[828] To claim that third source is innocuous is to be naïve about how it might be, and has been, used. In fact, there might be an incentive for the executive to use the third source when controversial (and potentially oppressive) action needs to be taken, precisely because the third source can be used without parliamentary debate or passing legislation. Second, even the examples given by Bruce Harris and others to illustrate the innocuousness of third source action are capable of threatening fundamental interests. Talk of governments entering into contracts or distributing pamphlets may sound harmless. But governments entering into, say, contracts with privatised providers to deliver personal protective equipment to safeguard workers against a major pandemic, or distributing pamphlets containing, say, prejudicial material about particular racial groups in a population would appear to be the kind of action that ought to be subject to the structured scrutiny made available by the legislature, and the circumscription offered by a statutory text. Third, this chapter has not considered reasons why the third source is particularly normative troubling.[829] One available argument, not dwelt upon here since the focus has been on reasoning common to the prerogative and third source, is that the existence of the third source enncourages the wrong kind of orientation to law, and indeed degrades the status of law itself: since in a legal system where the third source is authorised, law becomes not a necessary foundation for any executive action to be lawful, but rather a troublesome obstacle for the executive to avoid. The possible existence of arguments against the third source in particular is a further ground on which to doubt the view that the third source is invariably innocuous.

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[828] Such action was the subject of litigation in *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 and *Malone* (n 714).

[829] See eg John Howell, 'What the Crown May Do' (2010) 15 JR 36.

At the conclusion of this section, any supposedly offsetting positive case for the prerogative and third source appears to have dissolved. The prerogative and third source may seem to uphold values of efficiency and unanimity in government. But these are not necessarily characteristics of government traditionally upheld within the British legal order, and even if they are they may license undesirable outcomes. These values can be secured, and in a more defensible manner, through statutes setting out executive action.

Conclusion

What emerges from this analysis is not merely a partial account of what is wrong with the prerogative and third source. What should also be clear is what makes the prerogative and third source distinctive as a category of executive action. The question might have been raised at the outset of the chapter: why isolate the prerogative and third source?[830] Why not focus on arbitrary or rights-imperilling executive action, whether that action is taken under statutory or non-statutory executive authority? Statutory authorisation for executive action can, after all, also be problematic, if it is overly vague. The preceding analysis has endeavoured to provide an answer to these questions. Statutory executive authorisation may, on occasion, also raise other constitutional concerns – as when 'Henry VIII' clauses are passed into statute. But non-statutory executive authorities are worthy of special consideration because they are not subject to structured scrutiny or circumscription by an authoritative text. It might be said that these points are obvious. It is implicit in the fact that the prerogative and third source are non-statutory that they do not get statutory scrutiny, or textual limits imposed by a statute.

[830] It also might seem odd to isolate the source of power – the non-statutory nature of these executive powers – when administrative law doctrine has moved away from a focus on the source of power towards a focus on the subject-matter since *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

But this chapter has gone beyond identifying these features, and has explained why these features are in tension with the British legal system's standards.

Before we turn to the next chapter, a further comment is needed on methodological choices. Why has this chapter not framed the normative concerns as being concerns about the consistency of the prerogative and third source with 'the rule of law'?[831] Norms about the value of scrutiny and a statutory text fit squarely into a 'rule of law' tradition in liberal constitutional theory;[832] this is clearly a value invoked regularly within the British legal order.[833] Whether the rule of law is defined minimally or more expansively, most scholars accept it requires "that governmental actions should be circumscribed by general rules, previously announced".[834] References to clarity, publicity, and generality – values mentioned in this chapter – abound in this rule of law tradition.[835] The reasons discussed in this chapter for being concerned about the prerogative and third source *overlap with* reasons that are given weight in the rule of law tradition, but can stand independently from that tradition. It has been thought preferable to highlight contradictions with structured scrutiny and the value of

[831] Margit Cohn's 2021 book adopts this approach, querying whether fuzzy executive power (which is of course broader than the prerogative and third source) is consistent with the rule of law: n 50, 257–262.

[832] It could include Albert Venn Dicey's *Introduction to the Study of the Law of the Constitution* (first published 1885, 8th edn, Macmillan 1915); Lon Fuller's *The Morality of Law* (Yale UP 1964); and Lord Bingham's *The Rule of Law* (Allen Lane 2010), amongst others.

[833] See eg *R (Evans) v Attorney-General* [2015] UKSC 21, [2015] AC 1787, [51] (Lord Neuberger) and [154] (Lord Hughes); and the majority in *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768, [2017] All ER 158, [42].

[834] This is Trevor Allan's description of Raz's view of the rule of law: TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 38. In describing the rule of law, Dicey himself expressly refers to excluding the "existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government" as being inferior to the supremacy of regular law: in other words, prerogative power appeared to be the antithesis of the rule of law for Dicey. See Dicey (n 385).

[835] A version of these values is recounted (amongst other principles) by Lon Fuller in his account of the inner morality of law in *The Morality of Law* (n 832).

a constraining text, without making the contradictions contingent on settling the proper meaning of 'the rule of law'.

Two further objections should be considered. First, has a sufficient basis been given for saying that scrutiny and textual circumscription are valued by the British legal system? References have been made – by judges, officials, and politicians – to the value of structured scrutiny by branches of government, and to the importance of a stabilising text to constrain power. But is this enough to conclude they are values upheld by the legal system as a whole? Claiming that a legal system as a whole professes to value anything, even things as fundamental as scrutiny or the value of writing down law, is fraught. Politicians, judges, and officials come and go; legal systems change over time.

This chapter has not claimed that the British legal system has always valued structured scrutiny and circumscribing power through a written text; the historical analysis, albeit brief, in Chapter One shows that the practices of governing have changed so much over time in the United Kingdom that this claim could not be made out. All that has been claimed is that prominent representatives of the branches of government, or prominent publications emerging out of each branch, have espoused the value of scrutinising the exercise of power and using a text to circumscribe the operation of power.

A more subtle version of the objection takes the following form: there may have been recognition of the importance of structured scrutiny and a circumscribing text, but does this really mean that they are standards that have to be upheld at all times? Perhaps they are merely considerations to be taken into account, which may be departed from? There is, however, again a legitimate response. This chapter has not developed an argument that these values are superior principles that can never be violated. Instead, it has argued that structured scrutiny and the use of circumscribing texts appear to be commitments adopted within the legal system, and that the prerogative and third source's exercise is in tension with these commitments.

There is another closely related objection: namely, that commitments to structured scrutiny or the use of a circumscribing text to hold power to account are hollow at any rate. On this view, these commitments are violated more than they are honoured. Legislation passes through the United Kingdom Parliament without proper scrutiny frequently, and many forms of action by those in power are not bound by textual constraints. So why should any tension or contradiction matter? There is some force – and truth – in this objection. But all that this chapter contends is that this internal tension within the norms and structures of the British legal system calls for a response: the response might be an acceptance of the contradiction, an open abandonment of the commitments, a rejection of the prerogative and third source, or some other new synthesis. The dialectical method of immanent critique does not require accepting whole the truth of certain premises, but merely requires "entering" a dialogue with these premises to highlight a contradiction.[836]

We now have a sense of the historical malleability of the prerogative and the third source; the conceptual ambiguities at the core of any efforts to define 'the prerogative' and 'third source'; the indeterminacy in the case law; and the contradictions between these legal forms and supposed commitments of the British legal order. What is the appropriate response to these contradictions, indeterminacy, ambiguities, and historical complexities? That is the focus of the next two chapters.

[836] Harvey (n 778). See also Mark Tushnet, 'Critical Legal Studies and Constitutional Law: An Essay in Deconstruction' (1984) 36 Stan L Rev 623 at 629: "The Critical scholar must take part in the normal discourse of law while simultaneously placing the idea of normality in question."

Chapter Five:

How Much of a Difference Does a Codified Constitution Make?

The first four chapters have explained historical, conceptual, doctrinal, and normative contradictions and ambiguities in the prerogative and third source. This chapter considers whether the United Kingdom's adoption of a single written constitution might be a fruitful response to these contradictions and ambiguities. At the time of writing in 2021 it was not implausible that a single written constitution might be adopted in the near future. Three political parties, albeit smaller parties, proposed a single written constitution in 2019 election manifestos.[837] Prominent academics raised the prospect of a single written constitution.[838] Such discussions have been longstanding in the United Kingdom.

How might a single written constitution be a 'fruitful response', or 'make' a 'difference', to the contradictions and ambiguities in the prerogative and third source? The first and third chapters have highlighted indeterminacy in the legal structure of the prerogative and third source. It is difficult to pinpoint the legal origins of the prerogative and third source, say where the prerogative and third source begin or end, and set out the limits on their operation (assuming the third source exists). A single written constitution could settle some of this indeterminacy. It could specify the existence of particular authority for executive action, or provide greater guidance.

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[837] The Liberal Democrats, the Brexit Party, and the Green Party.

[838] Harrison Shaylor, 'Do we need a written constitution?' UCL Constitution Unit Blog, 8 January 2020, <https://constitution-unit.com/2020/01/08/do-we-need-a-written-constitution/> accessed 18 August 2021; also Brian Christopher Jones, 'A single written UK constitution may only make things worse', UK Constitutional Law Blog, 25 May 2020, <https://ukconstitutionallaw.org/2020/05/25/brian-christopher-jones-a-single-written-uk-constitution-may-only-make-things-worse/> accessed 18 August 2021; Jeff King, 'The Democratic Case for a Written Constitution' (2019) 72 CLP 1–36.

Chapter Two described the conceptual indeterminacy in the prerogative and third source; a single written constitution could define the prerogative or third source and give greater conceptual stability to these legal forms. Finally, Chapter Four underscores normative tensions between features of the prerogative and third source and prevailing values within the British legal system: in particular, because the prerogative and third source are not set out in a written text or subject to the structured scrutiny of the legislature. A single written constitution would not dissolve all tensions. But a constitution-making process might provide opportunity for lengthy scrutiny of the prerogative and third source; and a single written constitution could bring legal forms within a text that gives the forms some limits and content.

How are we to know whether a single written constitution for the United Kingdom would realise these possibilities? One way to achieve that is to consider other countries that have adopted single written constitutions, and to assess those experiences. This does not give a complete answer to the question of what a single written constitution in the United Kingdom would bring, since a codified British constitution would not replicate other countries' codified constitutions and jurisprudence could well turn out differently. But it provides insight into what a codified constitution could do, as well as offering comparative analysis of concepts akin to the prerogative and third source in jurisdictions with slightly different constitutional frameworks.

This chapter does not offer a systematic review of the experiences of countries with codified constitutions. What is sought is some understanding of the nature and texture of legal outcomes that could flow from adopting a codified constitution. That understanding is best secured through a detailed analysis of a smaller set of case studies. The chapter focuses on the constitutional law of the United States of America and Australia. These are common law jurisdictions with which I have some familiarity;[839] each jurisdiction has extensive

[839] I have worked or interned in legal or political roles in the United States and Australia.

jurisprudence on executive power and in particular non-statutory executive power, influenced by British concepts and modes of reasoning.[840] The focus, consistent with the approach in this dissertation, is on decided cases. A more complete understanding of constitutional experiences with non-statutory executive power in the United States and Australia would require further research into government practice and legal advice.

Vicki Jackson sketches a taxonomy of comparative constitutional legal work, noting it can be classificatory, historical, normative, functional, or contextual. In the main, this chapter adopts functional and contextual approaches: examining how doctrines and textual provisions can serve similar functions across different jurisdictions, but paying attention to the context of each jurisdiction.[841] Jackson notes good comparative analysis often deploys a "contextualised functionalism", which "requires a willingness to question whether functions, concepts, or doctrines that appear similar may in fact be quite different in different societies, an attention to how seemingly separate institutions or legal practices are connected to, and influenced by, others; and a commitment to be open to noticing how legal rules or doctrines may be affected by the identitarian or expressivist aspects of the constitution."[842] This chapter follows that injunction: querying whether prerogative- or third source-like concepts may be different in the United States and Australia; but noting connections between doctrines and

[840] I am aware of the risk of perpetuating an imperialist mindset by focusing on majority-white settler-colonial jurisdictions when other common law jurisdictions have jurisprudence on executive power; one factor in favour of the United States and Australia over other jurisdictions is a number of other jurisdictions (such as Kenya or South Africa) have more recently adopted constitutions with fewer cases decided at the time of writing. A central aim of this thesis has also been to map how power is exercised by the British state. Analysing the United States and Australian experience contributes to that central aim, since the form of capitalism and imperialism developed in the United Kingdom has had particular influence on American and Australian constitutional trajectories. There is some emerging scholarship and jurisprudence in Canada on sources of authority for executive action – see eg Alexander Bolt and Philippe Lagassé, 'Beyond Dicey: Executive Authorities in Canada' (2021) 3 J of Comm L 1 (suggesting a typology of six categories of executive authority, including a version of the third source) – but the scholarship and jurisprudence are less developed than in the United States or Australia.

[841] Vicki C Jackson (n 34) 55–67.

[842] ibid 72.

concepts in the United States and Australia, and in the United Kingdom;[843] and being alert to cultural and political features of the United States and Australia that inform constitutional text and judicial reasoning. There are risks in this comparative work: different language is used across these jurisdictions; different institutional contexts exist (in particular, the United States executive is different in structure from the United Kingdom and Australian executives, including due to the distinct constitutional role of the President); and each country's history, political dynamics, and legal culture are subtly different. The chapter aims to understand language, institutions, and contexts in each jurisdiction on their own terms, through careful reading of surrounding literature, while being willing – sensitively – to draw connections where appropriate. It acknowledges Mark Tushnet's observation that every comparative approach "carries with it some ideological baggage";[844] this chapter does not use comparison to show the universality of liberal principles, but assumes that historical, political and social context is capable of shaping case law in each jurisdiction.

Little comparative legal work has been done providing general analysis of how concepts akin to the prerogative and third source are approached in different jurisdictions.[845] There has been some general comparative work on the executive in constitutional law across jurisdictions,[846] and work on recent trends in executive power.[847] There is more fine-grained comparative work on subject-matter areas, or prerogatives: for example, Anne Twomey's

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[843] See Tushnet (n 34). This requires some "reading against the grain", with care, to connect concepts that may carry different lables: Benjamin (n 322). Margit Cohn's 2021 book also comments on "functional convergence" when comparing executive power in the United States and the United Kingdom: n 50, 162.

[844] Mark V Tushnet *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar 2014) 8.

[845] Margit Cohn also makes the point that comparative analysis of executive power is very under-developed: see n 50, 9.

[846] Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (OUP 2005).

[847] See Volume 28(2) of the Washington International Law Journal (2019) (papers from workshop on the 'Resurgency of Executive Primacy in the Age of Populism').

work on reserve powers of heads of state in Westminster legal systems.[848] But few scholars have compared the legal treatment of prerogative- and third source-like concepts.

One exception is Margit Cohn's 2015 analysis of "non-statutory executive powers" in the United Kingdom, Israel, and the United States of America.[849] Cohn notes that non-statutory executive powers, including the prerogative and third source in the United Kingdom, compromise representation and deliberation across jurisdictions. She examines three countries that show variety in whether they possess formal or informal constitutions; the extent to which textual provisions are open-ended; and in the content of powers allocated.[850] Following analysis of doctrinal developments, Cohn observes some similarities in, amongst other things, judicial doctrines adopted, levels of deference, and constraints imposed on non-statutory executive power.[851] She notes there has been little evidence of transplantion across the jurisdictions in initial design of the executive framework or how it has evolved, and suggests this lack of transplantation may be because "institutional-structural" dimensions of law are closely associated with national identity and internal politics.[852]

This chapter shares some of the conclusions reached by Cohn in her treatment of the United States: it highlights the open-endedness of the US constitutional text and the limits of text in determining outcomes. The addition of Australia to countries under comparison allows a more developed set of conclusions to be reached, since both Australia and the United States trace their origins back to British law (whereas Cohn observes that Israel is a "non-ancestor

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848 Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (CUP 2018).

849 Margit Cohn, 'Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural-Institutional Context' (2015) 64 ICLQ 65–102.

850 ibid 68–71.

851 ibid 72–94.

852 ibid 94–101.

… system").[853] Further, this chapter differs in two respects from Cohn's analysis. First, it places US and Australian cases into a broader historical and political context, which helps to reveal how concepts akin to the prerogative and third source are situated within a political struggle over attempts to give effect to the perceived needs of the state. Second, the chapter focuses in more detail on modes of judicial reasoning employed in Australian and US case law: for example, the three moves in Australian case law to modify the *De Keyser* rule (not, to my knowledge, hitherto discussed in the literature).[854] The chapter does not provide a comprehensive doctrinal overview of constitutional law in each jurisdiction. Nevertheless the analysis provides a basis on which to suggest that a single written constitution is unlikely to resolve the contradictions and ambiguities in the prerogative and third source so far discussed.

The United States of America

Following the destructive colonisation of the United States and European settlers' removal of power from Native Americans who had occupied the land for thousands of years, there was debate in the lead-up to the drafting of a new constitution about the executive branch of government. The Articles of Confederation, drafted in 1777, did not specifically refer to an executive. Alexander Hamilton was critical of administrative structures.[855] Thomas Jefferson

[853] ibid 90.

[854] In this respect the chapter shares some similarities with the analysis of a semiotics of legal argument in Duncan Kennedy, *Legal Reasoning: Collected Essays* (Davies Group, 2008) 87–152: in particular, this chapter focuses on familiar arguments that recur in the case law across the United States and Australia and tend to be mobilised in particular ways in debates about executive power.

[855] Steven G Calabresi and Saikrishna B Prakash, 'The President's Power to Execute the Laws' (1994) 104 Yale LJ 541, 602.

called for separation of executive and legislative powers.[856] The British law on the executive was live in the minds of drafters.[857]

The Constitution ratified in 1788 settled on a form for describing the scope and limits of executive power. Section 1 of Article II of the Constitution declares that "[t]he Executive Power shall be vested in a President of the United States of America". That Article also notes the President is the Commander in Chief of the Army and Navy, and vests various powers in the President, including the power to make treaties under certain conditions, to appoint ambassadors, and to "take Care that the Laws be faithfully executed". It is not the only article describing the extent or limits of the President's power: section 7(2) of Article I, for example, explains the President's power to veto bills.

Consideration of the text of the US Constitution reveals how a codified constitution might appear to resolve some of the contradictions and ambiguities in the British law of the prerogative and third source. The US Constitution brings together subject-matter areas where the executive can lawfully act; some, like the making of treaties, overlap with areas recognised by the British prerogative. The US Constitution prescribes limits to executive action, in some instances through the words chosen to describe a type of executive action (taking "Care that the laws be faithfully executed") and in others through allocation of powers to other actors. The textual elaboration of executive power through the US Constitution gives stability to understanding of executive action, settling some debates that might be otherwise left open.

However, a review – even if abbreviated – of case law and scholarship associated with the US Constitution reveals it would be too quick to claim the codified text 'resolves' the problems experienced within the British legal system, discussed in the first four chapters.

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[856] ibid. This chapter departs from previous chapters in referring to 'executive power' or 'executive powers': this language is used in the US Constitution and by US judges and academics.

[857] Lawrence Lessig and Cass R Sunstein, 'The President and the Administration' (1994) 94 CLR 1, 49.

The codification of executive power displaces debate onto the terrain of interpreting the constitutional text

The first and third chapters of this dissertation have exposed significant uncertainty in the law on the prerogative and the third source in the United Kingdom. It would be crude to compare the extent of uncertainty in the US law on executive power. But codification of US executive power in a single text has created new sites of uncertainty, centred on the constitutional text.

One site of uncertainty is the first three words of Article II, the seemingly most fundamental words: "the executive power". This is sometimes called the Vesting Clause.[858] As Julian Davis Mortenson writes, there are at least three ways of understanding this phrase, each of which is supported by Supreme Court justices and academics.[859] First, it could be a reference to powers that follow in the remainder of the article: for example, the power to make treaties, or to take care that the laws be faithfully executed. Second, the words "the executive power" could refer to a general power to execute the laws; the rest of the article could be regarded as illustrations of that general power. Third, the option favoured by Mortenson, "the executive power" could refer to a historical bundle of powers available to the executive at the time of the Constitution's drafting.

Underneath these disagreements in US jurisprudence and scholarship is a more foundational fault-line: how should judges and lawyers approach interpreting "the executive power"? Lessig and Sunstein see this as an inquiry primarily into the conception of the executive imagined by the Constitution's framers.[860] Calabresi and Prakash focus on the

[858] Louis Fisher, *The Law of the Executive Branch: Presidential Power* (OUP 2014) 62.

[859] Julian Davis Mortenson, 'Article II Vests the Executive Power, Not the Royal Prerogative' (2019) 119 Colum L Rev 1169, 1178–1182.

[860] Lessig and Sunstein (n 857) 13.

original meaning of the US Constitution's text.[861] Others proffer a values-based reading of the Constitution, considering the moral costs of interpretations of executive power.[862]

US justices have split repeatedly on the general methodological question, as well as on how "the executive power" is to be unpacked. Reviewing a sample of cases on the interpretation of Article II illustrates the point. In *Myers v United States*, in determining whether legislation requiring Senate involvement in postmaster removal decisions was constitutional, Chief Justice Taft discusses the framers' intentions.[863] Just as British judges have made passing comment on the merits of executive activities they are considering, Chief Justice Taft notes "the broader power is much more needed."[864] As is familiar from considering the United Kingdom case law, custom is relevant. Chief Justice Taft discusses "acquiescence" of all branches of government in the view that the President could act alone to remove officials.[865] He bases his conclusion on a broad view of Article II, which regards the granting of "executive power" as giving the President "the general administrative control of those executing laws":[866] the second of Mortensen's three approaches. The statute restricting the President's power to remove postmasters through requiring Congressional oversight is found unconstitutional.

Dissenting judges take divergent views on interpretive method; the meaning of Article II; and the conclusion on the facts. Justice Holmes says viewing "executive power" as a general free-ranging authority to execute law is a "spider's web inadequate to control the dominant facts."[867] Justice McReynolds finds evidence of acquiescence points to a role for

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[861] Calabresi and Prakash (n 855) 546.

[862] Richard H Fallon, Jr, 'Interpreting Presidential Powers' (2013) 63 Duke LJ 347, 350.

[863] *Myers v United States* (1926) 272 US 52, 116–117.

[864] ibid 125.

[865] See, eg, ibid 152.

[866] ibid 165.

[867] ibid 177.

Congress.[868] He contends the grant of executive power in Article II of the Constitution is tied to specific powers listed in the article, and does not go beyond these powers.[869] He rejects the view that Article II, Section 1, is a cross-reference to British law on the prerogative at the time of the Constitution's drafting.[870] He adopts Mortenson's first approach to the meaning of "executive power" (as reference to the enumerated powers in Article II), also rejecting the far-reaching generality of the second approach favoured by Chief Justice Taft (which sees "executive power" as a basis for a wider range of action). Justice Brandeis finds no express or implied constitutional power for the President to make removals of officials without Congressional oversight. He refers to unbroken "administrative practice … consistent with the existence in Congress of power to make removals subject to the consent of the Senate."[871] Justice Brandeis says any "practical disadvantage" of limiting the President's powers is "exaggerated".[872]

Humphrey's Executor v United States asks whether these same principles apply to the Federal Trade Commission, following the President's removal of Mr. Humphrey from his job at the Commission in 1933.[873] This occurred in the aftermath of the Great Depression, as President Roosevelt was launching his New Deal. Justice Sutherland, giving the opinion of a unanimous Court, finds Congress intended through the Federal Trade Commission Act to create a body of impartial experts, independent of executive interference.[874] Turning to whether the Act is unconstitutional, Justice Sutherland distinguishes *Myers* by saying a

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868 ibid 209.

869 ibid.

870 ibid 235.

871 ibid 259.

872 ibid 275.

873 *Humphrey's Executor v United States* (1934) 295 US 602.

874 ibid 625.

postmaster serves executive functions, distinct from the functions of the Federal Trade Commission; *Myers* applies only to "purely executive officers".[875] The Commission is an administrative body, not an executive arm.[876] The "character of the office" is the key consideration.[877] We see in this case even greater complexity emerging in the case law, despite the apparent succinctness of the language of the Constitution. The principles from *Myers* are, after *Humphrey's Executor*, subject to a further test: are offices of a "purely executive" character?

In *United States v Curtiss-Wright Export Corp*, the Supreme Court addresses executive power in foreign affairs. Paraguay declared war on Bolivia in 1933. A 1934 Congressional resolution authorised the President to ban arms sale to countries or parties engaged in the conflict; the President issued a proclamation allowing his Secretary of State to prescribe "exceptions and limitations" to the resolution; the proclamation was revoked in November 1935.[878] Individuals were charged under the resolution, and claimed the episode involved legislative power being unconstitutionally delegated to the executive.

Justice Sutherland, delivering the opinion of the Court, notes that generally the federal government can only exercise powers specifically enumerated in the Constitution.[879] However, the same rule does not apply in foreign affairs; the rule applies because the Constitution carries over powers held by states, but states never had foreign affairs powers.[880] Foreign affairs powers do not "depend upon … affirmative grants": making war, treaty-making, and domestic relations "would have vested in the federal government" had they not

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875 ibid 628.

876 ibid.

877 ibid 631.

878 *United States v Curtiss-Wright Expert Corp* (1936) 299 US 304, 313.

879 ibid 316.

880 ibid 316–317.

been mentioned in the Constitution, says Justice Sutherland.[881] Powers to "acquire territory by discovery and occupation" or "expel undesirable aliens" are not "expressly affirmed by the Constitution" but "exist as inherently inseparable from the conception of nationality".[882] This approach resuscitates the notion of powers "inseparable" from the Crown, discussed in *Saltpetre* and *Ship Money*.[883] The concept of nationality does not appear in the US Constitution.[884] Justice Sutherland finds the President alone exercises powers in the field of international relations.[885] He adds that "unbroken legislative practice" supports this.[886]

Fifty years later, the Supreme Court discussed how principles for Presidential powers of removal applied to appointment, in *Morrison v Olson*.[887] The case is about whether the Ethics in Government Act's establishment of an independent counsel (subject to Congressional oversight) to investigate Government officials for violating federal criminal law contravenes the Appointments Clause or impermissibly interferes with the President's Article II powers. The Act was challenged after the independent counsel defended President Reagan's attempt to withhold 'sensitive' documents concerning environmental policy.

Chief Justice Rehnquist for the majority finds the Act is not unconstitutional. Independent counsel officers are "inferior officers" and Congress can, under the Constitution, allow courts to appoint these officers. Chief Justice Rehnquist moves the case law beyond *Myers* and *Humphrey's Executor*, holding that a test of whether an official is "purely

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[881] ibid 318. There is a reference to the President being Commander in Chief of the Army and Navy in Article II(2) of the Constitution, not mentioned by Justice Sutherland.

[882] ibid.

[883] See n 137 (*Saltpetre*); n 158 per Sir Richard Hutton (*Ship Money*); n 143 (Holdsworth).

[884] For criticism see eg Michael D Ramsey, 'The Myth of Extraconstitutional Foreign Affairs Power' (2000) 42 WMLR 379.

[885] *Curtiss-Wright* (n 878) 319.

[886] ibid 322.

[887] *Morrison v Olson* (1988) 487 US 654.

executive" is overly rigid.[888] Some "purely executive" officials must be removable at will by the President; the key question is whether removal restrictions impede the President's constitutional duty.[889] Applying this test, Chief Justice Rehnquist considers the restriction allowing removal only with "good cause" to be a permissible burden on Presidential powers.[890] Justice Scalia, dissenting, asserts that Article II of the Constitution vests not "*some* of the executive power, but *all of* the executive power" in the President.[891] The scope of this executive power can be determined (at least in part) by practice.[892] He holds that the statute deprives the President of exclusive control over an area of executive activity, and is unconstitutional.[893] He argues the decision will have the effect of "weakening the Presidency by reducing the zeal of his staff".[894]

In *Zivotofsky v Kerry*, the Supreme Court considers whether the President had a basis in the Constitution to recognise foreign states, and whether the President had exclusive control over this power. Congress had directed that the President recognise citizens born in Jerusalem as having 'Israel' as their place of birth; the question was whether this was constitutional. By a majority the Court finds the President has an exclusive power specifying countries in passports. Justice Kennedy, joined by three other judges, notes the Constitution does not use the word "recognition".[895] This power is, however, related to other powers explicitly granted by the Constitution, such as powers relating to ambassadors; accordingly,

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888 ibid 689.

889 ibid.

890 ibid 692.

891 ibid 705.

892 ibid 706.

893 ibid.

894 ibid 713.

895 (2015) 576 US 1, 11.

"[t]he text and structure of the Constitution" support this power being vested in the President.[896] Justice Kennedy notes "the Nation must have a single policy regarding which governments are legitimate".[897] Precedents (including *Curtiss-Wright*) and "historical practice" support the position.[898] Justice Kennedy concludes that the statute under consideration infringes this exclusive power and is unconstitutional.[899]

Justice Thomas in dissent uses historical evidence to claim "executive power" in Article II includes foreign affairs powers at the time of the Constitution's drafting; the third of Mortenson's approaches to Article II.[900] Early practice supports this broad view.[901] On this basis, there is a residual foreign affairs power to regulate passports.[902] But Thomas J argues recognition powers are not implicated by reference to states in passports. He holds that Congress's direction may apply to consular reports, but not to passports (over which the President has exclusive power). Justice Scalia (joined by Roberts CJ and Alito J) quotes Blackstone on foreign affairs prerogatives and notes the US Constitution adopted a slightly different approach involving "balanced powers".[903] He claims that the statute does not touch on recognition, and that the majority's opinion rests on "functional considerations" (about the value of the country speaking with one voice), which Scalia J disavows.[904]

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[896] ibid 14.

[897] ibid.

[898] ibid 20–21.

[899] ibid 30.

[900] ibid 35.

[901] ibid 38.

[902] ibid 55–56.

[903] ibid 67.

[904] ibid 80.

The constitutional and political context of the United States is different from that of the United Kingdom. Key decisions about executive power in the States engage with statutes in detail (as in *Zivotofsky*) and do not focus so cleanly on non-statutory executive forms. The structure of the Constitution means there is more discussion of whether powers should be exclusively exercised by the executive; that question of exclusivity largely does not arise in the United Kingdom, in part because of the lack of a clear doctrine of separation of powers and because of the centrality of parliamentary sovereignty. Nevertheless the text of the Constitution does not settle controversies encountered in the law of the United Kingdom. The case law reveals divergences about the meaning of "executive power" and the method for discerning its meaning. Supreme Court decisions result in caveats not in the text of the Constitution: the President only has the exclusive power to remove officials if they serve a "purely executive" function. Decisions produce carve-outs, such as the claim that Article II of the Constitution does not govern foreign relations powers. The cases reveal that the Constitution does not cover all powers, such as the power to recognise states, and that key words in the Constitution (including "executive power") are not self-executing.

Caveats, carve-outs, and judicial development of scenarios not envisaged in a legal text are normal features of adjudication. But the Constitution is no self-contained code that eliminates ambiguities. While the US Constitution represents a point of departure, the case law reveals the return of modes of reasoning prevalent in the United Kingdom: reliance on custom, discussion of the merits of an executive power, and reasoning claiming powers are "inseparable" from nationality or sovereignty. Judicial practice is inconsistent in its deployment of these modes of reasoning: Scalia J lambasts "functional considerations" in *Zivotofsky*, but claims in dissent in *Morrison* that the majority will have the effect of "weakening" the Presidency;[905] Thomas J in *Zivotofsky* leans on practice in foreign affairs, but then argues

[905] Compare n 904 and n 894.

that Presidential practice cannot be the basis for constitutionality.[906] The US Constitution is a framework that does little to constrain or contain contradictions of the kind that have arisen in the United Kingdom case law on executive power. The Constitution merely creates a new textual basis from which ambiguities are generated.

The existence of something like 'the third source' has not disappeared in US constitutional debate

A codified constitution might appear capable of settling the question of the existence of something like 'the third source': a source of further authority for executive action beyond recognised legal categories. But in the United States, despite a reference to the vesting of executive power in the Constitution, the possibility of further authority for executive action has re-emerged. This further authority is not the same as the British 'third source', since existing sources of executive authority in United States law are not statute and prerogative. It is authority outside the Constitution and statutes: a different 'third source'.

The notion of executive power outside of the Constitution and statutes was raised in early nineteenth century Senate debates, quoted in *Myers v United States*. Justice McReynolds' dissent cites a speech by Clement Clay, in which Clay said, "Inherent power! That is a new principle to enlarge the power of the general government. … The partisans of the executive have discovered *a third and more fruitful source of power*."[907] The majority in *Curtiss-Wright* states the President can act in the sphere of foreign affairs without "affirmative grants" under the Constitution or statute[908] – though this is perhaps more akin to a foreign affairs prerogative.

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[906] *Zivotofsky* (n 895) 38 and 51.

[907] *Myers* (n 863) 180 (emphasis added).

[908] See n 881.

Whether some inherent executive power for domestic action exists is considered in *Youngstown Sheet & Tube v Sawyer*,[909] or 'the Steel Seizure Case'.[910] President Truman ended a steel workers' strike by seizing steel mills under executive order with no apparent basis in statute or Constitution, during the Korean War. Justice Black rejects the view of any executive power justifying the President's actions, saying Presidential power "must stem either from an act of Congress or from the Constitution itself".[911] No power could be implied. Justice Frankfurter agrees, noting "[a] scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority".[912] Justice Douglas concurs, saying any other conclusion would involve "rewriting [Article II] to suit the political conveniences of the present emergency."[913]

Justice Jackson's opinion, the subject of considerable analysis,[914] sets out three categories: first, where the President acts under implied or express authority from Congress (when the President has "maximum" authority);[915] second, where the President acts on the basis of "independent powers", when there is "a zone of twilight in which he [sic] and Congress may have concurrent authority";[916] and third, where the President acts incompatibly with Congress's express or implied will, in which case the President's "power is at its lowest

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909 *Youngstown Sheet & Tube v Sawyer* (1952) 343 US 579.

910 Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (CUP 1977).

911 *Youngstown* (n 909) 585.

912 ibid 613.

913 ibid 632.

914 Patricia L Bellia, 'Executive Power in *Youngstown*'s Shadows' (2002) 19 Constitutional Commentaries 87, 89.

915 ibid 636.

916 ibid 637. Justice Jackson adds: "any actual test of power is likely to depend on the imperatives of events …".

ebb".[917] The facts in *Youngstown* fall into the third category.[918] Justice Jackson rejects "nebulous, inherent powers never expressly granted but said to have accrued … from the customs and claims of preceding administrations."[919] Executive powers beyond statute and enumerated powers in the Constitution have "no beginning" and "no end".[920]

Justice Burton also finds the President has no "inherent constitutional power to seize private property which makes congressional action … unnecessary."[921] Justice Clark agrees, but leaves open the possibility of further non-statutory powers existing, stating: "the President's independent power to act depends upon the gravity of the situation confronting the nation."[922]

A dissenting judgment is delivered by Chief Justice Vinson, joined by Justices Reed and Minton. The dissent observes that "these are extraordinary times", highlighting the importance of steel for the Korean war effort.[923] Noting that the Constitution creates an energetic executive, Chief Justice Vinson finds the President's action was not unlawful. There is a history of swift Presidential action in times of emergency. The Government should not be "left subject to inertia when vigor and initiative are required."[924] The President was guided by the duty, in Section 3 of Article II, to "take Care that the Laws be faithfully executed".[925] The "absence of a specific statute authorizing seizure of the steel mills … has not until today

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[917] ibid.

[918] ibid 640.

[919] ibid 646.

[920] ibid 653.

[921] ibid 659.

[922] ibid 662.

[923] See 678.

[924] ibid 700.

[925] ibid 701.

been thought to prevent the President from executing the laws," writes the minority.[926] There is a need for "flexibility", says the minority, as "a matter of practical necessity."[927]

Youngstown was cited in a key case about President Nixon's actions: *United States v United States District Court*.[928] The case is about the power of the President to authorise (through the Attorney-General) warrantless domestic surveillance of White Panther Party members. It was decided in the same decade as *Malone*. Justice Powell for the majority does not engage closely with the question of inherent powers, but records the Government's argument that it should be given a broad discretion (akin to third source-type powers) allowing the strict requirements of the Fourth Amendment to be bypassed.[929] The Court rejects this argument, finding the surveillance unlawful.

Assertions of the existence of inherent executive powers were revived after 11 September 2001. Initially the focus was on powers operating in a foreign affairs context. John Yoo, author of some of the 'Torture Memos' and then Deputy Assistant Attorney General in the Office of Legal Counsel, wrote an opinion on 25 September 2001 affirming the President's "inherent" power to use military force against terrorists and countries harbouring terrorists.[930] This was an opinion and not a court judgment, but it demonstrated the perception (at least by some in the US government) that inherent powers were available.

The approach was stretched into domestic executive action in *Hamdi v Rumsfeld*, in which the lawfulness of executive detention of a US citizen within the US (designated as an

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[926] ibid 701–702.

[927] ibid 702.

[928] *United States v United States District Court for the Eastern District of Michigan* (1972) 407 US 297. *Youngstown* is cited by Justice Jackson at 332 (fn 13).

[929] ibid 318–319.

[930] John Yoo, 'The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them', 25 September 2001, <https://www.justice.gov/file/19151/download> accessed 18 August 2021.

'enemy combatant') was challenged. The Government did not explicitly call for the Court to approve inherent executive powers but – as Souter J notes - invoked "a mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war."[931] The Court does not comment on inherent executive powers, because it finds a general Congressional authorisation. However, Thomas J says in dissent he considers "the President very well may have inherent authority to detain those arrayed against our troops."[932]

The question is raised in *Hamdan v Rumsfeld*.[933] Yemeni national Ahmed Hamdan had been captured by the US military in 2001 and transported to Guantanamo Bay; the President deemed him eligible for trial by military commission in 2002.[934] It was alleged that Hamdan had transported Osama bin Laden, received weapons training, and transported weapons. Hamdan argued there was no statute or common law authority supporting trial by military commission for conspiracy. Justice Stevens for the Court notes that military commissions are "neither mentioned in the Constitution nor created by statute", but "born of military necessity."[935] Justice Stevens observes that "[e]xigency alone" does not render military commissions lawful.[936] He says "past practice" is relevant to discerning the common law governing military commissions,[937] but finds no authority to create a military commission to try the crime of conspiracy, saying "the commission lacks power to proceed".[938]

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931 *Hamdi v Rumsfeld, Secretary of Defense* (2004) 542 US 507, 552.

932 ibid 587.

933 *Hamdan v Rumsfeld, Secretary of Defense* (2006) 548 US 557.

934 ibid 568.

935 ibid 590.

936 ibid 591.

937 ibid 595.

938 ibid 613.

Justice Thomas's opinion (joined by Justices Scalia and Alito) uses *Youngstown* in defence of broad executive action,[939] calls for deference, and concludes the military commission is lawful. He cites precedent to support "the President's unfettered authority to prescribe military commission procedure".[940] In a footnote, he repeats his qualified defence of inherent powers from *Hamdi*, writing: "Although *the President very well may have inherent authority* to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question ..."[941]

The question of whether the US President has inherent executive powers not enumerated in the Constitution or statute has never been directly answered. But the argument has not disappeared.[942] Though there are differences in constitutional context, there are parallels between third source reasoning in the United Kingdom and inherent powers reasoning in the United States. The 'negative reasoning' used in the *Glasbrook* case and Ram memorandum emerges in Chief Justice Vinson's opinion in *Youngstown*. Claims about the virtue of "flexibility" and "practical necessity" in Chief Justice Vinson's judgment in *Youngstown* are reminiscent of Bruce Harris's defence of the third source, discussed in Chapter Two.

The US Constitution, despite its clear vesting of executive power, has not eliminated these arguments. It would be open for drafters of a constitutional text to spell out that no authority beyond a codified constitution or statute exists. But this section has highlighted that it is difficult for a text to fix the legal architecture of executive government. Government legal

939 ibid 680.

940 ibid 709.

941 ibid 682 (fn 2, emphasis added).

942 See also Louis Fisher, 'Invoking Presidential Powers: A Primer' (2007) 37 Pres Stud Q 1.

advisors and officials are likely to strain to interpret that text to enable maximal executive flexibility.

The US constitutional text does not exhaust the meaning of the Constitution

One of the reasons for third source-type arguments re-emerging in the United States context is that the text of the Constitution has never been the only source of the Constitution's meaning, as Margit Cohn points out.[943] The words of the text are not self-executing, and have not themselves contained answers to all possible controversies. Cohn points out pithily: "no text can supply a basis for all possible contingencies, unless its language is generalized to the point of loss of concrete meaning."[944] We have encountered Justice Jackson's claim that "the imperatives of events" are central in shaping the structure of executive power in the United States: more central than judges have generally admitted. It is worth saying more about broader social, economic, and political currents, and their role in influencing US case law.

Evidence has already been produced of the way custom or past practice has shaped the law on executive power in the United States.[945] This is not referred to in the text of the Constitution. Partly as a result, judges have cited not past practice consistently. Some judges, such as Chief Justice Vinson in *Youngstown*, refer to Presidential practice.[946] Justice Brandeis in

[943] Cohn (n 849) 85: "without settling the ambiguity inherent to the text of the constitution, presidents continue to enjoy some freedom to act in the absence of statute."

[944] ibid 69.

[945] See also Curtis A Bradley and Trevor W Morrison, 'Historical Gloss and the Separation of Powers' (2012) 126 Harv L Rev 411.

[946] See n 926.

Myers invokes "administrative practice".[947] Legislative practice is discussed by Sutherland J in *Curtiss-Wright*.[948] "Acquiescence" is raised in *Myers* by the majority and minority, in some cases in relation to all branches of government.[949] Judges have varied in the extent of past practice required. Justice Sutherland highlights "unbroken" legislative practice in *Curtiss-Wright*.[950] On other occasions the practice cited has not been completely unbroken.

The link between past practice and the law on executive power is rarely spelled out. In *Hamdan*, Stevens J suggests past practice may be evidence of the common law.[951] Mention of "acquiescence" implies acceptance of practice is an indication of constitutionality, but judges rarely consider whether institutions be misguided in their acquiescence. No mention has been made of the fact that individuals affected by allegedly unconstitutional practices may lack access to justice to challenge those practices; if this is so, 'acquiescence' might only reveal persistent barriers to accessing justice. Continuous practice could be invoked to show that finding such practice to be unconstitutional would be inconvenient; but convenience and constitutionality should not be elided. Overall, custom is one factor relevant to the law of executive power, which shows the text of the Constitution may not be entirely controlling of executive conduct. This analysis reveals there is some truth in John Griffith's claim about the United Kingdom that: "the constitution is no more and no less than what happens. Everything that happens is constitutional."[952]

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[947] See n 871.

[948] See n 886.

[949] See ns 865 and 868.

[950] See n 886.

[951] See n 937.

[952] JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1, 19.

Aside from custom, prevailing social and economic currents have informed judicial decisions. Contextual currents are rarely acknowledged by court decisions (with some exceptions, like the dissent in *Youngstown*), and it is to scholarship that we have to turn for evidence of this point. There is a rich vein of work on factors outside of the Constitution's text that have informed interpretation of the Constitution. Ernest Young's work on 'the constitution outside the Constitution' points to political parties and human rights as examples of external influences on the content of the Constitution.[953] Matthew Palmer's work on 'constitutional realism' notes Dicey had always maintained that constitutional conventions (including practices and understandings) constitute part of the constitution, and considers statutes, international law, common law and custom.[954] Laurence Tribe's book *The Invisible Constitution* highlights fundamental principles that represent the shadow of the formal codified US Constitution.[955]

This vein of scholarship, while important, has three shortcomings. First, it is overly narrow: it focuses on political norms that shape the content of the Constitution when other economic and social forces are relevant, as already seen in analysis of UK case law. Second, it is insufficiently historicised: the focus is generally on somewhat timeless principles said to lie behind the Constitution, rather than on how principles and forces came to the fore during particular historical periods. Thirdly, it tends to be sweeping and abstract, and rarely pays close attention to the interaction of extra-textual forces and particular modes of judicial reasoning.

Some work on judicial reasoning in constitutional cases, drawing on legal realism, aims to address at least this third shortcoming by highlighting how certain arguments are shaped by forces outside the courtroom. Recent work by David Pozen and Adam Samaha catalogues

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953 Ernest A Young, 'The Constitution Outside the Constitution' (2007) 117 Yale LJ 408.

954 Matthew SR Palmer, 'Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution' (2006) 54 AJCL 587, 628.

955 Laurence H Tribe, *The Invisible Constitution* (OUP 2008).

"categories of reasoning that are employed in nonconstitutional debates … but are considered out of bounds in debates over constitutional meaning".[956] Pozen and Samaha claim some arguments – including instrumentalist welfare-based policy arguments, fundamentalist arguments (based on deep premises), partisan arguments, emotional arguments, and popularity arguments – are off-limits in US constitutional law.[957] What is focused on less in this work is how arguments acquire or lose resonance during historical periods. Thus, this work (which Pozen and Samaha admit is "primarily descriptive and analytic")[958] may escape the third shortcoming mentioned in that it engages closely with legal reasoning, but slips back into the first and second shortcomings identified with work on 'the constitution outside the Constitution': it is focused on a narrow range of materials and does not capture historical change. As with the work on 'the constitution outside the Constitution', it does not address how extra-legal forces might be patterned ideologically.

At least some of the literature on 'constitutional orders' in US constitutional law addresses these shortcomings. Stephen Griffin describes this as being concerned with "relatively stable patterns of institutional interaction with respect to basic aspects of the Constitution such as governmental powers and individual rights."[959] Griffin argues that constitutional orders comprise the text of the Constitution, "how society organizes itself for politics", and state-building capacity.[960] For Mark Tushnet, constitutional orders "combine novel guiding principles with distinctive institutional arrangements."[961] Such work highlights

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956 David E Pozen and Adam M Samaha, 'Anti-Modalities' (2021) 119 Mich L Rev 729, 731; see also Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (OUP 1984).

957 Pozen and Samaha (n 956) 731.

958 ibid 796.

959 Stephen M. Griffin, 'The Executive Power' in Mark Tushnet, Mark A Graber, and Sanford Levinson (eds), *The Oxford Handbook of the US Constitution* (OUP 2015) 343, 344.

960 ibid 345.

961 Mark Tushnet, *The New Constitutional Order* (Princeton UP 2003) 8.

change over time. It is more textured than accounts claiming constitutional law is jolted by particular 'moments'.[962] It reaches beyond legal materials to explain influences on judicial decision-making. However, it remains limited in its account of what extra-legal forces drive constitutional change, tending to focus on the role of ideas, neglecting economic change.

One attempt to plug this gap has been the 'law-and-political-economy framework'.[963] Law-and-political-economy scholars respond to the way legal scholarship has been "profoundly shaped by a misconception of the relationship between politics and the economy".[964] Their approach is not limited to constitutional law or focused on executive power, but claims constitutional law has been particularly isolated from "economic power and other structural forms of inequality".[965] The argument of some of these scholars is "'the economy' has become an unquestioned foundation or backdrop of law, policy and politics", and there is a need to highlight how that foundation has shaped law.[966] The target of some deploying the law-and-political-economy framework is 'the Twentieth Century Synthesis', which rose to prominence in the 1970s and 1980s at the same time that neoliberalism rose to the fore in the political world, and emphasised a particular approach to economic efficiency.

Law-and-political-economy scholars are focused on the current conjuncture, and the influence of neoliberalism on law, which widens our understanding of what has shaped the United States Constitution beyond the text. This law-and-political-economy work is usefully supplemented by critical legal theory, including critical race theory, that underscores the

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962 See eg Bruce Ackerman, *We the People, Volume 1: Foundations* (Belknap Press 1993).

963 Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K Sabeel Rahman, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis' (2020) 129 Yale LJ 1784.

964 ibid 1789.

965 ibid 1790.

966 ibid 1793.

influence of political and economic frameworks on law over time, not merely in recent decades. Such work highlights the long-running influence of forces such as capitalism and imperialism, as well as the impacts of periods of economic change.[967] Poulantzas observes, in general terms not limited to the US, that the "legal system controls the process whereby power is apportioned to the various classes and … the distinct fractions of the bourgeoisie that make up a power-bloc."[968] Kimberle Crenshaw and Gary Peller write of the "ideological tilt" of constitutional law in a similar vein.[969] There is widespread acknowledgment of the influence of laissez-faire political-economic structures on the "*Lochner* era" in the early twentieth century.[970] But few scholars outside the critical tradition have applied this perspective to other eras in US constitutional law.

Far from the text of the US Constitution being the source of decisions on executive power, there is a need to take into account considerations beyond the text when understanding decisions: custom, principles lying behind the Constitution, the broader order of political ideas, and deeper political and economic structures. Sometimes the reasoning moves with the drift of prevailing currents, as with the dissent in *Youngstown* and its reference to the state's economic needs during the Korean War; at other times it is a response to those prevailing currents, as with the majority decision in *Hamdan v Rumsfeld* on military tribunals during a period of significant state counter-terrorism action.

The text of a constitution only goes so far in controlling outcomes. That suggests that a codified constitution for the United Kingdom would not be a complete solution to

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[967] See also Robert Knox, 'Against Law-sterity', *Salvage*, 13 December 2018, <https://salvage.zone/in-print/against-law-sterity/> accessed 18 August 2021.

[968] Nicos Poulantzas, *State, Power, Socialism* (Patrick Camiller tr, Verso 1978) 91.

[969] Kimberle Crenshaw and Gary Peller, 'The Contradictions of Mainstream Constitutional Theory' (1998) 45 UCLA L Rev 1683, 1685.

[970] For an international perspective: Sujit Choudhry, 'The *Lochner* Era and Comparative Constitutionalism' (2004) 2 ICON 1–55.

challenges discussed relating to the prerogative and third source. A codified constitution can attempt to close off particular controversies, such as whether the third source exists. But the United States' experience suggests prevailing economic, political, and social currents are likely to shape decisions made about that codified constitution. The same United Kingdom currents described above, especially in Chapters One and Three, are likely to remain influential even if a codified constitution appears to herald a new era for executive power.

Australia

The Australian Constitution shares characteristics with the United States Constitution. It is informed by the British common law; is the product of destructive colonisation that displaced and appropriated resources from Indigenous peoples; and divides powers between states and a federal government.

It came into force in 1901, when Australian states were officially federated, some three centuries after the first European arrivals in Australia, and around 50,000 years after the first Aboriginal arrivals in Australia.[971] There had been waves of pressure towards federal union in the late nineteenth century, prompted (amongst other things) by economic exchanges between the states, concerns about foreign affairs (including in relation to the Pacific), and a desire to regulate goods, services, and people coming into Australia. After a period of serious economic crisis in the 1890s, various constitutional conventions and referendums led to the

[971] Alan Cooper, Alan N Williams, and Nigel Spooner, 'When did Aboriginal people first arrive in Australia?', *The Conversation*, 6 August 2018, <https://theconversation.com/when-did-aboriginal-people-first-arrive-in-australia-100830#:~:text=Analysis%20of%20maternal%20genetic%20lineages,west%20of%20modern%2Dday%20Adelaide> accessed 18 August 2021.

Commonwealth of Australia Constitution Act being passed by the British Parliament in 1900.[972]

As with the United States Constitution, the Australian Constitution contains a key section elaborating on executive power. Chapter II addresses executive government, and s 61 says "executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." This language is less spare than Article II, Section 1 of the US Constitution, but in the words of Justice Kiefel, now Australia's Chief Justice, "the terms of s 61 do not offer much assistance in resolving questions as to the scope of executive power."[973] They immediately raise questions about the meaning of "the execution and maintenance of this Constitution, and of the laws of the Commonwealth". The remainder of Chapter II sets out a constitutional basis for executive actors, including ministers and civil servants. But the focus of the case law has been the meaning of s 61 and its relationship to prerogative, third source-like common law powers, and nationhood. Relatively few appellate cases address executive power – writing in 2003, George Winterton notes the "High Court has examined executive power on fewer than 10 occasions" (though it has revisited the topic several times since 2003).[974] Those that have been decided have focused on s 61.

The prerogative has crept back into Australian constitutional law

[972] For background: W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, Sweet & Maxwell 1910) 17–64.

[973] *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1, (2015) 255 CLR 514, 595.

[974] George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 FL Rev 421, 421.

It might be thought that the Australian Constitution's statement about executive power would enable an opportunity for a reimagining of the bounds and standards of executive action, free of Australia's British legal inheritance. However, the concept of the prerogative has crept back into Australian jurisprudence, with its uncertainties and instabilities. This has occurred for many reasons, including Australia's political, cultural, and legal links to the United Kingdom, as well as early Australian settler governments' needs for flexible legal tools.[975] It is plausible that the concept of the prerogative might inform interpretations of the scope of executive power under a codified British constitution, even if 'prerogative' was not explicitly mentioned.

Several leading cases on executive power were decided during the premiership of Gough Whitlam, who had a majority in Australia's lower house but no majority in the upper house. This continues a trend discernible in case law and political use of non-statutory executive legal tools across different jurisdictions: the prerogative, third source, and similar concepts are often invoked where governments have precarious political support and are more reluctant to pursue policy change via legislation. *Barton v Commonwealth* involves an attempt by the Government to extradite two Australians in Brazil, the Barton brothers.[976] The issue was whether there was a lawful basis for an Australian request for extradition, in the absence of an extradition treaty between Australia and Brazil.

Barton is an emphatic statement of the fact that prerogatives exercised by the executive in Australia and the United Kingdom were not extinguished by the introduction of a codified Australian Constitution. Justice Mason holds that s 61 of the Constitution "enables the Crown to undertake all executive action which is appropriate to the position of the

[975] W Harrison Moore (n 972) 1: "the Prerogative looms larger in Colonial than in Home institutions".

[976] *Barton v Commonwealth* (1974) 131 CLR 477.

Commonwealth."[977] He adds: this "includes the prerogative powers of the Crown".[978] Barwick CJ and Jacobs J also use the language of the prerogative to justify the executive action.[979]

Barton's view of the prerogative was applied in *Cadia Holdings v New South Wales*.[980] *Cadia* is about mining royalties. It concerns whether copper mined is a "privately owned mineral" or "publicly owned mineral". The answer to that question turned in part on whether the Crown prerogative to mines of gold and silver had been abridged by legislation. There is no discussion in the case about Indigenous rights to resources: another illustration of the point made in Chapter One – that the prerogative has often been invoked in ways ignorant of underlying Indigenous claims. French CJ notes the prerogative "formed part of the law of the colony of New South Wales, probably from the time of its establishment."[981] He adds that the general principle is that the common law applied in Australia "to the extent applicable to the conditions of the colony …"[982] The prerogative therefore applied, according to French CJ (who does not consider whether Indigenous occupation rendered the prerogative inapplicable). The majority – Gummow, Hayne, Heydon, and Crennan JJ – reaches the same conclusion.[983]

The pulling of the prerogatives into Australian law has imported – and in some cases expanded – ambiguities that were never settled in British case law.[984] *Johnson v Kent* involved argument over whether the executive could erect a tower with a restaurant and viewing

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977 ibid 498.

978 ibid.

979 ibid 485 (Barwick CJ) and 505 (Jacobs J).

980 *Cadia Holdings v New South Wales* (2010) 242 CLR 195.

981 ibid 200.

982 ibid 206.

983 ibid 226.

984 KM Hayne, 'Non-Statutory Executive Power' (2017) 28 PLR 333, 336–337.

facilities on Crown land atop Black Mountain in the Australian Capital Territory under the prerogative. (No consideration was given to underlying Aboriginal ownership rights.) Barwick CJ concludes the prerogative remained a part of executive powers under s 61 and that actions here could be "done by virtue of the prerogative".[985] Barwick CJ does not spell out which specific prerogative provided the relevant authority. Justice Jacobs notes the Commonwealth can act without a statute "if those acts are of the kind which lie within the prerogative of the Crown", and observes that the Commonwealth actions in the case "fall within such a category."[986] The common failure in British case law to describe prerogatives with precision and provide a comprehensive list enables judges in *Johnson v Kent* to refer to "the prerogative" as a generalised authority.

The uncertainty about how a prerogative's existence is proven arises again in *Barton*. Jacobs J comments that the "right of the Australian Government to communicate at will … is an essential attribute of this country as a sovereign nation",[987] adding that the "right to communicate freely with a foreign state is an important prerogative power".[988] Chief Justice Barwick notes that "cooperation of nations in the surrender of fugitives from justice is a most important aspect of international life."[989] Mason J refers to past Crown practice to ground the extradition prerogative.[990] These factors are considered though the merits of a supposed prerogative and evidence of customary practice are never, as in the United Kingdom, acknowledged to be relevant considerations when establishing a prerogative's existence. That

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985 *Johnson v Kent* (1975) 132 CLR 164, 170.

986 ibid 174.

987 *Barton* (n 976) 505.

988 ibid 508.

989 ibid 483.

990 ibid 494.

they are taken into account when not formally acknowledged as relevant allows the merits of a supposed prerogative and custom to be selectively deployed by judges.

Whether a prerogative disappears by falling into disuse, a point of uncertainty in British law, remains unresolved in Australian law. *Ruddock v Vadarlis* was a case decided in the Federal Court of Australia in which the prerogative's disuse was analysed. The case arose out of the rescue of 433 asylum-seekers by the Norwegian vessel the MV Tampa, which was blocked from taking the asylum-seekers to Christmas Island for processing. A claim for habeus corpus was taken on behalf of the asylum-seekers; a key question was whether the executive could prevent entry of non-citizens to Australia.[991] In dissent, Chief Justice Black suggests that if a prerogative is incompatible with modern jurisprudence, it could disappear through disuse; he cites Craies for the claim that the prerogative to prevent entry of non-citizens was "if not absolutely gone … rusty";[992] and concludes "it is, at best, doubtful that the asserted prerogative continues to exist at common law."[993] Chief Justice Black is, however, in a minority, with the majority finding that the Commonwealth has an executive power to prevent entry of non-citizens, including through use of detention. The uncertainty surrounding this point of law prevents clarity about the bounds of executive power and leaves the door open to the executive reviving age-old prerogatives.

Ambiguity has also been used to pry open further space for executive action in Australia, through three legal moves. First, the rule in *De Keyser* discussed in Chapter Three has been flexed in Australian jurisprudence to enable preservation of prerogatives. In *Barton*,

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[991] Australia has a history of exclusionary immigration policy. In the 1990s, xenophobia was whipped up further, particularly by MP Pauline Hanson: Jim Middleton, 'On Asylum Seekers, Our History Keeps Repeating Itself', *The Conversation*, 14 June 2016, <https://theconversation.com/on-asylum-seekers-our-history-keeps-repeating-itself-59473> accessed 18 August 2021. *Ruddock v Vadarlis* was heard on 13 September 2001, with judgment delivered on 18 September, a week after 11 September 2001.

[992] *Ruddock v Vadarlis* (2001) 110 FCR 491, 499.

[993] ibid 500.

Barwick CJ says "the rule that the prerogative of the Crown is not displaced except by a clear and unambiguous provision is extremely strong."[994] He cites no authority for this; necessary implication has been regarded as sufficient under the common law and requiring "clear and unambiguous" displacement appears to develop the law. The move allows Barwick CJ to conclude that legislation had not displaced the prerogative to request extradition in *Barton*. While French CJ in *Ruddock v Vadarlis* relies on authority grounded in sovereignty or nationhood (not prerogative) to find for the Crown, he applies the novel interpretation of the *De Keyser* rule from *Barton* to justify his conclusion, saying a power grounded in sovereignty or nationhood can only be extinguished with a "clear intention"; he construes Barwick CJ to have required an "extremely strong" signal.[995] This shift in the standard required to abrogate a prerogative builds on ambiguity in British case law to strengthen the hand of the prerogative in clashes between prerogative and statute.

Secondly, the standard test in *De Keyser* has been modified to add a thumb on the scales in favour of the prerogative. The merits of a prerogative have been integrated into the test. Justice Mason in *Barton* says the ground of the prerogative to request extradition is not fully covered by the statute, and notes "the decisive consideration" is that "the power … is an important power ..."[996] Justice French in *Ruddock v Vadarlis* observes: "The greater the significance of a particular executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power."[997] Even Chief Justice Black, dissenting in *Ruddock v Vadarlis*, accepts this approach: "[I]f a power is well used, well-established and important to the functioning of

994 *Barton* (n 976) 488 and 508 (Jacobs J).

995 *Ruddock v Vadarlis* (n 992) 540.

996 ibid 501.

997 ibid 540.

the Executive government, a very clear manifestation of an intention to abrogate will be required," he writes.[998] This sliding-scale approach to *De Keyser* is a departure from British law that makes it harder for prerogatives to be extinguished. It might be thought welcome that Australian judges are transparent about the merits of a prerogative, when arguably the merits have informed British judges' application of *De Keyser*. Australian judges are also free to develop the law for Australian conditions. The important point, however, is that through this glossing there is a shift in the scope of, and weight given to, the prerogative.

The third move in the Australian jurisprudence that enables an expansion of lawful executive action is the way the prerogative is used to colour a wide interpretation of s 61 of the Australian Constitution, which (as noted above) refers to "executive power" that "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". In *Ruddock v Vadarlis*, French J says s 61 is not "a species of the royal prerogative", but "may derive some of its content by reference to the royal prerogative".[999] This could seem unobjectionable: the section uses singular wording, and it would be odd if executive power in Australia were continuous with the scope of the prerogative under British law. But the point gets built upon, following Robert French's appointment as Chief Justice, in the *CPCF* case, concerning the executive power to exclude 'aliens'. Chief Justice French says, in an observation flagged as obiter, that:[1000]

> The content of the executive power [under the Constitution] may be said to extend to the prerogative powers … It does not follow that the prerogative content comprehensively defines the limits of the aspects of executive power to which it relates.

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[998] ibid 504.

[999] *Ruddock v Vadarlis* (n 992) 540.

[1000] *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1, (2015) CLR 514, 538.

This view of the prerogative treats it not as some ceiling on the bounds of executive power, but as a minimum floor for executive power, used to buttress expansion of prerogative power.

These three legal moves show it would be wrong to assume a new codified constitution, in the United Kingdom or elsewhere, will necessarily have a constraining effect. The new structure of a codified constitution may be used to justify expansion of executive action. The uncertainty of pre-existing law on the prerogative can be used to expand prerogatives and the scope of lawful executive action.[1001]

Debates about 'the third source' are ongoing

Just as the prerogative has not been eclipsed by the introduction of the Australian Constitution, arguments about the existence of the third source have not disappeared. Three years after the Australian Constitution came into force, the High Court decided *Clough v Leahy*, a decision remarkably similar in reasoning to *Malone v Metropolitan Police Commissioner* (decided some 75 years later).[1002] In part because *Clough v Leahy* is about executive powers in New South Wales Government, little reference is made to the terms of the Australian Constitution.

Clough v Leahy concerns establishment of a royal commission of inquiry into the Machine Shearers Union. This emerged out of a dispute between rival shearers' unions. John Leahy, Secretary of the Machine Shearers Union, refused to cooperate, claiming it interfered with litigation being pursued under the Arbitration Act. Chief Justice Griffith gives the judgment of the High Court, rejecting the argument that the commission of inquiry was

[1001] Winterton says: "the Constitution was not inscribed upon a *tabula rasa*. It was born into a common law world ...": n 974, 432.

[1002] *Clough v Leahy* (1905) 2 CLR 139.

unlawful. In four respects Chief Justice Griffith's reasoning is akin to reasoning that would later justify the third source in British case law.

First, Griffith CJ's starting point is not to ask whether the establishment of the commission of inquiry is lawful, but whether it is *not unlawful*.[1003] Chief Justice Griffith writes,"I propose to inquire whether there is any statute law or rule of common law that makes it unlawful for the Crown to issue Commissions of inquiry."[1004] Second, Griffith CJ compares the powers of the Crown and the powers of individuals. "[T]he powers of the Crown are practically no greater than the powers of a private individual," he writes.[1005] "The power of inquiry, of asking questions, is a power which every individual citizen possesses," argues Griffith CJ. As with the analogy in *Malone*, Griffith CJ's comparison is superficially appealing. Asking questions is something individuals and (agents of) the Crown can do. But viewing a Crown inquiry in this way is a rhetorical ruse. A Crown inquiry involves quasi-judicial processes, coercion, and the full weight of the state being behind activities; it is manifestly not just about "asking questions". Griffith CJ fails to consider whether the Crown capacity to ask questions is a *sufficient* condition of that capacity being lawful. Third, Griffith CJ uses a general statement about the freedom of individuals to fortify claims about the freedoms of the Crown. "We start … with the principle that every man [sic] is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbour …", he adds.[1006] Like Sir Robert Megarry VC, Griffith CJ does not consider whether there are reasons the Crown and

[1003] ibid 155.

[1004] ibid.

[1005] ibid 156.

[1006] ibid 157; compare *Malone* (n 714) 355.

individuals should be treated differently under the law. Fourth, Griffith CJ clarifies he is not discussing a prerogative.[1007]

For a period following *Clough v Leahy*, the structure of the third source-type argument was not replicated. In *New South Wales v Bardolph*, a case investigating a contract between the New South Wales government and a newspaper owner, some passing comments were made by two judges suggesting the Crown has the power to contract independent of statute.[1008] In *Barton*, McTiernan and Menzies JJ adopt 'negative reasoning' when approaching the lawfulness of a request to extradition, asking whether there is any prohibition on requests for extradite.[1009] However, these judges primarily rely upon arguments from nationhood or inherent authority, discussed below.

Over a century after *Clough v Leahy*, in *Williams v Commonwealth* ('*Williams (No 1)*'), an effort was made to consolidate something akin to the third source in Australian law, in a case about contracting-out.[1010] The outsourcing of government services to private contractors, or contracting-out, was a key element of neoliberalism from the 1980s onwards.[1011] The case concerned the lawfulness of the National Schools Chaplaincy Program: a contract to fund chaplains supplied by private providers in schools. A majority of the High Court rejects the lawfulness of the National Schools Chaplaincy Program, but third source-type arguments are prominent. Chief Justice French opens the door to these arguments by acknowledging

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[1007] ibid 156.

[1008] *New South Wales v Bardolph* (1934) 52 CLR 455, 496 (Rich J), 508 (Dixon J). The case on executive power affirms a decision of Evatt J at first instance; in 1987, decades after it was written, Evatt's doctorate on the prerogative would be published: Herbert Vere Evatt, *The Royal Prerogative* (Sweet & Maxwell 1987).

[1009] *Barton* (n 976) 490.

[1010] [2012] HCA 23, (2012) 248 CLR 156.

[1011] Labour Party (UK), *Democratising Local Public Services: A Plan for Twenty-First Century Insourcing*, 2019, <https://labour.org.uk/wp-content/uploads/2019/07/Democratising-Local-Public-Services.pdf> accessed 18 August 2021. On neoliberalism: Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019) 6–10.

"[t]here are undoubtedly significant fields of executive action which do not require express statutory authority", and notes there must be authority for "Commonwealth servants and agents to carry out activities in the exercise of the general powers conferred by the Constitution."[1012] This is reminiscent of third source advocates' claims that the third source is needed to supply authority for day-to-day government activities. Chief Justice French notes the Commonwealth has the capacity, "in common with other legal persons", to spend money and enter into contracts.[1013] However, he observes such capacities should not be used to interfere with the "legal rights and duties of others".[1014] References to shared capacities, and non-interference with rights, are key planks in third source reasoning. But French CJ rejects the view that the Government is "just another legal person".[1015] He distinguishes *Clough v Leahy*, noting the "characterisation" given of the power to make an inquiry "does not convey any coercive element in the power", and underscoring it does not concern the federal power at stake in *Williams (No 1)*.[1016] Chief Justice French refuses to accept there is an open-ended power for the Commonwealth to spend and contract without statutory authority, or a narrower power to do this in cases where an equivalent legislative power exists; hence the National Chaplaincy Program is constitutionally invalid.

The joint judgment of Gummow and Bell JJ, and the separate judgment of Hayne J, reject the third source in terms stronger than French CJ. Justices Gummow and Bell note the Constitution's references to the executive are vague, because "[t]he executive branch of government [under British law] was shrouded in mystery, partly attributable to the uncertain

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[1012] *Williams (No 1)* (n 1010) 191.

[1013] ibid.

[1014] ibid 192.

[1015] ibid 193.

[1016] ibid 206.

scope and status of the prerogative."[1017] They refuse to accept the Commonwealth has capacities in common with other legal persons that authorise spending and contracting-out.[1018] Justice Hayne is excoriating:[1019]

> It is not to be assumed, and was not demonstrated that the Executive Government of the Commonwealth has all of the capacities – in the sense of powers – to contract and spend that a natural person has. There is no basis in law for attributing human attitudes, form, or personality either to the federal polity that was created by the Constitution or … to one branch of the government …

Justice Hayne, like Chief Justice French, does not endorse the view that all spending and contracting out without statutory authority is constitutional, or that spending and contracting if falling within a sphere consistent with legislative powers would be constitutional – the latter would involve unhelpful analysis of a "hypothesised law".[1020] Justices Crennan and Kiefel provide more cautious opposition, accepting some comparison between the Crown and natural persons.[1021] Justice Heydon dissents, endorsing a version of the third source adapted to Australia, and placing weight on an initial "common assumption" in submissions that the executive power of the Commonwealth extended to contracting and spending as long as the Commonwealth had legislative power to do the same.

The judgment rejects a narrow and broad version of the third source under Australian law. Three judges – Gummow, Bell, and Hayne JJ – are forthright in their opposition. But four judges – French CJ, and Crennan, Kiefel, and Heydon JJ – accept the Crown and natural persons share certain capacities, though each judge makes different observations. The door is not entirely closed on a version of the third source being accepted in Australian law.

[1017] ibid 227.

[1018] ibid 237.

[1019] ibid 253.

[1020] ibid 274.

[1021] ibid 343, 352, 355 (Crennan J); 373 (Kiefel J).

Two years later, the law passed by the Federal Government in response to *(Williams No 1)* was challenged as unconstitutional, since it did not appear to fall within an accepted legislative head of power.[1022] On appeal to the High Court it was said that *Williams (No 1)* was wrongly decided; arguments about a third source-like power were revisited.

The majority judgment in *Williams (No 2)*, given by five judges, records the Commonwealth submission that *Williams (No 1)* caused "considerable inconvenience".[1023] This argument continues the link between convenience and the third source in case law.[1024] The Commonwealth submits that "a polity must possess all the powers that it needs in order to function as a polity", raising a point about the perceived needs of the state.[1025] But the majority denies that *Williams (No 1)* was wrongly decided. It notes the scope of executive power in Australia need not be coextensive with the scope of executive power in the United Kingdom. In a footnote, the majority mentions the third source under British law, making reference to cases and articles considered in this dissertation. "It is neither necessary nor appropriate to enter upon that subject," the majority concludes.[1026]

The third source, or a version of it, does not definitively form part of Australian law at the time of writing. But arguments resembling the structure of the third source entered Australian law in *Clough v Leahy*, and pressure has been exerted to maintain space for the executive to act in a manner akin to what the third source of authority grants in the United Kingdom. The Australian Constitution has not foreclosed the emergence of these arguments.

[1022] *Williams v Commonwealth* [2014] HCA 23, (2014) 252 CLR 416 ['*Williams (No 2)*'].

[1023] ibid 463.

[1024] *Glasbrook Brothers Ltd v Glamorgan County Council* (n 271).

[1025] ibid 467–468.

[1026] ibid 468 (fn 161).

A further channel of executive power has emerged in Australian law, grounded in an indeterminate notion of 'nationhood': a possible 'fourth source'.[1027]

In *Barton*, while most other judges use the prerogative to justify Australia's request for extradition, McTiernan and Menzies JJ focus on whether statute had expressly or by necessary implication "deprived the executive" of "its inherent power" to make requests for extradition.[1028] The notion of some form of inherent power is then discussed further in *Victoria v Commonwealth* ('*AAP*').[1029] This case was about the constitutionality of action taken by Gough Whitlam's government to implement the Australian Assistance Plan, a scheme for transforming social welfare. By a 4-3 majority the constitutional challenge is rejected.

Chief Justice Barwick sides against the Commonwealth, but accepts "some powers, legislative and executive, may come from the very formation of the Commonwealth as a polity and its emergence as an international state." He does not elaborate, noting that "[t]he extent of powers … inherent in the fact of nationhood and of international personality has not yet been fully explored".[1030] Justice Mason, finding for the Commonwealth, is more forthright in his comments, which would prove significant. "[T]he Commonwealth enjoys," Justice Mason

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[1027] For background: Anne Twomey, 'Pushing the Boundaries of Executive Power: *Pape*, The Prerogative and Nationhood' (2010) 34 MULR 313; Robert French, 'Executive Power in Australia – Nurtured and Bound in Anxiety' (2018) 18 UWALR 16; Cheryl Saunders, 'Separation of Legislative and Executive Power' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP 2018).

[1028] *Barton* (n 976) 491.

[1029] *Victoria v Commonwealth* (1975) 134 CLR 338.

[1030] ibid 362.

writes, "apart from its … enumerated powers, certain implied powers which stem from its existence and its character as a polity."[1031] He says:[1032]

> [T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51 (xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.

Justice Jacobs refers to sovereignty-related considerations, though he says this while elaborating on s 81 of the Constitution, which allows appropriations "for the purposes of the Commonwealth".[1033]

There is an elision in these arguments, between *implied* nationhood-based powers – grounded in ss 51, 61, or 81 of the Constitution[1034] – and *independent* nationhood-based powers, derived from the historical fact of Australia's establishment as a country. Justice Jacobs draws his understanding from the Constitution's text. Chief Justice Barwick regards powers arising directly out of the "formation of the Commonwealth" as a historical fact. Justice Mason moves between both positions, describing the powers as "implied", and noting that powers to engage in "enterprises peculiarly adapted to the government of a nation" come from "the existence and character of the Commonwealth" and from ss 51 and 61. It is not clear whether Mason J's reasoning is disjunctive, presenting history and text as alternative bases, or whether these grounds operate in conjunction to provide the foundation for nationhood powers. No judge explains why Australia's establishment as a nation justifies executive powers, or how nationhood is connected to s 61. "[E]xecution and maintenance" of the Constitution and laws

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[1031] ibid 397.

[1032] ibid.

[1033] ibid 412.

[1034] Section 51(xxxix) authorises legislative action on "matters incidental to the execution of any power vested by this Constitution" in Parliament, the Government or other listed bodies.

could be a reference to the executive's role in ensuring coherence across the Constitution and laws, or coherence over time.

In *Davis v Commonwealth*,[1035] the tensions between viewing nationhood powers as implied or independent are openly addressed. The case was prompted by Aboriginal Australians claiming the establishment of a company to arrange 'bicentenary' celebrations (the bicentenary of European colonisation of Australia) exceeded lawful executive power under the Constitution. All the judges (with Brennan J dissenting) find there is executive power to establish such a company. Four judges, led by now Chief Justice Mason, assert a wide-ranging independent nationhood power; three judges oppose that power, favouring one arising out of the Constitution's text.

The joint judgment of Mason CJ, Deane, and Gaudron JJ says executive powers are "derived from … the Constitution itself and from the character and status of the Commonwealth as a national polity".[1036] Again, this formulation is not clear about whether the constitutional distribution of powers and the character of the Commonwealth are jointly or separately the basis of the executive power. Chief Justice Mason and Justices Deane and Gaudron use a nationhood-like power to justify federal action over state action.[1037]

Justice Brennan uses rationales grounded in the Constitution and historical fact. He observes "there can be no doubt that the Executive Government … has an executive power to protect the nation",[1038] adding that "[t]he end and purpose of the Constitution is to sustain the nation".[1039] Justice Brennan states, "If the executive power of the Commonwealth extends

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1035 *Davis v Commonwealth* (1988) 166 CLR 79.

1036 ibid 93.

1037 ibid 94.

1038 ibid 109.

1039 ibid.

to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation *whereby its strength is fostered*."[1040] Finally, he says "[t]he variety of enterprises or activities which might fall for consideration preclude the a priori development of detailed criteria but, as cases are decided, perhaps more precise tests will be developed."[1041] Brennan J uses a range of terms: what "sustain[s] a nation", what fosters a nation's "strength", what will protect the nation. Each has a different meaning.

Justices Wilson and Dawson, and Justice Toohey, are alert to the dangers of nationhood-based reasoning. Justice Wilson and Dawson accept "the character and status of the Commonwealth as a national government" could be "an element to be considered in the construction of s 61 of the Constitution", but insist the nature of the Commonwealth should not be elevated to some independent source of power.[1042] Justice Toohey reaches a very similar conclusion, underscoring that powers should not go beyond what is "enumerated" in the Constitution.[1043]

A split re-emerges in the Federal Court of Australia in *Ruddock v Vadarlis*. Justice Beaumont decides in favour of the Commonwealth on another ground, but Justice French and Chief Justice Black have opposing views on nationhood-based powers. Justice French accepts no prerogative can justify the executive expulsion of non-citizens, but – drawing on *AAP* and *Davis* – says "Australia's status as a sovereign nation" gives it powers that have not been extinguished by legislation. He combines statements about the powers of states at the international level with a modified version of the *De Keyser* test to reach his conclusion. The power in the case "is so central to" Australia's "sovereignty" that "it is not to be supposed

[1040] ibid (emphasis added).

[1041] ibid 111.

[1042] ibid 103.

[1043] ibid 117.

that the Government of the nation would lack" this power.[1044] This leaves a morass of uncertainty. Judges, lawyers, and commentators will carry different assumptions about what "sovereignty" entails and requires. Chief Justice Black of the Federal Court is alive to the pitfalls of this. He notes new prerogatives cannot be created, suggesting establishment of a new 'nationhood' or 'sovereignty' power risks authorising new prerogatives through a backdoor. Section 61 of the Constitution, he says, could "emerge in a strong modern form" through reference to "the national interest".[1045]

Justice French, like Justice Mason, was appointed Chief Justice and developed these views on the High Court. He presided as Chief Justice in two cases, *Pape v Federal Commissioner of Taxation* and *CPCF v Minister for Immigration*, that contributed to nationhood powers gaining a stronger legal foothold. *Pape* was about the constitutionality of a one-off cash payment to Australians following the global financial crisis. A 4-3 majority upholds the constitutionality of the payment, with a majority endorsing nationhood-based reasoning.

Chief Justice French says s 61 of the Constitution "is not a locked display cabinet in a constitutional museum", is "not limited to statutory powers and the prerogative", and "has to be capable of serving the proper purposes of a national government."[1046] He claims s 61 includes "an area of inherent authority derived partly from the Royal Prerogative, and probably even more from the necessities of a modern national government", and says there "has been substantial support in this Court for that proposition."[1047] But he says *Pape* is not a case that requires affirmation of a nationhood power. It is about executive power to undertake "short-term fiscal measures to meet adverse economic conditions affecting the nation as a

[1044] *Ruddock v Vadarlis* (n 992) 543.

[1045] ibid 501.

[1046] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60.

[1047] ibid 60–61, citing Professor Sawer's unpublished 1976 Octagon Lecture.

whole, where such measures are … peculiarly within the capacity and resources of the Commonwealth Government."[1048]

Justices Gummow, Crennan, and Bell's judgment is more open in its reliance on a nationhood power. It notes "references to 'nationhood' and the like in the decisions of this Court may be traced to its earliest years".[1049] The judgment records: "in considering what enterprises and activities are peculiarly adapted to the government of the country and which cannot otherwise be carried on for its benefit, this case may be resolved without going beyond the notions of national emergency and the fiscal means of promptly responding ..."[1050] This is an endorsement of the nationhood-type test laid down by Mason J in *AAP* – the words in the first half of the quote are Mason J's even if he is not cited – at least in cases of "national emergency". Justice Heydon dissents, but applies Justice Mason's test, finding the one-off cash payment is unconstitutional because the outcomes could "otherwise be carried on".[1051] Justices Hayne and Kiefel are more circumspect. They accept there may be "some implied legislative power … that follows from the existence of the national polity".[1052] But nationhood is too uncertain to justify the power claimed. Despite the dissent of Justices Hayne and Kiefel, there appears to be a majority favouring nationhood-based reasoning in *Pape*, at least in situations of a national emergency. Four, perhaps five, judges accept nationhood has some role in reasoning about executive powers.

The point arises again in *CPCF*, where the question was whether the Commonwealth had powers to detain Sri Lankan nationals on a boat and take these nationals from Australian

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[1048] ibid 63.

[1049] ibid 84.

[1050] ibid 91.

[1051] ibid 177.

[1052] ibid 125.

to Indian waters.[1053] A majority finds legislation authorised the Commonwealth action, but three judges other than French CJ (who does not comment on the point) – Crennan J, Kiefel J, and Keane J – express support for a nationhood- or sovereignty-based executive power. Justice Crennan observes it is "common ground that the power to determine who may enter Australia and to exclude non-citizens is an incident of a state's sovereignty over territory", the weakest indirect endorsement, given it might be a transcription of argument or a statement of the international law position. Justice Kiefel (appointed Chief Justice from 2017) says the power to expel non-citizens "resides in every nation State, as an aspect of its sovereignty", though this should not be confused with "the nationhood power, which arises under the Constitution".[1054] While she claims not to rely on the nationhood power, Justice Kiefel's statement that it "arises under the Constitution" (and citation of *Pape*) is an indication of her view that it forms part of the law – a noteworthy indication, given her caution in *Pape*. Justice Keane says it is "well-settled" that the power argued for "is an incident of Australia's sovereign power as a nation."[1055] This might be considered a statement about international law, though Keane J's reference to "Australia's sovereign power as a nation" could be regarded as a nod to nationhood-type arguments, and his mention of the position "under the common law" suggests this is not merely an international law comment.

In *M68 v Minister for Immigration and Border Protection*, most judges avoid the topic, with a majority finding Australia's involvement in migrant detention in Nauru was authorised by statute – though Justice Gageler gives an exegesis on executive power, affirming that some "non-prerogative executive capacity" has an "inherent character".[1056]

1053 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

1054 ibid 496.

1055 ibid 647.

1056 *Plaintiff M68/2257 015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 98.

Nationhood is a basis for executive power, arguably since *Davis* and at least at since *Pape*. Unanswered questions remain, however. Does it have independent status on the basis of historical facts? Does it only arise in limited circumstances? What are its limits? As Anne Twomey writes, this basis for executive power "has no apparent boundaries and no clear source."[1057]

One question raised by Gageler J's intervention in *M68* is whether nationhood is a fourth source of executive power under Australian law, or a species of a possible third source of non-statutory authority for executive action. Justice Brennan's judgment in *Davis* refers to three sources of executive power under Australian law: "a statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity."[1058] Nationhood powers might be considered part of non-statutory and non-prerogative capacities. However, Brennan J's statement is made in 1988, before decisions in *Williams (No 1)* and *Williams (No 2)*, which discuss nationhood distinctly from a third source-type power. There appears a difference between nationhood-based arguments and third source-based arguments – particularly in the partial grounding of nationhood-based arguments in the Constitution – even if there is overlap in their linkages to the needs of government. It seems there are four potential sources of executive power under Australian law: statute, prerogative, (perhaps) capacities or third source-type bases, and nationhood.

This conclusion underscores that, should a codified constitution be adopted in the United Kingdom, new sources of executive authority – including nationhood – might arise. Authority might be said to flow from a new political settlement forged by a codified constitution. As Chapters One and Three have demonstrated, arguments about sovereignty

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[1057] Anne Twomey, 'Pushing the Boundaries of Executive Power – *Pape*, The Prerogative and Nationhood Powers' (2010) 34 MULR 313, 332.

[1058] *Davis* (n 1035) 108.

and powers inherent to or inseparable from the Crown have arisen under the law of the prerogative. The claim that a new constitution means that executive powers cannot be "a locked display cabinet in a constitutional museum"[1059] could be made in the United Kingdom. As New South Wales Chief Justice Spigelman (a political advisor when Gough Whitlam was Prime Minister) writes, constitutions generate power as well as constraining it.[1060]

Conclusion

Different conclusions might have been reached from comparative analysis had different countries been selected for study.[1061] Nevertheless there is value in focusing on jurisdictions whose courts and constitutions have drawn from the British constitutional experience. The focus has been on what codified constitutions can do to executive power, but the discussion has examined not just text but modes of judicial reasoning, the influence of context, and the relationship between judicial decision-making and the perceived needs of the state.

What explains the different legal trajectories? Why has the prerogative played an important role in Australia, while remaining marginal in the United States? Why have executive capacities, and nationhood-based powers, gained more traction in Australia than the United States? Complete answers would require another dissertation, informed by fine-grained understandings of each country's history. Plausible hypotheses include that constitutional texts have enabled or constrained different reasoning; that there is path

[1059] Made by French CJ in *Pape* (n 1046).

[1060] JJ Spigelman, 'Public Law and The Executive: 2010 Garran Oration' (2010) 69 Australian Journal of Public Administration 345, 347, citing Martin Loughlin, *Foundations of Public Law* (OUP 2010) 12.

[1061] See Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (OUP 2005).

dependency in each jurisdiction to forms of reasoning, based on the doctrine of precedent, amongst other things; that perceived needs of the state have differed in each jurisdiction; and that there are differing orientations to British concepts, shaped by factors such as the relative power of the United States and Australia as states, where lawyers and judges have been educated, and political and legal cultures.

What is more striking than differences between these jurisdictions are the similarities in judicial reasoning in cases on non-statutory executive authority in the United Kingdom, the United States, and Australia. In each jurisdiction, across very different time periods, there is a recurring focus on what executive action is of public benefit, what legal controls are inconvenient, and what evidence exists of past practice. Limits on executive action are vague, creating flexibility for governments but uncertainty for others. Judges revert to asking not whether executive action is positively authorised, but whether it is not unlawful; executives are compared with natural persons or individuals; points are made about powers inherent to government or sovereignty; and it is said that legal authority for executive action should not interfere with individual rights. If it is too strong to say there are cycles in reasoning across jurisdictions and across time periods, it is not too strong to say certain modes of reasoning appear to rhyme with earlier modes of reasoning from other jurisdictions.

Explaining why this is so is no easy task. It is too neat to conclude that judges revert to common reasoning because executive powers are needed, and because judges will escape any constitutional or legal straitjacket to secure these powers – though there is merit in Margit Cohn's observation that, across jurisdictions, prerogative and third source-like tools are expedient, allow executives to respond to changes in political realities, and enable the bypassing of accountability.[1062] It is also too easy to say patterns of reasoning reflect some immanent common law logic. But a kernel of truth can be extracted from each explanation.

[1062] Cohn (n 849) 69–70.

The United Kingdom, the United States, and Australia are bound within a common law Anglosphere, in which political and legal and economic frameworks may differ – but philosophical and economic features are shared, resulting in similar tendencies and pathologies. Within that shared system, in which liberal capitalism and colonialism loom as dominant background features, it is no surprise that judges respond to similar claims from governments or complaints from individuals. It is also no surprise, within the shared system, that lawyers and judges find similar forms of expression for arguments and conclusions. Cohn makes a related point about the importance of a "shared … ethos" and "generally similar socio-economic climates" in her comparative analysis.[1063]

Drawing conclusions about the prospects for a codified constitution in the United Kingdom on the basis of this analysis is fraught. Attention has been paid only to two jurisdictions. What can be said is that, though one normative shortcoming of the prerogative and third source identified in Chapter Four is the lack of a stabilising text, it should not be assumed that crafting a constitutional text will have a completely stabilising effect. Some of the problems flowing from the US and Australian constitutions might be constrained by drafting choices. It could be clarified that no inherent executive power exists, or that sovereignty or nationhood are no basis for executive power. But concepts can have a way of creeping back in to the law of the executive in different countries, even when they are excluded by a constitutional text. Further, compromises struck when negotiating a constitution, to secure widespread political agreement, make it unlikely that ambiguity can be entirely eliminated through drafting.[1064] Broader political and legal culture, and social and economic events, will bear on constitutional interpretation, shaping the ways text is

[1063] ibid 100.

[1064] Thanks to Hasan Dindjer for this point.

interpreted. Those seeking in a codified constitution a panacea to the problems of oppressive executive activity should look elsewhere.

Chapter Six:

Putting the Prerogative and Third Source on a Statutory Foundation?

Another response to the problems of the prerogative and third source, aside from drafting a new written constitution, is to put them on a statutory foundation. Putting the prerogative and third source 'on a statutory foundation' could cover a range of statutory interventions, from setting out in statute authorisation for executive action in an area previously covered by prerogative and third source, but without reference to them, through to explicitly abolishing all prerogative and third source authority and establishing a new framework for executive action in a single statute. There are many other forms of statutory intervention between these two options, which represent opposite ends of a spectrum. As with a codified constitution, putting the prerogative and third source on a statutory foundation could appear to resolve some of the problems identified in previous chapters. It could, depending on the form of intervention, reduce ambiguity about the prerogative and third source, and limits on their exercise. It could provide an opportunity for structured scrutiny of existing prerogative and third source activity. It could lead to more precisely articulated limits. Would statutory codification secure these results?

The first part of the chapter considers two kinds of statutory intervention attempted in the past: piecemeal codification of the prerogative and third source, and comprehensive codification. This is not an exhaustive history of all examples of statutes interacting with the prerogative and third source. But it offers the outline of a taxonomy of piecemeal codification, and commentary on the challenges of comprehensive codification, based on actions taken by successive British governments in the mid- to late-2000s. The second part of the chapter assesses the desirability of piecemeal and comprehensive codification, given the current

conjuncture. The risks and strengths of different forms of codification are described. It is suggested that comprehensive codification is defensible and desirable, though comprehensive codification will not eliminate judicial development of the scope of executive authority, and will not necessarily preclude expedient executive action. Comprehensive codification should therefore be pursued in full recognition that areas of action previously governed by the prerogative and third source will remain sites of political contestation across all three branches of government.

A theme of the chapter is that Parliament has been, and is likely in the future to remain being, a key actor in securing space for the executive to respond to the needs of the state. Previous chapters have highlighted that the executive, and the courts, have played important roles in sculpting and scaffolding executive action, as part of a broader struggle to give effect to the needs of the state. The executive has strategically claimed prerogative or third source activity in new spheres in the courts. The courts have often supported these claims, including by preserving ambiguity in case law to flexibility for the executive; this has sometimes contributed to the prerogative and third source being highly unsettled areas of law. The executive and judiciary have never been uniform in their practices, and behaviours have changed over time. What this chapter underscores is that Parliament's institutional interests and record in relation to the prerogative and third source should not be ignored. Parliament has acted to preserve the prerogative and third source, and to expand the scope of lawful executive action, and may continue to act in this way in future. That complement to the earlier chapters reveals that all three branches of government – judiciary, executive, and legislature – have invoked, developed, and manipulated the prerogative and third source to serve what they perceive to be the needs of the British state. It demonstrates that, while on occasion the legislature may have been a bulwark against executive power in the struggle to give effect to perceived needs of the state, in other moments the legislature has appeared to support and reinforce efforts to preserve ambiguities in the law of the prerogative and third source.

In methodological terms, this chapter has a more classificatory focus than previous chapters, in its effort to describe the statutory interventions undertaken to alter the contours of the prerogative and third source. This is consistent with earlier emphasis on the importance of historicising the prerogative and third source; in what follows attention shifts to the history of statutory intervention. The chapter maintains a contextual approach to understanding the history of statutory intervention and New Labour's reform efforts. It draws on and applies Goldoni and Wilkinson's call to pay attention "to the underlying material context ... and the dynamics of constitutional change",[1065] and to "[grapple] with the deeper social context in which formal constitutional development is embedded."[1066] In the same spirit as the normative analysis in Chapter Four, this chapter draws tentative conclusions (rooted in the conditions and norms of contemporary British society) and resists suggesting timeless truths. As with other chapters, it reaches conclusions through careful review of relevant literature, in particular work by David Gladstone, Anne Twomey, and Bruce Harris on codification.

The British experience of codifying the prerogative and third source

Piecemeal codification

The relationship between statutes and the prerogative and third source does not have an 'all-or-nothing' character, in which either statutes explicitly cover all of the ground once covered

[1065] Goldoni and Wilkinson (n 18) 568.

[1066] ibid 569.

by the prerogative or third source, or a statutory gap is left in prerogative and third source subject-matter areas. Individual statutes interact with the prerogative and third source in a range of ways. A full history of this interaction would represent a history of a significant proportion of statutes passed by the British Parliament and is not possible here. This section takes as a basis for analysis statutes that cover prerogative or third source subject-matter areas addressed in British cases discussed in this dissertation: going to war, imperial expansion, surveillance, the discovery of natural resources, local government, emergency action, inquiries, civil service activity, and powers relating to the management of Parliament. It draws on the results of a review of statutes explicitly using the words 'prerogative' or 'non-statutory powers'. Analysis of these statutes reveals that piecemeal codification varies in five different ways.

First, statutes adopt a range of positions in relation to how far they go in preserving or abolishing the prerogative and third source. The Emergency Powers (Defence) Act 1939 is clear that its powers supplement the prerogative, noting in s 9 that "[t]he powers conferred by or under this Act shall be in addition to, and not in derogation of, the powers exercisable by virtue of the prerogative of the Crown."

A large number of statutes, going at least as far back as the nineteenth century, explicitly save the prerogative. (It is difficult to find legislative references to something akin to the third source, perhaps because this authority for executive action was openly debated only in the late twentieth century and at least after Dicey the prerogative may have been regarded as encompassing the third source.) The 1837 Central Criminal Court Act clarifies that the prerogative of mercy is not affected by the legislation. Numerous pieces of colonial legislation save the prerogative similarly, including the Mutiny East Indies Act 1840, British North America Act 1867, and the Government of Burma Act 1936.

Some statutes manifestly cover ground previously covered by the prerogative or third source, but say nothing about saving the prerogative or third source, suggesting they are

extinguished by implication. The Civil Contingencies Act 2004 has no savings provision, despite setting out emergency powers and measures governing the disclosure of information that would have been previously governed by some prerogatives and the third source.

Finally, some recent statutes say nothing about their relationship to the prerogative and third source, but emphasise in explanatory notes that the prerogative and/or third source have been abolished. The explanatory notes accompanying the Constitutional Reform and Governance Act 2010 mention that "the Act removes the prerogative powers for the management of the Civil Service" but that "the prerogative will be retained in relation to security vetting and the management of the parts of the Civil Service of the State ... not covered by the provisions in Part I."[1067] The explanatory notes following the Fixed-Term Parliaments Act 2011 are more direct about the power to dissolve Parliament before the maximum five-year period: "This prerogative power was abolished by this Act."[1068]

These four possible positions on preservation/abolition show the variety of statutory orientations to the prerogative and third source. However, the form taken by these orientations demonstrates that Parliament has played an important role in protecting the prerogative and third source: it has sought to keep the prerogative and third source available to the executive, and where the prerogative and third source have been abolished, the legal effect tends to be buried in explanatory notes.

Second, statutes relating to prerogative or third source subject-matter areas can be time-bound or have no express limits on temporal scope. The Defence of the Realm Act 1914 gives the executive power to make regulations, including for trial by courts martial. It does not make clear whether it supersedes the prerogative or third source, but expands the realm of lawful executive authority. The Act allows regulations to be made "during the present war",

[1067] At [8]. This explanatory note arguably wrongly assumes that security vetting and aspects of civil service management were managed under the prerogative as opposed to the third source.

[1068] At [16].

thereby falling into the category of time-bound legislation. The Interception of Communications Act 1985, in contrast, which followed *Malone* (and is now overtaken by the Regulation of Investigatory Powers Act 2000), set out a general framework for surveillance, not limited to a particular period. Other statutes set out authority for the executive to act, in areas possibly covered by the prerogative and third source, when conditions are met: parts of the Civil Contingencies Act 2004 apply only when an emergency (a legislatively defined term) occurs.

Third, statutes intrude to a greater or lesser extent into the subject-matter of the prerogative and third source. The Localism Act 2011, at one end of a continuum, hives off an entire sphere of authority previously covered by the third source (if it does form part of the law of England and Wales), when it says in s 1(1) that "a local authority has power to do anything that individuals generally may do." That is how courts might state the third source authority for local government, and the Act replicates that in statutory form, entirely covering the ground. (The Act expands pre-existing common law authority by clarifying in s 1(4) that local authorities have the "power to do it for a commercial purpose or otherwise for a charge, or without charge".) Towards the midpoint of a continuum, the Fixed-Term Parliaments Act 2011 replaces some prerogatives and not others. It abolishes the power to dissolve Parliament before the maximum five-year period, establishing an alternative legislative framework to govern this process.[1069] However, it indicates in s 6 that it "does not affect Her Majesty's power to prorogue Parliament", keeping this prerogative intact (and creating conditions for *Miller (No 2)*). Thus, a statute can preserve some prerogatives or third source authority in a sphere and not other prerogatives or third source authority. Relatedly, a statute can part-abolish a single prerogative or area of third source authority: the Constitutional Reform and Governance Act removes some pre-existing common law authorisations for civil service

[1069] Section 2(7) of the Act.

activity, but leaves in place authority for security vetting. At the other end of a continuum, a statute can create a parallel process alongside a prerogative or third source authority. We encountered in Chapter Five early Australian case law suggesting that inquiries might be authorised under (something like) the third source. The UK Inquiries Act 2005 elaborates a detailed framework for statutory inquiries. But the explanatory notes suggest that "non-statutory inquiries", presumably conducted under the third source, might still be possible.[1070]

Fourth, statutes range from being spare in their restatement of authority, to being lengthy in setting out that authority. The Defence of the Realm Act 1914 contains two brief sections empowering trial by courts marshal and punishment of individuals contravening its provisions. In contrast, the Constitutional Reform and Governance Act 2010 is made up of 52 provisions, seven schedules, and extensive explanatory notes. This variation is, in part, a product of developments in drafting style; it is a result of some legislation covering more prerogatives and third source areas of authority than other legislation. But it demonstrates a further choice facing legislators: whether to provide maximal flexibility to the executive in exercising authority in an area once covered by the prerogative and third source, or to specify new sources of authority in some detail (often accompanied by provisions preserving powers or providing authority to make further regulations).[1071] This is not necessarily a choice between flexibility and constraint of the executive: sometimes, as with the Constitutional Reform and Governance Act, wide-ranging authority is specified precisely for avoidance of doubt, to ensure broad statements of authority are not read down.

Fifthly, relatedly, some legislation sets process-based conditions on executive action within a subject-matter area, while other legislation is silent on process. The Civil

[1070] See [29] and [30].

[1071] The Constitutional Reform and Governance Act contains both: s 4 says powers in relation to the management of any part of the civil service "continue to have effect" and s 51 allows a Minister of the Crown "by order" to "make such provision" as they "consider appropriate."

Contingencies Act 2004 enables the executive to make emergency regulations, and s 27 requires that where emergency regulations are made, a "senior Minister" of the Crown "shall as soon as is reasonably practicable" lay those regulations before the House. Each House of Parliament must pass a resolution approving them within seven days, or the regulations will lapse. Similarly, Part 2 of the Constitutional Reform and Governance Act deals with treaty ratification, and formalises the 'Ponsonby Rule', requiring that a copy of a treaty is published and laid before Parliament, and that each House is given a 21 sitting day opportunity to decide that the treaty is not ratified during that period. If the House of Commons or House of Lords resolves not to ratify the treaty, circumstances are set out under which a Minister can nevertheless indicate why ratification should proceed; s 22 notes that this ratification process may not apply in exceptional cases. Other legislation, such as the Defence of the Realm Act 1914, sets out no process-based conditions.

Legislation empowering the executive to act in any area covered by the prerogative or third source can combine different positions across these five sets of options. No standardised form has been adopted. What is clear is there are numerous historical examples of legislators acting to preserve flexibility for the executive. However, piecemeal codification need not proceed in this way in the future.

Comprehensive codification

The prerogative and third source have never been comprehensively codified in legislative form in the United Kingdom. In the latter years of New Labour, between 2004 and 2009, an ambition was expressed to bring a large part of the prerogative onto a statutory footing. This fell short of complete codification, and the third source was formally omitted. But steps taken towards reform touched on the third source. Reviewing the actions taken in the mid- to late-

2000s, under the premierships of Tony Blair and Gordon Brown, is instructive for any consideration of the merits of comprehensively codifying the prerogative and third source. Five publications between 2004 and 2009 warrant close attention.

A Labour MP, Tony Wright, not a member of Blair or Brown's Cabinets, kickstarted reform efforts when *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* was published by the House of Commons Public Administration Select Committee under his chairmanship in 2004.[1072] The report classified three kinds of prerogative: 'prerogative executive powers', exercised by ministers; the 'Queen's constitutional prerogatives'; and 'legal prerogatives of the Crown'. It is unclear in what sense the 'legal prerogatives of the Crown', such as the Crown's rights over swans, are "legal"; others discussed here, such as the Crown generally not being bound by statute, are best regarded as immunities falling outside of the sphere of the prerogative, properly understood.

Leaving aside these classification quibbles, the report recommends that the Law Commission review the 'legal prerogatives of the Crown', declares the Queen's constitutional prerogatives to be outside of its scope, and concludes that a public consultation exercise is needed on ministerial prerogative powers. At the outset of this period of reform the ambition of the exercise is scaled down, for threadbare reasons. (Just 15 years later *Miller (No 2)* would show the power to prorogue Parliament is hardly irrelevant, and is a prerogative whose limits should have been the subject of greater scrutiny earlier.) Nevertheless the report makes useful comments on the state of authority for executive action in United Kingdom law. It notes examples of prerogatives being put on a statutory footing.[1073] It lists ten principal prerogatives

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[1072] House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament', Fourth Report of Session 2003-04, 16 March 2004, <https://publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf> accessed 18 August 2021.

[1073] It refers here (ibid 7) to the Security Service Act 1989 and Intelligence Services Act 1994 without specifying the prerogative being codified; arguably these services operated under the third source.

exercised by ministers. It claims that "[f]urther uncertainty over the scope of Ministerial power is caused by the Ram doctrine", though it does not discuss the relationship between the prerogative and Ram doctrine at length, or analyse the third source.[1074] It records some history of opposition to the prerogative, quoting the Labour Party's 1989 commitment to review the prerogative. It cites Jack Straw MP's 1994 call to abolish the royal prerogative, which noted the prerogative "has been used as a smoke-screen by Ministers to obfuscate the use of power for which they are insufficiently accountable"; Straw would be criticised for misuse of executive power, while Foreign Secretary during the Iraq War and amidst claims of UK facilitation of torture.[1075]

The report considers case-by-case reform and comprehensive legislation, and in appendices includes a paper setting out models for a comprehensive codifying statute and a draft bill. One model is a statute confirming the existence of some prerogatives and abolishing others; the other includes a 'sunset clause' indicating that if legislation does not confirm the existence of prerogatives by a specified date, they should be considered abolished. The bill, a Ministers of the Crown (Executive Powers) Bill, is partial in its coverage. It requires information to be provided to Parliament on "all executive powers",[1076] and sets out reforms to action on armed conflict, declarations of war, activities by the armed forces, ratification of treaties, and powers over passports.

The Government formally responded to this report in July 2004, revealing a sign of the institutional intransigence and timidity to come. The response underscores Parliament's role as "the ultimate sovereign body", "the difficulties of abolishing the prerogative" and the

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[1074] ibid 8.

[1075] Ian Cobain, 'What did Jack Straw know about the UK's role in torture and rendition?', *The Guardian*, 28 June 2018, <https://www.theguardian.com/uk-news/2018/jun/28/what-did-jack-straw-know-about-the-uks-role-in-torture-and-rendition> accessed 18 August 2021.

[1076] ibid 34.

"much needed flexibility" it offers "to react quickly in possibly complex and dangerous circumstances."[1077] The response notes it is possible and "sometimes desirable" for the prerogative to be replaced by statute or "conventions on parliamentary scrutiny". However, it rejects the recommendation for a public consultation exercise, including on specific proposals for parliamentary scrutiny of armed conflict decisions, ratifying treaties, and dealing with passports. The existing "pragmatic approach" on armed conflict is considered best; the response says changes to the treaty ratification process could be "a substantial burden on Parliament's time" (though the Government indicates it will "reflect further"); and on passports "successive Governments have taken the view that the non-statutory system has worked well."[1078] The Government declines to make any other changes, pointing to areas where it is undertaking reforms, such as on a bill dealing with the civil service. The Government "is not persuaded that the Committee's proposal to replace prerogative powers with a statutory framework would improve the present position." Change may be appropriate on a "case-by-case basis".[1079] The response reveals the political difficulties in persuading the government to codify the prerogative; it is in the government's interests to maintain flexibility and authority.

Three years later, with Gordon Brown Prime Minister, the Government revisited the reforms in 'The Governance of Britain'.[1080] This Green Paper strikes a different tone from the

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[1077] UK Government, 'Government Response to the Public Adminstration Select Committee's Fourth Report of the 2003-4 Session: *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (HC422)*', July 2004 (Archived Content), <https://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/pubs/reports/prerogative.htm> accessed 18 August 2021.

[1078] ibid.

[1079] ibid.

[1080] Secretary of State for Justice and Lord Chancellor (Jack Straw MP), 'The Governance of Britain', July 2007, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf> accessed 18 August 2021.

Government's 2004 response, beginning by saying "[t]he Government will seek to surrender or limit powers which it considers should not, in a modern democracy, be exercised exclusively by the executive".[1081] It says the executive's ability to exercise authority without consultation of Parliament and the people "is no longer appropriate in a modern democracy", and notes the prerogative is subject to less scrutiny and is "out of date".[1082] However, the Government stops short of committing to abolish all prerogatives or put them on a statutory foundation. The Government commits to "placing the most important of these prerogative powers onto a more formal footing", and "where archaic powers are no longer in use ... the Government will consider options for ending them."[1083] This is the subject of one chapter; other chapters address broader accountability for the executive, reinvigorating democracy, and rebuilding the relationship between citizen and state.

The Government opts for the same tripartite classification used in the 2004 select committee report, and like the 2004 report, says the priority should be statutory reform of 'prerogative executive powers' rather than 'legal prerogatives' or the Monarch's personal or constitutional powers. The classification remains crude and there is little discussion of why the reasons for putting 'prerogative executive powers' on a statutory foundation do not apply to 'legal prerogatives' and the Monarch's personal or constitutional prerogatives. The Government says its general view is that prerogative executive powers "should be put onto a statutory basis"; it says it "intends to undertake a wider review of the remaining prerogative executive powers and will consider whether, in the longer term, all these powers should be codified ..."[1084] The Government notes it will initiate further consultation on deploying forces,

[1081] ibid 7.

[1082] ibid 15.

[1083] ibid.

[1084] ibid 18.

ratifying treaties, and dissolving Parliament. The 2007 Green Paper represents a stronger move towards codification of some prerogatives, though the Government carves out a subset of prerogatives (so-called executive prerogative powers) and is only firm about consultation.

The Government appears to back-pedal, in terms of ambition, by the time the 'Governance of Britain' White Paper is published in 2008.[1085] The first volume of the White Paper is accompanied by a draft Constitutional Renewal Bill and an analysis of consultations. The White Paper covers a range of topics, but on prerogative reform it focuses only on treaties, the civil service, and war powers. It notes a "reasonable level of support" for putting the Ponsonby Rule – the convention that Parliament should have 21 sitting days to consider a treaty prior to ratification – on a statutory footing, and recommends this occurs through the Constitutional Renewal Bill.[1086] It records it is "now time" to put the civil service "on a statutory basis", which had been hitherto "managed under the Royal Prerogative".[1087] However, it recommends that "prerogative powers" be "retained ... in the area of security vetting" to enable flexibility for intelligence agencies.[1088] A detailed resolution, rather than legislation, is recommended to govern war powers, with exceptions for special forces. Several other matters raised in the White Paper touch on the prerogative and third source. The

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[1085] Ministry of Justice, 'The Governance of Britain – Constitutional Renewal', March 2008, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250803/7342_i.pdf> accessed 18 August 2021.

[1086] ibid 28.

[1087] ibid 42. It is arguable that no specific prerogative governed the civil service, and that the civil service had been managed under the third source.

[1088] ibid 46. It is asserted that the powers of security vetting by intelligence agencies are derived from the prerogative. As Ewing, Mahoney, and Moretta note, "There is no general prerogative power ... specifically to create and maintain a secret service." Ewing, Mahoney, and Moretta show it is difficult to fit the activities of the security and intelligence services into a particular prerogative. It could be argued that the activities of the security and intelligence services were authorised under the third source, but if something akin to the third source was never explicitly invoked, this risks being a convenient retroactive justification: KD Ewing, Joan Mahoney, and Andrew Moretta, *MI5, the Cold War, and the Rule of Law* (OUP 2020) 20. Ewing, Mahoney, and Moretta show that MI5 was, in their words at 30, "established on the basis of unquestioned but questionable legal authority."

Government agrees in principle on the need for legislation to govern executive action on passports, and suggests the Attorney-General's role (arguably governed by the third source up to this point) should be clarified in legislation. As well, the Government says it is doing an "internal scoping exercise of the executive prerogative powers".[1089]

It is not clear how much resourcing had been dedicated to public engagement. The 2008 White Paper records 11 responses to a consultation on whether treaty-making should be governed by legislation. There were 15 responses on war powers, described as a "low level" of engagement.[1090] A website was said to have been launched to "provide regular updates ... and give members of the public the opportunity to participate", though little is said about online feedback. Under the heading, 'Engaging with the public', mention is made of "[a]n event in Leicester in December 2007" involving the Justice Secretary and the Minister of State "talking to the community about how our country is run", at which they "listened to people's thoughts on how our democracy can work better".[1091] While "a series of similar events ... around the country in 2008" are promised,[1092] it is surprising that – despite the promise of public engagement in the 2007 Green Paper – in-person consultation consisted of only one event in Leicester involving two ministers "talking to the community". This was a challenging time, as the global financial crisis began to affect the economy. However, doubts arise from this document about the extent of political commitment to putting the prerogative on a statutory foundation. The third source continued to be largely ignored. The watering-down of statutory intervention on matters concerning the intelligence agencies and special forces suggests internal struggles within government to preserve the flexibility of the prerogative.

[1089] ibid 62.

[1090] ibid 48.

[1091] ibid 11.

[1092] ibid.

One further document emerged in this period: a 2009 report on the 'Review of the Executive Royal Prerogative Powers'. This was the result of the internal scoping exercise flagged in the 2008 White Paper, all government departments having been asked to record reliance on a "non-statutory power" (seemingly bringing the third source within scope).[1093] A version of the tripartite classification employed in earlier New Labour efforts is redeployed, with a fourth category added. The prerogatives are divided into prerogative powers exercised by ministers, prerogative powers exercised by the Sovereign, legal prerogatives of the Crown, and archaic prerogative powers.[1094] Once more there is no clean distinction between these categories; the addition of an 'archaic' category helps little, since many of the legal prerogatives of the Crown (and other prerogatives) could be described as archaic. Sovereign prerogatives, legal prerogatives, and archaic prerogatives are hived off from the analysis with little explanation. The authors of this final report indicate they will not discuss international relations prerogatives, since these "work well", though that statement is not justified.[1095]

Following orthodoxy in constitutional law, the review paper recounts Blackstone and Dicey's approaches to the prerogative.[1096] The review rightly notes "the existence and extent of the [prerogative] power is a matter of common law", but says "[t]he difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all",[1097] begging the question how these "many prerogative powers" can be said to exist if there is no judicial authority and their existence "is a matter of common

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[1093] Ministry of Justice, 'The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report', 2009, <http://data.parliament.uk/DepositedPapers/Files/DEP2009-2493/DEP2009-2493.pdf> accessed 18 August 2021.

[1094] ibid 6.

[1095] ibid.

[1096] ibid 7.

[1097] ibid.

law". The review astutely observes that "the ban on creating new prerogatives can be undermined by courts recognising prerogatives which were previously of doubtful provenance", though the use of the word "ban" rings odd.[1098] The review should be commended for recognising the possible existence of the third source, hardly mentioned in 2004-2008 publications. It notes that "the common law also recognises that the Government is able to exercise powers derived from the Crown's status as a natural person – for example, to enter into contracts, convey property or make extra-statutory payments."[1099] This statement is a little more definitive than the position at common law, and the review brackets off the third source with little explanation. "Although such powers have sometimes been referred (including by the courts) as prerogative powers," the review notes, "this report is not intended to cover them, because they give rise to significantly different considerations."[1100] What these "significantly different considerations" are is never explained; this dissertation has argued the prerogative and third source share important historical features, conceptual ambiguities, doctrinal indeterminacy, and normative problems.

The review addresses individual subject-matter areas of executive action raised by departmental information. It argues that providing statutory authority for armed forces action would be "highly complex" and a "lengthy undertaking", such that "the resources ... required" could not "be justified": a value judgment that is not elaborated on.[1101] Statutes are said to cover much of the ground once covered by the royal prerogative of mercy and the prerogative to act during emergencies.[1102] The power to grant charters, not often discussed in analysis of

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[1098] ibid 9.

[1099] ibid 8.

[1100] ibid.

[1101] ibid 14.

[1102] At 19, the review suggests *Saltpetre* (n 129) provides "a power to enter private property for the purposes of making defences in time of peril", a wider reading of *Saltpetre* than the judgments allow.

the prerogative, is usefully identified, though is apparently used "sparingly".[1103] The review says the Inquiries Act "did not repeal the Secretary of State's non-statutory powers to set up inquiries".[1104] The use of "non-statutory powers" here is revealing: authority to conduct inquiries arises under the third source (if it does exist), and so the review is here bringing the third source (in part) back within scope while claiming not to touch it.

On authority for police action, the review notes, "[s]tatutes set out [some functions of the police] .... but not the general responsibility to make the necessary provision to enforce law and order should the established systems fail in some way."[1105] It claims that "[t]hat responsibility ... is enshrined in the Royal prerogative".[1106] Such a statement is highly contestable, at best, and plain wrong at worst: Chapters One and Three of this dissertation show that, apart from the exceptional *Northumbria* decision, police have had their authority extended through third source-like reasoning and never has a general prerogative for police action been affirmed. On authority for the armed forces, the review comments that "[t]o the extent that a residual prerogative power subsists, it may provide useful flexibility in unusual circumstances", but does not weigh this flexibility against the uncertainty that follows from such flexibility.[1107]

The review says, "[s]ome of the remaining prerogative powers could be candidates for abolition or reform, but their continued existence has – at the minimum – no significant negative effects."[1108] This remark is abrupt, given that negative effects are never considered.

[1103] ibid 22.

[1104] ibid 24.

[1105] ibid 27.

[1106] ibid.

[1107] ibid 28.

[1108] ibid 29.

The review hints at values it regards as primary when it says that legislation risks "dangerously weakening the state's ability to respond to unforeseen circumstances."[1109] The word "dangerously" does a lot of work, and is not explained; nor is the supposed danger of weakening the state weighed against the dangers of abuse of state power. The review closes by arguing that "change should not be proposed for change's sake" (a mischaracterisation of the case for legislative intervention) and that reform should proceed "on a case-by-case basis."[1110] The most useful part of the review is the annex containing executive activities recorded by departments. Some of these, such as the power to set up departments, do not appear to be governed by prerogative; on the powers of the Attorney-General, the review says "[a] number of those functions are non-statutory and have been described as prerogative powers", but provides no citation for the claim.[1111]

The following year the Brown Government would be voted out of office; many of the mooted reforms were abandoned, although the Constitutional Reform and Governance Act was passed in 2010, providing statutory authority for management of much of the civil service and ratification of treaties. Several conclusions are merited. What began as a project aspiring to more comprehensive codification collapsed into piecemeal changes. Large parts of the law of the prerogative were, without extensive justification, hived off from codification efforts. The third source was initially considered separate from the reform, only for it to re-emerge where some authority for executive action was properly described as rooted in the third source. Reform efforts had a deeply political character, in three senses. First, the dilution of initial ambition was a product of concerns about *preserving the executive's own broad authority*. Second, carve-outs and caveats in areas of executive activity that were reformed, such as the

[1109] ibid.

[1110] ibid 29.

[1111] ibid 33.

carve-out to preserve the prerogative of the security services to do security vetting, likely arose as a result of struggles for power *within the executive*. Third, decisions about where reforms should happen often depended on *contestable value judgments*, judgments that appear overly sanguine about the risks of executive over-reach.

The first five chapters of this dissertation have highlighted the ineliminably political character of the prerogative and third source in their treatment by courts and scholars. Put another way: the prerogative and third source have never been merely technical concepts, developed without reference to values; their existence and scope has been shaped by judges' and academics' theories of what the state should do. This chapter has demonstrated that, unsurprisingly, the intensely political and value-laden arguments that surround the prerogative and third source wherever they arise do not disappear when the executive or Parliament attempts to codify the prerogative and third source. Any future reform efforts need to reckon with the politics of the prerogative and third source, as revealed by New Labour's 2004–2009 efforts.

The merits of piecemeal and comprehensive codification: a preliminary assessment

Academic work on piecemeal and comprehensive codification

It is worthwhile considering existing literature on piecemeal and comprehensive codification of the prerogative and third source. While there is some literature on how reform should

proceed in individual subject-matter areas,[1112] writing on the higher-level question of whether the prerogative and third source should be codified in a comprehensive way is harder to find. Some scholarly contributions have recommended, in relatively cursory terms, that the prerogative be abolished or codified.[1113] But more extensive reflection on codification has been offered by David Gladstone, Bruce Harris, and Anne Twomey. None of their work addresses the question quite as it is posed here, but they represent a variety of perspectives: David Gladstone favours piecemeal codification, Bruce Harris endorses comprehensive codification of sorts, and Anne Twomey is critical of piecemeal and comprehensive codification.

David Gladstone, writing in 1998 before New Labour's reforms, argues for piecemeal codification of the prerogative, but does not discuss the third source. He calls the prerogative the "glue which holds the component parts of the constitutional structure together",[1114] but says it has become shrouded in mystery. It is not clear what 'the Crown' means; the metes and bounds of sovereignty are uncertain, though sovereignty seems to underpin the prerogative; and changes in the structure of the state after years of privatisation and outsourcing have added to confusion.[1115] He notes the prerogative, often described as the 'royal prerogative', is surrounded by high-sounding theatrical language – part of what Bagehot calls the "dignified" parts of the constitution.[1116] He argues that the prerogative is "circumscribed by convention as well as by common law and statute law" (though he offers no authority for this)[1117] and

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[1112] See eg Rosara Joseph, *The War Prerogative: History, Reform, and Constitutional Design* (OUP 2013).

[1113] See in particular Adam Tomkins, *Our Republican Constitution* (Bloomsbury 2005) 133–134: "The way forward is simple. Parliament should pass a Prerogative (Abolition) Act ..." Tomkins does not address the third source as part of this proposal.

[1114] David Gladstone, 'What shall we do with the Crown prerogative?' (1998) 4 JLS 1, 1.

[1115] ibid 2.

[1116] ibid 5.

[1117] ibid 6.

notes that "habit" plays a key role in determining the existence of the prerogative.[1118] He observes that the prerogative has been relied upon for various important decisions historically, including the United Kingdom's recognition of American independence and the "decision to return Hong Kong" to China.[1119] That Gladstone does not pinpoint specific prerogatives as the bases of these actions suggests he takes a broad view of the prerogative (reminiscent of Dicey's), which considers the third source to be part of a catch-all prerogative field.

Gladstone claims that for the prerogative to continue to be part of British law, it must serve a useful purpose, be subject to scrutiny, and be capable of clear legal definition. For Gladstone, the prerogative does not pass any of these tests. He points to some political pressure to abolish the prerogative, including from the Liberal Democrats in 1996. But, he argues, "that course is only feasible in the context of a written constitution."[1120] This is a little quick: it is not clear why the abolition of the prerogative could not occur through a comprehensive statute. Gladstone says rules around the prerogative are "so opaque that they baffle even the experts".[1121] He describes two reform options: putting all powers in one statute, or legislating for individual areas as it becomes clear they cause practical difficulty. He brackets out the personal prerogatives of the monarch, without giving extensive reasoning, noting that, "The powers are ancient, they are very rarely used and they are irreplaceable."[1122] It is not clear why their "ancient" quality means they should not be subject to reform; nor is it clear why they are "irreplaceable". It may be that Gladstone influenced the 2004 select

[1118] ibid 7.

[1119] ibid.

[1120] ibid 11.

[1121] ibid 12.

[1122] ibid 13.

committee report, which said it would not make recommendations regarding the monarch's personal prerogatives (a position adopted by government publications later in the 2000s).

Gladstone says comprehensive codification, personal prerogatives of the monarch excluded, "has the virtues of logic and simplicity."[1123] Moreover, "[i]t would end for ever learned speculation about how many powers remain active."[1124] Gladstone's main objection is that "drafters of the statute would face the intractable problem of what to put in place of the Crown as the overall source of authority".[1125] On the other hand, step-by-step reform would be more attractive to Parliament. Gladstone sides in favour of step-by-step reform. He lists fourteen prerogatives, a useful exercise given scholars have rarely attempted to map prerogatives, and closes by saying, "some learned lawyers ought perhaps to be asked to think the unthinkable." That reform of the prerogative is regarded by Gladstone as "thinking the unthinkable" is a telling reminder that the prerogative has a particular weight in the mind of scholars. It is not just the executive, the legislature, and the judiciary that are reluctant to reform the prerogative; much of mainstream legal and political culture is suffused with a cautious conservatism when it comes to changing the character of this executive power.

A little over a decade later, Bruce Harris – somewhat surprisingly, given his advocacy of the third source – calls in a 2009 article for the "replacement of the royal prerogative in New Zealand". His focus is on New Zealand and the prerogative only, but he draws on British case law and many of his arguments apply with equal force in the United Kingdom. Many of his arguments could apply to replacement of the third source. Harris acknowledges the prerogative "was originally a need-driven authority, the Monarch assuming, and the common law recognising, all those legal powers which the Monarch needed to govern compliant with

[1123] ibid 14.

[1124] ibid.

[1125] ibid.

the rule of law."[1126] Assuming that the prerogative's expansion has always tracked compliance with the rule of law is generous, but Harris is expressing here more pithily the point that the prerogative has often been shaped in response to the perceived needs of the executive and the state. Harris observes that the prerogative has developed in an ad hoc way: "the system of government stumbles on with the executive scrambling for authority in what is left of the ancient prerogative."[1127]

Like Gladstone, Harris argues that the prerogative fails to meet an ideal: of executive action in accordance with law. The prerogative is "often uncertain and untidy", "accessing the prerogative can be difficult", and there are limited opportunities for the courts to ensure greater coherence.[1128] Unlike Gladstone, Harris writes after New Labour's reforms and can assess these efforts. He notes they are only partial, and "do not ... go so far as to promise complete replacement of the prerogative with statutory authorisation."[1129] Harris notes in Ireland, where the prerogative has been superseded by a general executive power provision, some form of inherent executive authority has re-emerged, "driven by need".[1130] This is one possible consequence of codification – it does not completely contain discretionary executive power – and reinforces a point made in Chapter Five.

Nevertheless Harris says codification or replacement of the prerogative with statutory authority is justified. He says the first step is listing prerogatives, noting there is no reason why prerogatives exercised by the Monarch should not be on a statutory footing (disagreeing

[1126] BV Harris, 'Replacement of the Royal Prerogative in New Zealand' (2009) 23 NZULR 285, 287.

[1127] ibid.

[1128] ibid 302.

[1129] ibid 304.

[1130] ibid 306.

with the Green Paper discussed earlier).[1131] "The eventual abolition of the prerogative will be conducive to greater certainty", notes Harris, adding that "the government will no longer be tempted to fossick in the remnants of the ancient prerogative to find authority for proposed action."[1132] Next, statutory authorisation should be drafted. Harris notes that the third source "may be better placed on the democratic footing of statutory authority",[1133] but offers no more detail other than a suggestion that a convention might arise that new unmet need for government action (which hitherto could have resulted in invocation of the third source) should be authorised by statute.[1134] Statutory authorisation, according to Harris, involves greater democratic approval, more precise limits on power, accountability structures, clearer community perceptions, and better public access and public confidence in government.[1135]

Australian academic Anne Twomey has reflected on the experience of former United Kingdom colonies, and developed her thinking in a book on reserve powers, a public lecture on codifying the prerogative, and an article linked to that lecture.[1136] She is more ambivalent about codification than Gladstone and Harris. Her 2018 book on reserve powers, which only addresses a subset of prerogatives (some personal prerogatives of the Monarch), argues that "[t]he chief virtue of codification, being certainty as to the applicable rules, is rarely achieved

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[1131] ibid 312.

[1132] ibid 311.

[1133] ibid 314.

[1134] ibid 288.

[1135] ibid 314.

[1136] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (CUP 2018); Anne Twomey, 'Prerogative versus Parliament: What can be done? Does the prerogative need to be more tightly regulated, and how might that be done?', UCL Constitution Unit, 23 October 2019, <https://www.youtube.com/watch?v=bdOyaTsuieU> accessed 18 August 2021; Anne Twomey, 'Should we codify the royal prerogative?', UCL Constitution Unit, 1 November 2019, <https://constitution-unit.com/2019/11/01/should-we-codify-the-royal-prerogative/> accessed 18 August 2021.

in practice."[1137] "Unless there are clear, binding rules that exclude all discretion, there will always be arguments that discretion has survived", she writes.[1138] A second problem, aside from the inevitability of new powers emerging, is that "no code can predict every possible situation".[1139] Next, she mentions justiciability – that judges will have to continue to determine what it is appropriate for them to rule on – suggesting that controversies about the proper scope of judicial intervention will remain after codification. Fourth, she notes that "codification freezes reserve powers and prevents them from evolving to meet changing political environments."[1140] Finally, she cites a 1980 letter written from the Queen's Private Secretary Sir Philip Moore to the New Zealand Cabinet Secretary, in response to a suggestion that prerogatives be codified. Moore wrote, "the strength of a Governor-General may not lie more in having a certain aura of uncertainty ... if the Government appear to be exceeding their constitutional powers".[1141] In other words, resisting codification may curb executive power, since uncertainty could deter government action.

In Twomey's 2019 public lecture she describes the prerogative as a set of "historically-based executive powers", an apt description given that prerogatives' existence is derived from historical acknowledgment by the courts, and the importance of custom in courts' assessments.[1142] Twomey observes that prerogatives are "less clear in their scope and limits" because of these historical origins. But she argues there are good reasons for prerogatives not to be codified: to ensure flexibility, meet unanticipated crises, and allow for decisive action

[1137] Twomey *The Veiled Sceptre* (n 1136) 38.

[1138] ibid.

[1139] ibid 39.

[1140] ibid 41.

[1141] ibid 42.

[1142] Twomey, 'Should we codify the prerogative?' (n 1136).

"without delay and uncertainty". Considering cases in Fiji, Western Nigeria, Nepal, Vanuatu, and elsewhere, she says placing prerogatives on a statutory footing "may be appropriate in some cases", and may secure democratic limits and clarity. However, Twomey says "care must be taken about which prerogatives", and "how legislative reform is done" is all-important. The UK's Fixed-term Parliaments Act 2011 is an example of poorly executed reform.[1143]

Twomey's online article distils these ideas. She writes, "[a] written constitution is not necessarily an antidote for ambiguity or interpretative discretion" (a similar conclusion to that drawn in Chapter Five).[1144] A key point she makes, invoking Western Nigeria and the *Miller* cases, is codifying prerogatives can exacerbate uncertainty: "Disputes are likely to arise about the interpretation of the application of the conditions, courts are likely to become involved in enforcing them, and the delay involved in litigation is likely to exacerbate any political crisis."[1145] Twomey does not draw a distinction between codification in a written constitution and codification in statutory form. However, her caution is a useful counterpoint to Gladstone and Harris's enthusiasm for codification. Twomey is right that "many former British colonies have already taken this path [of codification], so there is a wealth of experience, both good and ill, which can be drawn upon, rather than working in a vacuum": an important reminder given the experience of former colonies is often ignored in UK legal analysis.

An assessment in light of the literature

[1143] All references are from: ibid.

[1144] Twomey, 'Should we codify the royal prerogative?' (n 1136).

[1145] ibid.

With these provisional observations made, it is possible to assess the case for piecemeal and comprehensive codification. As already noted, it is not possible or desirable to offer a normative evaluation that is true for all time; the assessment below necessarily arises out of the particular social context in which this dissertation is written. Another reason why this exercise is difficult is that piecemeal codification and comprehensive codification can take many different forms. Evaluation of each requires assumptions to be made. Evaluation is also often relative: it involves comparing one of these models with the status quo, or with the other, or with a codified constitution. That relative evaluation is complicated when the status quo is evolving, and each of the models (and a codified constitution) can be implemented differently.

Bearing these points in mind, one principal advantage of piecemeal codification, as identified by Gladstone, is it is politically feasible and attractive to members of the executive and legislature persuaded by the case for reform. It goes with the grain of past statutory interventions for reform to proceed on a case-by-case basis, as problems with a prerogative or third source area become clear. This is how civil service activity was put on a statutory footing, and how the ratification of treaties was given a statutory foundation.

Some caveats are needed. Political feasibility is not static, and can be shifted through political pressure. While it is politically feasible to put individual prerogatives or areas of third source activity on a statutory foundation, it may be that the significant political effort expended on individual reform efforts harms the feasibility of more wide-ranging reform. New Labour did secure some legislative reform, but this took time and political commitment, and was watered-down due to the institutional interests of the legislature and the executive. New Labour's focus on areas like treaty-making and the civil service may have made it more difficult for reform of other areas. Put another way: it is not clear that the cumulative political capital expended on individual reform efforts is less than the capital required for one comprehensive codification project. Individual reform efforts may invite greater

opportunities for subject-specific lobbying. Nevertheless, these qualifications aside, political feasibility represents a possible advantage of piecemeal codification.

A second advantage of piecemeal codification is it allows a tailored approach to varied subject-matter areas. Comprehensive codification might require enormous legislation, to capture the nuances of different prerogative and third source areas, or a one-size-fits-all approach. While enormous legislation is not unusual, there may be pressure for the legislation to adopt some general template for dealing with prerogatives and third source activities to make legislating more manageable. Piecemeal codification allows each area of executive action to have subject-specific legislation; this follows Anne Twomey's injunction for care to be taken in how prerogative (and third source) reform is carried out.

One area of third source activity ripe for legislative reform is government contracting,[1146] especially since the UK's exit from the European Union may invite reconsideration of the Public Contracts Regulations 2015. Government contracting legislation requires considerable detail, not least because those contracting with government will seek certainty. Piecemeal codification can ensure legislative time is directed towards areas like government contracting, in a way that avoids a one-size-fits-all approach.

There are, again, countervailing arguments. It would not be impossible for very detailed legislation to be passed, as is discussed below; nor would it be inappropriate, given the importance of executive power. A tailored approach to prerogative and third source subject-matter may give rise to undue complexity; comprehensive codification could achieve welcome simplicity and clarity, while not veering towards the spartan approach to executive power adopted, say, in the Australian and United States constitutions. Notwithstanding these

[1146] For an early and prescient discussion of the legal basis for government contracting – including consideration of whether a "new prerogative" was being fashioned in the late 1970s in a period of minority government – see: Terence Daintith, 'Regulation by Contract: The New Prerogative' (1979) 32 CLP 41–64.

points, piecemeal codification has some attraction in the potential it offers for tailored legislative responses.

Third, piecemeal codification would bring clarity to uncertain areas of law. It is not clear which prerogatives exist or whether the third source exists, it is not even certain how judges ought to decide whether prerogatives and the third source exist, and the limits on the prerogative and the third source might appear clear but lack precision when investigated. Piecemeal codification can clarify that the executive has authority to act in a particular area and what the limits on its action are, and can indicate whether the prerogative or other third source authority is preserved. Legislation has tended to be clear where the prerogative is preserved but silent on whether the prerogative or third source are abolished through an intervention, leaving the courts to decide the matter, but it would be possible for piecemeal codification to clarify its effect on pre-existing prerogative and third source authority. That increased clarity enables the public to be aware of the scope of lawful executive action, as well as giving certainty to law-makers and governments.

But piecemeal codification could leave large swathes of uncertainty, and this is the central weakness of it as a proposal. Even though, for example, a War Powers Act (proposed by the Labour Party as part of its 2019 manifesto)[1147] could consolidate the war prerogative and vastly reduce uncertainty in the sphere of that prerogative, that single statutory intervention does not increase clarity about the existence of other prerogatives and third source subject-matter areas. More importantly, targeted statutory intervention is unlikely to answer fundamental questions that apply to all prerogatives and third source activities. A single War Powers Act cannot resolve the role of custom in determining whether a prerogative exists, or the legal effect of prerogative disuse. It may spell out the constraints on going to

[1147] Labour Party (UK), 'Manifesto 2019: A New Internationalism', online at <https://labour.org.uk/manifesto-2019/a-new-internationalism/> accessed 18 August 2021.

war, but it will provide no detailed account on the limits of prerogative and third source activities across the board. It would be odd for the War Powers Act to confirm or deny the general existence of the third source. Perhaps particular limits should be set out in particular legislation, and judges should be left to resolve foundational questions. But foundational questions have been left uncertain for centuries. Judges have had limited opportunities to address them, and where they have had opportunities, they have generally remained equivocal or offered divergent views, failing to remove ambiguity. Indeterminacy exists throughout the law. But indeterminacy is of particular concern in the law of the prerogative and third source because it can enable and expand abuse of public power with grave effects, some of which have been highlighted in earlier chapters.

Comprehensive codification is a far more effective response to ambiguity and indeterminacy. One form of comprehensive codification would be to list prerogative and third source areas in a non-exhaustive way, setting out some areas and carving out others (such as the personal prerogatives of the Monarch), with an indication that judges may add to these areas. But a far more satisfactory approach to comprehensive codification would be for legislation to be more exhaustive. Legislation could list all subject-matter areas where the executive may act, set out relevant conditions for that action, describe limits, adopt a position on prerogative disuse (for example, using a sunset clause), clarify that the third source will no longer be available outside of the legislation, detail relevant interpretive doctrines (for example, that all powers necessary and incidental to those listed in the legislation will be available to the executive), and clarify that all action taken under the legislation is subject to judicial review on orthodox grounds.[1148] Bruce Harris appears right to say there is no principled reason to bracket out the personal prerogatives of the Monarch from legislation.

[1148] For one proposal about how judicial review might be adapted: Margit Cohn, 'Judicial review of non-statutory executive powers after *Bancoult*: a unified anxious model' (2009) PL 260–286.

Whether the legislation is best characterised as *abolition* or a *restatement* of the prerogative and third source is a matter of judgement and taste. Talk of 'abolition' may appear more aggressive; a 'restatement' may sound more positive. Accordingly, it may be advisable to speak of comprehensive codification as a restatement. The legislation might be called the Executive Powers Act.[1149]

No doubt it would be difficult to draft, but constitutional legislation is rarely easy to draft; the complexity of the legislation would befit its significance. (Constitutional legislation is customarily lengthy and detailed; a single codified constitution, in contrast, tends to contain shorter, more accessible provisions so that it is accessible to the public.) Not only would this legislation specify what prerogatives exist and what areas of third source subject-matter the executive may act within – something that can be achieved to some degree by piecemeal codification; it could address foundational, prerogative- and third source-wide questions since it would be legislation containing general principles for executive action.

A restatement would mitigate the *conceptual* and *doctrinal* indeterminacy of the prerogative and third source, whereas piecemeal legislation can only partially reduce doctrinal indeterminacy. It is unlikely that a restatement would set out an authoritative definition of the prerogative; or that it would resolve some of the problems raised in Chapter Two about formulations of the third source. It would not need to. It could make clear that the prerogative and third source would not exist independently of the legislation, addressing conceptual questions as well as foundational doctrinal ones.

Heightened conceptual and doctrinal stability, and general certainty, would appear to be major improvements on the status quo – and on piecemeal codification. How much of an improvement it is turns on the extent to which one regards conceptual and doctrinal

[1149] A slightly loose use of the word 'powers' might be justified if the Act is designed to be accessible to the public; 'Executive Authority Act' is technically preferable.

indeterminacy in the prerogative and third source as a problem. This dissertation has suggested that conceptual and doctrinal indeterminacy in the prerogative and third source is deeply troubling. It has argued that conceptual and doctrinal indeterminacy contributes to uncertainty for citizens and government officials alike, and – at its worst – abuse of power. Comprehensive codification could reduce the likelihood of that abuse of power, for the reasons given by Bruce Harris in his writing about comprehensive codification of the prerogative. It would restrict the ability of the government to seek out obscure precedents, or to refashion precedents, to extend the frontiers of state activity. It may also secure another consequence mentioned by Harris, though the point requires empirical substantiation: comprehensive codification could make the limits on government action more accessible.

One of the reasons Gladstone supports incremental codification over a more comprehensive approach is that "the drafters of [a comprehensive] ... statute would face the intractable problem of what to put in place of the Crown as the overall source of authority." But Gladstone does not elaborate on why this is an "intractable problem". His concern is unfounded, even in a scenario where comprehensive codification covers the prerogative and the third source (which goes beyond what Gladstone envisages). The Crown has embraced a variety of forms historically and at common law.[1150] Statutory codification of the prerogative and third source, if it were explicitly to use the language of 'the Crown', would not disfigure the Crown or modify it in a way radically different from how it has historically developed.

It is not unprecedented for statutes to reshape the Crown's structure or legal status. Examples include the Crown Proceedings Act 1947 or New Zealand's Crown Entities Act 2004. Ultimately, it would not be necessary in a statute comprehensively codifying the prerogative and third source to abandon 'the Crown', or put in place another concept.

[1150] See eg Janet McLean, '"Crown Him with Many Crowns": The Crown and the Treaty of Waitangi' (2008) 6 NZJPIL (Special Conference Issue: 'From Professing to Advising to Judging: Conference in Honour of Sir Kenneth Keith') 35–58.

Comprehensive codification could prompt helpful reflection from academics, law-makers, and others on the proper scope and meaning of the Crown. But even if an alternative concept was necessary, it is not unthinkable that the term 'the executive' could be used, to avoid the historical ambiguities surrounding 'the Crown'. The question of what would happen to 'the Crown' in the event that legislation comprehensively codifies the prerogative and third source is not a problem, much less an intractable one.

Twomey suggests (citing Philip Moore) that an "aura of uncertainty" prevents abuse of power. This is an empirical claim made without empirical evidence. Historical evidence, as recounted in Chapters One and Three, points away from the contention that uncertainty is a block on abuse of power. Uncertainty over the existence of a prerogative has not prevented the executive from acting, and then successfully claiming the existence of that prerogative in court, as in *Northumbria*. Uncertainty over the limits of the prerogative has not stopped the executive from testing limits, as in *De Keyser* or *Miller (No 2)*.[1151] Moore does not refer to the third source. But decades of uncertainty over whether the third source exists has not prevented the executive from acting as if the third source has been legally established.

There are two reasons why uncertainty is likely to be an unreliable constraint on abuse of power. First, the needs of the executive and the state are perceived to be so significant by politicians and decision-makers that possible illegality is not a sufficient counterweight against taking executive action. Second, especially at the time at which this dissertation was completed, legal aid and access to justice have become so constricted that the executive can act in the face of uncertainty knowing that a legal challenge may not be capable of being resourced. It is hard to assess the relevant counter-factual in historical context: how do we know whether there might have been even more abuse of power had this "aura of uncertainty" not existed? But historical evidence and underlying reasons suggest that statutory codification

[1151] See n 590 and n 487, respectively.

may be more robust than an "aura" in guarding against abuse of power, even if a statute is may maintain some ambiguity.

Twomey suggests a code cannot predict every future possible eventuality. There is therefore a risk of swinging between two poles in comprehensive codification: either, in an effort to anticipate future scenarios, legislation ends up being spartan, open-ended, and overly vague (a possibility that Dicey was alert to);[1152] or to keep power within defined limits legislation becomes too detailed and inflexible. The latter possibility is considered below. But to consider the problem of open-ended legislation: legislation cannot foresee all future scenarios, and it would be resource-intensive and demanding to map all prerogative and third source areas that an executive might need to rely on. As well, at the time of writing, the British state is fragmented and lacking in coordination and resilience.[1153]

Notwithstanding this, it would not be impossible to map areas of desirable executive activity, even during the current conjuncture. That is, after all, what constitution drafters around the world have done on multiple occasions. Lessons can be learned from the steps taken towards this exercise in the mid- and late-2000s in the United Kingdom: departments and agencies can be asked to send law-makers the areas of executive activity that need to be accounted for; public consultation could refine this list; and the list could be converted into legislation, accompanied by rules on disuse, limits, and grounds of review. In some areas open-endedness will be preferable; in others (as with the ratification of treaties) detail will be more desirable. Legislatures can adopt a tailored approach to various prerogative and third source areas; this strength of piecemeal codification can also be secured through comprehensive codification. Under the status quo, numerous aspects of the law remain ambiguous. Under comprehensive codification, at worst the amibiguity will be maintained, but where appropriate

[1152] See n 391.

[1153] Bob Jessop, 'The Organic Crisis of the British State: Putting Brexit in its Place' (2017) 14 Globalizations 133, 134–135.

ambiguity can be at least mitigated. Ultimately, while there may be some ambiguity, comprehensive codification is likely to be an improvement on the status quo. Judges will continue to have a role in interpreting the Executive Powers Act, particularly where new scenarios arise not explicitly anticipated by the Act. There will be be opportunities for legislative amendments where necessary. One benefit of codification over a codified constitution is that such amendments are more easily introduced.

But would this legislation, likely to be dense and sprawling, go too far in tying the hands of government and freezing certain prerogative and third source activities in time, preventing them from "evolving to meet changing political environments", in Twomey's words?[1154] This is the strongest objection to comprehensive codification. However, the prerogatives are, at the time of writing, frozen in law after the decision in *BBC v Johns*, and Twomey does not make an argument for overruling *BBC v Johns*. Twomey might say that while no new prerogatives can be created, rules and principles surrounding the prerogatives are capable of being developed; Twomey might add that the third source allows flexibility, and should not be codified. Nevertheless what this reveals is that the value judgment to be made is not a choice between flexibility and protection against abuse of power; it is a value judgment about (amongst other things) the degree of flexibility and the degree of protection against abuse of power that is required, given that at the time of writing the law has accepted (via *BBC v Johns*) that some inflexibility is desirable.

The question of what degree of flexibility in executive action should be afforded, and what degree of protection should be established against abuse of power, must be determined democratically – by the legislature representing society. Several clarifications and caveats can help to guide that democratic decision.

[1154] See n 1140.

First, the choice is not between preferring flexibility in the law on the prerogative and third source (with no risks of abuse of power) and prioritising the prevention of abuse of power. As this dissertation has demonstrated, opting for 'flexibility' in the law can carry within it the seeds of abuse of power, given that ambiguity and indeterminacy in the law have historically been used by governments to extend the frontiers of action into oppressive conduct, whether in the field of imperialism, preparing for war, or policing.

Second, to claim that complete codification is a recipe for rigidity is a caricature. An Executive Powers Act could preserve flexibility in particular areas of what have been hitherto prerogative and third source areas of action, through open-ended language, or decisions not to require any procedural conditions on certain executive action. Legislation that has intervened in prerogative and third source areas has often left executives with latitude, as discussed in this chapter. Comprehensive codification would establish a bedrock of clarity and transparency about the legal powers available to an executive; flexibility would be available on top of that bedrock.

Third, as Twomey notes, codification would not spell an end to executive – or judicial – discretion, or to broader patterns of oppressive conduct. Executives would likely stretch the bounds of listed areas of lawful action. Arguments might arise about inherent executive powers, though the Act could clarify whether these exist. There could well be disputes about what margin of action is available in the sphere surrounding each area of executive action, though it would be uncontentious for the legislation to indicate the executive has all powers necessary and incidental to carry out appropriate functions within an area. Judges would still be required to make far-reaching decisions about executive power. Abuse of power would not disappear, since the roots of abuse of power do not lie in the legal powers described in this dissertation; the prerogative and third source are the forms used to carry out abuses of power. These legal forms can enable and authorise abuses of power, but they do not generate such abuses of power through their existence. Ongoing political scrutiny and vigilance,

including from outside of Parliament, is needed to restrict instances of abuse of power.[1155] The Act is unlikely to be a blank slate, and is better regarded as a palimpsest: a text setting a new course for executive action that will bear residues of prior legal orders. An Executive Powers Act would not be a panacea for problems of government. The metes and bounds of executive power would remain a site of struggle. This is not a surprising conclusion, given the discussion in Chapter Five (and earlier chapters) on the limited capacity of legal texts entirely to control executive activity.

Nevertheless, this section has argued, comprehensive codification of the prerogative and third source would – at least for now – improve the architecture of government in the United Kingdom. It would reduce the swathes of uncertainty that exist in the law, and would remain in place under piecemeal codification of the prerogative and third source. It would allow conceptual and doctrinal indeterminacy to be addressed. It would, to some extent, guard against abuse of power, even if expectations should not be set too high. It could preserve flexibility for government action. The status of the Crown is not an intractable problem for reform; nor would legislation be impossible to draft. A legislature will make its own decisions about how far it will move towards a comprehensive Executive Powers Act, and the final form of this Act; the chapter has set out why individuals – inside and outside of Parliament – are justified in struggling for comprehensive legislation as a response to the problems described in this dissertation.

Conclusion

[1155] As this dissertation was finalised, the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 was passed. It put the power to authorise criminal conduct by undercover security and intelligence agents on a statutory footing. The Act is a reminder that putting executive action on a statutory footing does not extinguish the potential for abuse of power.

If previous chapters in this dissertation have focused on the role of the executive and judiciary in relation to the prerogative and third source – the ways the executive has claimed expanding authority for itself, and the ways the judiciary has responded to those claims – this chapter has brought the legislature more squarely into the discussion.[1156] This gives, alongside analysis of the role of academics in making sense of the prerogative and third source's conceptual basis[1157] and normative merits,[1158] a fuller picture of how different branches of government have related to the prerogative and third source. The chapter has highlighted the centrality of the legislature to the prerogative and third source – the legislature has shaped the prerogative and third source's scope and place within the British constitution – and has gestured to the role the legislature could play in future reforms. The chapter has also underscored that different fractions of the state (as well as different fractions of the executive and legislature) can have different views about how to give effect to the perceived needs of the state; 'the state' is not a homogeneous entity.

The legislature has often sought to preserve the prerogative and third source, and to maintain their flexibility. A picture cannot be painted of an unruly executive and judiciary, kept in check by a heroic legislature. The legislature has helped sustain and expand executive power. 'The legislature' has not been some invariant institution, incapable of change over time – and there have been moments of greater reforming zeal as well as insipid timidity; it has also been clear in the analysis of New Labour's activities that the British executive has forestalled legislative reform. Notwithstanding this, it can be concluded that the legislature has not demonstrated the hostility towards the prerogative and third source that one might expect. One possible explanation is that members of the United Kingdom legislature are

[1156] Chapter One touches on the changing relationship between the executive, legislature, and judiciary, and mentions several historical statutes.

[1157] See Chapter Two.

[1158] See Chapter Four.

often, because of the country's constitutional structure, past or prospective members of the executive. Another more direct explanation is that the executive itself is involved in drafting legislation puporting to codify the prerogative and third source.

This chapter has contributed to the existing literature by classifying statutory engagement with the prerogative and third source. It has attempted a critical overview of New Labour's reform efforts. It has built upon existing scholarship, which has rarely considered the codification of both the prerogative and third source, much less in light of the history of codification efforts.

Other reform options are possible: the adoption of parliamentary conventions for individual prerogatives or third source activities, or the establishment of select committees to review exercises of the prerogative and/or third source. These have been the subject of other academic work, for example by Andrew Blick;[1159] they also represent more partial reform agendas than those that are the subject of Chapters Five and Six. It should not be thought that because they have not been in considered in detail they are not worthy of further attention. Another possibility not explicitly considered here is reform of the prerogative only or of the third source only; this, too, has been discussed by others and represents a more modest reform agenda. Again, the agenda is no less meritorious only because it is modest; constraints of brevity prevent a fuller consideration of its merits. Reforms focused on more stringent judicial treatment of the prerogative and third source – of the kind considered by Margit Cohn (who advocates more anxious and active review of "fuzzy" executive power)[1160] – have not been addressed here, since they do not appear to respond to both the normative challenges raised in Chapter Four: namely, that the prerogative and third source are not subject to structured scrutiny or to a circumscribing text.

[1159] Andrew Blick, 'Emergency powers and the withering of the Royal Prerogative' (2014) 18 IJHR 195.

[1160] Cohn (2021) (n 50) 289.

The prerogative and third source are areas of law that are untidy, full of holes, and closely connected to the needs of the state. Efforts to reform the prerogative and third source are also likely to be messy, incomplete, and politicised. But that does not mean no attempt should be made to bring the prerogative and third source onto a statutory footing – and the chapter has argued that comprehensive codification represents the best way to minimise ambiguity and limit abuses of power while maintaining some flexibility.

Conclusion

The preceding chapters have contributed to understandings of the prerogative and third source in British constitutional law. This conclusion focuses on insights in two areas: doctrinal constitutional law and critical legal theory. It gestures to future projects in these areas.

One of the principal contributions of this dissertation has been to contextualise, clarify, and critique case law on the prerogative and third source, in the course of showing that the law is highly unsettled – and situated within ongoing contestation over giving effect to the perceived needs of the state. The high-profile *Miller* cases have prompted more scholarly interest in the prerogative. This dissertation has provided a fuller historical overview of prerogative case law than is often offered. It has suggested there are earlier decisions on the third source, before *Malone*. It has highlighted that aspects of the law of the prerogative and third source are less determinate than they appear to be; other concepts, such as public benefit, have a long history in judicial reasoning but are rarely considered formal preconditions of recognition of a prerogative or third source activity. Case law from British colonies reveals that the prerogative and third source have been deployed historically across the broader United Kingdom as attempts have been made to expand state power. Analysis of the United States and Australia illustrates how jurisdictions influenced by British constitutional law have developed prerogative- and third source-like concepts.

The cases discussed do not represent a complete catalogue of prerogative and third source cases. But they provide a basis for comments about patterns in judicial reasoning. Arguments are frequently made about custom, powers inseparable from the Crown or inherent in nationhood, the value of an activity for the executive; and public benefit or national interest. These arguments show the connection between the prerogative and third source, and broader debates about what the state should do.

There are patterns in the subject-matter of this case law. The cases analysed comprise 12 overlapping areas of state activity:

(i) the fiscal state;[1161]

(ii) the imperial state;[1162]

(iii) the military state;[1163]

(iv) the security state;[1164]

(v) the local state;[1165]

(vi) the infrastructure state;[1166]

(vii) the extractive state;[1167]

1161 *The Case of the King's Prerogative in Saltpetre* (1606) 77 ER 1294; *R v Hampden* (1637) 3 State Tr 826 ('*Ship Money*'); *Campbell v Hall* (1774) ER 1045; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

1162 *Campbell v Hall* (1774) ER 1045; *Solicitor-General v Corporation of the City of Dunedin* (1875) 1 NZ Jur (NZ) 1; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2008] UKHL 61, [2009] 1 AC 453.

1163 *R v Hampden* (1637) 3 State Tr 826 ('*Ship Money*'); *Youngstown Sheet & Tube v Sawyer* (1952) 343 US 579; *Hamdi v Rumsfeld, Secretary of Defense* (2004) 542 US; *Hamdan v Rumsfeld, Secretary of Defense* (2006) 548 US 557.

1164 *Glasbrook Brothers v County Council of Glamorgan* [1925] AC 270 (HL); *United States v United States District Court for the Eastern District of Michigan* (1972) 407 US 297; *Town Investments v Department of the Environment* [1978] AC 359 (HL); *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (QB); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482 (CA); *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26; *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 (CA).

1165 *Solicitor-General v Corporation of the City of Dunedin* (1875) 1 NZ Jur (NZ) 1; *R v The Inhabitants of Leake* (1833) 5 B & Ad 469; *R v Somerset City Council, ex parte Fewings and others* [1995] 1 All ER 513 (QB); *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148, [2008] 3 All ER 548 (CA).

1166 *Solicitor-General v Corporation of the City of Dunedin* (1875) 1 NZ Jur (NZ) 1; *R v The Inhabitants of Leake* (1833) 5 B & Ad 469; *Johnson v Kent* (1975) 132 CLR 164; *Laker Airways v Department of Trade* [1977] QB 643 (CA).

1167 *The Case of the King's Prerogative in Saltpetre* (1606) 77 ER 1294; *Dean v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 1988, [2017] 4 WLR 158 (HC); *Cadia Holdings v New South Wales* (2010) 242 CLR 195.

(viii) the welfare state;[1168]

(ix) the foreign affairs state;[1169]

(x) the relationship between labour and the state;[1170]

(xi) the bordered state;[1171] and

(xii) the contracting state.[1172]

It cannot be said *how central* the prerogative and third source have been to each dimension; this dissertation has acknowledged that statutes have played a part in shaping the state. But the prerogative and third source have served some function in structuring state activities in the United Kingdom, including across its empire. They form part of the story of struggles to extend or restrict the role of the state.

Often the dimensions involve a new frontier of state action, and often (as is clearest for imperial, military, and security activities) the state action threatens rights of individuals and

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[1168] *Myers v United States* (1926) 272 US 52; *Humphrey's Executor v United States* (1934) 295 US 602; *Victoria v Commonwealth* (1975) 134 CLR 338; *Davis v Commonwealth* (1988) 166 CLR 79; *Morrison v Olson* (1988) 487 US 654; *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] UKHL 3, [1995] 2 AC 513; *R v Secretary of State for Health, ex parte C* [2000] 1 FLR 627 (CA); *R v Worcester County Council, ex parte SW* 2000 WL 108417 (HC); *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 (HL).

[1169] *United States v Curtiss-Wright Expert Corp* (1936) 299 US 304; *Zivotofsky v Kerry* (2015) 576 US 1059; *R (on the application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697; *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768, [2017] All ER 158 ('*Miller* (No 1)'); *R (Miller) v Prime Minister* [2019] UKHL 41, [2020] AC 373 ('*Miller (No 2)*'); *Barton v Commonwealth* (1974) 131 CLR 477. *Miller (No 2)* is only indirectly related to foreign affairs.

[1170] *Clough v Leahy* (1905) 2 CLR 139; *Glasbrook Brothers v County Council of Glamorgan* [1925] AC 270; *Youngstown Sheet & Tube v Sawyer* (1952) 343 US 579; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

[1171] *Barton v Commonwealth* (1974) 131 CLR 477; *Ruddock v Vadarlis* (2001) 110 FCR 491; *R (on the Application of New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358; *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1, (2015) 255 CLR 514; *Plaintiff M68/2257 015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

[1172] *New South Wales v Bardolph* (1934) 52 CLR 455; *Williams v Commonwealth* [2014] HCA 23, (2012) 248 CLR 156 ('*Williams (No 1)*'); *Williams v Commonwealth* [2014] HCA 23, (2014) 252 CLR 416 ('*Williams (No 2)*').

groups. The dissertation has suggested why this is likely. The prerogative and third source are not subject to structured scrutiny or a limiting legislative text; they provide attractive legal routes for executives to advance novel, sometimes rights-threatening agendas.

A second thematic area arising in this dissertation is critical legal theory. Preceding chapters have been inflected by a critical legal disposition, even if explicit references to critical legal theory are sparing. A 'standard story' about the history of the prerogative and third source has been demystified. Cases have been put into a fuller context, taking into account the United Kingdom's imperial history. Canonical understandings of the prerogative have been challenged. Revised accounts of the prerogative and third source have been grounded in history. Indeterminacy in the law of the prerogative and third source has been underscored. It has been demonstrated that indeterminacy is often used to secure expansions in executive power. A methodology sometimes employed by critical theorists, immanent critique, has been applied. Indeterminacy is shown to re-emerge out of the false certainty promised by a single codified constitution. Finally, the politics of law reform relating to the prerogative and third source has been examined.

The upshot of this is a proposal for comprehensive codification sensitive to the political difficulties of codification, as well as the likely re-emergence of judicial discretion. The dissertation is alert to how law is embedded in society. Those engaged in law-making, including lawyers and judges, do not stand apart from patterns of power. Legal actors, along with academics, are involved in telling stories that rationalise patterns of power. Part of the role of critical legal scholars is dissecting stories about the law and the social conditions shaping them.

Critical legal studies scholars have tracked indeterminacy in the law,[1173] often pointing out that indeterminacy is manipulated through judicial reasoning,[1174] and can operate with a 'tilt' in favour of powerful interests.[1175] This dissertation has provided more evidence of indeterminacy in the law, along with analysis of the judicial reasoning that has shaped and been shaped by such indeterminacy. It has demonstrated the highly unsettled character of the prerogative and third source. The dissertation has applied the insights of critical legal theory to British constitutional law, a field not often subject to critical legal analysis.

Much British constitutional law scholarship, as well as judicial treatment of constitutional law, has sought greater coherence, by recommending how the law can be brought in line with certain principles. Dicey and Blackstone were engaged in this enterprise,[1176] an enterprise sometimes said to enhance legitimacy.[1177] This dissertation has opted for a different methodology: one that describes incoherence openly where it exists – the British constitution and British constitutional law are presented, warts and all – rather than airbrushing it out of the account of the law. Some judges' and academics' efforts simultaneously to explain the law and legitimate it may have resulted in insufficient attention being paid to British constitutional law's uncertainties and limitations. Neglect of British constitutional law's uncertainties and limitations has enabled scholars (such as Blackstone and

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[1173] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review 1685; China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto 2006).

[1174] Duncan Kennedy, 'A Semiotics of Legal Argument' (1991) 42 Syracuse L Rev 75.

[1175] Kimberle Crenshaw and Gary Peller, 'The Contradictions of Mainstream Constitutional Theory' (1998) 45 UCLA L Rev 1683, 1685.

[1176] On Blackstone: Michael Lobban, 'Rationalising the Common Law: Blackstone and His Predecessors' in Anthony Page and Wilfrid Prest (eds) *Blackstone and His Critics* (Hart 2018) 1–22; on Dicey: see his favoured William James dictum, n 373, and Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (n 374) 762.

[1177] See eg Dimitrios Kyritsis *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017).

Dicey) to speak in triumphalist terms about the British constitution, and may have made it easier for British legal traditions to be lauded as an export, sometimes to justify imperialism.

This dissertation has drawn upon observations by Marxist legal theorists and theorists of the state. Pashukanis' account of how law can become increasingly differentiated over time as it serves economic functions captures one aspect of the prerogative's development.[1178] But Pashukanis' account of the state and constitutional law can be reductive: he writes that in the the law of the state, "so-called *raison d'etat* holds sway, which is nothing but the principle of naked expediency."[1179] This dissertation has demonstrated that the needs of the state are a recurring theme in legal argument over the prerogative and third source, but the needs of the state – or naked expediency – do not always hold sway. The law of the prerogative and third source is a site of ongoing contestation. Some reference has been made to the work of Poulantzas and others to reach a more nuanced understanding of the needs of the state and their relationship to law. Further work could be done, bringing Marxist theorists of law and theorists of the state into conversation, to account for the case law.

Two future projects could build upon this work. First, it would be fruitful to map *the law of the executive* in the United Kingdom.[1180] There is considerable scholarship on constitutional and administrative law in the United Kingdom, attempting to cover the whole field. Slicing the law in terms of how it concerns the executive branch would allow greater consideration of how administrative law interacts with the law of the prerogative and third source. It would require an account of the law of the prerogative and third source, and of administrative law, as well as statutes governing executive action. This would be a considerable undertaking, but would allow comparison of non-statutory and statutory discretion. There

[1178] See n 166.

[1179] ibid 137.

[1180] See in US context: Louis Fisher, *The Law of the Executive Branch: Presidential Power* (OUP 2014).

would be no need to replicate existing administrative law work; this part of the law of the executive could be dealt with more cursorily.

One way of dividing up the law of the executive might be through using the twelve dimensions sketched above. Developing this account would allow conclusions to be reached about the extent to which the prerogative and third source have been relied upon in the expansion of fields of state action during different periods, though it is important that this contribution is not overstated. The project could build on work that has been done mapping the institutions of the executive,[1181] as well as Margit Cohn's 2021 book.[1182] It would have to engage with a neglected question of definition: what is the executive? A fuller law of the executive in the United Kingdom might examine how the prerogative and third source are used, in day-to-day activities, by the executive. That inquiry has been touched on above: in reference to the Ram memorandum, the US torture memos, and the practice of colonial officials. Law students are generally not trained to study how law is invoked by officials and others: how law is used as threat, leverage, defensive device, or distraction. That study of how law is *deployed* is an important part of understanding law as a whole.

Second, this dissertation has contributed notes towards an account of *the law of British imperialism*.[1183] The prerogative and the third source were legal forms relied upon in imperial expansion, to expand the United Kingdom's powers over the colonies and by settler-colonial governments asserting themselves within colonial territories. The dissertation has not suggested that reform of the prerogative and third source would end imperialistic action by the British state; the roots of imperialism do not lie in the law alone, and so it would be rash to suggest that reform of the law could in itself put a stop to imperialistic practices. But it has

[1181] See Terence Daintith and Alan C Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (OUP 1999).

[1182] See n 57.

[1183] See also Bhandar (n 222); Poole (n 82); Lino (n 411).

highlighted that the prerogative and third source contributed to imperial activities, and that the United Kingdom's imperial legal history is an important part of British constitutional law. How important were the prerogative and third source to imperialism, relative to other legal forms, and non-legal tools? Were the very legal forms used to carry out imperial projects the basis of justifications for imperialism? Did Indigenous peoples and others affected by imperialism engage with these legal forms as part of a strategy of resistance, or did racist impediments to access to justice and other factors prevent such a practice?

These questions could be answered as part of a project on the law of British imperialism, which – as with the law of the executive – would require engagement with how law was used in practice, and further analysis of settler-colonial and Indigenous legal materials. It would require differentiated understanding of jurisdictions in which the United Kingdom played an imperial role. The project could consider cognate claims of necessity, martial law, and Acts of State. This project would illuminate how the British state justified its own power to itself: a task helpful for identifying the reproduction of imperialism today.

These projects constitute an expansive research agenda. But they are testament to the generative character of a critical investigation into the law of the prerogative and third source. The law of the prerogative and third source may seem like innocuous anachronisms. But this dissertation has demonstrated, in more detail and with greater breadth of perspective than hitherto published work, that the prerogative and third source are highly unsettled – even more than is commonly acknowledged. Their historical foundations are complex; they lack clear conceptual underpinnings; the doctrine is full of ambiguity; and they cannot be easily squared with tenets of the British legal order. Because the prerogative and third source are highly unsettled, and deeply embedded in political struggles, any attempt to reform these areas is unlikely to be clear-cut. Constitutional codification will not be a complete curb on expansion of executive power. Statutory codification will not eliminate the ongoing struggle to give effect to the perceived needs of the state via tools of executive power, though it is a defensible and

desirable reform. By probing why and how the prerogative and third source are highly unsettled, this dissertation has yielded conclusions about law and the state. It has highlighted how the prerogative and third source are situated within an ongoing struggle over giving effect to the perceived needs of the British state, the role of different actors, and some of the tools (in particular, forms of legal argument) used in that struggle. This analysis provides a deeper understanding of power, and offers a glimpse of how power has been – and continues to be – rationalised, reinforced, and reconfigured through law.

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