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Legality, Legitimacy, and Legislation: The Role of Exceptional Circumstances Review in Common Law Judicial Review

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Abstract: Preventing the overconcentration of power is a central component of Western constitutional thought. However, in the British constitution power is generally concentrated in representative legislatures. Although these legislatures generally possess more legitimating characteristics than courts, we cannot assume that this balance will hold true for all time. This article argues that the common law judicial review jurisdiction contains a power to invalidate the Acts of representative legislatures in certain extreme, hypothetical situations. The seeds of this line of thought began dicta from a minority in *Jackson v Attorney General* and similar claims have appeared in several other landmark cases such as *AXA Insurance v Lord Advocate* and *Moohan v Lord Advocate*. Rather than something exceptional, the power to invalidate legislation is best understood as a natural outgrowth of the seeds of a theory of legislative legitimacy present in the common law that began in the late twentieth century.

Keywords: exceptional circumstances, common law, constitutions, judicial review, legislatures, legitimacy

1. *Introduction*

Good constitutions instantiate tensions, not hierarchies. Elementary courses in constitutional law and politics abound with lessons on the dangers inherent in unchecked and unlimited authority. Indeed, the prevention of this phenomenon is among the most universally accepted explanations of the need for the principle of the separation of powers.[1] In some respects, the British constitutional settlement, in which parliamentary sovereignty is generally seen as the foremost constitutional rule, exacerbates the risks of abuses of power. The common law first began to address this potential problem early in the twenty-first century. In a series of obiter dicta judges suggested that common law judicial review could be used to curtail the content and validity of legislation from the Westminster Parliament and devolved legislatures that seriously eroded certain deeply held common law values. In later cases, similar claims were made in respect of legislation from the devolved legislatures.

Claims of this nature first appeared in the speeches of Lords Steyn and Hope, and Lady Hale in *Jackson v Attorney General* decided in October 2005.[2] The circumstances that would justify such unprecedented judicial interference with legislation were described in *Jackson* and subsequent authorities as 'exceptional circumstances'.[3] This terminology is adopted here for

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1 Montesquieu, *The Spirit of Laws*, (Anne Cohler, Basia Miller, and Harold Stone trs CUP 1989) 157.

2 *Jackson v Her Majesty's Attorney General* [2005] UKHL 56; [2006] 1 AC 262.

3 *Jackson* (n 2), *AXA General Insurance v The Lord Advocate and Others* [2011] UKSC 46; [2012] 1 AC 868.

ease. The *Jackson* dicta suggested the principle of parliamentary sovereignty may be called into question by the common law if an Act of Parliament enacted sufficiently serious restrictions upon access to the courts. These declarations, along with various other aspects of the decision, generated intensive (and polarised) academic debate.[4]

Lord Steyn's suggestion that the orthodox concept of legislative supremacy was 'out of place in the modern United Kingdom',[5] became a flashpoint among academic commentators. On the one hand, Jowell claimed that the dicta represented evidence of a move towards a new 'hypothesis of constitutionalism' whereby Parliamentary sovereignty was restricted by external normative limitations.[6] On the other, Ekins argued that Lord Steyn's dictum aimed to 'undo [the] constitutional settlement by asserting an open-ended judicial power to invalidate statutes that judges think are unjust.'[7] Several other commentators classified the speeches as a rhetorical tour de force by judges in respect of the perceived mishandling of human rights issues surrounding anti-terrorism and immigration legislation in the period after 9/11.[8]

Despite initially coming from a minority of judges, obiter dicta of this nature proved to be no mere flash in the pan. Since *Jackson* several other cases have questioned the relationship between Acts of representative legislatures and the extent of common law control. The discussion has not been restricted to either the principle of parliamentary sovereignty or Acts of the Westminster Parliament. For example, in 2011 Lord Hope built upon the analysis advanced by the minority in *Jackson* in *AXA Insurance Ltd v Lord Advocate*[9] with respect to Acts of the devolved legislatures. In the same year Lord Dyson in *Cart v Upper Tribunal* explained that there was 'no principle more basic' to the legal system than the rule of law.[10] Thereafter, in *Moohan*[11], Lord Hodge extended the scope of what constituted 'exceptional circumstances' beyond the sphere of access to justice to a substantial or complete removal of voting rights. In *Privacy International*,[12] decided in 2019, Lord Carnwath explained that legislation which purported to 'wholly exclude' judicial review for 'excess or abuse of jurisdiction, or error of law' would not be given 'binding effect'.[13]

Some fifteen years have passed since *Jackson* and the time has come for a reappraisal of the status and purpose of 'exceptional circumstances review' in common law judicial review.

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4 Intellectual responses to the *Jackson* decision were wide-ranging: a cursory Westlaw search returns over forty separate journal articles and notes referring to the judgment. Some scholars focused on the implications of the decision for the conceptual debate on parliamentary sovereignty, see e.g. Alison L Young, 'Hunting Sovereignty: Jackson v Her Majesty's Attorney-General' [2006] PL (Summer) 187, and Han Ru-Zhou, 'Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty' (2013) 129 LQR 610. Whereas others focussed on the dicta of Lords Steyn, Hope and Lady Hale specifically on its potential impact, for good or ill, for the role of the judiciary in contemporary constitutional arrangements. Conor Gearty urged vigilance: 'against the mistake of allowing...judges…power over our democratic branch.' Conor Gearty 'Justice Lecture: Taking control' (2007) 26 Law Society Gazette (8 November). By contrast Stuart Lakin argued that the dicta represented an 'explicit judicial endorsement' that the British Constitution was animated and controlled primarily by the rule of law: see Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28(4) OJLS 709, 730.

5 *Jackson* (n 2) Lord Steyn [102].

6 Jeffrey Jowell, 'Parliamentary Sovereignty under the New Constitutional Hypothesis' [2006] PL (Aut) 562, 572.

7 Richard Ekins, 'Legislative Freedom in the United Kingdom' (2017) 133 (Oct) Law Quarterly Review 582, 582.

8 Tom J Mullen, 'Reflections on *Jackson v Attorney General*: Questioning Sovereignty' (2007) 27(1) Legal Studies 1, 16.

9 *AXA General Insurance* (n 3).

10 *Cart v The Upper Tribunal (Rev 1)* [2011] UKSC 28, [2011] 3 WLR 107.

11 *Moohan and Another (Appellants) v The Lord Advocate (Respondents)* [2014] UKSC 67; [2015] 1 AC 901.

12 *Privacy International v Investigatory Powers Tribunal* [2019] 4 All ER 1; [2019] UKSC 22.

13 Privacy (n 12) [144].

It is tempting, but ultimately unhelpful, to dismiss such dicta as mere 'shots across the bows'[14] or as a clash between the principles of parliamentary sovereignty and the rule of law at the highest levels of abstraction. Whilst there is merit in both observations, they only scratch the surface of the developing relationship between the common law supervisory jurisdiction and legislation made by representative institutions.

The story to be told is far from obvious or settled. This article argues that the role of exceptional circumstances review is best understood as a development and progression of the common law approach to judicial review of legislation which can be traced to the end of the twentieth century. It is neither wholly novel, nor a covert march towards rule by judges or 'juristocracy'.[15] The argument advanced herein eschews the framework of 'common law constitutionalism', which seeks to justify judicial review in general terms as a mechanism to vindicate the rule of law.[16] Instead, this article unites insights from political science and legal doctrine to explain the specific role of exceptional circumstances review in the British constitution. The analysis aims to demonstrate that legislative legitimacy and control via judicial review does not amount to a zero-sum game. In so doing, it draws upon Scharpf's threefold legitimacy criteria for the evaluation of governance arrangements. These three facets of legitimacy, namely, 'input legitimacy', 'throughput legitimacy', and 'output legitimacy' are explained in the relevant stages of analysis below.[17] This connection furthers the argument common law has a nuanced approach to categorising legislation in relation to its legitimacy features.

This is exemplified by the different ways in which common law supervisory jurisdiction approaches judicial review of Prerogative Orders in Council, Acts of the devolved legislatures, and Acts of Parliament, respectively. Once this relationship is understood it becomes clear that exceptional circumstances review represents the endpoint in a spectrum in common law judicial review. Its purpose is to prevent further constitutional degradation if the legitimacy of legislatures degrades sufficiently.

Analysis proceeds in three broad stages. Part 2 explains how the common law approaches control of legislation in relation to its content or 'output legitimacy'. Part 3 explains that the range and depth of common law review depends on the 'input' and 'throughput legitimacy' of the legislation in question. Finally, Part 4 situates the claims made in this paper within broader debates about legislation and judicial review in the context of the British constitution In particular, the argument confronts concerns that the dicta on exceptional

[14] Tom J Mullen, (n 8) 16. See also Mark Elliott 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Sir Jeffrey Jowell and Colm O'Cinneide (ed), *The Changing Constitution* (9th edn, OUP 2019).

[15] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge MA 2007).

[16] In her thought provoking and insightful analysis, Se-Shauna Wheatle succinctly characterises common law constitutionalism as embracing several broad themes such as a commitment to a 'substantive conception of the rule of law and…fundamental values'. It has many strands, but what unifies it into a school of thought is a commitment to 'the notion of an unwritten fundamental law'. Se-Shauna Wheatle, *Principled Reasoning in Human Rights Adjudication* (Hart 2017), 29. See also: John Laws, *The Common Law Constitution* (Hamlyn Lectures, CUP 2014), Adam Tomkins, *Our Republican Constitution* (Hart 2005), Ch 1, Paul Craig, 'Public Law, Political Theory and Legal Theory' [2000] PL (Summer) 211, Trevor Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013), Chs. 2-3. For a critical perspective on this school of thought see further: JAG Griffith, 'The Brave New World of Sir John Laws ' (2000) 63 MLR 159 ; JAG Griffith, 'The Common Law and the Political Constitution (2001) 117 LQR 42, Thomas Poole, 'Back to the Future: Unearthing the Theory of Common Law Constitutionalism' (2003) 23(3) OJLS 435, Jeffrey Goldsworthy, 'The myth of the common law constitution' in Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010).

[17] Fritz W. Scharpf, *Governing in Europe: Effective and Democratic* (OUP 1999) Ch 1. See also: Simona Piattoni, *The Theory of Multi-Level Governance: Conceptual, Empirical, and Normative Challenges* (OUP 2010), Part III.

circumstances review is of little use because the circumstances which may require its activation are unlikely to arise.

2. *Legality, Proportionality, and Exceptionality: Control of Legislation According to Output Legitimacy*

The orthodox theory of parliamentary sovereignty, stemming from the nineteenth century writings of Albert Venn Dicey, is well-known and well-worn. It posits that the Westminster Parliament has absolute legislative supremacy.[18] But long held-constitutional orthodoxy belies the complexity of reality. Although the Westminster Parliament remains foremost it is no longer the only representative legislature in the constitutional order. Scotland, and Wales have had representative assemblies since the close of the twentieth century. Northern Ireland has had its own legislature intermittently since 1922.[19] In the context of challenges to legislative competence under the devolution settlements, courts have had to grapple with the status of such legislation relative to the common law supervisory jurisdiction.

Any realistic picture of the British constitution must also acknowledge the formidable presence of executive power. The growth of executive power is seen as a general trend in Western constitutional thought.[20] Non-statutory (or prerogative powers) are a significant feature of Western constitutions in general, and the British constitution specifically, forming the basis for significant initiatives in domestic and foreign policy.[21] In respect of statutory powers, there is even a presumption against the use of the Westminster legislative process in which central government departments are encouraged to consider 'whether the ends they wish to achieve could be reached by purely administrative means… secondary legislation or a legislative reform order could be used before embarking on primary legislation.'[22] The picture painted by orthodox constitutional theory, of an empowered Parliament dominating a subservient executive, is undercut by the nature of parliamentary politics. Webber explains that the fact that Her Majesty's Loyal Opposition is effectively a 'government-in-waiting'[23] encourages cooperation, as opposed to contest between the executive and the legislature.[24] Or to put it more bluntly, the party system in a liberal democracy generates 'equilibrium' between government and opposition because 'everyone has skin in the game'.[25] But the common law accommodates both fidelity to Diceyan principle and sensitivity to these complex realities. Legislative supremacy is not considered to be a freestanding part of the constitutional order. In *UNISON v Lord Chancellor* Lord Reed explained that parliamentary sovereignty could not

[18] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1885) 39-40.

[19] Brice Dickinson, 'Devolution in Northern Ireland' in Sir Jeffrey Jowell and Colm O'Cinneide (ed), *The Changing Constitution* (9th edn, OUP 2019).

[20] See, e.g., David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006), Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart 2018), Mark A. Graber**,** Sanford Levinson**,** and Mark Tushnet (eds), *Constitutional Democracy in Crisis* (OUP 2018).

[21] Margit Cohn, 'Non-Statutory Executive Powers: Assessing Global-Constitutionalism in a Structural Institutional Context' (2015) 64 ICLQ 65, 70.

[22] Cabinet Office, 'Guide to Making Legislation' (The Stationary Office, July 2017) [5.3].

[23] Grégoire Webber, 'Loyal Opposition and the Political Constitution' (2017) 37(2) *OJLS* 357, 369, emphasis original.

[24] For a further insight into the competing visions of democracy held by actors in Westminster and Whitehall, respectively see: A. H. Birch, *Representative and Responsible Government: An Essay on the British Constitution* (Allen and Unwin 1964).

[25] Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 84-85.

be understood in isolation. Instead it required the cooperation of external institutions, such as courts, and respect for other constitutional principles, such as the rule of law, for Westminster's legislation to have meaningful effect. Without these other elements in the constitution being sufficiently respected 'laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.'[26]

An alternative reading of the common law approach to legislation is therefore possible. Judicial review has developed methods to control the content and interpretation of representative legislation through a series of escalating interpretive controls. These controls fall into three broad categories: the principle of legality, the doctrine of proportionate process, and exceptional circumstances review. The intensity of control varies according to the content of legislation. In short, the spectrum ranges from statutory interpretation to the disapplication of legislation. At the weak end there is interpretation using the principle of legality, the principle of proportionate process allows for legislative freedom to balance competing public policy goals. The concept of proportionate process aims to ensure that any 'decision that is proportionate in light of the nature of the decision'.[27] Proportionate process recognises that the rule of law, or more specifically protection through law, must be balanced against other competing aims. In the context of controlling administrative action this might involve weighing adjudication against other factors such as cost-effectiveness, informality, accessibility, expediency, finality, and so on. In other words, proportionate process, exemplified in the *Cart* decision (below)[28], recognises the freedom of legislatures to balance aims within a particular framework. The court is then asked, within the scope of that framework, to conduct a balancing exercise which amounts to asking if the 'ends justify the means?'.[29] By contrast exceptional circumstances review is the strongest form of review because it may result in a refusal to recognise an Act as valid law. Unlike proportionality, in which the balancing is inherent, exceptional circumstances review imposes a hard limit on legislative freedom that cannot be transgressed.

As discussion progresses it will be shown that legality and proportionate process remain sufficient adjudicative tools in contexts where legislatures instantiate the values of a 'liberal democracy'[30] in which legislatures continue to see their relationship with courts as 'governed by accepted principles of the "rule of law".'[31] It is only in the event that these assumptions are departed from that exceptional circumstances review in the manner posited by Lords Steyn, Hope, Hodge and Lady Hale should be considered.

In other words, the need for exceptional circumstances review is inversely proportional to the legitimacy of legislation. Scharpf's taxonomy of legitimacy can help us to illuminate the sophisticated nature of the common law's approach to review of legislation. The three facets of legitimacy, characterised by Scharf as 'input', 'output', and 'throughput' legitimacy are separate but mutually reinforcing. The original taxonomy of legitimacy was intended as a fairer metric for assessing the legitimacy of governance arrangements in the European Union. Prior to his foundational work, supra-national institutions had been assessed against criteria developed to measure democratic nation-states. Legitimacy can be broken down into three separate (but complementary and mutually reinforcing) categories.

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[26] *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409, Lord Reed [68].

[27] Timothy Endicott, *Administrative Law* (4th edn, OUP 2018) 133.

[28] *Cart* (n 10).

[29] *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] 1 AC 945, Lady Hale [98].

[30] *AXA Insurance* (n 3) Lord Reed [153].

[31] *Privacy International* (n 12) [119].

This trajectory of control reflects a sophisticated approach to all facets of the legitimacy of legislation. Input legitimacy is 'concerned with the composition of institutions, and clearly may include democratic legitimacy, achieved through election'.[32] Input legitimacy subsists in institutions which secure 'ample representation of all relevant interests and points of view when making authoritative decisions.'[33] In this respect, input and throughput legitimacy may not be hermetically sealed. Throughput (or procedural legitimacy) is generally discussed 'in relation to courts' but is equally applicable to legislative proceedings.[34] Schmidt explains that throughput legitimacy evaluates what 'goes on inside' institutions 'in the space between the political input and the policy output'.[35] Throughput legitimacy therefore focuses on the quality of the processes inside a governance institution. In the present context, this amounts to the quality of deliberation in the legislative process.

Piattoni, building on Scharpf's analysis, explains that 'output legitimacy' refers to the 'quality of decisions produced and their effectiveness in solving the problems that they supposedly address.'[36] In the present contexts Acts of representative legislatures are a manifestation of their 'output legitimacy'.[37] Legislative outputs are judged against their capacity to 'effectively promote the common welfare of the constituency in question.'[38] Output legitimacy in a forum of this nature can be derived from a range of concepts, such as electoral accountability, or independent expertise.[39] Understandably, the concept has been adapted to assess the legitimacy of bicameral legislative institutions.[40] Well-functioning representative legislatures will display a high degree of all three facets of legitimacy.

2.1 *The Principle of Legality*

Judicial fidelity to parliamentary sovereignty has not obstructed the development of a principle of legality with both breadth and depth. Space precludes citation of every authority, but a general trend can be observed. The principle of legality (though not necessarily so-called at the time) began as a mechanism to prevent executive rulemaking from infringing fundamental rights. In time, and in the hands of different judges, it has transformed into a robust principle for the interpretation of the Acts of representative legislatures.

In short, the legality principle has increased its scope beyond the control of executive rulemaking and has transformed into a potential constraint on the content and application of representative legislation. As its use has increased, different strains of thought regarding its scope and content have appeared in judgments. Access to justice and the principle of legality remain intimately connected. The principle's development has been extensive, but it remains an insufficiently strong constraint upon wholesale, explicit restrictions for two reasons. First the strongest conception of the principle (posited by Lord Reed) which suggests judicial constraints on Acts of Westminster remains limited to a power of interpretation. Secondly, the reliance upon the principle of legality by Lord Carnwath in *Privacy International* implies that

[32] Russell 'Rethinking Bicameral Strength' (n 37) 375-376.
[33] Simona Piattoni, *The Theory of Multi-Level Governance* (n 17) 190.
[34] Russell 'Rethinking Bicameral Strength' (n 37) 375-376.
[35] Vivien A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output *and* Throughput' (2013) 61 Political Studies 2, 5.
[36] Piattoni, *The Theory of Multi-Level Governance* (n 33) 190.
[37] Scharf, *Governing in Europe* (n 17) 10-21
[38] Scharf, *Governing in Europe* (n 17) 6.
[39] Scharf, *Governing in Europe* (n 17) 14-15.
[40] Meg Russell 'Rethinking Bicameral Strength: A Three-Dimensional Approach' (2013) Journal of Legislative Studies 370, 375-376.

the principle relies in part on functioning legislative institutions which are sensitive to the political ramifications of legislation which runs contrary to fundamental rights for its full effectiveness.[41] The principle of legality is, in effect, a fair-weather friend of the common law constitution.

Young explains that while the principle of legality may have its roots in sixteenth century jurisprudence,[42] its modern understanding can be traces to three cases concerning the rights of access to justice.[43] In *Witham* Laws LJ held that a statutory instrument enacted by the Lord Chancellor removing a fee exemption for poor litigants was ultra vires the Supreme Court Act 1981. This was because access to the courts was a constitutional right derived from both the common law and the European Convention on Human Rights (ECHR).[44] The specific consequences of designating something as a constitutional right at common law had two consequences: first, such rights could not be abrogated by the executive, and secondly, if they were to be abrogated by an Act of the Westminster Parliament the statutory language must be explicit.[45] Thus, *Witham* prevented the executive from abrogating access to justice through the use of ambiguous statutory terms.

Although the term 'principle of legality' was first used in *Pierson*[46], decided by the House of Lords in 1997, the first case to fully flesh out the contours of the modern principle was *Simms* in 1999.[47] The case is perhaps most well-known for Lord Hoffmann's dictum that 'fundamental rights cannot be overridden by general or ambiguous words.' However, His speech contains several important elements. Lord Hoffmann explained that the principle applied to Acts of Parliament as well as subordinate legislation. Although the Westminster Parliament remained free to legislate contrary to fundamental rights, it must do so explicitly, and 'squarely confront the political cost' of any rights violating legislation enacted. The cost of any such action would presumably be due at the ballot box in a future General Election. Lord Hoffmann's requirement of explicit statutory authorisation of infringement of fundamental rights was based on his understanding of the fallibility of legislative procedures. Even in a developed, bicameral legislative process, statutory provisions may be enacted where 'the full implications of their unqualified meaning may have passed unnoticed in the democratic process'. To this end, the common law was required to use the legality principle as a form of constitutional control which was 'little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'[48]

The shift in the principle of legality from control of the executive to control of the legislature was further reflected in the development of the concept of constitutional statutes. In *Thoburn*, Laws LJ drew upon the idea of fundamental or constitutional rights expressed in *Simms* to create a free-standing category of Acts of Parliament known as constitutional statutes.[49] These statutes were identified by their ability to condition the 'legal relationship between citizen and State in some general, overarching manner' or which 'enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'. The efficacy of the original test for constitutional statutes has been the subject of wide academic

[41] *Privacy International* (n 12), Lord Carnwath [101].

[42] Alison L Young, 'Fundamental Common Law Rights and Legislation' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart 2020) 223, 226.

[43] *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198, *R v Lord Chancellor ex parte Witham* [1998] QB 575, *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539.

[44] *Witham* (n 43).

[45] *Witham* (n 43).

[46] *Pierson* (n 43) Alison L Young (n 42) 226.

[47] *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33; [2000] 2 AC 115.

[48] *Simms* (n 47) Lord Hoffmann.

[49] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2002] 3 WLR 247.

debate but for our purposes that is not important. [50] What is important, by contrast, is that the concept of constitutional statutes strengthens the obligation upon Parliament to legislate explicitly to repeal statutes classified by the common law as constitutional statutes. Just as fundamental rights cannot be displaced by statutory ambiguity, constitutional statutes cannot be repealed by implication.

In *Evans v Attorney General*[51] Lord Neuberger used the principle of legality as a catalyst for his holding that the Attorney General's use of a statutory power which purportedly authorised him to overturn a judicial decision was unlawful. The information in question related to correspondence between Prince Charles in his capacity as the future Monarch and various government departments. Mr Evans, a journalist for *The Guardian* newspaper sought disclosure because he suspected that the Prince was using the correspondence for political advocacy in relation to causes that he personally favoured. Section 53(2) of the Freedom of Information Act 2000 empowered an "accountable person" (the Attorney General) to issue a certificate overturning a judicial order to release information. Lord Neuberger held, that section 53(2) interfered with two important constitutional principles, namely that court decisions were binding between the relevant parties, and that decisions of the executive are subject to legal control.[52] His Lordship put the point succinctly, explaining that if Parliament had intended to interfere with constitutional principles of such importance and to create the 'remarkable effect' of allowing an executive official to set aside a decision of a court of law, then, the principle of legality demanded that the wording of the statute must be 'crystal clear'.[53] Section 53(2) of the 2000 Act fell 'far short' of the clarity requirements imposed by the principle of legality to permit such a reading.

A similar strain of thought appears in Lord Reed's judgment in *UNISON* in which he commented that 'even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation'.[54] The substance of the main ruling was that executive rules raising employment tribunal fees were unlawful because they infringed the common law principle of access to justice.

Several Supreme Court authorities suggested further progress in the amount of judicial control over legislative enactments that the principle of legality may provide. The principle of legality arguably reached its zenith in the landmark *Miller (No. 1)*.[55] A majority of eight justices subscribed to the view that the principle of legality was a key component in preventing the prerogative alone being used to initiate major constitutional change without parliamentary consent.[56] However, the *dicta* of Lord Reed in *AXA Insurance* and Lord Carnwath in *Privacy International* both indicate that the realisation of the principle's efficacy is reliant upon a functioning political culture which includes respect for democratic values and the rule of law.

In *AXA Insurance* Lord Reed explained that Acts of the devolved legislatures were insulated from review on the ordinary common law grounds of review (such as irrationality) by their democratic credentials.[57] The appellants, an insurance company, had raised a common law challenge to the rationality of the Asbestos (Damages) Scotland Act 2009 on the basis that

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[50] Tarunabh Khaitan, '"Constitution" as a Statutory Term' (2013) LQR 589, Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) OJLS 461. See also Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, 2010), 312-314.

[51] *R (Evans and Another) v Attorney General* [2015] UKSC 21; [2015] 1 AC 1787.

[52] *Evans* (n 52) [52].

[53] Evans (n 52) [57]-[58].

[54] *UNISON* (n 26) [88].

[55] *R (Miller) v Secretary of State for Exiting the European Union (Miller No. 1)* [2017] UKSC 5, [2018] AC 61.

[56] *Miller No. 1* (n 55) [86].

[57] *AXA General Insurance* (n 3).

it retroactively overturned a decision of the House of Lords in *Rothwell.*[58] The decision in *Rothwell* held that pleural plaques did not gives rise to an injury which could be the basis of a claim for damages. However, Lord Reed explained that Acts of the devolved legislatures remained amenable to a form of residual 'constitutional' judicial review which was animated by the principle of legality.[59] The protection of fundamental rights was not exhausted by the statutory arrangements which prevented legislation contrary to the ECHR, and as such the common law had a role to play in respect of devolved legislation.[60] To that end, the principle of legality bound both the Westminster Parliament and the devolved legislatures.

In the context of Acts of the devolved legislatures the principle of legality served to uphold background constitutional assumptions. When Westminster legislated to create the Scottish Parliament 'it legislated for a liberal democracy founded on particular constitutional principles and traditions.'[61] The result of this constitutional commitment was that Westminster 'cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.'[62] As there was no prospect of the Asbestos (Damages) Scotland Act 2009 amounting to a violation of the rule of law, Lord Reed did not elaborate further on how the principle of legality would operate to resupply these constitutional values in a piece of devolved legislation deemed to be deficient in them.

In *Privacy International* Lord Carnwath appears to envision a role for the principle which is narrower still. His judgment implies that the principle of legality will only provide a restraint on severe legislative abuses of the rule of law where the background constitutional culture exists to guard against such transgressions. The same assumption is inherent in Lord Hoffmann's initial formulation. The dispute in *Privacy International* concerned the legality of an 'ouster clause' in section 67(8) of the Regulation of Investigatory Powers Act 2000 prohibiting all further judicial review of the decisions of the Investigatory Powers Tribunal (IPT). The tribunal is the only forum for litigants to challenge the legality of covert surveillance by executive agencies such as the police, MI5, and MI6.

Argument before the Supreme Court focussed on two broad questions: first, whether section 67(8) precluded judicial review for error of law by the High Court, and secondly whether (and if so by what constitutional principles) the Westminster Parliament could legislate to remove the jurisdiction of the High Court to review an inferior court or tribunal. Lord Carnwath (with whom Lord Kerr and Lady Hale agreed) held that section 67(8) did not insulate the IPT from judicial review for error of law or excess or abuse of jurisdiction.[63] The IPT can hear claims against public agencies for unlawful surveillance based in tort or pursuant to the Human Rights Act 1998. One of a number of factors that influenced Lord Carnwath's judgment was that allowing the tribunal to be insulated from the jurisdiction of the High Court would allow it to potentially develop its own 'local law' in these fields of general application.[64] Without corrective review for error of law the result could be that certain public agencies have a general body of law applied to them in a different way from other actors. As such, the broader constitutional issues did not need to be addressed to dispose of the case. Lord Carnwath explained that as all parties to the litigation accepted that the relationship between the Westminster Parliament and the courts was 'governed by the accepted principles of the "rule of law"' there was no need to address the issues of the type covered in *Jackson* which spoke to

[58] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] AC 281.
[59] *AXA General Insurance* (n 3) [149].
[60] *AXA General Insurance* (n 3) [151].
[61] *AXA General Insurance* (n 3) [153].
[62] *AXA General Insurance* (n 3) [153].
[63] *Privacy International* (n 12).
[64] *Privacy International* (n 12) [112].

the situation where Parliament may legislate in a manner that purported to 'abrogate or derogate' from such principles.[65]

However, Lord Carnwath made two further points that spoke to the relationship between courts and legislatures. First, he explained how the political dimensions of principle of legality functioned in relation to a previous controversial ouster clause which appeared in clause 11 of the Asylum and Immigration (Treatment of Claimants) Bill. This clause, which many consider to be the inspiration behind the dicta in *Jackson*, sought to insulate decisions of the Asylum and Immigration Tribunal from all forms of judicial review.[66] The strength of the clause cannot be overstated. Rawlings remarked that had it become law it would have 'taken national administrative law back to the sleepy days of the 1950s'.[67] It specifically precluded judicial review challenges based upon lack of jurisdiction, error of law, irregularity, breach of natural justice or 'any other matter'.[68] It drew widespread criticism, including from Lord Woolf, the then Lord Chief Justice, who remarked that were it to become law 'it could be the catalyst for a written constitution.'[69] Due to widespread political pressure the clause was withdrawn. Lord Carnwath explained that the withdrawal of clause 11 was a demonstration of the 'practical importance' of the principle of legality's requirement that Parliament must 'squarely confront the political cost' of any proposed action. Much like Lord Reed's analysis in *AXA Insurance* this vision of the principle of legality assumes the existence of a political culture willing to mount a robust defence of liberal democratic constitutional norms.

Finally, he reflected on an alternative situation whereby a future Westminster Parliament may pass legislation which aimed to 'exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law'.[70] His Lordship explained that legislation with this content would not be given 'binding effect'.[71] Whilst there is no further citation of *Jackson* in relation to this statement, it clearly reflects similar sentiments to the corpus of dicta on exceptional circumstances review.

2.2 *Proportionate Process in Cart v Upper Tribunal*

Not all potential conflicts between legislatures and the common law occur as a result of statutory ambiguity or explicit attempts to undercut constitutional principles. Some occur in relation to statutory silence. In *Cart v Upper Tribunal*[72] the Supreme Court confronted such a silence. The ruling sheds important light on the extent to which the common law will permit representative legislatures to balance access to justice against other broad public interest goals. Lady Hale framed the issue as involving 'two principles which needed to be reconciled' namely the 'relative autonomy' which Parliament had intended for the tribunal system and 'the constitutional role of the High Court as the guardian of the standards of legality and due process' – a role which could not be removed by legislation.[73]

65 *Privacy* (n 12) [119].
66 Richard Rawlings 'Review, Revenge, and Retreat' (2005) 68(3) MLR 378.
67 Rawlings (n 66) 379.
68 *Privacy International* (n 12) [101].
69 Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) 63(2) CLJ 317, 329.
70 *Privacy International* (n 12) [144].
71 *Privacy International* (n 12) [144].
72 *Cart* (n 10).
73 *Cart* (n 10) [33].

The issue in *Cart* was the extent to which refusals of permission to appeal by the Upper Tribunal should be amenable to judicial review. The Tribunals Courts and Enforcement Act 2007 established a new two-tier tribunal system. Despite the Leggatt Report[74] (on which the reformed structure was based) recommending an ouster clause to exclude judicial review of the system in the High Court, the 2007 Act contained no such provision. Parliament opted instead to designate the Upper Tribunal as a 'superior court of record'.[75] Despite government argument to the contrary the Supreme Court held that such a classification did not 'immunise' decisions of the Upper Tribunal from judicial review.[76]

Three possible options were available to the Court in determining the scope of judicial review. Option one involved confirming the holding of the Court of Appeal restricting judicial review to 'pre-*Anisminic* jurisdictional error', which would restrict judicial review to a decision in which the Upper Tribunal had gone beyond the 'four corners of its statutory remit'[77] or made a decision which was vitiated by 'procedural irregularity of such a kind as to constitute a denial of the applicant's right to a fair hearing'.[78] The second option was to make judicial review available in full. The third and final option (which the Supreme Court chose) was to transpose the second-tier appeals criteria which permitted review where a dispute raised 'an important point of principle or practice' or should be heard for 'some other compelling reason'.[79] Lady Hale explained that there 'must be a limit to the resources which the legal system can devote to the task of trying to get the decision right in any individual case.' However, resource-based limitations should not create a situation where 'Serious questions of law might never be "channelled into the legal system".'[80] Lord Brown was more frank: 'The rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff.'[81]

The *Cart* decision represents what Elliott and Thomas have described as 'proportionate process'.[82] It walks the difficult line between needlessly replicating the work of the reformed tribunal system and opting for an overly restrictive test (such as jurisdictional error) that risked immunising other forms of errors which may be 'egregious and obvious' from review.[83] From a constitutional perspective, this reflects an understanding that legislatures must balance access to justice with other competing public interest goals, such as the allocation of the state's scarce resources. However, for Lord Dyson, proportionate process still implied a non-derogable baseline of judicial control that Westminster could not erode. He explained that 'there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review.'[84]

2.3 Remedies Against Legislation in Exceptional Circumstances

74 Sir Andrew Leggatt, *Tribunals for Users – One System, One Service* (TSO, March 2001).
75 Tribunals, Courts and Enforcement Act 2007, s 3(5).
76 *Cart* (n 10) [87].
77 *R (Rex Cart) v The Upper Tribunal* [2009] EWHC 3052, Laws LJ [99].
78 *Cart* (n 10) [34].
79 *Cart* (n 10) [27].
80 *Cart* (n 10) Lady Hale [41]-[43].
81 *Cart* (n 10) [100] Lord Brown.
82 Mark Elliott and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' [2012] CLJ 297.
83 *Cart* (n 10), Lord Dyson [110].
84 *Cart* (n 10), Lord Dyson [122].

The modern-day contention[85] that courts can declare Acts of representative legislatures to be unlawful at common law first appeared in *obiter dicta* of three Law Lords in *Jackson v Attorney General*.[86] The appellants, who opposed the ban on fox hunting with dogs contained in the Hunting Act 2004, claimed that the 2004 Act was 'primary legislation' because it had been made using the Parliament Acts. The Parliament Acts of 1911 and 1949 allow Parliament to legislate without the consent of the House of Lords. The 2004 Act's status as secondary or 'delegated' legislation, so ran the claim, meant that it was amenable to the ordinary principles of judicial review and should be the subject of a quashing order. This argument was unanimously rejected by a nine-judge panel. Acts made under the special procedure provided by the Parliament Acts remain primary legislation. The ratio in *Jackson* is therefore very narrow – Acts made under the Parliament Acts enjoy the same constitutional status as legislation made using the ordinary legislative procedure (involving the House of Commons, the House of Lords, and the Monarch).

However, debate in the case broadened to address the issue of whether the truncated legislative procedure in the Parliament Acts should be subject to implied limitations by the common law. Lord Steyn began his series of claims about the limitations on the content of legislation made according to the Parliament Acts with the controversial assertion that parliamentary sovereignty was a 'construct of the common law'.[87] This meant that in 'exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts' the House of Lords may have to consider whether 'a sovereign Parliament acting at the behest of a complaisant House of Commons' could validly enact such legislation.[88] Lord Hope put things more broadly by stating that it 'is no longer right to say that its freedom to legislate admits of no qualification whatever.'[89] Thereafter he explained that parliamentary sovereignty would amount to an empty principle if 'legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law.'[90] Lady Hale opined that the 'courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny'.[91]

Lord Hope elaborated on his somewhat broad and ambiguous *Jackson* dictum in *AXA General Insurance v Lord Advocate*.[92] It was not only the Westminster Parliament using the Parliament Acts that could be the subject of common law restrictions. Unlike Lord Reed, who approach the role of the common law through the prism of the principle of legality, Lord Hope explained that exceptional circumstances review would lie when an unchecked majority abused its position to enact legislation that sought 'to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual.'[93] This is much closer to Lord Steyn's approach in *Jackson.* Lord Hope explained that the threat of such action, in the context of the

[85] A similar, broader, claim first appeared in the 17th Century in Dr Bonham's Case (1610) 8 Co. Rep. 107; 77 Eng. Rep. 638: "in many cases, the common law will (d) controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void" at p. 652. However, Sir Edward Coke retreated from this position in his later writings. See Neil Duxbury, *Elements of Legislation* (CUP 2012) 29-31.

[86] *Jackson* (n 2).

[87] *Jackson* (n 2), Lord Steyn [102].

[88] *Jackson* (n 2) Lord Steyn [102]

[89] *Jackson* (n 2)Lord Hope [107].

[90] *Jackson* (n 2) Lord Hope [120].

[91] *Jackson* (n 2)Lady Hale [159].

[92] *AXA General Insurance Ltd* (n 3).

[93] *AXA General Insurance Ltd* (n 3).

AXA General Insurance Ltd (n 3), Lord Hope [51].

Scottish Parliament, went beyond the merely hypothetical. In fact: 'Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.'[94]

The common law is generally content to temper legislative silences or ambiguities with the interpretive tools discussed above. However, legislation which violates constitutional norms may do so explicitly and egregiously. Exceptional circumstances review exists in order to provide a remedy against such egregious and explicit violations in the event of the failure of the political culture implied by the principle of legality. In *Moohan*, decided in 2014, Lord Hodge extended the analysis developed by Lord Hope in relation to access to justice to voting rights. Lord Hodge recognised the central role of the franchise in shoring up the legitimacy of representative legislatures. Moohan, a prisoner, challenged section 2 of the Scottish Independence Referendum (Franchise) Act 2013 which prevented serving prisoners from participating in the September 2014 referendum on Scottish Independence. The appellant argued that section 2 was unconstitutional because it contravened 'the principle of universal suffrage' inherent in the common law, and as a result the ban on prisoner voting in the referendum 'contravened the common law requirements of the rule of law.'[95]

The Supreme Court rejected this claim, and in doing so held that there was no common law right to universal suffrage. This was because the extent of the franchise had always been determined by legislation.[96] Lord Hodge explained that the Westminster Parliament regulated 'the modalities of the expression of democracy'.[97] Therefore, it was inappropriate for the courts to use the common law to alter existing legislation which governed the franchise.[98] Notwithstanding this general principle, Lord Hodge explained that he did 'not exclude' the possibility of departure from it in exceptional circumstances. It could not be ruled out that a court might declare legislation regulating the franchise 'unconstitutional':

> in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by the principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful.[99]

This dictum was endorsed, but not applied, by the Court of Appeal in *Schindler*.[100] Here, the appellant unsuccessfully challenged a legislative prohibition on the right to vote in the Brexit referendum imposed on UK nationals who had lived overseas for fifteen years. The appellant also argued that the court had a general common law jurisdiction to declare legislation which conflicted with common law rights unconstitutional. Once again, this argument was roundly rejected. However, the Court of Appeal affirmed the dicta of Lord Hodge in *Moohan* before concluding that there was 'nothing abusive' about the legislation in the instant case.[101]

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[94] *AXA General Insurance Ltd* (n 3)
, Lord Hope [51]
[95] *Moohan* (n 11) Lord Hodge [5].
[96] *Moohan* (n 11) [34].
[97] *Moohan* (n 11) [34].
[98] *Moohan* (n 11) Lord Hodge [34].
[99] *Moohan* (n 11) Lord Hodge [35].
[100] *Shindler and Another v Chancellor of the Duchy of Lancaster and Another* [2016] EWCA Civ 469*;* [2017] QB 226 [49].
[101] Schindler (n 100) [49]-[50].

The emerging picture of common law control of the output legitimacy of representative legislation is a nuanced one. The dicta in *Moohan* demonstrates the importance of input and throughput legitimacy to the common law, despite the ostensible focus upon output legitimacy. Ruling that acts of representative legislatures are unconstitutional according to the common law has understandably been restricted to very narrow and (presently) hypothetical circumstances in which a legislature seeks to effectively abolish judicial review or voting rights in elections. Individual judges have repeatedly emphasised the unlikely nature of such legislation reaching the statute book. However, beneath all these statements, there are deeper ideas about the value and integrity of the legislative process.

In a constitutional order where parliamentary privilege is jealously guarded by Westminster and the 'enrolled Bill rule'[102] ensures that claims cannot be brought about defects in legislative proceedings such a claim might appear heretical. But the common law has tempered principles of judicial review of according to the perceived legitimacy of the legislation in question since the late twentieth century.

3. *Legislative Legitimacy and the Common Law: Orders in Council, Devolved Legislation, and Acts of Westminster*

It is a constitutional truism that the Westminster Parliament enacts primary legislation, meaning that its Acts are generally 'accepted by the courts at…face value, without needing support from any superior authority'.[103] By contrast, secondary (or delegated) legislation is that which derives its authority from a higher statutory source. But such nomenclature is not a determinative guide to the reach and depth of the common law judicial review jurisdiction. In other words, the common law's respect for both parliamentary sovereignty, and representative legislatures neither is nor out to be based solely or decisively upon majoritarian democracy. Such majoritarianism can be a minimum basis for legislation, but it cannot be the sole legitimating criterion. The dangers inherent in simple majoritarianism, discussed in this section, have the potential to corrode both throughput and output legitimacy in representative legislatures when operating alone.

The common law contains a long-standing recognition that legislation with a greater combination of legitimacy factors (input, throughput, and output) is more likely to be shielded from common law review. The converse is also true. This explains why primary legislation made by the executive is in principle amenable to full judicial review. This is the broader rationale that unites the dicta in *Jackson*, *AXA Insurance*, and *Moohan*. Exceptional circumstances review, as envisioned by Lords Steyn and Hope can reasonably be conceived of as a logical extension of the line of thought which began in *Council of Civil Service Unions v Minister for the Civil Service (GCHQ).*[104] On the understanding advanced here, exceptional circumstances review does not amount to a doctrine which means the courts are 'elevated illegitimately to a position of constitutional supremacy'[105]

[102] See, for example, The Scotland Act 1998, s 28(5): 'The validity of an Act of the Scottish Parliament is not affected by any invalidity in the proceedings of the Parliament leading to its enactment'. The 'enrolled bill' rule was originally recognised by the common law in *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710, 723–25, and subsequently endorsed in *British Railways Board v Pickin* [1974] UKHL 1; [1974] AC 765.

[103] Sir William Wade, *Constitutional Fundamentals* (Stevens, London 1980), 27 – 28 in *R (Jackson and Others) v Her Majesty's Attorney General* [2005] EWCA Civ 126; [2005] QB 579 [36].

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

[105] Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015) 201.

In *GCHQ* the appellant challenged the legality of the Prime Minister's decision to ban employees of the Government Communications Headquarters (GCHQ), the clandestine surveillance agency, from trade union membership. The judgment is most remembered for its landmark ruling that the exercise of the Royal Prerogative court attract judicial review. Lord Diplock explained that judicial review turned on the 'nature'[106] of the power at issue as opposed to its 'source'. In the course of proceedings, the House of Lords accepted an affidavit from Sir Robert Armstrong, the (then) Cabinet Secretary, that Prerogative Orders in Council were a form of primary legislation. Nevertheless, this classification alone did not exclude the possibility of judicial review.

In more recent times the Human Rights Act 1998 specified that prerogative Orders in Council are primary legislation, meaning that they can only be the subject of a section 4 declaration of incompatibility under the 1998 Act, as opposed to a quashing order.[107] However, *Bancoult (No. 2)*, decided in 2008, reaffirmed the approach to Prerogative Orders in Council taken in *GCHQ*. Lord Hoffmann succinctly explained the reason that judicial review was available in full. Despite their status as "primary" legislation they lack 'the unique authority Parliament derives from its representative character' and are 'still an exercise of power by the executive alone.'[108]

Technically, Acts of the devolved legislatures are secondary legislation, because they derive their authority from parent Acts of Westminster. However, this classification seems instinctually inapposite. In 2006 McHarg persuasively argued that Acts of devolved legislatures have 'more in common with primary than with delegated legislation'.[109] This was because Westminster had "delegated" authority to a representative democratic institution as opposed to a single Minister or an executive agency.[110] In *AXA Insurance* Lord Reed reiterated that the 'classification of legislation as primary or secondary is not determinative of its susceptibility to judicial review'.[111] Instead, the Supreme Court explained that a range of factors insulated Acts of the devolved legislatures from the ordinary common law grounds of review, which made them more constitutionally legitimate from the perspective of the common law than Prerogative Orders in Council.

The Scottish Parliament is not a sovereign legislature. Unlike the Westminster Parliament, which possesses an inherent legislative jurisdiction (or in Diceyan terms 'legislative supremacy'), its powers are both constituted by and limited by statute. The Scotland Act 1998 'reserves' certain areas of legislative competence to Westminster. If the Scottish Parliament legislates in these areas the legislation will be deemed ultra vires and void for lack of competence.[112] In addition to this, the Scottish Parliament cannot pass legislation which infringes the rights in the European Convention on Human Rights (ECHR).[113] Judicial review of Acts of the Scottish Parliament[114] and pre-legislative review of Bills is authorised the Scotland Act 1998. [115]

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106 *GCHQ* (n 104) Lord Diplock.

107 Human Rights Act 1998, section 2(1)(f)(i).

108 *R (on the application of Bancoult) (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant)* [2008] UKHL 61; [2009] 1 AC 453 [35] Lord Hoffmann.

109 Aileen McHarg 'What is Delegated Legislation?' [2006] PL 539, 561.

110 McHarg 'What is Delegated Legislation?' (n 109) 561.

111 *AXA General Insurance* (n 3) Lord Reed [141]

112 Scotland Act 1998, s 29(1).

113 Scotland Act 1998, Scotland Act 1998, Schedule 5 'Reserved Matters'.

114 Scotland Act 1998, s 29(1).

115 *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, A Reference by the Attorney General and the Advocate General for Scotland (Scotland)* [2018] UKSC 64 [26]. In this case the

However, the Scotland Act is silent on the availability of common law review, leaving the court in 'uncharted territory' to decide an issue that was 'one of principle'.[116] As shown above, Lords Reed and Hope reached differing conclusions on the nature and extent of common law review. Nevertheless, both agreed that the legislative process featured greater input and procedural legitimacy than executive legislation. This enhanced legitimacy precluded the application of ordinary common law grounds of review such as irrationality.

Lord Hope explained that the Scottish Parliament has a 'firm rooting in the traditions of a universal democracy. It draws its strength from the electorate'.[117] As a result, it possessed 'the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate.'[118] In turn this reduced the scope of common law intervention to 'only in the most exceptional circumstances.' In a similar vein, Lord Reed explained that the Scotland Act 1998 'established a democratically elected legislature having the power to make laws, to be known as Acts of the Scottish Parliament. Such laws require to be made following procedures designed to ensure democratic scrutiny'.[119] These democratic credentials gave rise to what he described as 'plenary powers within the limits on legislative competence' laid down by the Scotland Act 1998, meaning that such powers 'do not require to be exercised for any specific purpose or with regard to any specific considerations.'[120] In the context of the devolved legislatures, according to Lord Reed, the presence of such plenary powers rendered the ordinary common law "grounds of review developed in relation to administrative bodies which have been given limited powers for identifiable purposes"[121] inapplicable to the Scottish Parliament's legislation.

In respect of throughput legitimacy, Lord Hope developed earlier observations by Lord Steyn in *Jackson.* He acknowledged that scope of common law review was easier to determine in respect of the devolved legislatures because the supervisory jurisdiction did not 'to compete with the principle of sovereignty'.[122] However, even in the context of Westminster, bare sovereignty alone is not considered by all judges to be determinative of the scope of judicial review. To understand this, it is important to revisit the fact that *Jackson* was a dispute in the context of the Parliament Acts. The Parliament Acts allow Parliament to legislate without the consent of the House of Lords. In other words, Westminster becomes a unicameral Parliament using this procedure.

The role of the House of Lords makes an important contribution to the throughput legitimacy of the Westminster Parliament. It functions as a 'Constitutional Watchdog', in part due to the expertise of its appointed membership, and in part due to the fact its time (unlike the Commons) is not controlled by the Government. Oliver explains that its scrutiny that helps secure a 'democratically inhibited government'. The presence of the House of Lords constrains a bare majority will in the Commons because it provides a different forum for deliberation.[123] These different forms of deliberation helps secure throughput legitimacy in the Westminster legislative process. Similar justifications for bicameralism appear in Waldron's work. He recalls the approach of the German Goths who operated bicameralism of a kind for all

Supreme Court held that common law challenges to legislative competence could not be brought during pre-legislative scrutiny claims.

116 *AXA General Insurance* (n 3) Lord Hope [48].
117 *AXA General Insurance* (n 3) Lord Hope [49].
118 *AXA General Insurance Ltd* (n 3), Lord Reed [145].
119 *AXA General Insurance Ltd* (n 3) Lord Reed [145].
120 *AXA General Insurance Ltd* (n 3) Lord Reed [147].
121 *AXA General Insurance Ltd* (n 3) Lord Reed [147].
122 *AXA General Insurance Ltd* (n 3), Lord Hope [51].
123 Dawn Oliver, 'Democracy, Parliament, and Constitutional Watch Dogs' [2000] PL 553, 553.

important decisions. The Goths would debate an issue '[d]runk, to give a bit of vigour and spirit to their deliberations, and sober, to add a dimension of prudence and discretion.'[124]

In *Jackson* Lord Steyn was acutely aware of the loss of throughput legitimacy the Parliament Acts procedure entailed. In the course of argument, the Attorney General claimed that the Parliament Acts could be used to enact seismic constitutional change, including the abolition of the second chamber. Nothing on the face of the Parliament Acts explicitly precludes this. However, Lord Steyn, expressed scepticism towards the 'strict legalism' of the Attorney General's argument.[125] Recounting the Commons majorities of the last twenty-five years, he endorsed the analysis by Lord Hailsham that the 'dominance of a government elected with a large majority over Parliament has progressively become greater.'[126] Hailsham's analysis is usually reduced to the soundbite 'elective dictatorship'.[127] Behind this expression lay a deeper concern that the Sovereignty of Parliament had become, in reality, 'the sovereignty of the House of Commons'[128] whose powers are limited 'only by the consciences of its Members'.[129] This concern led Lord Steyn to reject the Attorney General's claim about the possibility of radical constitutional reform under the Parliament Acts because he was 'deeply troubled about assenting to the validity of such an exorbitant assertion of government power in our bi-cameral system.' Furthermore '[i]t may be that such an issue would test the relative merits of strict legalism and constitutional legal principle in the courts at the most fundamental level.'[130]

Lord Hope's judgment in *AXA Insurance* is simply an adaption of the same ideas to the context of a unicameral devolved legislature. The Supreme Court decided *AXA Insurance* shortly after the Scottish National Party had won a majority in Holyrood's only chamber. Unlike Westminster, elections to the Scottish Parliament are by way of proportional representation, making majorities much less likely than in the Commons. In view of the advent of this unprecedented majority Lord Hope remarked that 'We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. *Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised*.'[131] Lord Hodge's judgment in *Moohan* contains echoes similar themes. Recall his dictum imaging a 'very unlikely event [where] a parliamentary majority abusively sought to entrench its power'.[132] The common theme that unites the dicta of each judge is that sovereignty (or elected representation) only provides an effective shield from common law review when the legislature can give appropriate weight to minority and dissenting voices.

Restricting exceptional circumstances review to unicameral legislatures which have suffered a severe breakdown in the deliberative process reflects the strong claims to legitimacy possessed by the legislative process when contrasted with common law supervisory jurisdiction. The legitimacy of legislatures is often referred to in shorthand as the 'many minds principle'[133] or as the 'wisdom of the multitude'.[134] In modern social choice theory, or the study

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124 Jeremy Waldron, 'Bicameralism and the Separation of Powers' (2012) 65 CLP 31, 32. This author takes no position on which of the Houses of Parliament is 'drunk' or 'sober'. Decide for yourself.

125 *Jackson* (n 2) Lord Steyn [71].

126 *Jackson* (n 2) Lord Steyn [71].

127 Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (Collins, London 1979) 126.

128 Lord Hailsham, *The Dilemma of Democracy* (n 127) 126.

129 Lord Hailsham, *The Dilemma of Democracy* (n 127) 126.

130 *Jackson* (n 2) Lord Steyn [101].

131 *AXA General Insurance* (n 3) [51], emphasis added.

132 *Moohan* (n 11).

133 Adrian Vermeule, 'Many-minds Arguments in Legal Theory' (2009) 1 (1) Journal of Legal Analysis 1.

134 Aristotle, *Politics*, Book III, Ch. 11. See further Jeremy Waldron, 'The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics' (1995) 23(4) *Political Theory* 563.

of collective decision-making, such legitimacy was expressed mathematically by Condorcet in the 18th century. Condorcet's *Jury Theorem* posits that if each individual has a better than random, but worse than perfect chance of making a determination on the guilt of a defendant, then, the probability of a correct decision will increase as the jury pool grows larger.[135] Applying this to constitutional decision-making, it implies that legislatures are more suitable for complex moral reasoning than courts due to their increased size and diversity.[136]

Despite its propensity for greater legitimacy, decision-making in large groups remains vulnerable to irrationality.[137] Such groups are more likely to act irrationally when they tend towards homogeneity. This phenomenon, known as 'group polarisation'[138], occurs when a group of largely homogenous and like-minded people are left to conduct regular meetings without sustained exposure to competing views. These circumstances increase the likelihood that the group will become more extreme in its decision-making. In legislatures the risk of group polarisation is highest in a 'system of one party domination which stifles dissent in part because it refuses to establish space for the emergence of divergent positions.'[139] Sunstein's insight helps illuminate why the dicta on exceptional circumstances review occurred in litigation concerning the Parliament Acts on the one hand, and a devolved legislature with an unprecedented majority on the other: the risks of group polarisation are higher (but by no means guaranteed) by such arrangements. In general, the presence of Opposition MPs and debate should be sufficient to obviate the risk of group polarisation occurring. However, this does not reduce the need for constitutional vigilance against such risks. When these risks are better understood, it becomes clear that characterising majoritarian democracy as the 'central virtue' of any representative legislature is insufficient. Majoritarianism in legislation may be desirable on its face because it promotes the allocation of '*equal* weight' to the views of the electorate.[140] However, this is based upon an 'implausibly narrow' conception of equality.[141]

4. *Exceptional Circumstances Review in its Broader Context*

We have established that the common law is neither blind nor deaf to the multifaceted legitimacy criteria present in representative legislation. Nonetheless, adherents of orthodox parliamentary sovereignty have expressed significant disquiet over the implications of exceptional circumstances review.

One of the most forceful critiques came from Lord Neuberger in his 2011 judicial lecture entitled *Who are the Masters Now?*[142] The lecture, delivered before the Supreme Court

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135 Marquis de Condorcet, *Essay on the Application of Analysis to the Probability of Majority Decisions* (1785) in Christian List, 'Social Choice Theory', in Edward N. Zalta (ed) The Stanford Encyclopaedia of Philosophy (Winter 2013 Edition) , https://plato.stanford.edu/archives/win2013/entries/social-choice/

136 Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7(1) International Journal of Constitutional Law 2.

137 List, 'Social Choice Theory' (n 135) ibid.

138 Cass Sunstein, 'Deliberative Trouble? Why Groups Go to Extremes' (2000) 110 (1) The Yale Law Journal 71.

139 Sunstein, 'Deliberative Trouble?' (n 138) 105.

140 Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015) 36, emphasis original.

141 Literal majoritarianism, exemplified by the House of Commons or any unicameral legislature acting alone, offers an 'implausibly narrow' conception of equality, Charles Beitz, *Political Equality* (Princeton University Press 1989) 64.

142 Lord Neuberger of Abbotsbury, 'Who are the Masters Now?' Second Lord Alexander of Weedon Lecture (6 April 2011).

decided *AXA Insurance*, characterised parliamentary sovereignty as 'absolute'.[143] Lord Neuberger considered the dicta of Lord Steyn et al in *Jackson* to be historically inaccurate, lacking in legitimacy, and 'far removed from present reality'.[144]

There is no doubt that Lord Steyn's claim that parliamentary sovereignty is a 'construct of the common law'[145] is historically contestable.[146] However, the desire for historical continuity does not preclude normative arguments about the appropriate balance between courts and representative legislatures in any constitutional settlement. None of the arguments in this article turn upon the accuracy of Lord Steyn's claim about the genesis of parliamentary sovereignty.

In respect of the critique based on the relative legitimacy of Parliament and the common law courts, we must acknowledge that some of the most vigorous defences of orthodox parliamentary sovereignty and the most forceful critiques of judicial review of legislation both openly acknowledge that the legitimacy of representative legislatures is contingent as opposed to fixed. The orthodox view of parliamentary sovereignty is very much a descriptive one.[147] It holds any Westminster Act however egregious in its substance, or defective in procedural terms would amount to valid law. To take a well-worn example, an Act of Parliament which legislated for the infanticide of all blue eyed babies would be legally valid, and the courts would be bound to enforce it.[148] Goldsworthy, a committed defender of parliamentary sovereignty, dismisses such examples as hyperbolic.[149] However, in so doing, he concedes that such a stringent hierarchy of norms requires a 'trust' that Parliament will not enact statutes that undermine the very values that make it sovereign.[150]

Contemporary scholars, such as Gordon, now acknowledge that treating parliamentary sovereignty as a 'neutral statement' is no longer feasible, inasmuch as that 'if the underlying normative framework lacks appeal…the doctrine must give way to a more desirable conception of legislative authority within the constitution.'[151] Similarly, Waldron's critique of the legitimacy of constitutional review which empowers courts to strike down legislation rests on particular assumptions about legislatures and the health of the constitutional order.[152] First, democratic institutions must be 'in reasonably good working order'[153] and must include a representative legislature elected by way of 'universal adult suffrage'.[154] Secondly, there must be a non-representative (unelected) judiciary which hears individual disputes and 'uphold(s) the rule of law'.[155] Thirdly, public officials and most members of society must be committed to the ideals of 'individual and minority rights'.[156] Finally, the over-arching commitment to rights must include the presence of 'persisting, substantial, and good-faith disagreement about

143 Neuberger, 'Who are the Masters Now?' (n 142) [14].

144 Neuberger, 'Who are the Masters Now?' (n 142) [15].

145 *Jackson* (n 2) [102] Lord Steyn.

146 Neuberger, 'Who are the Masters Now?' (n 142) [42]. See also Paul Craig, 'Public Law, Political Theory, and Legal Theory' (n 16) 211.

147 Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' (2016) 2 Canadian Journal of Law & Jurisprudence 321, 334.

148 TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013), 141.

149 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2011), Ch. 10, s.7 'extreme cases'.

150 Goldsworthy, *The Sovereignty of Parliament* (n 149) 254.

151 Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015) 16-17.

152 Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) Yale Law Journal 1346.

153 Waldron, 'The Core of the Case Against Judicial Review' (n 152) 1346.

154 Waldron, 'The Core of the Case Against Judicial Review' (n 152) 1346.

155 Waldron, 'The Core of the Case Against Judicial Review' (n 152) 1346.

156 Waldron, 'The Core of the Case Against Judicial Review' (n 152) 1346.

rights'[157] both in legislative institutions and wider society.[158] If any of these criteria lapses, then, the critique of such 'strong-form' judicial review loses much of its force.

Lord Neuberger's strongest argument is the realism critique. The *obiter dicta* on exceptional circumstances review does appear to speak to some imagined dystopian future. Legitimising exceptional circumstances review would require a radical departure from background political circumstances. The fact that the need for exceptional circumstances review 'involves postulating a wholly different Parliament from that which we have ever known'[159] is therefore a source of relief. However, lack of imagination is not a substitute for constitutional vigilance. Constitutions ought to make contingency plans for worst case scenarios. This realisation is reflected elsewhere in the British constitution, in legislation such as the Civil Contingencies Act 2004, and even in international human rights instruments which permit derogation in a range of circumstances.[160] Whilst these might be thought of as external or circumstantial emergencies (war, pandemic disease) history tells us that claims to exceptionalism frequently lead to over-concentration of power and the degradation of institutional legitimacy.[161] This is perhaps best captured by Schmitt's realist claim (now interpreted by many as a cautionary tale) that the 'Sovereign is he who decides on the exception.'[162]

This explains why echoes of the argument in this article reverberate throughout constitutional history and theory. The argument is not altogether moot in the present circumstances. Concerns about the rise in populist authoritarian governments and democratic backsliding in the Western World have become more prominent.[163] In the UK context, Norris and Inglehart point to strong evidence that key players in the Leave Campaign during the Brexit referendum bore the hallmarks of populism, including sustained challenges to the 'legitimate authority of "the establishment"' and attacks upon the judiciary and Westminster.[164] However, in their multi-jurisdictional study of democratic decline, Ginsberg and Huq point out that parliamentary systems like the United Kingdom are generally less vulnerable than their Presidential counterparts to democratic decay. Parliamentary systems distribute political benefits, respond to changing circumstances, and render political leadership vulnerable more adeptly than Presidential systems.[165] Moreover, Ginsberg and Huq caution against reliance solely on constitutional courts to safeguard constitutional and liberal norms because they are 'attractive targets for the forces of erosion.'[166] Therefore, it seems wise to adopt a view of the British constitution that sees the legitimacy of courts and legislatures as contingent and fluid as opposed to permanently fixed. The United Kingdom may be far from the grip of

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157 Waldron, 'The Core of the Case Against Judicial Review' (n 152) 1346.

158 Waldron, 'The Core of the Case Against Judicial Review' (n 152) 1346.

159 Neuberger, 'Who are the Masters Now?' (n 142) [44].

160 European Convention on Human Rights (195) Art 15; International Covenant on Civil and Political Rights (1966) Article 4.

161 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006) Ch 1.

162 Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty*; translated by (George Schwab tr, MIT Press,1988) 5.

163 The precise definition of 'populism' remains deeply contested. Populism can be a feature of left-wing or right-wing politics. As such, it has been aptly characterised by Mudde and Kalt Wasser as a 'thin-centred' ideology, see Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (OUP 2017) 6.

However, Müller identifies the three common features of all populist movements as: a critical disposition towards perceived 'elites', an 'anti-pluralist' perspective, and a commitment to 'exclusionary' identity politics. See: Jan-Werner Müller, *What is Populism?* (Random House, 2016) 1-6.

164 Pippa Norris and Ronald Inglehart, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism* (CUP, Cambridge 2019), 4-6.

165 Ginsberg and Huq (n 25) 179-187.

166 Ginsberg and Huq (n 25) 189.

authoritarianism, but good constitutions promote a state of eternal vigilance. This is the allure of the exceptional circumstances doctrine.

In addition to this, any court invited to invoke exceptional circumstances review must navigate a conflict between this novel species of review and other cherished constitutional norms, such as parliamentary privilege. The courts jealously guard both aspects of parliamentary privilege, including parliament's right to be the sole judge of its own proceedings (exclusive cognisance) and the guarantee in Article 9 of the Bill of Rights Act 1689 which mandates that 'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.' This rule is described as the 'single most important parliamentary privilege'.[167] After all, its purpose is to ensure that legislators can speak freely in Parliament, without the threat of criminal and civil sanctions. At common law, the courts have interpreted this to mean that the quality of legislative debate cannot be scrutinised by a court.[168] The devolved legislatures do not have doctrines of privilege per se, but the 'enrolled Bill rule' guaranteed in section 28(5) of the Scotland Act 1998 fulfils a similar purpose by making clear that the validity of legislation cannot be challenged on the grounds that the legislative process is in some way defective.[169]

The courts jealously protect parliamentary privilege, even in the face of competing constitutional norms. In *HS2* The Supreme Court held that the doctrine of the supremacy of European Union Law does not require the courts to question the adequacy of the legislative process. The Court rejected a challenge to the effect that the presence of a 'three-line whip' in the House of Commons rendered the legislative process insufficient for the purposes of a requirement of public consultation imposed by an EU Directive.[170] Moreover, when adjudicating claims under the Human Rights Act 1998 legislative deliberation is viewed as a strong reason to give weight to the public policy aims of legislation.[171] It is unlikely that courts would rush to undertake the evaluation of alleged inadequacies legislative process demanded by exceptional circumstances review when many more benign alternatives are on the statute book. An acrobat on a tightrope takes comfort in the presence of the safety net but would rather rebalance than make use of it. Exceptional circumstances review, then, is a doctrine reserved for a preventing radical change in the constitutional landscape which seeks to wholly undercut the legitimacy of that landscape. Fault in the legislative process would most likely require a complete absence of debate, or minority parties to be excluded altogether from the processes of legislative deliberation and voting.

5. *Conclusion*

Exceptional circumstances review neither represents a wholly new hypothesis of constitutionalism, nor an illegitimate siphon which redirects the flow of power from representative legislatures towards the common law. This article has argued that exceptional circumstances review is an organic outgrowth of pre-existing elements of the common law

[167] Joint Committee on Parliamentary Privilege, *First Report* (1st Report 1998-99, HL 43-I / HC 214-I) executive summary.

[168] British Railways Board v Pickin (n 102).

[169] Scotland Act 1998 s 28(5), Northern Ireland Act 1998 s 5(5), Government of Wales Act 2006 s 107(3)

[170] *R (on the application of HS2 Action Alliance Limited) (Appellant) v The Secretary of State for Transport and another (Respondents)* [2014] UKSC 3; [2014] 1 WLR 324.

[171] *R (Nicklinson and Another) v Ministry of Justice* [2014] UKSC 38; [2015] 1 AC 657, *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] AC 1312.

approach to judicial review of various forms of legislation. It merely represents the end point on a spectrum of control that begins with statutory interpretation ends with the potential for courts to refuse to recognise the effect of legislative provisions.

This spectrum is carefully calibrated. The common law recognises that the breadth and depth of judicial review is commensurate with the legitimacy of the legislation under review. In other words, as legislative legitimacy increases, the extent of judicial control will decrease. The reverse is also true. Careful calibration is also reflected in the extremely narrow circumstances in which legislation will be controlled using exceptional circumstances review: judicial dicta has focussed for the most part on statutes which purport to remove access to justice or that restricts the franchise in a blanket or disproportionate manner. In addition to this extreme content, legislation with this content must be made by a unicameral legislature stripped of its internal legitimacy.

In general, the common law recognises and celebrates the legislative autonomy of representative institutions – whether such autonomy stems from legislative supremacy or the emerging application of the concept of plenary powers in the context of the devolution settlement. Most potential conflicts with the constellation of principles that the rule of law contains can therefore be mediated through the tools of statutory interpretation. Exceptional circumstances review remains very much in the realm of the hypothetical. But constitutional scholars must recognise that whether this remains the case is a question of political culture as opposed to ossified constitutional principles.

Those who worship at the altar of orthodox parliamentary sovereignty may remain yet sceptical of the legitimacy of such a strong judicial review power taking root in the common law. But the time has now come to recognise that the orthodox conception of legislative supremacy obscures complex issues of legitimacy and trust. Institutions with a representative character will always have a prima facie greater claim to legitimacy than common law courts. However, the time has come to accept the balance of authority in the British constitution rests upon values which are ultimately contingent. This paper is a small contribution to the debate about those deeper issues. To put the point succinctly: it 'behoves us to provide against a rainy day while the Sun shines.'[172]

[172] Abraham Tucker, *Light of Nature Pursued* (1777) III. II. 402 in "rainy day, n." *OED Online*, (OUP 2020).