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Comparative Judicialism, Popular Sovereignty, and the Rule of Law: The US and UK Supreme Courts

Lissa Griffin* and Thomas Kidney**

Table of Contents

I.	Introduction	324
II.	Appointment and Nomination Processes	328
	A. The Supreme Court of the United States	328
	B. The UK Supreme Court	333
III.	The Role and Powers of the Courts in their Respective Constitutional Systems	339
	A. The Supreme Court of the United States	339
	B. The UK Supreme Court	345
IV.	Interpretive Methodologies	355
	A. Constitutional Interpretation by the Supreme Court of the United States	355
	B. Statutory Interpretation by the UK Supreme Court	364
V.	Comparative Analysis	369
VI.	Conclusion	372

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I. Introduction

In a speech given less than a year after the end of World War II, Winston Churchill referred to a “special relationship between the British Commonwealth and Empire and the United States.”¹ This special relationship has engendered comparisons between Congress and Parliament, the White House and Downing Street, and the roles and personalities of the persons who occupy the offices of the Presidency and Prime Minister. Much ink has been spilled and oxygen consumed by academics, politicians, and commentators comparing the two countries’ respective constitutional systems. However, an oft-overlooked area of comparison is that between the Supreme Court of the United States (SCOTUS) and the Supreme Court of the United Kingdom (UKSC). Created in 1789, following ratification of the US Constitution and passage of the Judiciary Act of 1789, SCOTUS is one of the few US political institutions older than its British counterpart—the UKSC. That court was created by the Constitutional Reform Act 2005 (CRA 2005) and started to hear cases in October 2009—just eleven years ago.²

SCOTUS and the UKSC both occupy central roles in their respective constitutional systems. Perhaps because of this, both courts have attracted the critical attention of the media and politicians. Most recently, for example, SCOTUS received intense criticism following decisions concerning LGBTQ rights, abortion rights, and immigration.³ Similarly, the UK Supreme Court recently came under severe criticism for its handling of

1. Winston Churchill, U.K. Prime Minister, *The Sinews of Peace* (Mar. 5, 1946) (transcript available at <https://perma.cc/425C-78LF>).

2. Constitutional Reform Act 2005, c. 4 (Eng.), <https://perma.cc/7Q6Z-WBYH>. Prior to the CRA 2005, the Supreme Court was contained within the House of Lords. Confusingly, this meant that members of the Appellate Committee of the House of Lords could also sit as members of the legislative branch. One of the reasons behind the creation of a Supreme Court was to create a stricter separation of powers between the judiciary and the legislature. For further information, see DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM, 2003, CP 11/03.

3. For a recent review of the Supreme Court’s term, see Adam Liptak, *In a Term Full of Major Cases, the Supreme Court Tacked to the Center*, N.Y. TIMES (July 10, 2020), <https://perma.cc/A5LV-75BR> (last updated Sept. 9, 2020).

two cases relating to Britain's controversial exit from the European Union (Brexit).⁴

Both courts have been accused of broadening their roles beyond traditional separation of powers boundaries. In 2019, the UKSC became the center of political and media attention when it heard the case of *R (Miller) v. Prime Minister*.⁵ The case concerned the decision of the Prime Minister to "prorogue" Parliament, that is, adjourn its deliberations, which in effect would have helped run down the clock and achieve his stated goal of securing Britain's departure from the European Union (EU) on October 31, 2019. The unanimous decision of an eleven-member panel of the UKSC was that the decision of the Prime Minister was "unlawful," and the decision rendered "null and of no effect."⁶ The decision led Owen Boycott, legal affairs correspondent of *The Guardian*, to conclude that the court had become "confident in its role" and "an increasingly recognisable feature of national life."⁷ Beyond the areas of constitutional and administrative law, the court has also demonstrated its confidence in issuing a number of other judgments that overturn long-held precedents or create new ones.⁸ In fact, the court's decision in *Miller (No. 2)* led to so much concern from the Conservative government, that the Party issued a manifesto during the December 2019 election to establish a "Constitution, Democracy [and] Rights Commission" to look at "the

4. See *R (Miller) v. SOS for Exiting the E.U.* [2017] UKSC 5, [2018] AC 61 (appeal taken from EWHC (Admin)); *R (Miller) v. Prime Minister* [2019] UKSC 41, [2020] AC 373 (appeal taken from EWHC (QB)). Throughout the article, the authors will refer to the first Miller case as "*Miller (No. 1)*" and the second case as "*Miller (No. 2)*."

5. [2019] UKSC 41, [2020] AC 373 (appeal taken from EWHC (QB)).

6. *Id.* at [69].

7. Owen Boycott, *After 10 Years, the Supreme Court Is Confident in Its Role*, *GUARDIAN* (Sept. 26, 2019, 9:52 AM), <https://perma.cc/2HVR-ZSEP>.

8. See, e.g., *R v. Jogee* [2016] UKSC 8, [2017] AC 387 (appeal taken from EWCA (Crim)) (overturning the current law on joint enterprise); *Ivey v. Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391 (appeal taken from EWCA (Civ)) (amending the test for "dishonesty" in criminal cases involving theft, fraud, etc.); *Radmacher v. Granatino* [2010] UKSC 42, [2011] 1 AC 534 (appeal taken from EWCA (Civ)) (recognizing the binding nature of pre-nuptial agreements in English and Welsh law for the first time).

relationship between the Government, Parliament and the Courts”⁹

And so it goes with SCOTUS, given its position as perhaps the most famous court in the world. SCOTUS was described by Alexander Bickel in 1986 as “the most extraordinarily powerful court of law the world has ever known.”¹⁰ Over the ensuing three decades since Bickel wrote this in his famous book,¹¹ the Court has continued to play a large role as the final arbiter of the Constitution, with a wide, supervisory role over Congress, the Executive Branch, and the states. As with Brexit, this role has arguably expanded as pressing social, political, and economic issues have increasingly relied on the Court for resolution. Take several examples from the Court’s most recent term. In *Bostock v. Clayton County*,¹² SCOTUS ruled that the term “sex” used in Title VII of the Civil Rights Act of 1964 encompasses the “gender identity” of members of the LGBTQ community.¹³ In *Department of Homeland Security v. Regents of the University of California*,¹⁴ a majority held that the mechanism used by the Trump Administration to shutter the DACA program violated the Administrative Procedure Act.¹⁵ The final cases handed down in the 2019–2020 term involved whether Manhattan District Attorney Cyrus Vance could subpoena the president’s tax returns and whether the House Judiciary Committee could access the same information.¹⁶ A majority of the justices, in both cases, rejected the Trump Administration’s argument of broad immunity. In the future, the decisions in both cases will be

9. THE CONSERVATIVE & UNIONIST PARTY, THE CONSERVATIVE AND UNIONIST PARTY MANIFESTO 2019: GET BREXIT DONE UNLEASH BRITAIN’S POTENTIAL 48 (2019), <https://perma.cc/3ZZ9-K4W5> (PDF).

10. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF AMERICAN POLITICS 1 (2d ed. 1986).

11. *Id.*

12. 140 S. Ct. 1731 (2020).

13. *Id.* at 1737.

14. 140 S. Ct. 1891 (2020).

15. *Id.* at 1901.

16. *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

studied as landmark cases on presidential power.¹⁷ This is all in just *one* term.

This Article will compare SCOTUS and the UKSC in several dimensions. Part II addresses the appointment processes and the membership of the courts, setting the stage for a comparison of the extent politics enters the process and its impact on the courts' powers. Part III then analyses the powers of each of the courts, and the role of each court within its respective constitutional structure. Part IV analyzes the respective method of statutory/constitutional interpretation employed by each of the courts and how these approaches differ. Finally, Part V discusses the growing independence of the courts in resolving social and political controversies, the future of that expanding role, and the impact of that role on the courts' legitimacy.

This Article concludes that SCOTUS remains a much more powerful court than its UK counterpart, a relatively young court whose powers are evolving. However, the UKSC appears to be catching up to SCOTUS in terms of its ability to act as a constitutional court and its ability to be the sole arbiter of constitutional matters. It is also becoming more willing to depart from precedent, issue rulings that are unfriendly to the government of the day, and exercise powers to the very limit of its boundaries. By doing so, the UKSC is becoming more like SCOTUS. This naturally has far-reaching and profound consequences for the separation of powers within the United Kingdom. At the same time, SCOTUS continues to assume a larger role in limiting the executive and legislative branches.

Both courts face an uncertain future in which their roles in their constitutional systems will come under intense scrutiny and pressure. The tension between the rule of law and the sovereignty of the elected branches is palpable. Indeed, this is part of an international trend; in a time of political leaders who seemingly are pushing the limits of the rule of law, this tension will only become more acute. By way of conclusion, this Article will consider what lessons each of the courts can learn from each other as they must tread a delicate line between preserving the

17. See Benjamin Weiser & William K. Rashbaum, *Trump Must Turn Over Tax Returns to D.A., Judge Rules*, N.Y. TIMES (Aug. 20, 2020), <https://perma.cc/66SP-GKH7> (last updated Nov. 4, 2020).

rule of law and usurping the role of elected representatives. How each will respond may have a profound impact on their respective roles, on the courts' perceived legitimacy, and on the separation of powers in Washington, D.C. and Westminster.

II. *Appointment and Nomination Processes*

A. *The Supreme Court of the United States*

The US Constitution gives the president the power to “appoint . . . Judges of the Supreme Court” with the “advice and consent of the Senate.”¹⁸ The president nominates a justice of the Supreme Court and the Senate makes the ultimate decision as to whether that individual is confirmed. As has been widely recognized, to say that this clause is “ambiguous” is an understatement.¹⁹

A clearer understanding can be ascertained by looking at the early historical context in which this phrase was created. When the Constitution was drafted, the primary purpose of creating a joint effort of the president and the Senate was to present a check on the power of the president. To Alexander Hamilton, the Senate “[w]ould be an excellent check upon a spirit of favouritism in the president and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”²⁰ The idea of requiring the Senate’s “advice and consent” in the selection of Supreme Court nominees was only a late addition at the Constitutional Convention.²¹ Yet, as history shows, the idea that the Senate

18. U.S. CONST. art. II, § 2, cl. 2.

19. See James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 339 (1989) (explaining how the Judicial Clause in the US Constitution is vague and ambiguous).

20. THE FEDERALIST NO. 76, at 385 (Alexander Hamilton) (Ian Shapiro ed., 2009).

21. See Eric T. Kaspar, *The Politics of Rejection: The Framers’ Constitutional Design for Supreme Court Appointments*, 51 CREIGHTON L. REV. 539 (2018) (providing an abridged version of the Philadelphia Convention); see also David R. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1494–96 (1991) (providing a history of how specific terms were added to the US Constitution, specifically Article II).

would be a rubber stamp or overly deferential to presidential nominees was disproven in the early years of the Republic. In the summer of 1795, George Washington made the recess appointment of Justice John Rutledge to succeed John Jay as chief justice. Rutledge's nomination ultimately was rejected by the Senate, with Rutledge resigning from the Court shortly thereafter. Moreover, during its first 105-year history, the Senate did not merely serve as a rubber stamp for presidential appointments, but in fact rejected twenty out of the eighty-one presidential nominees (including Rutledge).²² In more recent times, this may be shifting. Since 1980, only one SCOTUS nominee has been rejected by the full Senate: this was Robert Bork in 1987.²³ On the other hand, the knowledge that the Senate will not rubberstamp a presidential nominee may have resulted in other nominees withdrawing their nominations rather than face potential rejection from the Senate.²⁴

The president and Senate are both elected, of course. Given that fact, it is hardly surprising that politics looms large over the appointment process. The influence of politics has manifested itself in a number of ways. The first is in the selection of nominees by the president. When considering whom to nominate, presidents consider several factors. These can be superficial—such as age, gender, political affiliation, and the race of the nominee. For example, a recent biography of Sandra Day O'Connor contends that Ronald Reagan had been keen to nominate (and confirm) the first female Supreme Court

22. Henry P. Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1202 (1988). Perhaps President John Tyler occupies an ignominious footnote in US history; of the six nominees he named and sent to the Senate, only one was ultimately confirmed.

23. Linda Greenhouse, *Bork's Nomination Is Rejected, 58–42; Reagan Saddened*, N.Y. TIMES (Oct. 24, 1987), <https://perma.cc/QKL5-7CSW>.

24. Nominated in the wake of Bork's rejection, Douglas Ginsburg withdrew his own candidacy before even reaching the Senate after his use of illegal drugs came to light. Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana Clamour*, N.Y. TIMES (Nov. 8, 1987), <https://perma.cc/6V8S-YS7B>. For different reasons, Harriet Miers, nominated by President George W. Bush to succeed Justice Sandra Day O'Connor, withdrew her own nomination after receiving criticism from both Republicans and Democrats. Timothy Williams, *Miers Withdraws Her Nomination*, N.Y. TIMES (Oct. 27, 2005), <https://perma.cc/Y9XV-5QX5>.

justice.²⁵ Similarly, President Clinton told a confidante that he wanted to be the first person to nominate a Hispanic candidate to the bench (which he ultimately did not do).²⁶ Clinton was also eager to nominate a governor to the Court, with New York Governor Mario Cuomo being on the final shortlist of candidates to both vacancies that Clinton would ultimately fill.²⁷

Beyond the superficial characteristics of potential nominees, presidents and their administrations consider the legal philosophies of potential Supreme Court nominees. Some even argue that the process for the White House is based largely, if not entirely, on whether a nominee supports a president's political agenda.²⁸ It would be all too simple, and perhaps improper, for judicial nominees to come out with bold, unequivocal phrases such as, "If nominated I will overturn/uphold *Roe v. Wade*." However, while convention requires that they refrain from commenting on certain contentious issues that they could face as a justice of the Court, these political issues may ultimately dictate who gets selected by a president. Take, for example, statements made by then-presidential candidate Donald Trump. During a presidential debate in 2016, he stated that he was a "pro-life candidate" and would appoint "pro-life judges" if he was elected to the White House.²⁹ Indeed, when President Trump selected three nominees, Justice Neil Gorsuch, Justice Brett Kavanaugh, and Justice Amy Coney Barrett, their pro-life positions were key.

These considerations have extended to Democratic administrations as well. President Obama's ultimate nomination of Sonia Sotomayor to succeed Justice David Souter is a good example. Jeffrey Toobin has reported that Denise Wood (a judge on the Seventh Circuit Court of Appeals) came under

25. EVAN THOMAS, *FIRST: SANDRA DAY O'CONNOR* 122–23 (2019).

26. TAYLOR BRANCH, *THE CLINTON TAPES: A PRESIDENT'S SECRET DIARY* 149–50 (2010).

27. *Id.* at 42–43. According to Branch, Bruce Babbitt (Governor of Arizona) also made the shortlist for Clinton's first appointment (who would eventually be Ruth Bader Ginsburg).

28. Monaghan, *supra* note 22, at 1205.

29. Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016, 9:31 PM), <https://perma.cc/6ZUY-5YQV> (last updated Oct. 19, 2016, 10:00 PM).

serious consideration for this vacancy.³⁰ However, administration figures believed that her position on abortion and the fact that her decisions on abortion had been overruled by the Supreme Court were insurmountable negatives.³¹ President Obama thought that “the benefits of appointing her (Wood) were, from a political perspective, unclear.”³²

After being named by the president and, hopefully, surviving the media’s glare (something that Douglas Ginsburg and Harriet Miers were unable to do), the nominee then moves to the Senate for consideration. How much of a role the Senate plays in the process has been subject to intense debate among scholars. Some argue that the founders envisioned an “energetic” Senate role in the process.³³ Others contend that while the Senate has an important role, its ultimate role is merely to guard against the appointment of “nominees perceived to be morally unworthy or too radical.”³⁴ Another view is the “deferential” view—that the Senate’s role is to determine whether the ideology of a nominee falls within a “main broad stream.”³⁴ Yet it is difficult to find wider support for this latter, minimalist or deferential view of the Senate’s role. Alexander Hamilton argued that one of the functions of the Senate is “restraining” the president.³⁵ Perhaps the prevailing view is best described as a “realist” role: when making a selection, the president must consider whether his nominee has a realistic chance of clearing the Senate.

The Senate Judiciary Committee hearings are the subject of much focus by academics, journalists, legal practitioners, and the media.³⁶ Supreme Court hearings in the Senate Judiciary Committee have become national (and international) spectacles;

30. JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 130 (2012).

31. *Id.* at 131 (detailing how a Supreme Court justice candidate’s ruling on a controversial political issue affected her consideration for the bench).

32. *Id.*

33. Kaspar, *supra* note 21, at 568.

34. Monaghan, *supra* note 22, at 1203; *see id.* at 1210 (contending that the Senate is a “poor judge of judicial philosophy”).

35. *THE FEDERALIST NO. 77*, at 387 (Alexander Hamilton) (Ian Shapiro ed., 2009).

36. However, for the purposes of this article, discussion will be limited to the role of the Senate, rather than the specific mechanics of the hearing.

they are covered widely, often live on national network television, and receive extensive coverage on cable news.³⁷ Apart from increasing viewership and civic engagement, it is hard to envisage what the public hearings actually achieve. The nominees reveal virtually nothing about themselves, their positions, or their view of the judicial role. David Strauss and Cass Sunstein, writing in the wake of the Clarence Thomas hearings, wrote that the process “amounts to a media event unedifying for the public, undignified for the country, and unlikely to produce outstanding Justices or an outstanding Court.”³⁸

It is hard to disagree with this sentiment. Clarence Thomas seemingly spent more time discussing the allegations against him by Anita Hill than he did discussing his approach to *stare decisis*. Justice Kavanaugh’s hearings will be remembered most, not for his approach to *Roe v. Wade*³⁹ or to Constitutional Interpretation, but for the spectacle of the discussion of allegations of sexual misconduct against him.⁴⁰ As one commentator has noted, nominees have generally stuck to the same script, which is “to say nothing, say it at great length, and then say it again.”⁴¹ Then-Judge Antonin Scalia offered an *in extremis* interpretation of this practice. During his confirmation, Scalia refused to answer a question about the Court’s decision two centuries before in *Marbury v. Madison*.⁴² And witness Justice Barrett’s recent appearance, when she indicated she did

37. Mary Clark, for example, argues that the role of the Senate has “evolved substantially over time” and she points to growing propensity of nominees to pay “courtesy calls” to members of the Senate. Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 467–68 (2001).

38. Strauss & Sunstein, *supra* note 21, at 1492.

39. 410 U.S. 113 (1973).

40. Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), <https://perma.cc/Z4GV-RLW7>.

41. Adam Liptak, *Brett Kavanaugh’s Expert Evasions: Learned from Past Masters*, N.Y. TIMES (Sept. 8, 2018), <https://perma.cc/E56H-XHMY>.

42. *Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 33–34 (1986) (statement of Antonin Scalia, Judge, United States Court of Appeals for the District of Columbia).

not know anything about climate change and other equally public and important social issues.

In sum, the term “advice and consent” has created a process that is inherently political, with politics dictating who the president nominates and whether or not senators will ultimately vote their approval.⁴³ The Barrett appointment, rushed through after President Trump admitted he wanted her to be present to vote on cases surrounding his own upcoming election,⁴⁴ is the most recent and perhaps extreme example. In addition to its impact on the legitimacy of the Court, the process has become so political that selection of Supreme Court nominees now occupies a central, sometimes decisive, role in presidential and Senate elections.

B. The UK Supreme Court

The nomination process to the UK Supreme Court is a much less controversial and politicized process than the US process described above, and much less of a public spectacle. This is due, of course, in part to the cultural differences between the two countries. But it also reflects the process itself. Rather than being set forth in vague constitutional text, the way in which Supreme Court justices are appointed is defined in almost painstaking detail by the Constitutional Reform Act 2005.⁴⁵ The first appointees to the UKSC were those who held positions on the Appellate Committee of the House of Lords, the UKSC’s

43. For example, consider the remarks made by then-Senator Obama when President George W. Bush named Samuel Alito to fill the vacancy left by Justice O’Connor:

Though I will reserve judgment on how I will vote on Judge Alito’s nomination until after the hearings, I am concerned that President Bush has wasted an opportunity to appoint a consensus nominee in the mold of Sandra Day O’Connor and has instead made a selection to appease the far right-wing of the Republican Party.

Press Release, Senator Barack Obama, Obama Statement on President Bush’s Nomination of Judge Samuel Alito to the Supreme Court (Oct. 31, 2005), <https://perma.cc/7SHF-KRAS>.

44. David Jackson & Joey Garrison, *Trump Says He Wants to Fill Supreme Court Seat Quickly in Case Justices Need to Settle Election Dispute*, USA TODAY (Sep. 23, 2020), <https://perma.cc/3PTD-ZCM2>.

45. Constitutional Reform Act 2005, c. 4 (Eng.), <https://perma.cc/7Q6Z-WBYH>. Parts of the CRA 2005 have been amended by the Crime and Courts Act 2013, c. 22 (Eng.), <https://perma.cc/399A-2R6M>.

predecessor. Its first president was then-Senior Lord of Appeal, Lord Phillips of Worth Matravers.⁴⁶ The CRA 2005 ushered in a new era of judicial appointments in the UK. The new system replaced the so-called “taps on the shoulder” from the Lord Chancellor with the Judicial Appointments Commission (JAC).⁴⁷

When a vacancy arises on the Supreme Court, the Lord Chancellor, working with the president of the Supreme Court, creates an ad-hoc selection panel.⁴⁸ The president of the Supreme Court chairs the panel. Another member will be a senior judge from the United Kingdom who is not a member of the Supreme Court.⁴⁹ Vacancies are posted online and are akin to most public and private sector recruitment notices.⁵⁰ Ironically, for a position of profound constitutional importance,

46. Constitutional Reform Act § 24(b).

47. Clark, *supra* note 37, at 473; see Constitutional Reform Act § 61(1).

48. The Lord Chancellor’s role is among the oldest positions of the UK government. The Lord Chancellor, for much of English history, was a member of all three branches of government. The Lord Chancellor sat as a member of the Cabinet (Executive), a member of the House of Lords (Legislature), and as a member of the Appellate Committee of the House of Lords (Judiciary). One of the ideas driving the CRA 2005 was the need to reform the position of the Lord Chancellor and especially how it relates to the independence of the judiciary. For a discussion of the position in the 21st century, see Graham Gee, *What are Lord Chancellors For?*, 2017 PUB. L. 11; Patrick O’Brien, *“Enemies of the People”: Judges, the Media, and the Mythic Lord Chancellor*, 2017 PUB. L. 135.

49. For example, the UK Supreme Court is currently recruiting a replacement for Lord Kerr of Tonaghmore. On the panel to recruit his replacement is the president of the Supreme Court (Lord Reed of Allermuir), the chief justice of Northern Ireland (Sir Declan Morgan), and three other individuals who are members of the Judicial Appointments Commission for England and Wales, the JAC for Northern Ireland, and the Judicial Appointments Board for Scotland. *Selection Process for Supreme Court Justice Launched*, U.K. SUP. CT. (Apr. 20, 2020), <https://perma.cc/EFD9-VGST>. There is a detailed process set out in diagrammatic form on the Supreme Court’s website. See generally *Judicial Vacancies: Justice of the Supreme Court of the United Kingdom*, U.K. SUP. CT., <https://perma.cc/448J-7T6L>.

50. Vacancies are also listed in national newspapers and more bespoke publications. February 2019 saw the launch of the recruitment for three new justices after the pending retirements of Lady Hale, Lord Carnwarth, and Lord Wilson in the first half of 2020. For an example of the announcements made when the justices retired, see *Supreme Court Selection Process for President and Justices*, U.K. SUP. CT. (Feb. 8, 2019), <https://perma.cc/Z8CD-GLW8>.

the job description and information pack are what one would expect for senior positions across the public and private sectors.⁵¹ The members of the panel must include

(a) at least one who is non-legally-qualified, (b) at least one judge of the Court, (c) at least one member of the Judicial Appointments Commission, (d) at least one member of the Judicial Appointments Board for Scotland, and (e) at least one member of the Northern Ireland Judicial Appointments Commission, and more than one of the requirements may be met by the same person's membership of the commission.⁵²

One of the intended effects of the legislation was to open the judicial appointments process to legal practitioners who were not already judges.⁵³ However, in the court's first decade just two non-judges have been appointed. The first was Jonathan Sumption appointed in 2011 and the second was Prof. Andrew Burrows, who became a justice in June 2020.⁵⁴ Sumption was a noted Queen's Counsel (QC) who had been instructed in a number of high-profile cases including the Baker Report on the Iraq War and on behalf of the Russian billionaire Roman Abramovich in a claim against Boris Berezovsky in a contract law dispute.⁵⁵ Burrows, on the other hand, was a noted academic who had held a highly prestigious tenured position at

51. For further reading, see U.K. SUP. CT., INFORMATION PACK: VACANCY FOR APPOINTMENT AS A JUSTICE OF THE SUPREME COURT (2020), <https://perma.cc/26SU-MJJN> (PDF). The information pack is for candidates who are interested in replacing Lord Kerr of Tonaghmore; as Lord Kerr is a judge who previously practiced law in Northern Ireland, the position is only open to those with similar experience. *Id.* at 2.

52. Crime and Courts Act, sch. 13 ¶ 4(1). The chair of the selection panel (usually the president of the court) and Lord Chancellor must consider diversity as a factor for appointment. See Constitutional Reform Act § 137A.

53. A.W. BRADLEY, K.D. EWING & C.J.S. KNIGHT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 331–33 (17th ed. 2018).

54. Clive Colman, *Jonathan Sumption QC Appointed Supreme Court Judge*, BBC (May 4, 2011), <https://perma.cc/GWQ9-UYBD>. Sumption was once described as having “a brain the size of a planet” and is also a notable scholar of the Hundred Years War. *Id.*

55. *Id.* A Queen's Counsel is typically a senior barrister who has practiced for a decade or more. Aside from having “QC” after one's name, a QC is a senior barrister and the appointment is a hallmark of their quality as an advocate. Readers in the United States who, rightly, may be baffled by the various terminology can find a useful primer in EMILY ALLBON & SANMEET KAUR DUA, ELLIOTT & QUINN'S LEGAL SYSTEM 216–39 (20th ed. 2019).

the University of Oxford.⁵⁶ His expertise was mainly in commercial law, with his work regularly cited in commercial cases by both the Court of Appeal and his now-colleagues on the UK Supreme Court. At the time of this writing, all other appointees since 2009 have been Court of Appeal judges (or their equivalent in Scotland and Northern Ireland).⁵⁷

The role and membership provisions of the JAC and the CRA 2005 were both amended by the Crime and Courts Act 2013 (CCA 2013).⁵⁸ The first salient provision of CCA 2013 is that the number of justices is capped at 12. The only stipulation is that an odd number of justices should be selected for each weekly court sitting.⁵⁹ It is up to the president and deputy president of the court to allocate the panel size for each case and the workload of the justices.⁶⁰ Typically, the court sits as a larger group when the case involves an issue of particularly high legal importance. The maximum panel size is eleven and the court has only sat in this formation on two occasions. These were both of the *Miller* cases, the first of which dealt with the government's decision to invoke Article 50 of the Treaty on European Union (TEU)⁶¹ to trigger Brexit negotiations and the

56. *Prof. Andrew Burrows Appointed to the Supreme Court*, UNIV. OF OXFORD FAC. OF LAW (July 24, 2019), <https://perma.cc/TCK9-NF46>.

57. Due to the nature of the history of the UK, each of the nations that make up the UK have their own separate legal systems (except for England and Wales). The next highest court to the UKSC in England and Wales is the Court of Appeal; in Scotland it is the Court of Session; and in Northern Ireland, the Northern Ireland Court of Appeal. Since the Supreme Court's inception in 2009, there have been two Scottish justices (currently these are Lord Reed and Lord Hodge) and one Northern Irish judge (Lord Kerr). Lord Reed, Lord Hodge, and Lord Kerr were all judges at the court of appeal level in Scotland and Northern Ireland. The remaining appointees (aside from Lord Sumption and Lord Burrows) were all justices of the England and Wales Court of Appeal.

58. Crime and Courts Act 2013, c. 22 (Eng.), <https://perma.cc/399A-2R6M>.

59. *Id.*

60. *Id.*

61. Consolidated Version of the Treaty on European Union, 2012 O.J. (C 326) art. 50.

second of which dealt with the Prime Minister's decision to prorogue Parliament.⁶²

If the total number of justices is expected to fall below twelve, due either to retirement, death, or resignation, a selection panel is convened.⁶³ Once the panel has reached a decision on the individual whom it wishes to appoint, the Lord Chancellor can either appoint the nominee, ask the panel to reconsider its recommendation, or reject the nominee altogether.⁶⁴ So far all nominees have been accepted by the Lord Chancellor, so that one can only imagine that they would be rejected in only the most exceptional circumstances.

Given the importance of Parliament in the United Kingdom and the doctrine of Parliamentary Sovereignty, the involvement of Parliament in the selection process is conspicuous by its absence.⁶⁵ Unlike in the United States, legislators—members of the House of Commons and House of Lords—do not have a direct or even an indirect say in who serves on the Supreme Court. The reason given for excluding parliamentary involvement is that it threatens to upset the delicate balance of the UK's separation of powers.⁶⁶ Commentators point to the role of the judiciary in mediating disputes between the Government and individuals, groups, and organizations.⁶⁷ A central tenet of the rule of law is the notion that judges are independent of other branches.⁶⁸ The essence of the UK Constitution is that the government is drawn

62. *R (Miller) v. Prime Minister* [2019] UKSC 41, [2020] AC 373 (appeal taken from EWHC (QB)); *R (Miller) v. SOS for Exiting the E.U.* [2017] UKSC 5, [2018] AC 61 (appeal taken from EWHC (Admin)).

63. Lord Dyson is the only Supreme Court justice to have resigned to take up a different judicial position. He resigned from the court in 2012 to take up the position of master of the rolls and head of civil justice.

64. The Supreme Court (Judicial Appointments) Regulations 2013, SI 2013/2193, art. 20 (Eng.).

65. For a further discussion on Parliamentary Sovereignty, see *infra* Part III.B.

66. The United Kingdom does not have the same, strict separation of powers as in the United States. For the best primer on the separation of powers in the United States, see *THE FEDERALIST* NO. 51, at 263 (James Madison) (Ian Shapiro et al., ed., 2009). Compare that to the United Kingdom. See BRADLEY, EWING & KNIGHT, *supra* note 53, at 96–102.

67. See, e.g., WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 17 (11th ed. 2014).

68. *Id.* at 16.

directly from Parliament, with the Prime Minister being the leader of the party who commands a majority of support in the House of Commons.⁶⁹ Relying on elected officials to select Supreme Court justices, as in the United States, would have profound consequences for the legitimacy and independence of the judiciary, and for the separation of powers generally.

The UK selection process has been sharply criticized for two reasons. One leading commentator argues that “the democratic deficit in the selection process of an increasingly powerful Supreme Court has deepened at a time when there is growing expectation of electoral accountability amongst political decision-makers.”⁷⁰ The democratic deficit referred to has two components that challenge the court’s legitimacy: (1) how the justices are selected and the powers that they exercise and (2) the narrow social background from which UK judges are drawn.⁷¹ There is much to these arguments. Parliament, and the House of Commons specifically, is the representative body in the Constitution. Parliament’s power is drawn from the electorate, providing a mandate to make controversial decisions and accountability to the electorate. Judges, on the other hand, cannot lay claim to either such a mandate or such public accountability.

This supposed “lack of legitimacy” line of argument has itself been challenged. One scholar takes the position that the Supreme Court is morphing into an independently legitimate constitutional court that interprets and develops fundamental principles of constitutional law.⁷² As such, the justices are themselves legitimate and representative, drawing their legitimacy as being “representational organs” of law.⁷³ This argument finds some support from the justices themselves. Lord Neuberger, while president of the court, contended that the justices’ detachment from an electorate affords judges the

69. The House of Commons is the British equivalent of the House of Representatives.

70. Kate Malleson, *The Evolving Role of the Supreme Court*, 2011 PUB. L. 754, 769.

71. *Id.* at 754.

72. Jo Eric Kushal Murkens, *Judicious Review: The Constitutional Practice of the UK Supreme Court*, 77 CAMBRIDGE L.J. 349, 350 (2018).

73. *Id.* at 363.

opportunity to provide guidance on certain potentially too-controversial topics.⁷⁴

This view of the Supreme Court as independent does not take away from the idea that Parliament is the representational body within the UK constitution. There is, nonetheless, a reticence among practitioners, politicians, and academics to introduce US-style parliamentary hearings. One of the reasons for this is the “revulsion at the Senate process” among the UK’s political and legal establishment and the concern that such hearings would lead to politicization of the judiciary.⁷⁵ However, as will be discussed, the increasingly powerful role that the UKSC is playing within the separation of powers and the increased calls for parliamentary involvement may only grow louder as the Supreme Court wields more power and is increasingly challenging both the executive and the legislative branches on a wide range of policy issues. Without drawing legitimacy from Parliament (Congress’s UK counterpart) or being directly elected, some argue that the powers being wielded by the UK Supreme Court either need to be reined in or Parliament should have a greater say in who sits as a justice.

III. The Role and Powers of the Courts in their Respective Constitutional Systems

A. The Supreme Court of the United States

Unlike the situation in the United Kingdom, where there is no written constitution, the United States has a written Constitution, commentaries on the drafting of that Constitution by the Founding Fathers at the Philadelphia Convention, and the *Federalist Papers*. It therefore is able to rely on a series of written documents to help deduce the original intent of the Framers with respect to the powers of the Supreme Court. Article III, Section 1 of the Constitution enumerates that “the

74. *R (Nicklinson) v. Ministry of Just.* [2014] UKSC 38, [2015] AC 657 [104] (appeal taken from EWCA (Civ)).

75. Clark, *supra* note 37, at 485–86. Clark points to the confirmation process of Robert Bork and Clarence Thomas as one of the reasons why Parliamentary involvement has not been entertained. Any concern, one imagines, will have grown more acute in the wake of the hearings to confirm Justice Brett Kavanaugh and Justice Amy Coney Barrett.

judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁷⁶

The powers of the Court are addressed in Article III, Section 2, which provides that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.⁷⁷

With respect to the scope of the Supreme Court’s review powers, Alexander Bickel, looking at the records of the Constitutional Convention in Philadelphia, argues that the Founding Fathers were “inviting judicial review.”⁷⁸ However, Constitutional text alone does not provide a sufficient basis for understanding the scope of the Supreme Court’s review.

The seminal case of *Marbury v. Madison* provides the best judicial interpretation of the role of the Supreme Court.⁷⁹ The decision has been called “our foremost symbol of judicial power.”⁸⁰ It has also been argued that the decision is the ultimate symbol of the notion that the constitution is a limiting document: “[t]hus did Marshall assume for his court what is nowhere made explicitly in the Constitution the ultimate power to apply the Constitution, acts of contrary notwithstanding.”⁸¹

It is hard to disagree with the notion that *Marbury* is an important decision. The decision builds upon the rather vague text of Article III and establishes the judicial branch,

76. U.S. CONST. art. III, § 1.

77. *Id.* § 2.

78. BICKEL, *supra* note 10, at 11–16.

79. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

80. Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 481 (2004).

81. BICKEL, *supra* note 10, at 3.

specifically the Supreme Court, as the ultimate arbiter of the Constitution so that when a statute/executive action is contrary to the Constitution, it is the Constitution that prevails. This interpretation finds support from Justice Scalia, who argued that *Marbury* was “lawyer’s work” and that “when the Constitution is at issue, the Constitution prevails because it is a ‘super statute.’”⁸²

As then-Chief Justice Marshall wrote unequivocally, “[i]t is emphatically the province and the duty of the judicial department to say what the law is If two laws conflict with each other, the Court must decide on the operation of each.”⁸³ Chief Justice Marshall continued that the idea that any laws were superior to the Constitution would “subvert the very foundation of all written constitutions.”⁸⁴ It has been observed that this notion is one of the reasons why the “least dangerous branch” has become one of the most powerful branches among the federal government.⁸⁵

At the same time, it has been argued that this position places too much emphasis on *Marbury* as the foundation on which judicial power and judicial review are based. The decision has been called one of “great statesmanship, not great theorizing.”⁸⁶ One can also look for guidance at Alexander Hamilton’s thoughts about the Supreme Court, which are so cogently explained in the *Federalist Papers*.⁸⁷ Federalist 78, which predated *Marbury v. Madison* by over a decade, provides perhaps the clearest statement of the Founders’ vision for the judiciary. When discussing the need for life tenure for Supreme Court justices, Hamilton argued that “[i]n a monarchy it is an excellent barrier to the despotism of the prince; in a republic it

82. Antonin G. Scalia, Assoc. Just., U.S. Sup. Ct., Remarks at the Woodrow Wilson International Center for Scholars: Constitutional Interpretation the Old Fashioned Way (Mar. 14, 2005) (transcript available at <https://perma.cc/57BG-67XG> (PDF)).

83. *Marbury*, 5 U.S. (1 Cranch) at 177.

84. *Id.* at 178.

85. Harry F. Tepker, *Marbury’s Legacy of Judicial Review After Two Centuries*, 57 OKLA. L. REV. 127, 136 (2004).

86. Christopher L. Eisgruber, *Marbury, Marshall, and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1204 (2003).

87. THE FEDERALIST NOS. 78–82 (Alexander Hamilton) (Ian Shapiro ed., 2009).

is a no less excellent barrier to the encroachments and oppressions of the representative body.”⁸⁸ In discussing these “encroachments and oppressions,” Hamilton is surely pointing to the potential of congressional legislation or executive action to contravene the provisions of the Constitution. He develops this argument further:

No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.⁸⁹

In terms of who decides on the meaning of the Constitution, Hamilton argues:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.⁹⁰

These statements are crystal clear on the surface; there is no linguistic or semantic uncertainty. Thus, *Marbury* did little else but confirm what Hamilton had written in 1788.⁹¹

Why then did it take a further fifteen years for this vision to be realized by Chief Justice Marshall in *Marbury*? To answer this one must return to the earlier description of the decision as one of “great statesmanship, not great theorizing.”⁹² Marshall, in a model that future chief justices would follow, was sensitive to the institutional position of the Supreme Court *vis-à-vis* the

88. THE FEDERALIST No. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

89. *Id.* at 393.

90. *Id.* at 394.

91. The authors are no lexicographers; however, if one compares the above two quotations with that quoted at *supra* note 35, the phraseology is almost identical.

92. Eisgruber, *supra* note 86, at 1204.

other branches.⁹³ In *Marbury*, a case involving the appointment power of the president under Article II and the changing politics of the Jeffersonian Era, Marshall was clear to avoid a confrontation with the incoming Jefferson administration and the potential resulting institutional fallout for the Supreme Court. This viewpoint is supported by others.⁹⁴ It also has been pointed out that during the Colonial Era, judges were viewed with suspicion because they were viewed as “appendages or extensions of royal authority.”⁹⁵ While Marshall interpreted Article III in the same way as Hamilton, one can understand Marshall’s need for a more cautious interpretation that was sensitive to the institutional position of the Supreme Court within the US separation of powers. Marshall seemingly had a strategy of “less is more.”⁹⁶ *Marbury* was and remains an important decision; institutions often need a marker to demarcate a departure point and for the Supreme Court, *Marbury* offers this. Without *Marbury*, the Court might not have the basis for wielding the extraordinary powers that it does today.

What then is the legacy of *Marbury* and how has it impacted the role of the Supreme Court? The major legacy is the ability of SCOTUS to be the ultimate arbiter of the Constitution. Given

93. This is perhaps one of the oft-overlooked legacies of the *Marbury* decision and one can see the impact of this throughout US history. Most recently one can look at Chief Justice Roberts’s opinion in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); his decision to join the four “liberal” justices to uphold vast portions of the Affordable Care Act perhaps best exemplifies *Marbury*’s legacy. At the end of his opinion (the opinion of the court), Roberts writes that “the Framers created a Federal Government of limited powers and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.” *Id.* at 588. This statement denotes the importance of the institution of the court to Roberts within the separation of powers. Toobin’s account of the deliberations seems to suggest that Roberts vacillated on what the final decision would be, to the point that Justice Ginsburg’s opinion was first written as a dissent, then transformed into a concurring opinion. See TOOBIN, *supra* note 30, at 280–98.

94. Eisgruber, *supra* note 86, at 1210.

95. Gordon S. Wood, *The Origins of Judicial Review, Or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 790 (1999).

96. *Id.* at 805.

the codified nature of the US Constitution, especially the addition of the Bill of Rights (and subsequent amendments), this line in the sand gave SCOTUS wide-ranging powers, especially over the other branches of government. This legacy has manifested itself a number of times, but perhaps the most striking one is the role SCOTUS played during the Civil Rights Movement of the 1950s, 1960s, and 1970s to give African Americans the rights enshrined in the 14th and 15th Amendments of the Constitution.⁹⁷ Similarly, from the 1970s onwards, Supreme Court litigation has been used across the political spectrum to achieve social and political goals.⁹⁸

Another legacy of *Marbury* is the central role that the Supreme Court plays within the political and constitutional system. *Marbury* helped to confirm the role of the Supreme Court as an “umpire” among the different branches.⁹⁹ The history of the United States is filled with seminal cases whereby the Supreme Court acted as an umpire in disputes between the various different branches. For example, in *United States v. Nixon*,¹⁰⁰ the Court unanimously ruled that President Nixon was required to turn over tapes of Oval Office meetings to the White House special prosecutor.¹⁰¹ Just over two decades later, it would similarly rule unanimously that a sitting president is

97. See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (detailing how the US Supreme Court's decisions on civil rights cases led to progress towards equal rights for African Americans).

98. Conservative campaigners have used the Supreme Court to expand key political objectives. For example, the court has interpreted the Second Amendment to include a personal right to own guns. See *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008). Liberal campaigners have used litigation to advance LGBTQ rights. Since 2000, the court has issued two rulings which have been transformative for the LGBTQ community within the United States. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court held that legislation that criminalized homosexuality was unconstitutional, *id.* at 567, and in *Obergefell v. Hodges*, 576 U.S. 644 (2015), it held that same-sex couples had a right to marry under the Due Process and Equal Protection Clauses, *id.* at 665.

99. *Transcript: Roberts's Opening Statement Before Senate Panel*, N.Y. TIMES (Sept. 12, 2005), <https://perma.cc/9A2F-S8Q9>.

100. 418 U.S. 683 (1974).

101. See *id.* at 713–14.

not immune from civil law proceedings in a federal court while in office.¹⁰²

Marbury established the Supreme Court as the final arbiter of all matters related to the Constitution. Over the two centuries since the decision, the Court has taken on Marshall's notion that "[i]t is emphatically the province and the duty of the judicial department to say what the law is."¹⁰³ Marshall's notion that it is for the Supreme Court to "say what the law is" is central to how the Supreme Court wields its power, because how any court, let alone a constitutional or apex court, interprets law and constitutions is ultimately how its power and influence is wielded.

B. *The UK Supreme Court*

The calls for either limiting the power of the UK Supreme Court or introducing some element of parliamentary involvement in selection have risen in response to the view that the UK Supreme Court has been enlarging its exercise of power. In order to understand why that view exists, one must turn to the power of the Supreme Court and its wider role in the UK's separation of powers structure.

Unlike the powers of the Supreme Court of the United States, the powers of the UK Supreme Court are not easily located in a single document, in a group of documents, or in pieces of legislation. The court was created by legislation in 2005.¹⁰⁴ The legislation, however, did not enumerate powers, nor did it define the court's role within the broader constitutional framework. Without any text to interpret, how best can the powers of the UK Supreme Court be analyzed?

As with its predecessor, the UKSC enjoys wide powers of review over actions of the government and its various agencies.¹⁰⁵ Section 31 of the Senior Courts Act 1981, which

102. *Clinton v. Jones*, 520 U.S. 681, 695 (1997).

103. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

104. Constitutional Reform Act 2005, c. 4 (Eng.), <https://perma.cc/7Q6Z-WBYH>.

105. Most of the legislation that regulates the relationship between the citizen and the state will address how individuals can redress potential grievances arising from decisions of the government and other executive

survived the creation of the Supreme Court, deals with the various procedures and powers of the Supreme Court in relation to judicial review.¹⁰⁶ In addition to substantive judicial review, which examines the outcome of a decision, the courts in the UK (including the UKSC) have the power to look into the legality of executive decisions, i.e., whether these actions are *ultra vires* and if procedural guarantees have been met.¹⁰⁷ However, unlike its US counterpart, the UKSC cannot strike down legislation or call into question the validity of Acts of Parliament (i.e., legislation).¹⁰⁸

Over the past two decades, primary legislation has given the UKSC a number of new powers. The most important legislation is the Human Rights Act 1998 (HRA 1998). As a former justice of the Supreme Court Lord Sumption put it, human rights “are where law and politics meet.”¹⁰⁹ HRA 1998 provided the judiciary with new powers to interpret primary legislation in accordance with Convention Rights.¹¹⁰ It allows a

agencies. Most of these claims occur, at least in the first instance, in front of tribunals. The status of tribunals and their wider relationship to the UK judicial system is discussed within the Tribunals, Courts & Enforcement Act 2007, c. 15 (Eng.), <https://perma.cc/UUH9-AXK6>. For a further discussion of the tribunal system, see BRADLEY, EWING & KNIGHT, *supra* note 53, 614–25.

106. Senior Courts Act 1981, c. 54, § 31 (Eng.), <https://perma.cc/XUN4-H3Q2>.

107. An in-depth discussion of judicial review in the United Kingdom is beyond the scope of this article. However, for an introduction to the topic, see WADE & FORSYTH, *supra* note 67, at 15–32, and BRADLEY, EWING & KNIGHT, *supra* note 53, at 583–94.

108. This precedent has been stated as obiter dicta a number of times by the courts at all levels across the United Kingdom. The case most cited by the Supreme Court in this regard is *British Railways Board v. Pickin* [1974] AC 765 (HL) (appeal taken from Eng.). The case was cited by Lord Bingham of Cornhill in the leading judgment in *R (Jackson) v. Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [27] (Lord Bingham) (appeal taken from EWCA (Civ)). At the time of writing, neither the House of Lords nor the UK Supreme Court has attempted to call into question the validity of an Act of Parliament, or to invalidate its provisions.

109. Former Justice Jonathan Sumption, U.K. Sup. Ct., Address at the Reith Lectures 2019: Law and the Decline of Politics—Lecture 3: Human Rights and Wrongs (June 4, 2019) (transcript available at <https://perma.cc/F94G-7TFY> (PDF)).

110. Human Rights Act 1998, c. 42, § 3(1) (Eng.), <https://perma.cc/CTX9-F4DT>. To see how the House of the Lords (the precursor of the UKSC) has

judge to issue a “declaration of incompatibility” on domestic legislation deemed to contravene Convention Rights.¹¹¹ Convention rights are those fundamental rights that one would expect in any democracy. These include the right to life, the right to live free from human and degrading treatment, and the right to a fair trial.¹¹²

What makes the debate around the HRA 1998 interesting is the doctrine of parliamentary sovereignty. As one commentator has described it, this doctrine has “almost served as a surrogate written constitution, making sense of the myriad conventions and other unarticulated norms that structure the British system of government.”¹¹³ The doctrine of Parliamentary Sovereignty has been defined as Parliament’s “right to make or unmake any law whatever; and, further, that no person or body is recognised by law as having the power to override or set aside the legislation of Parliament.”¹¹⁴ This definition has three components:

1. Parliament is Supreme—it can legislate on any topic that it chooses.

used section 3(1) of the HRA 1998, see *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30, [2004] 2 AC 557 (appeal taken from EWCA (Civ)). *Ghaidan* dealt with whether the terms “spouse” or “husband” used in the Rent Act 1977, c. 42 (Eng.), also encompassed those in same-sex relationships.

111. Section 4(6) of the HRA 1998 provides that:

A declaration under this section (“a declaration of incompatibility”)—(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.

Since the coming into force of the HRA 1998, the House of Lords and the Supreme Court have issued twenty-nine declarations of incompatibility. See BRADLEY, EWING & KNIGHT, *supra* note 53, at 382–85. Of these, twenty have led to primary legislation being changed by Parliament. Bradley et al. argue that “it is a striking feature of this power, that the courts will go to considerable lengths to avoid using it.” *Id.* at 382–85.

112. US readers should perhaps think of these rights as the first ten amendments to the Constitution. U.S. CONST. amends. I–X. The Convention Rights are found within Schedule 1 of the Human Rights Act of 1998. Human Rights Act 1998, c. 42, § 1(3), sch. 1 (UK).

113. Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. L. REV. 543, 551 (2014).

114. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 38 (7th ed. 1908).

2. No person or body can question the validity of an Act of Parliament.
3. No Parliament can bind its successors.

It is within this context that the UK Supreme Court uses its powers of judicial review under sections 3 and 4 of the HRA 1998. These sections provide the Supreme Court with tools that have reshaped its role and the wider role of the judiciary within the UK's constitutional framework.

The HRA 1998 made more acute a debate that had been played out among scholars for decades. Is it Parliamentary Sovereignty or the rule of law that controls how the Constitution operates? To Lord Sumption, who since retiring as a justice of the Supreme Court has been critical of a purported rise in judicial power:

The Courts have developed a broader concept of the rule of law which greatly enlarges their constitutional role. They have claimed a wider supervisory authority over other organs of the State. They have inched their way towards a notion of fundamental law overriding the ordinary processes of political decision-making, and these things have inevitably carried them into the realms of legislative and ministerial policy.¹¹⁵

In *R (Jackson) v. Attorney General*,¹¹⁶ this debate played out among the then-members of the Appellate Committee of the House of Lords.¹¹⁷ To Lord Steyn, “the classic account given by Dicey of the doctrine of supremacy of Parliament, pure and absolutely as it was, *can now be seen to be out of place in the modern United Kingdom.*”¹¹⁸

This statement drew support from Lord Hope and Lady Hale,¹¹⁹ and provides support for Justice Sumption's contention

115. Former Justice Jonathan Sumption, U.K. Sup. Ct., Address at the Reith Lectures 2019: Law and the Decline of Politics—Lecture 2: In Praise of Politics (May 28, 2019) (transcript available at <https://perma.cc/27RK-NBMU>(PDF)).

116. [2005] UKHL 56, [2006] 1 AC 262 (appeal taken from EWCA (Civ)).

117. The Appellate Committee of the House of Lords was the precursor to the UK Supreme Court.

118. *R (Jackson)* [2005] UKHL 56, [102] (Lord Steyn) (emphasis added).

119. *Id.* [104]–[109] (Lord Hope of Craighead); *id.* [159] (Lady Hale of Richmond). Lord Hope would become the first deputy president of the Supreme Court and Lady Hale would be the first female appointed as president of the Supreme Court.

that judges now see themselves as guardians of the rule of law and protection against an overbearing Parliament.¹²⁰ This evolving notion is at the very heart of the role of the judiciary within the UK's constitutional framework. One noted commentator argues that the judiciary are merely upholding their traditional role in holding the executive to account and providing clarity to statutory legislation.¹²¹ According to this analysis, judicial review is "the legal mechanism through which the courts routinely effectuate the regulatory scheme challenged before them."¹²² This perspective on their role has regularly been expressed extra-judicially by justices of the Supreme Court.¹²³

This argument, however, places too much emphasis on the UK constitution as a legal document and downplays the political nature of the UK Constitution. Before becoming the president of the Supreme Court, Lord Neuberger warned:

For appointed judges to claim the right to override the will of the democratically elected legislature, when they cannot claim to have been accorded that right by popular mandate, whether directly or through Parliament, seems to me to be unmaintainable unless they have been expressly given that right by the people acting through their democratically elected representatives.¹²⁴

120. Other members of the House of Lords did not come to the same conclusion on this matter as Lord Hope, Lady Hale, and Lord Steyn. However, the mere fact that three members of the House of Lords (two of whom would be among the first justices of the new Supreme Court) discussed the issue of obiter dicta demonstrates their potential assertiveness against the Government and Parliament.

121. Paul Craig, *Judicial Power, the Judicial Power Project and the UK*, 36 U. QUEENSL. L.J. 355 (2017).

122. *Id.* at 367.

123. Lady Hale, Deputy President, U.K. Sup. Ct., Inaugural Lecture at the Institute for Legal and Constitutional Research: The U.K. Supreme Court in the United Kingdom Constitution (Oct. 8, 2015) (transcript available at <https://perma.cc/JF7R-KNUB> (PDF)); Lord Neuberger, President, U.K. Sup. Ct., Address at the Faculty of Law, National University of Singapore: Has the Identity of the English Common Law Been Eroded By EU Laws and the European Convention of Human Rights? (Aug. 18, 2016) (transcript available at <https://perma.cc/TZT8-4QYP> (PDF)).

124. Lord Neuberger of Abbotsbury, Master of the Rolls, Speech at the Second Lord Alexander of Weedon Lecture: Who Are the Masters Now? (Apr. 6, 2011) (transcript available at <https://perma.cc/Z5K5-TGK5> (PDF)).

To Lord Neuberger, parliamentary sovereignty remains the controlling doctrine. His remarks present a middle ground between the two sides of the debate—the rule of law is vital, but judges should not downplay the importance of parliamentary sovereignty. This approach was perhaps best illustrated by the court’s judgment in *R (Miller) v. Secretary of State for Exiting the European Union*,¹²⁵ where the role of parliamentary sovereignty proved the central issue. *Miller (No. 1)* dealt with the technical issue of how the then-Prime Minister, Theresa May, could start Brexit negotiations and invoke Article 50 of the Treaty of the European Union. To the majority, the issue was “whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen.”¹²⁶ By a majority of eight to three, the justices held that any notice to leave the EU first had to be enacted by an Act of Parliament. The decision was seen as a victory for the sovereignty of Parliament over the government.¹²⁷

Inherent in an uncodified constitution is a degree of flexibility that should leave sufficient room for judges to consider the political ramifications of their decisions. Championing an overly legalistic interpretation negates any political ramifications that may arise because of a judicial decision. Because it expanded the courts’ powers, the introduction of HRA 1998 intensified the debate. Judges now perceive their role in enforcing the rule of law the “ultimate safeguard against such abuses of the legislative power of Parliament.”¹²⁸

A further consequence of the HRA 1998 was the expansion of the scope of judicial review to include proportionality review. The most recent definition of proportionality was provided by

125. [2017] UKSC 5, [2018] AC 61 (appeal taken from EWHC (Admin)).

126. *Id.* at [2].

127. See generally Robert Craig, *Miller Supreme Court Case Summary*, U.K. CONST. L. ASS’N: BLOG (Jan. 26, 2017), <https://perma.cc/9N9N-RLMV> (describing Parliament’s power in domestic disputes over the government); Mark Elliott, *The Supreme Court’s Judgment in Miller: In Search of Constitutional Principle*, 76 CAMBRIDGE L.J. 257 (2017).

128. Lord Hope, Deputy President, UK Sup. Ct., Address at the WG Hart Legal Workshop—Sovereignty in Question: A View from the Bench 12 (June 28, 2011) (transcript available at <https://perma.cc/UXD9-C3CJ> (PDF)).

Lord Sumption in *Bank Mellat v. Her Majesty's Treasury* (No. 2).¹²⁹ In that decision, he wrote that, in reviewing legislation, the Supreme Court should:

[D]etermine: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.¹³⁰

This definition leaves room for the justices to make value judgments that typically have been reserved for ministers and Members of Parliament. Commentators have argued that “the proportionality test remains a powerful normative and prescriptive tool in the hands of judges in judicial review,”¹³¹ because it “act[s] as a standing invitation for courts to decide, and then decide again, what is proportionate or fair.”¹³²

An example of how the Supreme Court deploys the four-part proportionality test is its recent judgment in *R (Steinfeld and Keidan) v. Secretary of State for International Development*.¹³³ That case dealt with the decision of the government to exclude opposite-sex couples from enjoying the benefits of a civil partnership, which at the time was only open to same-sex couples. Exercising proportionality review, Lord Kerr explained¹³⁴ that a “*new* form of discrimination was introduced” by the legislation¹³⁵ and that “the government had to eliminate the inequality of treatment *immediately*.”¹³⁶ Commentators have noted that inherent in proportionality is a “culture of

129. [2013] UKSC 39, [2014] 1 AC 700 (appeal taken from EWCA (Civ)).

130. *Id.* at [20].

131. Tom Hickman, *Problems for Proportionality*, 2010 N.Z. L. REV 303, 317.

132. Richard Ekins & Graham Gee, *Putting Judicial Power in Its Place*, 36 U. QUEENSL. L.J. 375, 383 (2017), <https://perma.cc/HH9J-87CR> (PDF).

133. [2018] UKSC 32, [2020] AC 1 (appeal taken from EWCA (Civ)).

134. *Id.* at [41]–[53] (Lord Kerr SCJ).

135. *Id.* at [46] (emphasis added).

136. *Id.* at [50].

justification,”¹³⁷ that is, that the doctrine “imposes a burden on the public authority to justify its conduct.”¹³⁸ This shifts the ground on which the UK’s Constitutional framework is based; Parliament and the Government now need to justify their actions in all potential cases under the HRA 1998. While Parliament and the Government often have political reasons for making decisions, proportionality review allows judges to question these decisions and make their own normative, value judgments on issues traditionally reserved for Parliament and the Government.

Proportionality is currently limited to HRA 1998 claims.¹³⁹ The Supreme Court has refrained from making it available for all cases. Lord Neuberger, for one, has contended that using proportionality for all claims would have “potentially profound and far-reaching consequences.”¹⁴⁰ Using proportionality in all cases “threatens to collapse the fundamental distinction between the role of judges and public officials.”¹⁴¹ These far-reaching consequences could augment the judiciary’s role within *trias politica* and lead to greater encroachment into territory once occupied by ministers and Members of Parliament.

Another source for its expanding role is that, as with its US counterpart, the UKSC is increasingly being used by individuals and organizations to address major political issues. Again, Lord Sumption puts it memorably: “To adopt the famous dictum of the German military theorist Clausewitz about war, law is now the continuation of politics by other means.”¹⁴² Two recent cases involving the UK’s departure from the European Union—first

137. Jeffrey Jowell, *The Democratic Necessity of Administrative Justice*, 2006 ACTA JURIDICA 13, 18 (quoting Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. ON HUM. RTS. 31, 32 (1994)).

138. Hickman, *supra* note 131, at 314.

139. Ass’n of Brit. Civilian Internees: Far E. Region v. SOS for Def. [2003] EWCA (Civ) 473, [2003] QB 1397 (appeal taken from EWHC (Admin)).

140. Keyu v. SOS for Foreign and Commonwealth Affs. [2015] UKSC 69, [2016] AC 1355, [133] (Lord Neuberger P) (appeal taken from EWCA (Civ)). Lord Neuberger *obiter* discussed that the Supreme Court could change this approach but only if it was considered by a nine-member panel of the Supreme Court. *Id.* at [132].

141. Tom Hickman, *The Substance and Structure of Proportionality*, 2008 PUB. L. 694, 701.

142. Sumption, *supra* note 115, at 6.

the Article 50 case in 2017 and then the prorogation case in 2019—illustrate this point and involved the court sitting as a full, eleven-member panel. In both cases, the Supreme Court ruled against the government.¹⁴³ In the prorogation case, the justices were at pains to explain that the issue before the court was *not* a political issue: “It is important to emphasise that the issue in these appeals is not when and on what terms the United Kingdom is to leave the European Union.”¹⁴⁴ The issue to Lady Hale and Lord Reed was the lawfulness of the Prime Minister’s advice on prorogation.¹⁴⁵ A unanimous court ruled the advice unlawful, and the Order in Council was rendered null and void.¹⁴⁶ To several commentators, this decision was a response to a legal question and was “correct and compelling.”¹⁴⁷

In his opinion, Lord Sumption compared the UK’s constitution to the US Constitution. To Sumption, the latter is the “archetypal legal constitution. Britain, by comparison, has historically been the archetypal political state.”¹⁴⁸ In *Miller (No. 2)*, the justices were asked to rule on a matter with profound political consequences on a deeply divisive political issue—whether the prorogation of Parliament by the Prime Minister was lawful. Lord Reed extra-judicially stated that this presented a case in which “public opinion is sharply divided.”¹⁴⁹ Indeed, commentators have argued that the *ratio* in *Miller (No. 2)* was “not a legal argument” but rather a “political

143. In the Article 50 case, the judgment was 8-3, and in the prorogation case, the court was unanimous in its opinion in ruling against the Government. *R (Miller) v. SOS for Exiting the E.U.* [2017] UKSC 5, [2018] AC 61 (appeal taken from EWHC (Admin)) (Article 50 case); *R (Miller) v. Prime Minister* [2019] UKSC 41, [2020] AC 373 (appeal taken from EWHC (QB)) (prorogation case).

144. *R (Miller)* [2019] UKSC 41, [1].

145. *Id.* at [27].

146. An Order in Council is similar in substance to an Executive order.

147. Paul Craig, *The Supreme Court, Prorogation and Constitutional Principle*, 2020 PUB. L. 248, 248.

148. Former Justice Jonathan Sumption, U.K. Sup. Ct., The Reith Lectures 2019: Law and the Decline of Politics, Lecture 4: Rights and the Ideal Constitution 2 (June 11, 2019) (transcript available at <https://perma.cc/TTV9-DHGP> (PDF)).

149. Lord Reed, Deputy President, U.K. Sup. Ct., Presidential Address at The Bentham Association Lecture: The Supreme Court Ten Years On 13 (Mar. 6, 2019) (transcript available at <https://perma.cc/563T-48RA> (PDF)).

evaluation.”¹⁵⁰ By engaging in this debate and ruling against the government, the justices involved themselves in the political game. Instead, the Supreme Court could have followed the example of the High Court (the lower court), which ruled in favor of the Prime Minister by holding that the question was political in nature and non-justiciable.¹⁵¹

One leading critic of this rise in judicial power argues that the Supreme Court should have taken the opportunity “to arrest a worrying trend of judicializing political questions.”¹⁵² In this context, Lord Bingham’s prescient statement comes to mind: “The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.”¹⁵³

The motives of the plaintiffs in *Miller (No. 2)* were clear—to secure a further referendum and frustrate the Brexit process.¹⁵⁴ Typically, motives are not questioned on judicial review. However, for many judicial review claims it is difficult to separate the motive of the claimants from their intended outcome. Judges are being put in the uncomfortable position of ruling on questions of a political nature. This has led to judges issuing judgments on diverse issues ranging from transport

150. Richard Ekins & Stephen Laws, *The Supreme Court Has Done Lasting Damage to Our Constitution*, PROSPECT (Oct. 4, 2019), <https://perma.cc/DDE5-7Q7D>.

151. R (Miller) v. Prime Minister [2019] EWHC 2381 (QB), [51]. As alluded to earlier in this Article, *supra* note 57 and accompanying text, there are a number of distinct legal systems in the UK. There is an English and Welsh system, a separate Scottish system, and another for Northern Ireland. The Prime Minister’s decision to prorogue Parliament was challenged in each jurisdiction. The Court of Session of the Inner House, in Scotland, found in favor of the Appellants, and in England and Wales, the High Court found in favor of the Prime Minister. For a background on the case and an overview, see Mark Elliott, *A New Approach to Constitutional Adjudication? Miller II in the Supreme Court*, PUB. L. FOR EVERYONE (Sept. 24, 2019), <https://perma.cc/RV5H-KJKN>.

152. RICHARD EKINS, POL’Y EXCH., PARLIAMENTARY SOVEREIGNTY AND THE POLITICS OF PROROGATION 6 (2019), <https://perma.cc/PSW9-G9Y7> (PDF).

153. R (Countryside All.) v. A-G [2007] UKHL 52, [2008] 1 AC 719, [45] (Lord Bingham of Cornhill) (appeal taken from EWCA (Civ)).

154. Gina Miller, Opinion, *People Want a Proper Say on Brexit. Let Them Have It*, GUARDIAN (Aug. 1, 2018), <https://perma.cc/ET77-A9VM>.

policy, to welfare benefits, to court fees.¹⁵⁵ Some see this trend as threatening “the rule of law, responsible law-making and self-government.”¹⁵⁶

IV. Interpretive Methodologies

A. Constitutional Interpretation by the Supreme Court of the United States

Describing the power of judicial review, then-Judge John Roberts Jr., at his confirmation hearings in 2005, remarked that:

Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire.¹⁵⁷

As readers who follow sports will know, how umpires and referees interpret the rules in sports has tremendous impact on the outcome of the game being played. Just so, how the Supreme Court interprets the Constitution—whether by textualism, originalism, or as a living document—has a significant impact on its decisions.

The two methods of constitutional interpretation that seem to qualify as the new dominant orthodoxy are textualism and originalism. Textualism is best defined as a strict construction of the words as written.¹⁵⁸ Originalism requires “that the Court should ascribe meaning to the Constitution’s text that is

155. See generally *Packham v. SOS for Transp.* [2020] EWHC (Admin) 829 (issuing a judgment on the decision by the Secretary of State for Transport to continue the HS2 rail project); *RR v. SOS for Work and Pensions* [2019] UKSC 52 (appeal taken from UKUT (AAC)) (determining the extent to which the appellant was entitled to housing benefits); *R (UNISON) v. Lord Chancellor* [2017] UKSC 51 (appeal taken from EWCA (Civ)) (deciding dispute determining fee allocation in employment tribunal proceedings).

156. Ekins & Gee, *supra* note 132, at 385.

157. *Transcript: Roberts’s Opening Statement*, *supra* note 99.

158. For a more in-depth discussion of the history of textualism and a definition of textualism, see generally Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005).

consistent with its commonly understood meaning at the time the Constitution was adopted.”¹⁵⁹

There are differences to each of these methods, but the two are often synonymous. For example, one cannot truly define the meaning of the words used in the Constitution without knowing the intent of the person(s) who drafted them. The approach of originalists is to first look at the text of the Constitution or piece of legislation and second, to ask what the piece of legislation meant to those who wrote the document.

Justice Antonin Scalia was perhaps the most famous advocate of originalism. To paraphrase his perspective, the role of the judge is to say what the law is, not what the law should be.¹⁶⁰ One former Scalia law clerk, and a leading scholar on the subject of originalism, recalled that Justice Scalia would often turn to the history of the United States, records of the Constitutional Convention, and the dictionary that would have been used by the Founders at the time the Constitution was ratified to interpret constitutional text.¹⁶¹

The power of originalism can be seen in the role it has had in shaping the Court’s philosophy and how it has underpinned some of the Court’s key modern decisions. One case that academics cite as the pinnacle of the triumph of the originalist ideology is *District of Columbia v. Heller*.¹⁶² In *Heller*, in an opinion written by Justice Scalia, the majority held that the Second Amendment guarantees a personal right to keep and bear arms.¹⁶³ Cass Sunstein has labelled the majority opinion “the most explicitly and self-consciously originalist opinion in the history of the Supreme Court.”¹⁶⁴ Jeffrey Shaman goes one step further, asserting that *Heller* was the Court’s first

159. Adam Lamparello & Charles E. Maclean, *Originalism and the Criminal Law: Vindicating Justice Scalia’s Jurisprudence—and the Constitution*, 50 AKRON L. REV. 227, 234 (2016).

160. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

161. Gary Lawson, *Confronting Crawford: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism*, 84 U. CHI. L. REV. 2265, 2279 (2017).

162. 554 U.S. 570 (2008).

163. *Id.* at 573–636.

164. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 246 (2008).

originalist decision.¹⁶⁵ These perspectives may well be valid; Justice Scalia's opinion often reads more like it belongs in an academic history journal than in the *United States Reports*. Indeed, the originalist nature of the opinion had an impact on the dissents issued by Justice Stevens and Justice Breyer.¹⁶⁶ Both justices engaged largely in a historical debate with Justice Scalia about what the ratifiers of the Second Amendment to the Constitution meant when they used the phrase "the right to keep and bear arms."¹⁶⁷

An earlier Justice Scalia decision also provides an excellent example of originalism and how it has come to shape the Court's opinions. In *Crawford v. Washington*,¹⁶⁸ the issue was the meaning of the text of the Sixth Amendment's Confrontation Clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" ¹⁶⁹ Before *Crawford*, the Court's non-textualist, case-by-case reliability approach to the Confrontation Clause can be seen in its decision in *Ohio v. Roberts*.¹⁷⁰ By a majority of 6–3, the Court in *Roberts* ruled that because the purpose of the right to confront is to ensure reliable evidence, hearsay evidence may be admitted under the Confrontation Clause if it can be proven that the evidence bears sufficient "indicia of reliability."¹⁷¹ This is an excellent example of interpreting the Constitution as a living document whose principles must be adapted to changing times. Writing for the three dissenting justices, Justice Brennan (joined by Justices Marshall and Stevens) argued that before *Roberts*, the Court had "imposed a heavy burden on the prosecution either to secure the presence

165. Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 90 (2010) ("[I]t was not until the Court's decision in *District of Columbia v. Heller* in 2008 that Justice Scalia was finally able to garner a majority of the Court—and only a 5-4 majority, at that—to sign onto an opinion emphatically taking an originalist slant.").

166. *Heller*, 554 U.S. at 636–81 (Stevens, J., dissenting); *id.* at 681–723 (Breyer, J., dissenting).

167. U.S. CONST. amend. II; *see supra* note 166 and accompanying text.

168. 541 U.S. 36 (2004).

169. U.S. CONST. amend. VI.

170. 448 U.S. 56 (1980).

171. *Id.* at 65–66. Justice Blackmun authored the majority opinion in *Roberts*.

of the witness or to demonstrate the impossibility of that endeavor.”¹⁷² The focus then moved to whether the evidence was reliable whether the witness was available or not.

The “indicia of reliability” doctrine from *Roberts* has been heavily criticized. The decisions rendered after *Roberts* have been described by one academic as an “unprincipled, inconsistent, ad hoc, dismal failure.”¹⁷³ Following *Roberts*, the Court considered the Confrontation Clause in *Maryland v. Craig*.¹⁷⁴ By a 5–4 majority, the Court there held that the framers had only a “preference” for in-person testimony and that remote testimony in sensitive cases was constitutional.¹⁷⁵ Dissenting in *Craig*, Justice Scalia argued that the majority had “failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.”¹⁷⁶ Two years later, in *White v. Illinois*,¹⁷⁷ Justice Scalia joined Justice Thomas in his concurring opinion restating his position from *Craig* about the importance of in-person testimony and his opposition to reliance solely on the reliability framework that the majority had created in *Roberts*.¹⁷⁸

Having laid this foundation, the facts in *Crawford v. Washington* presented Justice Scalia with an opportunity to depart from the precedent of *Roberts* and put in place his own, textualist interpretation of the Sixth Amendment’s Confrontation Clause.¹⁷⁹ *Crawford* has been described as “among the most important constitutional cases in modern times.”¹⁸⁰ The issue facing the Court in *Crawford* was whether a taped statement made in the police station by the petitioner’s wife was admissible as evidence; the witness was unavailable due to the marital privilege, so she was not—and had not

172. *Id.* at 78–79 (Brennan, J., dissenting).

173. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 185 (2005).

174. 497 U.S. 836 (1990).

175. *Id.* at 849. The factual issue in *Craig* was whether a victim of a sexual offense, who was a minor, could testify via closed circuit television. *Id.* at 840.

176. *Id.* at 860 (Scalia, J., dissenting).

177. 502 U.S. 346 (1992).

178. *Id.* at 358–66 (Thomas, J., concurring).

179. See generally *Crawford v. Washington*, 541 U.S. 36 (2004).

180. Lawson, *supra* note 161, at 2266.

been—subject to cross-examination.¹⁸¹ Justice Scalia’s opinion is a *tour de force* of the originalist methodology; he surveys the history of the Sixth Amendment and helps to place readers in both the minds and historical context of those who ratified the Sixth Amendment.

From the start, Justice Scalia noted that petitioner argued that *Roberts* “strays from the original meaning of the Confrontation Clause and urges us to reconsider it.”¹⁸² Scalia’s first step is to look at the text of the Sixth Amendment. However, as Justice Scalia noted, in this case “[t]he Constitution’s text does not alone resolve this case.”¹⁸³ Therefore, Justice Scalia adopted an originalist perspective and “turn[ed] to the historical background of the Clause to understand its meaning.”¹⁸⁴ The route to understanding the scope of the Confrontation Clause, to Justice Scalia, is in the common law, with its adversarial process and physical confrontation of witnesses.¹⁸⁵ He notes that the idea of admitting out-of-court statements would have been anathema to the common law, aside from its reliance on Marian pre-trial examinations. The opinion proceeds with a lively account of Sir Walter Raleigh’s trial for treason at the turn of the 17th Century, which resulted in Raleigh’s conviction based largely on an out-of-court affidavit.¹⁸⁶ Justice Scalia discusses how “[t]hrough a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses.”¹⁸⁷

Justice Scalia then turned to the colonies and noted that a number of the early state constitutions guaranteed a right of

181. For the factual background of the case, see *Crawford*, 541 U.S. at 38–42.

182. *Id.* at 42–43. Indeed, if one listens or reviews the transcript of oral arguments, the issue was at the front and center of the case. It was clear the Petitioners were urging that the precedent handed down in *Roberts* be overturned. See generally Transcript of Oral Argument at 7, *Crawford*, 541 U.S. 36 (No. 02-9410), <https://perma.cc/C2B4-5Y2C> (PDF).

183. *Crawford*, 541 U.S. at 42.

184. *Id.* at 43.

185. *Id.* at 43–50 (discussing at length the conceptual roots of “[t]he right to confront one’s accusers” in the common law).

186. *Id.* at 44–45.

187. *Id.* at 44.

confrontation.¹⁸⁸ He charts the early interpretation of the Sixth Amendment by the States, including a North Carolina case, *State v. Webb*,¹⁸⁹ in which the North Carolina Superior Court rejected a broad reading of then-existing English law and held: “[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.”¹⁹⁰

With this backdrop, Justice Scalia concluded that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”¹⁹¹ Flowing from this is Scalia’s second conclusion that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”¹⁹² Therefore, any variation from these two principles would be contrary to the Sixth Amendment. These two inferences are crucial to Justice Scalia’s decision (with all but two members of the Court agreeing) to overturn the Court’s 1980 *Roberts* decision.¹⁹³ Identifying his “principal evil” of the Sixth Amendment is critical to textualism and originalism; to Justice Scalia and others, any demurral from the intent of those who ratified the Sixth Amendment is an evil in itself that needs to be cured by overruling contrary precedent.

Justice Scalia takes particular aim at the second element of the *Roberts* framework—the notion of relying on judicial findings of reliability. “Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”¹⁹⁴

He continues by arguing:

188. *Id.* at 48–49.

189. *State v. Webb*, 2 N.C. (1 Hayw.) 103 (1794).

190. *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (quoting *Webb*, 2 N.C. (1 Hayw.) at 104).

191. *Id.* at 50.

192. *Id.* at 53–54.

193. The only two justices who dissented from the decision to overrule the precedent were Chief Justice Rehnquist and Justice Sandra Day O’Connor. *Id.* at 36.

194. *Id.* at 61.

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability.¹⁹⁵

Justice Scalia finishes on a crescendo, which was typical of his acerbic style. “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”¹⁹⁶

Therefore, because the Court’s decision in *Roberts*, and particularly the reliability framework, demurs from the original intent and the meaning of the Sixth Amendment, Justice Scalia ushered away twenty-four years of precedent presumably to give the Sixth Amendment its true meaning.

With the passing of Justice Scalia in February 2016, some predicted the death of originalism and textualism. That prediction turned out to be quite wrong. For one, Justice Scalia’s replacement on the Court, Justice Neil Gorsuch, is a self-described originalist.¹⁹⁷ Justice Thomas has also shown flashes of an originalist ideology. The continuing importance of textualism and the legacy of Justice Scalia were seen most recently in *Bostock v. Clayton County*. That case involved three joined cases in which the issue was whether the term “sex,” as used in Title VII of the Civil Rights Act 1964 prohibiting discrimination, encompasses discrimination against members of the LGBTQ community.¹⁹⁸ Justice Gorsuch, writing for a six-member majority, held that members of the LGBTQ community were indeed protected by the landmark legislation. His method to reach this decision is straight from the textualist and originalist playbook—he seeks to define the term “sex” in a

195. *Id.* at 62.

196. *Id.*

197. Nina Totenberg, *Judge Gorsuch’s Originalism Contrasts With Mentor’s Pragmatism*, NPR (Feb. 6, 2017, 4:37 AM), <https://perma.cc/DV4B-NYXQ>; Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), <https://perma.cc/644B-YU5M>.

198. For a factual overview of the case, see *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737–38 (2020).

way that would have been clear to those who had drafted and passed the legislation in 1964. Gorsuch's *ratio* was heavily attacked by Justice Alito in a scathing dissent, particularly about Justice Gorsuch's grounding of the decision in textualism.¹⁹⁹

What makes this case even more interesting was that there was no concurring opinion from any of the more liberal justices. One would have imagined that Justice Ginsburg, for example, would have wanted to offer an opinion that was not grounded in textualism or originalism, but rather in the meaning behind the words. Instead, one of the largest constitutional gains for members of the LGBTQ community is grounded in textualism and originalism—a narrow definition of a particular term that, to the majority in *Bostock*, was intended to encompass members of that community. Justice Kagan, perhaps, was not speaking in jest when she commented “[w]e are all textualists now.”²⁰⁰

As this Article was being composed on Friday, September 18, 2020, the tragic news was announced that Ruth Bader Ginsburg passed away at aged 87, opening a new vacancy on the Court.²⁰¹ As a response, President Trump nominated Judge Amy Coney Barrett, a judge on the Seventh Circuit Court of Appeals,

199. *Id.* at 1754–822 (Alito, J., dissenting). Justice Alito in his dissent, wrote—to paraphrase Justice Ginsburg—something of a “zinger.” A passage at the start of dissent is worth quoting in full:

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should “update” old statutes so that they better reflect the current values of society.

Id. at 1755–56 (citation omitted). For further discussion of this nascent scholarly discussion, see generally Marcia Coyle, *Gorsuch, Alito and Kavanaugh Tangle Over Textualism in Major Win for LGBT Workers*, NAT'L L.J. (June 15, 2020, 3:21 PM), <https://perma.cc/H8ZW-9EEH>.

200. Elena Kagan, Assoc. Just., U.S. Sup. Ct., *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes* (Nov. 18, 2015), <https://perma.cc/UN8R-LG7U>.

201. Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 18, 2020), <https://perma.cc/UB7F-3VZ3> (last updated Sept. 24, 2020).

and Justice Barrett was subsequently confirmed.²⁰² Justice Barrett clerked for Justice Scalia in the Supreme Court's 1998–99 term and has been described by some as the “heir” to Justice Scalia’s legacy.²⁰³ She is a well-known disciple of Justice Scalia’s interpretative method of constitutional and legislative interpretation.²⁰⁴ Her appointment will therefore not only have the potential to remake the Court to a Republican-appointed majority, but also to place another originalist on the Court.²⁰⁵

For now, *Bostock* demonstrates that the Supreme Court’s reliance on textualism and originalism is alive and well. Apparently, if groups on both sides of a political issue wish to advance their causes, attempting to construct an argument around an originalist and textualist interpretation is one way to get the justices’ attention. The real concern about these methods of interpretation is their proponents’ argument that they limit the power of the justices.²⁰⁶ However, the truth is that textualism and originalism both provide a Supreme Court justice with enormous conservative power—by relying on dictionary meanings and interpreting historical contexts, they are advancing their own conservative views.

202. Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://perma.cc/S2GT-P95Z>.

203. Peter Baker & Nicholas Fandos, *Trump Announces Barrett as Supreme Court Nominee, Describing Her as Heir to Scalia*, N.Y. TIMES (Sept. 26, 2020), <https://perma.cc/S2GT-P95Z> (last updated Sept. 28, 2020). Interestingly, Justice Scalia’s son, Eugene Scalia (currently Secretary of Labor) and widow, Maureen Scalia, were both present in the Rose Garden as President Trump made his announcement. Press Release, President Donald J. Trump, Remarks by President Trump Announcing His Nominee for Associate Justice of the Supreme Court of the United States (Sept. 26, 2020), <https://perma.cc/X6TD-SG7V>.

204. Judge Barrett has written numerous works on originalism and textualism. See generally, e.g., Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1 (2016).

205. For a useful summary on Justice Barrett’s positions, see Adam Liptak, *Barrett’s Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), <https://perma.cc/AF8A-AYQM>.

206. This may help to explain why textualists and originalists generally are appointed by Republican presidents.

B. Statutory Interpretation by the UK Supreme Court

While the UK Supreme Court does not have a written constitution to interpret, it wields tremendous power by the way in which it interprets legislation passed by Parliament. As seen earlier in this Article, the powers of the Supreme Court are expanding, with the court arguably becoming more powerful in its supervisory role over the other branches of government, especially Parliament, through the HRA, proportionality review, and its willingness to address heavily politicized issues. One way in which Parliament has reacted is by inserting “ouster clauses” into pieces of legislation. An ouster clause is a provision in a statute that is “aimed at restricting, and sometimes at eliminating judicial review.”²⁰⁷

The case of *R (Evans) v. Attorney General*²⁰⁸ provides an example of how the Supreme Court interprets legislation that purports to oust it from jurisdiction to review. The case concerned whether letters written by the Prince of Wales to ministers in the mid-2000’s could be released under the Freedom of Information Act 2000 (FOIA 2000).²⁰⁹ In *R (Evans)*, an application was made for disclosure of these letters by a journalist at *The Guardian* that was first rejected by the government. The journalist then appealed to the Information Commissioner, who upheld the decision of the government and the journalist then appealed to the Upper Tribunal (UT). The UT ultimately ruled in favor of the journalist and the Attorney General sought to have this decision reversed by the Supreme Court.

The case turned on Section 53, subsection 2 of the FOIA 2000, providing that:

A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of

207. WADE & FORSYTH, *supra* note 67, at 608.

208. *R (Evans) v. A-G*, [2015] UKSC 21, [2015] AC 1787 (Lord Neuberger P.) (appeal taken from EWCA (Civ)).

209. A fuller account of the facts of the case detail is available in the opening paragraphs of Lord Neuberger’s judgment. *Id.* at [1]–[20].

the request or requests concerned, there was no failure falling within subsection (1)(b).²¹⁰

In ordinary English, this means that if an application has been made and ultimately allowed by the Information Commissioner, then an “accountable person” can issue a certificate that overrules this decision.

The Attorney General argued that the legislation, especially the term “reasonable grounds,” conferred upon him a wide discretionary power and should be interpreted literally.²¹¹ Conversely, the lawyer for Evans argued the legislation “does not permit the accountable person to issue a certificate simply because, on the basis of the same facts and issues . . . he takes a different view from that which was taken.”²¹² Litigation resulted in a UT decision holding there was no justification to block the release of the letters.²¹³ When the case arrived at the Supreme Court, Lord Neuberger, president of the Supreme Court, identified two issues: first, whether a decision by a court or tribunal could be overridden by a minister; and second, whether decisions of ministers could be reviewed by a court, especially given the text of section 53 of the FOIA 2000.²¹⁴ Lord Neuberger, Lord Kerr, and Lord Reed ruled against the government. They held that a decision of a tribunal could not be overridden by a minister and that the decisions of a minister could be reviewed. To this part of the majority, section 53 did not act as an ouster clause. Writing for these three justices, Lord Neuberger’s *ratio* was that:

A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.²¹⁵

210. Freedom of Information Act 2000, c. 36, § 53(2) (UK), <https://perma.cc/6YHX-JAL3>.

211. *R (Evans)* [2015] UKSC 21, [49] (Lord Neuberger P).

212. *Id.* at [50].

213. *Evans v. Info. Comm’r* [2012] UKUT (AAC) 313.

214. *R (Evans)* [2015] UKSC 21, [52].

215. *Id.* at [51].

The case has been described as “one of the landmark public-law cases of the early 21st century.”²¹⁶ Another scholar argues that the decision “reflects, at root, divergent attitudes to fundamental constitutional doctrine and—even further down—different understandings of the concept of law itself.”²¹⁷ This *ratio* has been heavily criticized. Leading the critics were the two dissenting justices, Lord Wilson and Lord Hughes. Lord Wilson was most trenchant in his dissent; he contended that “in reaching its decision, the Court of Appeal did not in my view interpret s[ection] 53 of FOIA. It *re-wrote* it.”²¹⁸ Academics have joined the criticism. Ekins and Gee argue that the “judgement does not advance a remotely plausible reading of the statute”²¹⁹ They further reject the idea that the majority upheld the rule of law, since “the techniques it deploys—highly implausible interpretation of the statute and highly intrusive judicial review—serve to compromise that ideal by overturning settled law and encouraging more litigation.”²²⁰

The *Judicial Power Project*, a Policy Exchange group that would be best described as “right of center” and that regards the rise of judicial power with alarm, lists this case among its “50 Problematic Cases”:

The Supreme Court ignores the limits of the judicial role by rewriting the Freedom of Information Act to effectively remove the power to prevent the publication of information that the UK Parliament had conferred on the Attorney General.²²¹

216. Mark Elliott, *A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution's Relational Architecture*, 2015 PUB. L. 539, 540.

217. T.R.S. Allan, *Law, Democracy and Constitutionalism: Reflections on Evans v Attorney General*, 75 CAMBRIDGE L.J. 38, 38 (2016).

218. *R (Evans)* [2015] UKSC 21, [168] (Lord Wilson SCJ) (emphasis added).

219. Ekins & Gee, *supra* note 132, at 388.

220. *Id.*

221. *50 Problematic Cases*, JUD. POWER PROJECT (May 9, 2016), <https://perma.cc/VLZ6-ARGP>. These fifty cases, to the Project, are emblematic of a wider trend of rising judicial power and the threats that it poses to the wider Constitution. *Id.*

Others have argued that Lord Neuberger's *ratio* responds to a "constitutional question."²²² At the heart of that question is whether a judicial decision can be overridden by a member of the executive branch. To Lord Neuberger, the answer is a clear "no." He recognized this issue by paraphrasing a previous member of the House of Lords, Lord Templeman, to whom such a notion would "reverse the result of the Civil War."²²³ This "constitutional question" and its potential impact on the separation of powers led Lord Mance and Lady Hale to join the majority, albeit for different reasons. Lord Mance framed the question as an "administrative law question," focusing more on the merits of the Attorney General's decision.²²⁴ Lord Mance saw a broader interpretation of section 53 than Lord Neuberger.²²⁵ To Lord Mance, the Attorney General can overrule a decision by the UT but only if the minister finds that there was an error of law.²²⁶ Lady Hale noted that she and Lord Mance took a "rather more cautious" view "but agreed that a higher hurdle than rationality was required for a valid certificate. It was not good enough for the Attorney General simply to weigh the relevant public interests differently from the tribunal"²²⁷

Both justices found the rationale for the Attorney General's decision lacking. In his decision, Lord Neuberger attempted to pre-empt some of the inevitable criticism. Lord Neuberger quoted Lord Hoffman, another former member of the House of

222. Elliott, *supra* note 216, at 546 ("Th[e] disagreement . . . plays out on a much broader constitutional canvas, being concerned not with the appropriate depth of judicial scrutiny (which is itself, admittedly, an ultimately constitutional question) but with the deployment of normative principles so as to interpretively neutralise unconstitutional executive authority.").

223. *R (Evans) v. A-G* [2015] UKSC 21, [2015] AC 1787, [53] (Lord Neuberger P) (appeal taken from EWCA (Civ)) (citing *M v. Home Office* [1993] UKHL 5, [1994] 1 AC 377 (HL) 395 (Lord Templeman) (appeal taken from QB)).

224. Elliott, *supra* note 216, at 542.

225. *R (Evans)* [2015] UKSC 21, [124] (Lord Mance SCJ) ("I consider that s[ection] 53 must have been intended by Parliament to have, and can and should be read as having, a wider potential effect than that which Lord Neuberger has attributed to it.").

226. *Id.* at [145].

227. Lady Hale, Deputy President, U.K. Sup. Ct., Sultan Azlan Shah Lecture: The Supreme Court: Guardian of the Constitution? 7 (Nov. 9, 2016) (transcript available at <https://perma.cc/NY8Q-BAGT> (PDF)).

Lords, that “fundamental rights cannot be overridden by general or ambiguous words.”²²⁸ This was also addressed by Lady Hale; for her, the statutory provisions had to be “crystal clear.”²²⁹ Indeed, it has been argued that Lord Neuberger’s interpretation is perfectly within the confines of parliamentary sovereignty and does no “violence” to the text.”²³⁰

Even usually supportive court scholars argue that the decision may be among those “controversial cases where it can be argued that the courts went too far”²³¹ Indeed, it is difficult not to so conclude. As academics have pointed out, it would have been difficult for Parliament to foresee the judiciary, especially a president of the Supreme Court, interpreting the legislation in a way that effectively limits the power of ministers that is clearly given to them by legislation. Therefore, one finds the interpretation of Lord Hughes, Lord Wilson, and the decisions’ critics more plausible. Parliament empowered a responsible person to override a decision of the Information Commissioner/UT. If ministers had been using the power under section 53 extensively, then Lord Neuberger’s interpretation is more plausible. However, the Supreme Court found only limited use of section 53 by ministers.²³² One could understand Lord Neuberger using judicial review to sanction ministers for acting *ultra vires* on several occasions, but this was not the case.

Without a codified constitution to fall back on, justices of the UK Supreme Court wield tremendous power in how they ultimately interpret legislation. By failing to interpret the words as they are enacted by Parliament, justices are imposing *their* own views and values on legislation. As Justice Antonin Scalia warned in his early years on SCOTUS: “It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society.’”²³³ By interpreting the text of legislation in the manner that the

228. *R (Evans)* [2015] UKSC 21, [56] (Lord Neuberger P) (quoting *R v. SOS for the Home Dep’t* [1999] UKHL 33, [2000] 2 AC 115 (HL) 131 (Lord Hoffmann) (appeal taken from QB)).

229. Lady Hale, *supra* note 227, at 7.

230. Allan, *supra* note 217, at 48.

231. Craig, *supra* note 121, at 363.

232. *R (Evans)* [2015] UKSC 21, [60]–[66].

233. Scalia, *supra* note 160, at 863.

justices did in *R (Evans)*, the justices go so far from the meaning of legislation that they end up practically rewriting it to suit their own interpretation of higher fundamental principles. One could argue that the further that UK Supreme Court goes beyond the text of legislation, the more it threatens representative democracy and parliamentary supremacy.

V. *Comparative Analysis*

The start of this article considered the words of Winston Churchill, speaking after the end of World War II, who recognized a “special relationship” between the United Kingdom and the United States.²³⁴ This article has shown that, when considering the respective supreme courts, there are, indeed, many similarities between them. Both institutions are incredibly important within their wider separation of powers structure. Both decide cases that present a challenge to separation of powers notions, which inevitably draws both courts into what can often be uncomfortable and highly contentious debates with the other branches of government.

This Article has examined three distinct aspects of the courts—the nomination and appointment process for the justices, the powers of the courts and the role of the courts within the respective separation of powers scheme, and finally, a more in-depth examination of how the respective courts interpret their bedrock legal documents: the Constitution (US) and parliamentary legislation (UK). What then can we learn from this comparison?

On the appointment process, it is clear that the US appointment process is infinitely more political than the UK appointment process. From the start of the US process—presidential candidates muse on who they appoint to the Court—to the end of the process—Senators weigh carefully whether to confirm or not—politics is at the heart of the process. As this Article has shown, politics did enter the minds of the Framers of the Constitution; however, the Framers may not have envisioned the hyper-partisan events that Supreme Court nominations have become. Indeed, the public spectacles of the confirmation of two justices—Clarence Thomas and Brett

234. See *supra* note 1 and accompanying text.

Kavanaugh, and now a third Amy Coney Barrett—may have the Framers wondering what ever happened to their design.

Moving forward, the US can learn something from the UK process. Justices of the UKSC are chosen because of their legal experience and are appointed on merit, without any discernible examination of legal or judicial philosophy and without any substantial popular participation. Perhaps, as Professors David Strauss and Cass Sunstein have suggested, the Senate could examine more about the fitness for office rather than dissecting individual judicial philosophies or grandstanding to win votes.²³⁵ While it would appear, unlike in the UK, that the Supreme Court of the United States derives much of its legitimacy from the role of elected officials in the selection of the justices, a more merits-based selection process might be a greater positive public face to the appointment process, which can only improve the standing of both the Senate and the Supreme Court. The fact that elected officials select and consent to the appointment does not necessarily mean the process has to be superficial.

Moving to the powers and role of the respective courts, both courts maintain broad supervisory review powers over the other branches of government. One way that the UK Supreme Court is becoming more like SCOTUS is its ability to answer profound questions of constitutional importance where law meets politics. The two *Miller* cases were emblematic of these decisions. The upcoming year for the UKSC promises to be another one in which the court will hand down decisions that will impact the government.²³⁶ The center of the political world will once again focus on the Supreme Court.

The UK Supreme Court is becoming more like its counterpart in Washington, D.C. It is wielding more powers and it is less likely to back down in a conflict with the other branches

235. See Strauss & Sunstein, *supra* note 21, at 1517–18.

236. Two cases are worth mentioning: the first case is whether the decision to build a third runway at Heathrow Airport in London infringes environmental legislation and the second case involves whether the government can legally remove the citizenship of a British citizen who had traveled to Syria and swore an allegiance to Daesh (ISIL). *R (Plan B Earth Ltd.) v. SOS for Transp.* [2020] EWCA (Civ) 214 (appeal taken from EWHC (Admin)); *Begum v. Special Immigr. Appeals Comm'n* [2020] ECWA (Civ) 918 (appeal taken from EWHC (Admin)).

of government. As demonstrated above, a major reason for this is the passage of the Human Rights Act 1998. The Act provides the UK Supreme Court with previously unavailable powers. It has required and empowered judges to interpret legislation in previously unforeseen ways and to issue a declaration of incompatibility if necessary.

Furthermore, and perhaps what is more difficult to quantify, is the rising propensity of the UK Supreme Court to take on, rather than avoid, difficult questions or simply to rule issues as non-justiciable. This has long been a trend in the United States, with SCOTUS regularly issuing rulings that have challenged the powers of the Presidency.²³⁷ The UK Supreme Court is seemingly following this example, perhaps emboldened by its new HRA powers; in the prorogation case, the court easily could have followed the decision of the High Court and ruled the matter to be political in nature and therefore non-justiciable.²³⁸ However, the UK Supreme Court unanimously ruled that the issue was justiciable and the advice given unlawful, providing an embarrassing defeat for the government.

Such decisions present a challenge to the legitimacy of the UK Supreme Court. Yes, as has been argued above, justices draw their authority slightly differently from Members of Parliament. UK Supreme Court justices draw their authority from the long history of judicial independence and the framework set out by the Constitutional Reform Act 2005 and the Crime and Courts Act 2013. However, unlike in the United States, UK Supreme Court justices do not have their legitimacy drawn from representatives of the people. In the United States, the potential justices face a barrage of questions from Senators and arguably are more legitimate in the sense that their position is ultimately given to them by representatives of the people. This is not something UK Supreme Court justices can do. It is perhaps why there have not been calls to rein in the power of US justices.

237. See generally, *e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Trump v. Deutsche Bank AG, 140 S. Ct. 660 (2019); Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

238. See *supra* Part III.B.

Finally, both courts wield tremendous power in the way that they interpret text—whether that be the Constitution in the United States or legislation in the United Kingdom. One recommendation for justices of the UK Supreme Court is that they follow the example set by Justice Scalia and Justice Gorsuch—that is, to look more at the text and historical context of how legislation is passed. In the same way that the US Constitution is supreme in the United States, Parliament is supreme in the United Kingdom. Justices of the Supreme Court need to remember this when they are interpreting statutes. Attempts to demur from this doctrine, thinly dressed as “defending the rule of law,” are likely to see the Supreme Court’s powers decreased and its membership more determined by politics.

VI. Conclusion

What does the future hold for the respective courts? In the United States, the 2020 presidential election has resulted in prolonged litigation (including in the Supreme Court),²³⁹ and a Georgia runoff election determined the Senate majority.²⁴⁰ Justice Ginsburg has died and been replaced; another justice is in his eighties.²⁴¹ It may be that SCOTUS will prove to have been pivotal to the conclusion of the presidential election, as it was in *Bush v. Gore*.²⁴² Important decisions on the power of Congress to enact the Affordable Care Act²⁴³ and on the continuing attack on *Roe v. Wade* are also on the horizon. What impact the Court’s rulings on these issues will have on the Court’s legitimacy remains to be seen.

On the other side of the pond, as this piece was being written, the UK Government announced its appointment of an

239. Deanna Paul, *Election 2020: Trump Campaign Lawsuits, Explained*, WALL ST. J. (Nov. 18, 2020, 3:45 PM), <https://perma.cc/9Q79-VBMC>.

240. Luke Broadwater, *What’s a Runoff, and Why Are There Two? Here’s Why Georgia Matters*, N.Y. TIMES (Nov. 7, 2020), <https://perma.cc/KR3D-JY4W> (last updated Dec. 5, 2020).

241. Greenhouse, *supra* note 201.

242. 531 U.S. 98 (2000).

243. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *cert. granted*, *California v. Texas*, 140 S. Ct. 1262 (2020) (No. 19-840).

independent panel to examine the system of judicial review.²⁴⁴ This seems to be the Government's delivering on its manifesto commitment in December 2019.²⁴⁵ How the review proceeds, and its recommendations, could have tremendous implications for the court's powers. The fact that the UK, like the rest of the world, is grappling with issues stemming from COVID-19 and a recession, means any reforms might be reactive or may fly under the radar and not receive the attention they deserve.²⁴⁶

Both courts face an uncertain future in which their roles in their constitutional systems will come under intense scrutiny and pressure. The tension between the rule of law, often seen as the preserve of the judicial branches of government, and the sovereignty of the elected branches is palpable. In a time of the "strong man," allegedly "populist leaders" who seemingly are pushing the limits of the rule of law, the breakdown of collaboration and debate, and the ever-present influence of social media, this tension will only become more acute. The UK and the US Supreme Courts must tread a delicate line between the preserving the rule of law and usurping the role of elected representatives. How the Supreme Court in Washington and the Supreme Court in London address these challenges will have a tremendous impact on their respective futures.

244. *See Government Launches Independent Panel to Look at Judicial Review*, MINISTRY OF JUST., (July 31, 2020), <https://perma.cc/C9ED-SMDJ>.

245. *See supra* Part I.

246. Although generally supportive of the government's purported reforms and the need to rein in the power of the UK Supreme Court, it is the authors' hope that this paper, and the wider academic and legal community, help ensure that these reforms are fully debated and scrutinized before being enacted.

