

Legal Ideology, Legal Doctrine and the UK's Top Judges*

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In the United States, appointments to the Supreme Court are more political, and therefore there is a stronger possibility that the composition of the court might affect the outcome. This is not the case in the United Kingdom.¹

Everyone knows that the composition of the Court has an impact on the outcome of cases.²

Introduction

The last four decades have been a period of radical change for the UK's judiciary, witnessing among other things the creation of a new action of judicial review, the acquisition by judges of the power to review laws for compatibility with human rights, fundamental changes to civil procedure and the funding of litigation, a new process for the appointment of judges, and the creation of a new Supreme Court. In none of these reforms, however, was much consideration given to the potential institutional impact they might have upon the judiciary, or to the questions of function and design that one would ordinarily associate with the restructuring of an important governing institution. Would changes to caseloads and appointment processes affect the way in which the judicial branch perceived or discharged its role? Would new powers and procedures, and a new funding

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¹ Department of Constitutional Affairs (2003) *Constitutional Reform: A Supreme Court for the United Kingdom* CP 11/03, London, Department of Constitutional Affairs, para. 52.

² Richard Cornes, *Memorandum to the Select Committee on the Constitutional Reform Bill*, 28 April 2003, at para. 7.

settlement, affect the relationship between the judiciary and other branches of government?

The neglect of institutional issues in judicial reform presents a striking contrast to the reform of other institutions of the state, where issues of structure and design received sustained attention. And it presents a puzzle. It is not denied that judges differ systematically in their views on the law, and that their judgments to some extent reflect views peculiar to them.³ Journals are filled with articles analysing the jurisprudence developed by particular judges in the course of their career,⁴ or discussing at length how leading judges differ in their approach to important legal questions ranging from insolvency law⁵ to the boundary between private and public law.⁶ Judges themselves acknowledge such differences and their impact upon cases.⁷ The dominant view is, nevertheless, that these differences lack *institutional* significance. The reason for this appears to lie in a sense of judicial exceptionalism: because the judiciary is not political in the way that other institutions or even other judiciaries are, matters such as judicial appointments, bench-constitution procedures, and decision-making processes are not an immediate concern.

The purpose of this article is to argue that this complacent acceptance of judicial exceptionalism is profoundly misconceived. The structure and functioning of the UK's judiciary pose the same sort of concerns in relation to institutional design and institutional weaknesses as any other branch of the state, even if judges are not 'political', and neither can nor should be ignored. Our article begins (Part I) by examining the relationship between "political" models of the judiciary and "legal" models. We argue that far from being rivals, the two accounts are perfectly compatible and shed significant light on each other. Doctrinal adjudication is intelligible not just *legally*—as a theory of law—but also *politically*—as a theory of governing institutions within a political system.

Part II puts our hybrid "doctrinal" model to a test through a statistical analysis of thirty years of decisions in one specific area—cases against public bodies—using a red-light / green-light scale based on the work of Harlow and Rawlings. We show that there are measurable ideological differences between judges in the UK's top court, which affect the outcome of cases and the direction in which the law evolves. In Part III, we argue that the failure to take institutional issues seriously means that changes to the structure and functioning of the judiciary are, in contemporary policy-making, approached in a cavalier way that would be unthinkable in relation to any other governing institution, and which has the potential to seriously undermine the effectiveness of the judiciary. Remedying this calls for far closer engagement by lawyers with the insights of

³ Alan Paterson, *The Law Lords* (Palgrave Macmillan 1983); Brice Dickson, 'The Processing of Appeals in the House of Lords' (2007) 123(4) *Law Quarterly Review* 571.

⁴ Michael Fordham, 'Lord Bingham's Legacy' (2009) 14(1) *Judicial Review* 103.

⁵ Gerard McCormick, 'Lords Hoffmann and Millett and the Shaping of Credit and Insolvency Law' [2005] (4) *Lloyd's Maritime and Commercial Law Quarterly* 491.

⁶ See Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press 2004).

⁷ See Lord Hoffmann in *White v Chief Constable of South Yorkshire* [1999] AC 455, 502, speculating that a different bench would probably have decided *McLoughlin v O'Brien* [1983] 1 AC 410 differently.

‘the new institutionalism’ in political science,⁸ and with the questions of the structure, form and design of judicial institutions that our discipline has thus far ignored.

1 The Attitudinal Model and Legal Doctrine

On the face of it, the legal model of adjudication represents a view on what it is judges seek to do, which is different to the point of being incommensurable with political-institutional models, which see adjudication in terms of political ideology. In this section, however, we argue that this impression results from judicial politics scholars and legal scholars fundamentally misunderstanding each others’ claims in relation to the courts as governing institutions. In reality, both seek to explain the same thing—the nature of judicial discretion, and the things that influence the manner in which judges exercise it—and the answers they offer are complementary rather than contradictory.

The attitudinal model seeks to place the judiciary on the same footing as other political institutions.⁹ Its key claim is that judging is political in a specific ‘policy-oriented’ sense.¹⁰ Judges, on this view, behave like “single-minded seekers of legal policy”¹¹ who decide cases so as to promote their preferred ideological position, which are usually seen as lying on a liberal/conservative axis. This ‘policy-seeking’ view of judges fits well with spatial theories of politics, and the theory is also perceived as fitting the facts. Studies of the attitudinal model have provided a good fit of observed judicial decision on the US Supreme Court, the German Constitutional Court,¹² and (to a lesser extent) on US state supreme courts, which has made it seem ‘right’¹³

The model has, however, been rejected in the UK. The attitudes involved in judicial decision-making in the UK, it is claimed, are “so subtle and complex” and the cases “so difficult... to categorise” that “it would be impossible to infer a judge’s legal ideology from his voting pattern.”¹⁴ Differences in judges’ voting records thus cannot “be tied straightforwardly to differences of political ideology.”¹⁵ Empirically, too, estimates of the top judges’ ideal points are

⁸ RM Smith, ‘Political Jurisprudence, The “New Institutionalism,” and the Future of Public Law’ (1988) 82(1) *The American Political Science Review* 89.

⁹ Robert A Dahl, ‘Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker’ (1957) 6 *Journal of Public Law* 279.

¹⁰ Richard Hodder-Williams, ‘Six Notions of ‘Political’ and the United States Supreme Court’ (1992) 22(1) *British Journal of Political Science* 1.

¹¹ Tracey E George and Lee Epstein, ‘On the Nature of Supreme Court Decision Making’ (1992) 86(2) *The American Political Science Review* 323, 325.

¹² Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005).

¹³ Jeffrey A Segal, ‘Judicial Behavior’ in Keith Whittington, R Daniel Keleman, and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) pp. 27-8.

¹⁴ D Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press 1998) 35.

¹⁵ Thomas Poole and Sangeeta Shah, ‘The Law Lords and Human Rights’ (2011) 74(1) *The Modern Law Review* 79, p. 104. A partial exception to this trend was JAG Griffith, who argued that the decisions of the senior judiciary remained overtly political and reflected

said not to represent positions on a liberal/conservative axis at all, but only a judge's "propensity to dissent."¹⁶ Critics also point out that the model does a significantly worse job of explaining decisions on subordinate US courts, and jurisdictions such as Canada.¹⁷

Yet these criticisms are unsatisfactory for two reasons. Firstly, they present an incomplete account of the judiciary, in that they offer no alternative explanation for the acknowledged differences between judges. If judges' positions cannot be characterized as occupying a political space, then what sort of space do they occupy? Secondly, and more importantly, this misunderstands both what judicial politics scholars mean by 'attitudes', and the place of a left/right scale in the attitudinal model. The question the judicial politics literature seeks to explain is why judges decide the way they do. The influence of the behaviouralist tradition, which saw the central intellectual task of political science to be that of explaining the behaviour of political actors such as politicians, voters, bureaucrats, and judges, led to an aspiration towards value-neutral description and explanation of judicial behaviour.

Critically, however, nothing in the behavioural tradition suggests that differences in judicial attitudes *must* be represented as occurring on a classic left/right scale. There are three distinct and potentially severable strands in the attitudinal model, of which the conventional liberal-conservative axis is only one. Disaggregated, these are: (a) a hypothesis that judicial decisions reflect personal attitudes held by individual judges; (b) the spatial representation of these positions, typically using sophisticated statistical techniques—these days, typically Bayesian item-response theory—to estimate judges' positions; and (c) the interpretation of such estimates as positions on a liberal/conservative or left-right ideological dimension. The objections discussed above have been levelled almost exclusively at (c), and do not require the rejection of (a) or (b). The failure of the classic left/right scale simply points to the need to identify an alternate dimension on which it *does* make sense to measure judicial attitudes.

How, then, might we identify such a dimension? The "left/right" dimension came to be accepted in judicial politics scholarship as an alternative to the traditional legal account of decision-making, which suggested that judges decide in accordance with doctrine. If the attitudinal model has failed, might this "doctrinal" model provide us with the tools we need to identify the space which judicial positions occupy? There are three reasons to think that it may.

The first is that the doctrinal model does not in fact posit the mechanistic account of decision making that judicial politics scholars claim it embodies. It does not deny that judges often differ systematically in their views as to the law, or assert that such differences are irrelevant to how they decide cases. The claim is, rather, that the differences are located on a scale best described in the

predominantly conservative leanings, but his view remains a minority position. See J A G Griffith, *The Politics of the Judiciary* (5th, HarperCollins Publishers September 1997).

¹⁶ Chris Hanretty, 'The Decisions and Ideal Points of British Law Lords' (2012) 43(03) *British Journal of Political Science* 703, 710.

¹⁷ CL Ostberg and Matthew E Wetstein, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005).

categories of legal doctrine. The claims made by the doctrinal model, in other words, are claims in relation to the dimensions that are salient in determining how judges decide cases. Given the fact that the left/right dimension turns out *not* to have salience, it is worth exploring whether these dimensions do.

Secondly, a dimension of salience defined in doctrinal terms is intelligible not just in terms of legal theory, but also within the tradition of political institutionalism. Attitudinalist criticism of ‘the legal model’ usually boils down to a rejection of what is portrayed as a *structural* account of the judiciary which depicts judges decisions as determined by pre-existing structures of the law (rules and doctrine). In its place, behaviouralist political scientists offer a pure *agency* account that depicts judges as deciding based on their own “sincere ideological values.”¹⁸ The role of legal doctrine is purely epiphenomenal, either an *ex post facto* rationalisation of the judge’s decision or (less charitably) a fabric from which the judge can fashion comforting lies that judges use to mollify the losers of the cases before them.¹⁹

But this is a mischaracterisation of the role which doctrinal scholars claim it plays within the legal process. Stripped to its essentials, doctrine—the rules and principles derived from legislation and case law—does no more than address a problem which is well known in the literatures on both law and public administration; namely, guiding the manner in which a decision-maker exercises discretion. Legal doctrine does so indirectly, by directing a decision-maker to consider certain factors, but not others.²⁰ The effect of placing a certain problem within the legal category ‘contract’, for example, is to direct a judge’s attention *away* from issues of substantive fairness (is the government being overcharged for the outsourced services?); whereas putting a problem within the category ‘human rights’ directs a judge *towards* issues of substantive fairness (is the scale of the infringement proportionate to the public purpose pursued?).

In constraining the exercise of discretion, legal doctrine does not operate through specific rules of the type that one may see in relation to an administrative authority. The superior courts are unlike, say, a local authority which enforces noise pollution norms under Part III of the Environmental Protection Act 1990 through the application bright-line rules expressed in terms of decibels. Nor are they given clear and specific policy objectives to pursue, as is the case with the Financial Conduct Authority. They typically operate, instead, through relatively open-textured concepts,²¹ such as ‘reasonableness’, ‘bias’ or ‘legitimate expectations’. Whilst these concepts, of their nature, are not capable of precise definition and hence give the judiciary some flexibility in deploying them in deciding cases, their application in a given case is nevertheless guided by precedent, which constrains the ability of judges to simply decide cases in

¹⁸ Segal (n 13) 24.

¹⁹ Martin Shapiro, ‘Judges as Liars’ (1994) 17 *Harvard Journal of Law and Public Policy* 155.

²⁰ Frederick Schauer, ‘Formalism: Legal, Constitutional, Judicial’ in Keith Whittington, R Daniel Kelemen, and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008).

²¹ HLA Hart, *The Concept of Law* (1st edn, Clarendon Press 1961) 124.

accordance with their ideological preferences. The result is a picture where doctrine—much like any institution—both *enables* and *constrains* the exercise of discretion; and where much of its effect lies not just in the formal institutions of legislation and rules, but also in the *informal* institutions—the ‘law in lawyers’ heads’²²—that guide the application of those open-textured rules and concepts to a given case.

Judicial decision-making is therefore neither as malleable or as lacking in guidance as the agency account would have it nor as externally controlling as a purely structural account would be. Instead, judges have considerable scope to engage in *institutional entrepreneurship*—shaping the very institutions that constrain them. T. B. Lawrence captures the strategic element to such institutional entrepreneurship in the phrase ‘institutional strategy’.²³ An institutional strategy is one in which a conscious effort is made to transform or influence the functioning of institutions so as to establish a predilection towards a particular type of outcome, or a particular approach to evaluative decision-making.²⁴ Institutional entrepreneurs engage in institutional strategy by articulating and defending particular institutional practices (and criticizing others) so as to shape institutional change.

Viewing different legal approaches as *institutional* strategies suggests that they may be far more complex and layered than strategies devised and pursued by judges as a matter of *individual* entrepreneurship would be. Viewing them as *informal* institutions in addition lets us provide for the fact that there may, at any time, be a number of different institutional strategies co-existing within the judicial system, which different judges will buy into in different ways, and which can exhibit surprising continuities over time.²⁵ A doctrinal scale is thus a scale of institutional strategies, expressed in the terms in which legal actors articulate them. Such a scale may approximate to a liberal/conservative strategy in environments where, for example, the tests posed by doctrine are closely linked to political positions, or where institutional features of particular courts—such as the nature of cases coming before them, the appointment of judges, and procedures for reaching decisions—encourage a political approach to decision-making, but would not do so elsewhere.

Thirdly, there are sound reasons why deciding cases *doctrinally*, in terms somewhat removed from those of political disagreement, is desirable as an approach to governing, at least for institutions that occupy the place the judiciary does in the modern British State. In addition to being open-textured, legal rules are typically expressed in *socially embedded* language. The words and concepts

²² LM Lopucki, ‘Legal Culture, Legal Strategy, and the Law in Lawyers’ Heads’ (1996) 90 Northwestern University Law Review 1498.

²³ Thomas B Lawrence, ‘Institutional Strategy’ (1999) 25(2) Journal of Management 161.

²⁴ It is important to note that it is the effort that is conscious rather than the strategy. Lawrence suggests that “institutional strategies can develop both deliberately as intended strategies, and unintentionally as emergent strategies.” *ibid*, p. 167.

²⁵ The speeches of Parke B and Pollock LCB to the House of Lords in *Egerton v Brownlow* (1853) 4 HLC 1, for instance, predate the formalism / realism debate in contract by several generations, but bear a striking resemblance to the positions that would be taken in that debate by judges and jurists.

of legal doctrine—such as ‘cause’, ‘unreasonableness’, ‘expectation’, ‘using powers for an unauthorized purpose’—are close to everyday experience, and derive their legal content primarily from cases involving everyday situations.

This gives the resulting institution a high degree of what Peter Evans has called ‘embedded autonomy’.²⁶ Channelling the exercise of discretion through legal doctrine gives the judiciary a degree of autonomy from social pressures (in that the claims of each contestant are considered not in and of themselves, but through the reductionist lens of doctrine) as well as political pressures (in that positions as represented in the conceptual framework of legal doctrine do not have an exact correspondence with particular political stances). At the same time, because doctrine is built *on* concepts drawn from everyday experience and *through* cases reflecting everyday conflicts, its development remains embedded in broader social needs and perspectives. Whilst such a judiciary is not political in the policy-seeking sense, it remains political in a *definitional* sense, in that it “authoritatively allocates values”, as well as in a *systemic* sense, in that its decisions have consequences for other parts of the political system.²⁷

Viewing legal doctrine in these terms makes it clear why a doctrinal model of adjudication is both intelligible and ‘political’ in a definitional sense. Doctrinal positions do not merely represent *personal* philosophies as to desirable outcomes or objectives. They are ‘institutionalized’, in that they are part of an identifiable legal and judicial culture, which in turn is a component of the overall approach of governance taken within a state. In the context of the UK, this understanding is visible in the work of JAG Griffith on the politics of the judiciary.

Griffith makes a definitional claim about the nature of politics, as well as an institutional claim about the relationship between courts and other governing institutions when he suggests that “Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions.”²⁸ Yet, because the focus of his work was upon questions concerning controversial social issues which were typically distributional—the preference for collective over private consumption, or the role of trade unions—the focus of the debate around his thesis was on “the influencing, pragmatic and partisan notions” of politics,²⁹ rather than his definitional or institutional claims.

As others have pointed out, one reason why the political aspect of judging has so often been ignored in the UK (as well as, one might add, why the relatively few works that explicitly address the politics of judging have attracted so much controversy) is the persistence of such a ‘political controversy’ approach among both lawyers and political scientists.³⁰ Looking beyond cases and studies involving controversial distributive issues makes these broader aspects of ‘political’ models—and their relevance to the questions lawyers ask—much clearer.

²⁶ Peter Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton University Press 1995).

²⁷ Hodder-Williams (n 10).

²⁸ JAG Griffith, *The Politics of the Judiciary* (Manchester University Press 1977) p. 190.

²⁹ Hodder-Williams (n 10).

³⁰ S Sterett, ‘Politics and Jurisprudence in the British Courts’ (1988) 1(2) *Canadian Journal of Law and Jurisprudence* 173.

2 Testing the doctrinal model statistically

2.1 Constructing a doctrinal scale

The account we have so far advanced provides a *framework* for understanding judicial politics and a *theory* for analysing judicial decision-making in the superior courts of the United Kingdom, rather than a *model*.³¹ Nevertheless, its observable implications make it amenable to empirical evaluation. Specifically, it suggests that the salient dimension of judicial disagreement will ordinarily correspond to the sort of matters to which doctrine directs judicial decision-making, rather than necessarily reflecting party-political ideology.

The structure and workload of the UK's judiciary further suggests that our understanding of judicial attitudes is better framed in a narrower and more focused way than a liberal/conservative scale. The US Supreme Court's workload is shaped by the absence of a Federal common law, and the limited powers of the Federal government in private law. The UK Supreme Court, in contrast, does hear such cases quite regularly. Liberal and conservative ideologies do not provide much assistance when it comes to answering questions in relation to the precise proportion of damages to be reduced in a case of contributory negligence,³² or whether a company followed contractual procedures while making a decision affecting a counterparty,³³ to pick two recent examples. Simultaneously, the absence of a general power to judicially review primary legislation eliminates cases in which party-political ideologies are most salient, and in relation to which institutional strategies grounded in such ideologies are likely to be most useful. The result is to restrict the usefulness of liberal and conservative ideologies not just as institutional strategies for deciding cases, but also as vehicles for institutional entrepreneurship in developing the law.

Secondly, institutional differences between the UK and the US, particularly in the 'informal' institutions that comprise each jurisdiction's constitutional culture,³⁴ also reduce the *acceptability* of liberal and conservative ideologies both as institutional strategies and vehicles for institutional entrepreneurship. Of particular importance is the theoretical and rhetorical role which parliamentary sovereignty plays in the UK's constitutional culture. The impact of this on judicial positions can be seen from the fact that judges in the UK have repeatedly invoked parliamentary sovereignty in discussing their role under the Human Rights Act. They powers, they have emphasised "have been ceded to them by Parliament" and as things presently stand "Parliament can take them back."³⁵

³¹ Elinor Ostrom, *Understanding Institutional Diversity* (Princeton University Press 2005) 27-29.

³² *Jackson v Murray* [2015] UKSC 5.

³³ *Braganza v BP Shipping Limited* [2015] UKSC 17.

³⁴ The concept of 'constitutional culture' we use is derived from Lawrence Friedman, and incorporates what he referred to as "internal legal culture" — shared understandings held by legal actors — as well as what he termed "external legal culture" — shared understandings held by non-legal actors. See Lawrence Friedman, 'The Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).

³⁵ See eg the remarks of Elias LJ, 'The rise of the Strasbourg-geoise: judicial activism and the ECHR' (Annual Lord Renton Lec-

Equally, they have stressed that judges do in fact seek to respect Parliamentary sovereignty when exercising powers under the Human Rights Act, even though the Act will inevitably require them to pronounce on questions that have a political dimension.³⁶ Thus Lord Judge, in an interview with Radio 4 in 2013, drew a sharp distinction between the application of human rights by judges in the UK and judges on the European Court of Human Rights. Judges in the UK, he said, respected the sovereignty of Parliament in legislating on societal issues, unlike judges in Strasbourg.³⁷ This has no counterpart in the US, and it makes it significantly less likely that the salient dimension of judicial disagreement will be measurable on a scale of political ideology, as distinct from a doctrinal one.

A doctrinal scale will necessarily be more contextual than a left/right scale, such that the dimension that is salient for one particular class of disputes may not necessarily be salient for another. Within a doctrinal context, for example, we would not necessarily expect to see obvious continuity between the approach taken in landlord-tenant disputes and in cases involving the extent of state power to regulate the press. We accordingly selected a subset of cases, cases against public bodies, for our analysis.

Our scale was constructed on the basis of Harlow and Rawlings' distinction between 'red light' and 'green light' judicial attitudes towards administrative discretion, according to whether they see the proper role of the courts as taking respectively a restrictive or a permissive attitude.³⁸ We sought to study whether judges differ in their attitudes towards state actors—in terms of some judges being more 'pro-state' or 'green-light' than others—and whether this disposition, or attitude, has an effect on how they decide cases. Such a scale is clearly distinguishable from a left/right scale. Left-wing circles have long been divided on this issue, seen in the debates—from the early Fabians to the early Labour party's conflict between 'Poplarism' and the mainstream Labour Party, through the post-war Labour government to today—between constitutional orthodoxists and constitutional heretics over constitutional reform, and how broad or narrow the legal restrictions on government discretion should be.³⁹ Conversely, studies of the constitution under Thatcher have identified the paradox that, in order to pursue an agenda of shrinking the state, the 'New Conservatives' of the 1980s assumed powers that were previously unknown to the UK's Constitution.⁴⁰

Moreover, unlike a classical left/right dimension, a red-light/green-light di-

ture, London, November 2009) [<http://www.statutelawsociety.co.uk/wp-content/uploads/2014/01/EliasLectureSLS24.11.09FINAL.doc>], accessed 21 December 2015.

³⁶ Ibid.

³⁷ The interview was widely reported in the press. See e.g. Steven Swinford, 'European courts have too much power, says former Lord Chief Justice', *The Daily Telegraph* (London, 28 December 2013) [<http://www.telegraph.co.uk/news/politics/10540275/European-courts-have-too-much-power-says-former-Lord-Chief-Justice.html>], accessed 21 December 2015.

³⁸ Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press September 2009).

³⁹ See Anthony Wright, 'British Socialists and the British Constitution' (1990) 43 *Parliamentary Affairs* 322.

⁴⁰ C Graham and T Prosser, *Waiving the Rules: The Constitution under Thatcherism* (Open University Press 1988).

mension seems, on casual observation, to capture much of the disagreement between judges across a range of specific issues. Recent administrative law literature, particularly in the context of the Human Rights Act, expresses Harlow and Rawlings's red-light/green-light dimension in terms of the degree of 'deference' due to decision-makers on whom a discretion has been conferred. But while the basic terms of disagreement are clearest in administrative law where the control of executive discretion is of central concern, they also can be seen to capture the contours of judicial disagreement where the state's actions are challenged in private law. Of central significance to all cases against the state, regardless of whether they are brought in public or private law, is the extent to which the law gives discretionary powers to executive government bodies. An assertion that the police owed a duty of care to a victim of crime, or that a local authority owed a duty to abused children involves an assertion that the state body in question does not enjoy an unfettered privilege to act or decide as it chooses; instead, it is subject to a legal duty that restricts its freedom of action in relation to the manner in which it may act or decide. A decision either way falls within a red-light / green-light spectrum in private law as much as in public law.

2.2 Data and modelling

The primary difficulty to be overcome in measuring judicial attitudes is that—like many other constructs of interest to academic lawyers—they are not directly observable: in statistical terms they are *latent variables*. Being unobservable does not, however, mean that they are not measurable. We can, and do, observe manifestations or indicators of these latent properties. In the case of judicial attitudes, the most obvious of these are the outcomes which a judge chooses in his or her decisions.⁴¹ A range of statistical techniques can be used to estimate judicial attitudes from their decisions. We employed a modelling technique called Bayesian ideal point estimation, which estimates each judge's attitude as an 'ideal point' on a scale relative to other judges. A full explanation of this technique, along with our reasons for choosing it and the technical details of our model, is set out in a supplementary appendix to this paper.⁴²

The data on which we ran the model consisted of all non-unanimous cases involving a challenge to a decision of a state body between Hilary term 1985 and the end of Trinity Term 2015, a period of just over 30 years.⁴³ Due to the high degree of consensus among judges on the top court, this gave us 150 cases. Each judge's decision in each case was assigned a value of 2, 0 or 1 according whether that judge's ruling gave the state body a win, a loss, or a partial win.

⁴¹ Other possible sources include textual analysis of the words in which judges express themselves in their decisions, or data obtained from elite interviews as in the work of Alan Paterson.

⁴² The supplementary appendix is not printed here for reasons of space and complexity. It is available online at <http://ssrn.com/abstract=0000000>, or by contacting the authors.

⁴³ The restriction of our analysis to non-unanimous reflects the fact that our model operates on a relative scale. Only cases incorporating a dissent provide information about the relative positions of judges.

This is the most natural form of coding to estimate relative positions on a red-light/green-light scale. In a case where some judges have held for the state and some against, a judge who has held against the state at least partially has by definition found that discretion was wrongly exercised to some extent. This means that he or she has by necessary implication set narrower bounds on executive discretion than a judge who has held for the state in the same case, and hence is by definition more ‘red-light’.

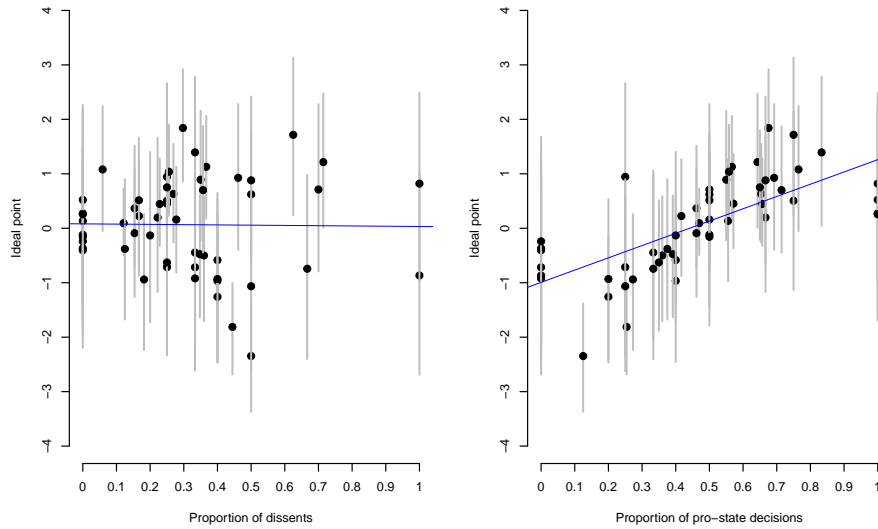


Fig. 1: *Ideal points and judges voting (a) by dissents and (b) by pro-state decisions. There is no obvious evidence of a relationship between estimated ideal points and propensity to dissent, whereas there is a clear and positive relationship between the number of pro-state decisions and the estimated ideal point. This suggests that our estimated ideal points are interpretable as spatial estimates of ideological positions on a red-light/green-light axis.*

The results of running our model against the data bear out our initial hypothesis that a red-light/green-light dimension is a better way of characterising judicial attitudes than a classical left/right scale. Before turning to our substantive findings, it is useful to explain why. The mere fact that a model produces results does not, in and of itself, vindicate the hypothesis it represents. Our hypothesis is, however, vindicated when our results are compared statistically with those obtained by Chris Hanretty, a political scientist who ran a similar analysis of decisions of the House of Lords, but using the traditional liberal/conservative political scale. Hanretty found that although his model produced results in the form of ideal points, when subjected to conventional statistical tests, the

ideal points turned out to only measure a judge’s “propensity to dissent.” He came to this conclusion by comparing a regression of his results against the proportion of cases in which a judge supported the liberal-coded outcome, with a regression against the proportion of dissenting judgements.⁴⁴ This approach to testing fit is sound, and we replicated it on our results with the opposite result to Hanretty’s. Figure 1 shows in the left panel a regression of our results against proportion of dissents, and on the right against the proportion of pro-state decisions. Inspecting Figure 1 shows no obvious relationship between our estimated ideal points and willingness to dissent, while there is a clear (and positive) relationship between estimated ideal point and the proportion of (wholly) pro-state decisions.

The comparison with the equivalent diagnostic in Hanretty is remarkable. The difference demonstrates that a red-light/green-light scale encodes a dimension of judicial disagreement that is both more meaningful and more salient than the conventional liberal/conservative scale that informed Hanretty’s work. Empirical techniques, it would seem, offer evidence in support of the “legal model”, and of the idea that it is doctrinal positions, rather than political positions, that play a determinative role in adjudication—at least, as far as the UK’s judiciary is concerned.

2.3 The dispositions of the judges

We now turn to discussing our substantive results and their significance. Figure 2 shows one presentation of the findings of our model: estimated ideal points on our red-light/green-light scale, arrayed from the most green-light at the top right of the plot down to the most red-light in the bottom left. For each judge, Figure 2 captures a 95% Bayesian credible interval, overlaid with a 50% credible interval represented by the thick grey line. Judges positioned further towards the right can be understood as adopting a relatively more permissive approach towards the state, or (equivalently) as extending a greater degree of latitude to state actors, while judges further towards the left can be seen as adopting a more restrictive approach.⁴⁵

There is a good deal of separation in these ideal point estimates, suggesting that there are meaningful differences among judges. For example, there is no overlap between the 95% credible intervals of the most green-light judge (by point estimate), Lord Brown, and that of Lord Hope, who lies in the middle of the range; neither is there any overlap between the 95% credible intervals of Lords Hope and those of Lord Kerr and Lady Hale at the red-light end of the scale. We can also see a good level of separation between such infamarginal judges such as Lords Phillips and Lord Carswell, or Lord Mance and Lord Walker. The implication of these results is that judicial attitudes clearly

⁴⁴ Hanretty (n 16) 713–714.

⁴⁵ For present purposes, we make no distinction between the central, local and devolved levels of government, or between executive and judicial authority. This is a topic we intend to explore in future work.

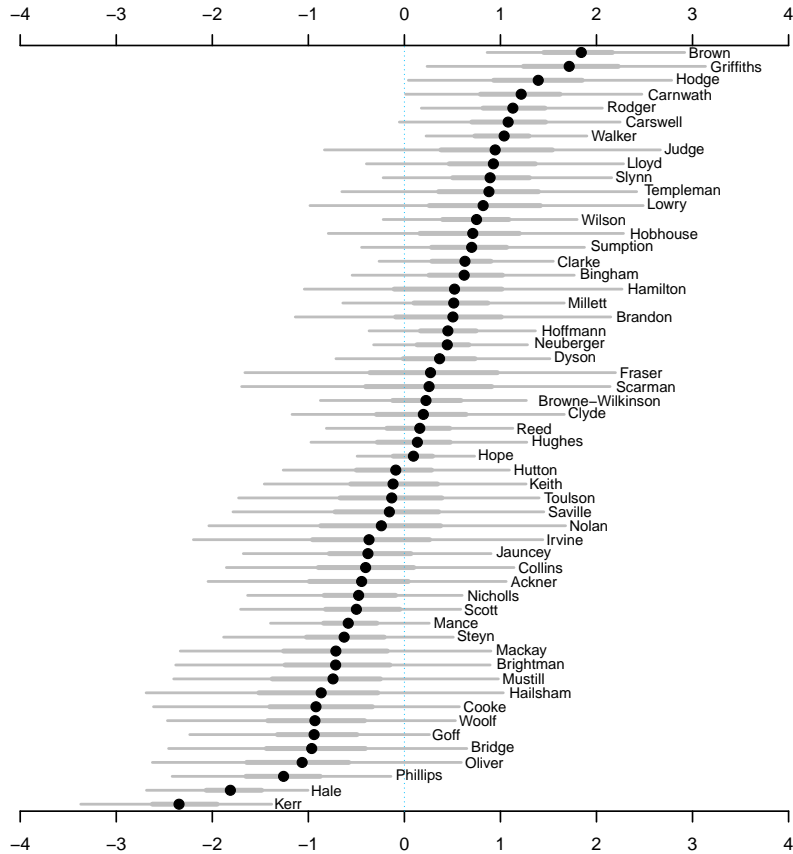


Fig. 2: *Estimated ideal points on a red-light/green-light scale. Judges towards the top-right of the figure have more green-light views than judges towards the bottom-left. The thick grey lines plot a 50% highest posterior density (HPD) region, while the thin grey lines plot a 95% HPD interval.*

matter. Judges are not ‘blank slates’ whose attitudes towards the latitude to be given to state bodies are indistinguishable from one another.

Among the judges that occupy the most green-light positions (by point estimate) are Lords Brown, Rodger, Carswell and Walker. At the other end of the spectrum, Lord Kerr, Lady Hale and Lord Phillips represent the most red-light positions. The estimated positions of the UK’s top judges on a red-light/green-light scale also serves to contrast our doctrinal model from more conventional interpretations of the attitudinal model which seeks to locate judicial attitudes on a liberal/conservative scale. For example, at the green-light end of

the spectrum, we can see a former Conservative minister, Lord Rodger, holding a position barely distinguishable from Lord Carswell, appointed by a Labour Prime Minister, Tony Blair. Similarly, at the green-light end, we find Lord Goff, a Conservative judicial appointment, occupying a similar position to Lord Phillips, a Labour appointment. It would be difficult to explain some of these appointments—on most theories of political decision-making, at any rate—if, counter-factually, these were measures of judicial ideology on an overtly political scale. Yet such observations sit perfectly comfortably with our attempt to measure judges' positions on a doctrinal scale.

Our approach, and the findings they generate are important also in that they enable us to look at judges' positions in the round. While not intending to be a substitute to for a close reading of particular judgments, it is perhaps an important corrective. For example, by focusing on a decision like the *Belmarsh detainees* case, one might get an impression that Lord Hoffmann is one of the most clearly red-light judges. Yet this is the same Lord Hoffmann who held in *Bancoult* that the expulsion of a population from its homeland without due process was lawful. Looking to the pattern of decided cases as a whole it is clear that the Hoffmann of *Bancoult* is the more typical—some 59% of his judgments were fully in favour of the state. This also shows that advantages of Bayesian item-response theory, which takes account of the 'difficulty' of cases—*i.e.* the extent to which the issues raised in the case were such that holding for the state would require a pronounced green-light stance—over simpler analyses based purely on 'win ratios'.⁴⁶

3 Institutional Implications: Preserving a fine balance

The model set out in Part II has demonstrated that differences in the judicial dispositions of individual judges are real and estimable from their decisions—in other words, they affect the decisions of individual judges in the cases they hear. In the context of the UK's judiciary, these decisions are best characterized as reflecting doctrinal positions on a red-light/ green-light scale, rather than positions on a left/ right scale. Contrary to what one might expect, however, this should lead lawyers to engage more, not less, with questions of institutional structure and design.

In the first place, the fact that it is doctrinal, rather than political, dispositions that matter should not allay concerns about the institutional role of the judiciary in the modern state. One of the more important institutional implications of the attitudinal model is that it matters who decides a case. This insight holds regardless of whether the underlying attitudes are party-political or doctrinal. We show in Figure 3, below, that the degree of judicial disagreement is sufficiently great that—to the conventional standards of statistical reliability—bench composition can still matter to how cases are decided, at least sometimes. Figure 3 shows the estimated median ideal point for each of the cases in our analysis, with the vertical line indicating the point estimate for the median

⁴⁶ For example, the work of Poole and Shah: see Poole and Shah (n 15).

judge in our analysis. In other words, our analysis suggests that many cases in our sample were heard by a bench clearly more favourable to the state—or to those challenging a decision of the state—than other possible benches.

The problems of panel constitution—and, in particular, the issues posed by panels skewed away from the overall median—is one that is familiar to political scientists.⁴⁷ This problem does not go away if the salient dimension is doctrinally defined. At one level, this ought not to tell us anything new. We are, so cognitive science tells us, strongly influenced by our prior beliefs and leanings in processing or evaluating any new information or situation.⁴⁸ There is no reason at all to suppose that judges would be an exception to this general rule. Nevertheless, the result is important. If the Chagos Islanders (to pick up one example from the top quarter of Figure 3) lost their appeal to be restored to their homeland simply because their cases came up before a panel that was more ‘green-light’ than other panels might have been, or if the Revenue in *Sempra Metals* (to pick an example from the bottom quarter of Figure 3) would actually have succeeded in their claim had a slightly different bench heard the appeal, then the judicial system falls seriously short of fulfilling the role it is commonly taken to have. Despite this, the fallacy that this problem only affects a ‘politicized’ judiciary continues to (mis)inform debates on the reform of judicial institutions, as the statement by the Department of Constitutional Affairs at the head of this paper demonstrates.⁴⁹

The problem is exacerbated by the fact that a panel skewed away from a doctrinal median affects not only the outcomes of the specific cases which that panel hears, but also the way that the decision is justified in terms of doctrine and, hence, the direction in which the law develops. *Sempra Metals* is a leading case in the law of restitution, and the law would look different if the minority view – emphasising the role of judicial discretion and equitable principles in restitutionary remedies – had prevailed, rather than the more rigid approach that we see in the majority decision, which held the remedy to be available as a matter of right. The entire direction of the development of the common law in certain areas could thus quite conceivably be determined by the circumstances of the selection of a panel of the Supreme Court.

Moreover, permissiveness towards the state is just one dimension of judicial disagreement. Legal theory suggests several other such dimensions which may matter. Adams and Brownsword have suggested that judges in contract disputes in the higher courts are guided (to varying degrees) by the competing ideologies of ‘market individualism’ and ‘consumer welfarism’, which, so they maintain, cut across traditional judicial ideologies of formalism and real-

⁴⁷ Matthew McCubbins, Roger Noll, and Barry Weingast, ‘Administrative Procedures as Instruments of Political Control’ (1987) 3(2) *Journal of Law, Economics and Organisation* 243, 262.

⁴⁸ For an overview of application of cognitive science to law, see the collection in Cass Sunstein (ed), *Behavioral Law and Economics* (Cambridge University Press 2000)

⁴⁹ Department of Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom (Consultation Paper, CP 11/03)* (Department of Constitutional Affairs 2003), para. 52.

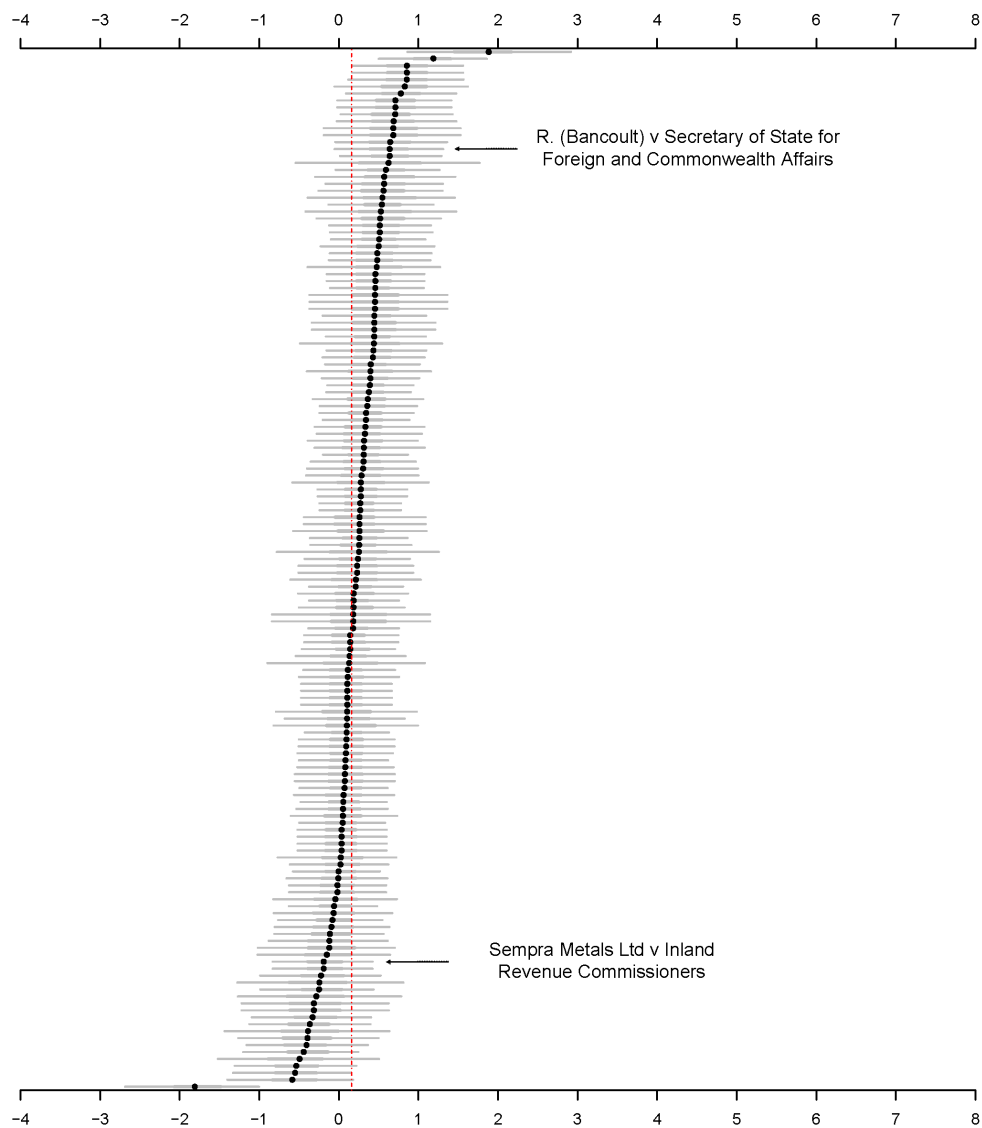


Fig. 3: *The effect of bench composition on outcomes. This figure plots point estimates and 95% HPD intervals for the position of the median judge in each of the cases in our analysis. Large differences from the centre at the top and bottom of the graph indicate cases in which it is possible that the composition of the bench had an effect on the outcome of the case.*

ism.⁵⁰ Another example, applicable to the field of constitutional law, is judges' views on the relative weight which ought to be given to different mechanisms for regulating government—in particular, the balance between what Tomkins calls legal constitutionalism and political constitutionalism, a dimension which in his view divided the majority from the dissenting views in the *Fire Brigades Union* case.⁵¹ There is no *a priori* reason to suppose that differences in these dimensions are any less pronounced than in the dimension we have studied here, nor that the composition of benches makes any less of a difference.

Against the background of our findings, the structure and functioning of our judicial system—which has continued to assume that who hears a case does not matter—is hard to justify. We stress that our findings do not in any way impugn the personalities or motives of the judges. As we have sought to emphasise, it is inevitable that people are influenced by their prior beliefs. The problem, rather, is one of institutional design. Public administration scholarship has for centuries given serious thought to how executive government institutions should be structured so that the attitudes and preferences of those who staffed them should work towards and not against the demands we make of them. Debates between Bentham and Mill over whether executive authority and responsibility should be vested in committees or in 'single seated functionaries',⁵² through Donald Kingsley's characterisation of the UK's civil service as a 'representative bureaucracy',⁵³ to Vincent Ostrom's⁵⁴ contrast between the competing paradigms of 'bureaucratic administration' and 'democratic administration' form part of the background to discussion of administrative reform and design of regulatory institutions. In the modern literature, these classical ideas have been formalised within a powerful body of theory on institutional design.⁵⁵ Unfortunately, similar efforts have not been made to articulate a theoretical perspective on the design of judicial institutions, nor has law reform in practice grappled with these issues.

Further, as the public administration literature indicates, the issues stretch beyond the narrow issue of bench selection to the way judges are selected for higher office and the way cases are chosen for consideration by the Supreme

⁵⁰ JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7(2) *Legal Studies* 205.

⁵¹ *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513. For Tomkins's analysis, see Adam Tomkins, *Public Law* (Clarendon Press 2003) 18-30.

⁵² Bernard Schaffer, 'The Idea of the Ministerial Department: Bentham, Mill and Bagehot' (1957) 3(1) *Australian Journal of Politics & History* 60.

⁵³ see Donald Kingsley, *Representative Bureaucracy: An Interpretation of the British Civil Service* (Antioch Press 1944).

⁵⁴ Vincent Ostrom, *The Intellectual Crisis in American Public Administration* (Second Edition, University Alabama Press 1989).

⁵⁵ In the US context, a seminal contribution is the work of 'McNollgast': McCubbins, Noll, and Weingast, 'Administrative Procedures as Instruments of Political Control' (n 47); Matthew McCubbins, Roger Noll, and Barry Weingast, 'Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies' (1989) 75(2) *Virginia Law Review* 431. Murray Horn applies these ideas within the context of 'Westminster' style Democracies. See Murray J Horn, *The Political Economy of Public Administration: Institutional Choice in the Public Sector* (Cambridge Univ Press 1995).

Court. Part IV of the Constitutional Reform Act 2005 gives an important and over-riding symbolic commitment to a professionalised judiciary⁵⁶ and to the continuing “need to encourage diversity in the range of persons available for selection for appointments.”⁵⁷ Diversity is often seen in terms of ethnic or gender diversity – most notoriously in Lord Sumption’s repeated remarks about the downsides of diversity – but our findings suggest the importance of taking a broader view. Would the balance of dispositions in the UK’s courts differ if judges were recruited from a legally-relevant, but not practitioner-based, background, for example lawyers working for housing charities, or for Citizens Advice Bureaux? Without making specific recommendations here, our findings underscore the need to think systematically about the design of judicial institutions, and how these can ensure an appropriate balance of attitudes and dispositions, however those may be defined. In this respect the lack of such thinking in deliberations surrounding the Constitutional Reform Act, or for that matter in the currently ongoing debate about the possible repeal of the Human Rights Act, is disappointing. Much more sophisticated analysis is needed of the relationship between legal institutions, legal doctrine and case outcomes,⁵⁸ as the public administration scholarship listed above demonstrates.

Equally, a disregard for questions of institutional design when it comes to constitutional changes affecting the judiciary is problematic because the institutional role discharged by the judiciary within the governing institutions of the UK is, as we have argued, the result of a number of finely-balanced factors. To the extent the ‘embedded autonomy’ of the senior judiciary depends on a fine balance it is vulnerable to disruption on a number of fronts. Evans himself pointed out that complacency about the success of an institutional configuration could end up undermining the very embedded autonomy that had created it.⁵⁹ From this perspective, complacency about the apolitical character of judging could end up undermining that very character, in the absence of a corresponding awareness of the delicate institutional configuration that makes this apolitical character possible. If we accept—as we argued above—that deciding cases on doctrinal grounds is preferable to a nakedly political appellate jurisdiction, then there are reasons to find a number of current trends worrying.

In recent constitutional changes, all too little attention has been paid to the twinning of embeddedness and autonomy, and the delicate balance of institutional arrangements on which it rests. The tendency is, instead, for traditional, ‘commonsense’ categories to be replaced by frameworks which lack not only the embeddedness of those they replaced but also their autonomy, in that they are rooted in ideological approaches that are both remote from everyday experience and more overtly political. This is true across a range of private and public law matters, but given its prominence in current political debates, the way in which the law protects human rights serves as a good example. In the new

⁵⁶ S. 62.

⁵⁷ S. 63.

⁵⁸ This point has been emphasized by a number of legal theorists. See Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013).

⁵⁹ Evans (n 26) 229.

approach introduced by the Human Rights Act, judges review policy decisions using a conceptual apparatus and framework—a dimension of salience—that is far more closely connected with political ideology than its predecessors were. Rather than focusing simply on whether a particular action falls within the powers given to the state body, approaches grounded in human rights require judges to consider whether the action concerned was *normatively* justifiable—for example because it was proportionate to achieving some acceptable purpose.

Such an approach to adjudication not only enables but actually requires considerations of political ideology (as distinct from doctrine) to be factored into judicial decision-making. The dimension that is salient to deciding a particular case under human rights law may well not be *the* dimension that was salient in the process of making the particular policy in question, but it is nevertheless *a* dimension of salience taken from the world of political ideology. The result is to require courts to assert the primacy of one dimension of salience derived from political ideology over all others, regardless of whether this reflects the perspectives on primacy held by policymakers and the common public. This presents a stark contrast with the more traditional ‘common law’ approaches to adjudicating disputes arising from administrative decision making, which sought to institutionally entrench an approach wherein the dimensions of salience that judges bring to bear in decision making were *insulated* from dimensions of salience derived from the world of political ideology.

It has not been our purpose, in making these points about human rights, to argue either for the greater entrenchment of human rights within the legal system, or for a return to the good old rules of the common law through a British Bill of Rights. The point we seek to make is the precise opposite, namely, the poverty of a debate framed in terms of such simplistic dichotomies. Our purpose has been to point to the institutional issues which such a frame leaves unaddressed, but which must be addressed if reforms are to be effective and not have unintended consequences. These issues remain pertinent, regardless of whether the law is framed in terms of human rights, or in terms of ‘British’ rights, or a souped-up system of judicial review. Changes to an institution’s terms of reference or the profile of its work have the potential to affect its functioning in far-reaching ways. Given this, it is troubling that so little thought has been given to these issues in recent reforms—including not just the introduction of the conceptual apparatus of human rights or its proposed abolition, but also other reforms such as the abolition of legal aid and the introduction of marketised mechanisms of funding civil litigation, all of which are likely to significantly transform the profiles of the litigants and the cases that come before the courts.

4 Conclusion

Although the judiciary has long been acknowledged to be the third branch of government, its functioning as a branch of government remains understudied and under-theorised in the UK when compared with the other branches, and it has remained shrouded in what is almost an air of mystique. In relation

to members of the other two branches—the legislature and executive—much attention has been devoted to how ideological and other similar factors affect their behaviour, and how this in turn affects the effective discharge by these bodies of their role. This has produced a rich literature on institutional design and governance, of which account is taken by policymakers when designing new administrative institutions or regulatory bodies. But very little attention has been paid to these questions as far as the judicial branch of government in the UK is concerned.

Our aim in this article has been to point out that this is problematic. Judges are people—talented and committed people, certainly, but people nevertheless. The institutional effectiveness of our highest court is, therefore, subject to the same type of pressures and constraints as any other group. The failure to study these is problematic not just because it leaves a vital branch of government unstudied and relatively poorly understood. The expansion of the British state in the past hundred years has arguably changed the nature of the relationship between the judiciary and the other branches of government. The growth of regulation has vastly expanded the judiciary's public law role in reviewing the actions of executive and administrative authorities, as well as its private law role—for example, dealing with negligence in the discharge of statutory or regulatory functions. The growth and subsequent shrinkage of the welfare state, and the consequent shifts in the services provided by the state to citizens, have also brought about a significant rise in actions against the state. Finally, and most recently, the Human Rights Act has given the judiciary considerable new powers to review the actions and policies of the other branches of government. These are fundamental changes in politically and ideologically charged areas, and they make it imperative that we ask the questions in relation to the judiciary that we have long asked in relation to other branches of government.

The United Kingdom has been fortunate in that the upper tiers of the judiciary have during the course of the twentieth century evolved institutional strategies that have had the effect of mitigating the impact of the overtly political aspects of the issues with which they must deal. The result is valuable and worth preserving – a highest court that is neither as politicised nor as systematically influenced by political ideologies as the US Supreme Court is commonly said to be. Yet, as we have shown here, these strategies are far from robust. They rest on a fragile institutional balance, which is easily undermined.

Much recent reform has proceeded on the implicit assumption that institutional strategies will remain unaffected despite the constant and far-reaching tinkering with the jurisdiction, functioning and workload of the judiciary that has characterised the past four decades. There is no rational basis for this assumption, which flies in the face of everything theories of institutions tell us about the impact of changing environments upon the institution and upon actors seeking to work within the institutional framework. This confidence, and the absence of any real attempt to verify its validity, presents a particularly stark contrast with the debate over reforming the upper chamber of the UK's Parliament by turning it from being a chamber consisting entirely of unelected members, to being a chamber consisting mostly or entirely of elected members.

The debate here has focused in great depth on the question of how such a reform might affect the institutional relationship between the two houses of Parliament, and on the impact it may have on the (currently) acknowledged supremacy of the lower house. This suggests that the failure to consider the institutional impact of reforms is not intrinsic to politics. Rather, it reflects the limitations of the way the structure and operation of the judiciary are understood and theorised.

What, then, is the way forward? Our aim in this article has been to point the way towards what must be our ultimate goal if we are to be effective in studying the judiciary—namely, the creation of a proper institutionalist account of the judicial branch of government which *studies* the norms, conventions, aims, purposes and strategies that underlie the functioning of the judiciary, and the institutional processes by which these evolve, change, are adapted to new uses, and disappear, rather than simply starting with assumptions as to what these are. Such a model, which we have taken steps towards outlining, not only parallels the standard models that are used to study, for example, the behaviour of members of bureaucracies, but also avoids the reductionist simplifications that plague existing models of the judiciary, whether ‘legal’ or ‘political’. At the level of theory and methodology, we have demonstrated here that the legal account of judicial decision-making, far from being opposed to standard theories of political institutions, is entirely compatible with them. When put together, the two offer an understanding of the nature and role of the judiciary that has much greater explanatory value than either discipline can offer by itself. Such a combination is, therefore, not only desirable, but also of importance in terms of its contribution to theoretical accounts of the modern British state. It is only through an approach that brings the two together that we can fully begin to understand the role of the judiciary in governance in the UK, and work towards preserving its best features in the face of the continuing trend of radical reforms to the court system.