

Substantive Review, Statutory Interpretation and Bifurcation in the United Kingdom Supreme Court

Timothy James Sayer

School of Law
Newcastle University

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Abstract

This doctoral thesis examines the interrelationship between administrative law doctrine and policymaking in the UK Supreme Court. In particular, the thesis tests the hypothesis that administrative law in the UK is hindered by the problem of ‘bifurcation’. Bifurcation arises when law and policy are conceptualised in discursively separate fields, and in particular when legal norms do not fully develop an institutionally sensitive approach to the regulation of administrative discretion. Its core effects are that judicial scrutiny of executive policy can oscillate between strong review and judicial deference. It is functionally sub-optimal, because it can risk leaving serious flaws in decision making processes untested, or dictating outcomes to decision makers. Finally, bifurcation can exacerbate differences in judicial attitude toward the appropriate extent of executive discretion.

This hypothesis is tested via analysis of public law judgments handed down by the Supreme Court between 2014-2018. The analysis considers three areas of doctrine separately: proportionality analysis in qualified rights cases under the Human Rights Act 1998, substantive review under the common law, and statutory interpretation.

The thesis finds qualified support for the hypothesis, discovering in all three doctrinal approaches the potential for bifurcation. At the same time, it unearths a body of judgments in which the Supreme Court takes an institutionally sensitive approach, stimulating public bodies to exercise their functions in a deliberative, participative and transparent manner. The approaches taken in these cases are used to develop and recommend a judicial attitude of ‘passivactivism’. Drawing on functionalist and pragmatist schools of thought, passivactivism seeks to structure the intensity of judicial review via consideration of whether a public body has made effective use of those institutional characteristics which led to it being entrusted with a particular decision.

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Chapter 1. Introduction

1.1 Preliminaries: The Judiciary and Questions of Policy

There has been a rise in the power of apex courts in the determination of public policy questions.¹ A range of reasons have been suggested for this rise. Tate and Vallinder cite: geopolitical factors; the rise of intergovernmental or supranational courts; increasing distrust of elected politicians and/or perceived ineffectiveness of majoritarian institutions; the spread of constitutional courts; the influence of constitutional concepts legitimating judicial power; the growing influence of rights-based philosophies; and the tactical use of litigation by interest groups to achieve strategic ends.² To this list Guarnieri and Pederzoli add the increase of state activity (the welfare state in particular) in the modern era and the concomitant increase in the use of broadly worded, ends-focused, statutory provisions delegating broad powers to government actors.³ An increased use of statute in this way increases the work and influence of the courts, and the nature of legal disputes necessarily becomes more polycentric.⁴

This global increase in the judicial role is reflected in the United Kingdom.⁵ From the 1960s onwards the courts increasingly subjected discretionary executive powers to a wider range of legal standards, whose application could intensify depending on context.⁶ Fewer and fewer areas of government operation are immune from judicial oversight by virtue of either subject or source.⁷ Indeed, at the time of writing the Supreme Court is considering the legality of the Prime Minister's advice to the Queen to prorogue Parliament.⁸ The European Communities Act 1972 significantly enhanced the scope of the courts' power, leading to the previously unthinkable judicial suspension of an Act of Parliament.⁹ The legislative reforms of the New Labour years, particularly via enhancement of domestic rights protections via the Human Rights Act 1998, provided a heightened role for the domestic judges in subjecting the exercise of public power to constitutional standards.¹⁰ This package of reforms included the Constitutional Reform Act 2005,

¹ For an overview see R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

² C Neal Tate and T Vallinder, 'The Global Expansion of Judicial Power: The Judicialization of Politics' in C Neal Tate and T Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995) 1.

³ See C Guarnieri and P Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (OUP 2002).

⁴ On which see L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; J Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' [1994] *Cambridge Law Journal* 367.

⁵ See e.g. M Sunkin, 'The United Kingdom' in C Neal Tate and T Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995) 67.

⁶ For a useful discussion see DR Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press 2018) 47-56.

⁷ For example, the rationale for detention of suspects for national security reasons, once a question thought pre-eminently one for the executive (see *Liversidge v Anderson* [1942] AC 206 (HL)) has been scrutinised and found wanting by the courts (see *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68).

⁸ On appeal from *R (Miller) v The Prime Minister* [2019] EWHC 2381.

⁹ *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85 (HL).

¹⁰ See generally V Bogdanor, *The New British Constitution* (Hart 2009).

which removed the judicial function of the House of Lords and instituted a UK Supreme Court. While the ‘constitutional’ nature of the Supreme Court’s workload might owe more to broader constitutional change than the introduction of the court per se, the effect is nonetheless that the UK now has an apex court operating in many ways as a constitutional court.¹¹

The increasing judicialisation of policy questions matters.¹² The rule of law requires clear and predictable legal limits on government power.¹³ And the need for judicially enforceable safeguards for core liberties (i.e. protecting personal interests vital to the functioning of a liberal democracy) is clear.¹⁴ But it is also necessary for expert policymakers, accountable to democratic institutions, to be able to exercise discretionary powers in the public interest. Judicialisation means an increase in the power of courts, and the subsequent adoption of court-like processes by governments and parliaments.¹⁵ It can also lead to suppression or distortion of effective decision-making processes, the empowerment of groups with the skills and funding to undertake litigation, and can erode the responsibility of the political constitution.¹⁶ It requires careful consideration of the dynamics of legitimacy at play in the development and application of administrative law norms. This thesis tackles this interplay.

1.2 The Central Hypothesis and Research Question: Judges, Policy and the Question of Bifurcation

Much of the general literature on judicial review centres around the potential for constitutional rights norms to prohibit the implementation of majority policy choices (the so-called ‘counter-majoritarian dilemma’).¹⁷ The broad spectrum ranges from those who focus more on judicial review’s counter-majoritarian potential as a safeguard for the fundamental conditions of a democracy,¹⁸ and those who seek to limit its potential to debase the democratic ideal via elite judicial rule.¹⁹

¹¹ See e.g. R Masterman and JEK Murkens, ‘Skirting Supremacy and Subordination: the Constitutional Authority of the United Kingdom Supreme Court’ [2013] Public Law 800; S Stephenson, ‘The Supreme Court’s Renewed Interest in Autochthonous Constitutionalism’ [2015] Public Law 394.

¹² Guarnieri and Pederzoli (n 3) ch 2.

¹³ T Bingham, *The Rule of Law* (Penguin 2011) ch 6.

¹⁴ See AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2004).

¹⁵ T Vallinder ‘When the Courts Go Marching In’ in Neal Tate and Vallinder *The Global Expansion of Judicial Power* (n 2) 13. See also R Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Central European University Press 2002); and M De S-O-l’E. Lasser, *Judicial Transformations: The Rights Revolution in the Courts Of Europe* (OUP 2009).

¹⁶ See e.g. A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000) 189-200; Guarnieri and Pederzoli (n 3).

¹⁷ AM Bickel, *The Least Dangerous Branch* (2nd edn, Yale University Press 1986).

¹⁸ E.g. JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980); LB Tremblay, ‘General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law’ (2003) 23 Oxford Journal of Legal Studies 525; J Jowell, ‘Parliamentary Sovereignty under the New Constitutional Hypothesis’ [2006] Public Law 562.

¹⁹ E.g. MV Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press 2000); LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (OUP 2004); J Waldron, ‘The Core of the Case Against

In a UK context, where the power of the courts to override primary legislation is limited,²⁰ related debates arise between legal and political constitutionalists as to regulation of executive power. Legal constitutionalists argue that government should be subjected to a range of judicial imposed norms, including fundamental values,²¹ and principles of good governance.²² The ‘common law’ aspect of these legal norms stems from their historical authority, the culmination of over three hundred years of accrued principles of justice.²³ Constitutionalists in this tradition are generally sceptical of the capability of ordinary politics to protect individuals from arbitrary government power.²⁴ Political constitutionalists, on the other hand, prefer to rely on democratic rather than legal means of controlling executive power.²⁵ Adam Tomkins, for example, characterises the UK constitution as republican, and maintains a preference for ministerial accountability to Parliament over judicially created standards.²⁶ For such commentators, the extension of judicial review risks undermining proper deliberation which lies at the heart of political debate,²⁷ and closes down the plural viewpoints that achieve a hearing in Parliamentary debates.²⁸ Eschewing judicial control, on this view, is less *prima facie* prescriptive,²⁹ and avoids the undermining of wider constitutional goods by judicial standards taking priority over other constitutional goods.³⁰

These debates about the nature and extent of judicial regulation of policy disguise deeper inconsistencies in the UK constitution. Legal norms in the UK incorporate *both* legal and political forms of constitutionalism.³¹ A mixture of forms of constitutionalism reflects the need for different institutions to regulate different aspects of executive functioning.³² Yet it also risks a problem of what I call ‘intra-doctrinal bifurcation’. Bifurcation, in my usage (discussed further below), comprises a number of strands, but at base it refers to judicial approaches to regulation of administrative decision making which risk both being overly active or overly passive.

Judicial Review’ (2006) 115 Yale Law Journal 1346; R Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (CUP 2007).

²⁰ At the time of writing, to conflicts with EU law.

²¹ J Laws ‘Law and democracy’ [1995] Public Law 72; J Laws, ‘The Constitution: Morals and Rights’ [1996] Public Law 622; J Jowell, ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ [2000] Public Law 671.

²² D Oliver, ‘Law, Politics and Public Accountability: The Search for a New Equilibrium’ [1994] Public Law 238.

²³ See P Craig, ‘The Common Law, Shared Power and Judicial Review’ (2004) 24 Oxford Journal of Legal Studies 237; ‘Competing Models of Judicial Review’ [1999] Public Law 428.

²⁴ E.g. G Phillipson, ‘Deference, Discretion, and Democracy in the Human Rights Act Era’ (2007) 40 Current Legal Problems 40; P Craig, ‘Political Constitutionalism and the Judicial Role: A Response’ (2011) 9 International Journal of Constitutional Law 112.

²⁵ The classic exposition is JAG Griffith, ‘The Political Constitution’ (1979) 42 MLR 1.

²⁶ A Tomkins, *Our Republican Constitution* (Hart 2005).

²⁷ Bellamy (n 19).

²⁸ M Goldoni and C MacCorkindale ‘Why We (Still) Need a Revolution’ (2013) 14 German Law Journal 2197, 2211.

²⁹ G Gee and GCN Webber, ‘What Is a Political Constitution?’ (2010) 30 Oxford Journal of Legal Studies 273-299.

³⁰ A Tomkins, ‘What’s Left of the Political Constitution’ (2013) 14 German Law Journal 2275, 2287.

³¹ CJS Knight, ‘Bi-polar Sovereignty Restated’ [2009] Cambridge Law Journal 361.

³² P Cane, *Controlling Administrative Power* (CUP 2016).

My concept of bifurcation takes as its jumping off point normative debates on whether doctrines of proportionality review (on which see Chapters 4 and 5) and rationality review (see Chapter 6) should remain separate (i.e. bifurcate) or converge (i.e. unify). This may be thought of an *inter-doctrinal* bifurcation. The debates constitute a significant portion of commentary in recent years on substantive review.³³ The concept is cited in important recent monographs on administrative law.³⁴ It continues to be subject to commentary.³⁵ Such discussions are key to my thesis, both in forming the core focus of recent academic debate on substantive review, but also in perpetuating a core problems in terms of approaches by the UK judiciary to substantive review. The focus of this literature on the appropriate judicial standard of substantive review central to this thesis, in terms of the questions it raises about the legitimacy of administrative law in questions of merit or substance. Yet, discussion of legal doctrine in the abstract can ignore the impacts of its *practical* application. And it is my central contention that academic (and judicial) debate over whether substantive review should constitute one or two doctrines unhelpfully occludes consideration of the actual impacts of such review in individual cases. Further, the contours of the debate itself *replicate* a flaw which is consistently arising in the caselaw. It is for this reason, that I have repurposed a term of art from the academic literature; I am simultaneously critiquing judicial practice and the dominant academic debates which have sprung up around it.

One of the central points of divergence between commentators who believe that proportionality and rationality should remain separate (bifurcationists), and those who consider proportionality should become the sole standard of substantive review (unificationists), is that many of those in the former group consider that this would lead to review becoming too intense (see Chapter 4). Thus, the two groups split (in part – the points of difference are multiple as I shall explain in Chapter 4) on the relative weakness or strength of substantive review. I adopt the term bifurcation here because it engages both with the idea (developed in Chapter 2) that UK administrative law comprises an unstable admixture of strong and weak forms of review (I term this *intra-doctrinal* bifurcation), but also the current academic debate which replicates and perpetuates this same dynamic. While questions over the appropriate intensity of review when deploying a particular doctrine are acknowledged in the literature,³⁶ a central aspect of my

³³ See e.g. M Elliott and H Wilberg, 'Introduction' in M Elliott and H Wilberg (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015) 1.

³⁴ DR Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018) 97; S Nason, *Reconstructing Judicial Review* (Hart 2016) 194-2011.

³⁵ E.g. L Marsons, 'Bifurcation, Unification and Calibration: A Comparison of Indian and English Approaches to Proportionality' (2018) 2 *Indian Law Review* 26.

³⁶ E.g. M Hunt, 'Against Bifurcation' in D Dyzenhaus, M Hunt and G Huscroft (eds), *A Simple Common Lawyer* (Hart 2009) 99, 111.

hypothesis is that the potential for *intra-doctrinal* bifurcation is insufficiently acknowledged by either academics or judges.

My use of the term thus articulates both engagement with an important body of academic commentary, but explores and highlights the ways in which those debates do not effectively grapple with questions of institutional functioning which I submit should be central to administrative law. Bifurcation, in my sense, thus does not have precisely the same meaning as it does in the literature, but is used intentionally as a constant reminder of issues I contend that literature overlooks. Bifurcation in my sense means, principally, that judicial practice risks both becoming overly active *and* overly passive. The concept can be broken down into four interlocking components. First, bifurcation *arises* when law and policy are conceptualised in discursively separate fields (Chapter 2 recounts the emergence of bifurcation in the UK). In particular, it arises when legal norms do not fully develop an institutionally sensitive approach to the regulation of administrative discretion. Second, and centrally, its core *effect* is that judicial scrutiny of executive policy can oscillate between strong review (which risks judicialisation in the sense described above) and judicial deference (which relies on potentially ineffective political accountability). Third, bifurcation is *functionally sub-optimal*, because it can risk leaving serious flaws in decision making processes untested, or dictating outcomes to decision makers. Finally, bifurcation can exacerbate *differences in judicial attitude* toward the appropriate extent of executive discretion.³⁷ My core hypothesis is that bifurcation (and other than where context makes clear, by ‘bifurcation’ hereafter I refer to intra-doctrinal bifurcation) continues to hamper the development of effective, coherent administrative law in the UK. My research question considers the extent to which the hypothesis is sustainable.

1.3 Testing the Hypothesis: The Meaning of Policy and the Effects of Judicial Discretion

At the outset I noted widespread concern about the impact of apex courts on questions of policymaking. For this reason, I have chosen to test my hypothesis in the UK Supreme Court. While not explicitly a ‘constitutional court’, the UK Supreme Court was established as part of a package of constitutional reform in the Constitutional Reform Act 2005.³⁸ It falls for consideration as part of the process of ‘constitutionalism’ taking place during the New Labour years.³⁹ This shift in the UK’s constitutional framework provides a window for consideration of

³⁷ See TT Arvind and L Stirton, ‘Legal Ideology, Legal Doctrine and the UK’s ‘Top Judges’ [2016] Public Law 418.

³⁸ See Lord Windlesham, ‘The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change: Part 1’ [2005] Public Law 806; ‘The Constitutional Reform Act 2005: the Politics of Constitutional Reform: Part 2’ [2006] Public Law 35; and A le Sueur, ‘From Appellate Committee to Supreme Court: A Narrative’ in L Blom-Cooper, B Dickson and G Drewry (eds) *The Judicial House of Lords 1876-2009* (OUP 2009) 64.

³⁹ See K Malleon, ‘The Evolving Role of the Supreme Court’ [2011] Public Law 754.

the Court's self-positioning relative to the other institutions of state.⁴⁰ A second reason for this choice is that the doctrine of precedent in the UK means that decisions of its apex court are likely to be the most important and influential in terms of setting the jurisprudential framework for consideration of policy questions by the lower courts. Conversely, the Court is not formally bound by decisions of other domestic courts, which allowed consideration of the effects of judicial discretion at their least inhibited. A third reason to focus on the Supreme Court is that the effects of bifurcation are better examined through 'hard' cases which do not permit of easy legal answers.⁴¹ The cases before the UK's final court of appeal are more likely to fall into that category, given that other than rare 'leapfrog' appeals, the cases heard by the Court will ordinarily have been ventilated before the High Court (or equivalent) and the Court of Appeal.

Much legal research in the UK is doctrinal.⁴² To test my bifurcational hypothesis in the Supreme Court, however, I have taken inspiration from quantitative and qualitative empirical analysis, in order to move beyond merely explaining or critiquing the application or development of legal doctrine in isolated cases. As Bradney explains:

Quantitative and qualitative empirical research into law and legal processes provides not just more information about law; it provides information of a different character from that which can be obtained through other methods of research. It answers questions about law that cannot be answered in any other way.⁴³

My aim was to investigate the interrelationship between administrative law doctrine and public policy within a single apex court. In particular, I wanted to examine the impact of current legal doctrine in conditioning judicial approaches to administrative action. Given the extent to which this would require analysis of doctrine, I did not consider that a formal quantitative and qualitative approach would be appropriate. Nonetheless, my draws inspiration from such methods, by attempting a survey of cases across a rigorous selection of cases. This approach allows me to draw wider conclusions about the institution dynamics between law and government than would a purely doctrinal approach.

My survey method is set out in Chapter 3, but two matters require preliminary comment. First, the term 'policy' is susceptible to a range of categorisations.⁴⁴ In this thesis, my interest is in *executive* discretion under the powers afforded it by statute or under prerogative powers. I thus use

⁴⁰ P Cane 'Understanding Judicial Review and its Impact' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004) 23.

⁴¹ R Dworkin, *Taking Rights Seriously* (Duckworth 1977) ch 4.

⁴² T Hutchinson, 'Doctrinal Research: Researching the Jury' in D Watkins and M Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8, 13-16.

⁴³ A Bradney, 'The Place of Empirical Legal Research in the Law School Curriculum' in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 1031, 1033.

⁴⁴ P Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave Macmillan 2013) ch 2.

a broad definition of ‘policy’, encompassing all three kinds of discretionary decision making identified by Galligan: ‘modified adjudication’ (i.e. the application of rules or standards in individual cases); ‘specific policy issues’ (e.g. where to build a road); and ‘general policy issues’ (setting out standards for general application).⁴⁵ The terms ‘policy’, ‘discretion’ and ‘administration’ are accordingly used interchangeably in the thesis. The second matter is the question of *judicial* discretion. Judges have bounded discretion within the parameters established by doctrine and the practice of the legal community.⁴⁶ It is a central contention of this thesis that there is a dynamic interrelationship between the two forms of discretion, in that the exercise of judicial discretion can be more or less permissive of executive action. My hypothesis is that current approaches to doctrine can lead to bifurcation. The remainder of this introduction summarises the thesis.

1.4 Substantive Review and Bifurcation

The nature and extent of substantive review of executive policy by the courts is central to discussion of appropriate institutional balance between government and the judiciary. Chapters 4 to 6 therefore analyse proportionality and rationality review in the Supreme Court. This discussion overlaps, as I have flagged above, with consideration of debates in the UK over inter-doctrinal bifurcation; the question of whether proportionality should become the sole head of substantive review.⁴⁷ I argue that current debates underestimate the extent to which both proportionality and rationality review are prone to intra-doctrinal bifurcation (i.e. risking lapse into overly strong and overly weak forms of review). As noted above, I have repurposed the concept of bifurcation from the inter-doctrinal academic debate, in order both to make my central argument about substantive review in the UK, but also to emphasise that current academic debate is trapped in the same conceptual pattern of strong/weak review as the jurisprudence itself.

Chapter 4 sets out an initial survey of proportionality review in the Supreme Court, showing that the conditions for such intra-doctrinal bifurcation are in place. Chapter 5 sets out analysis of a number of key cases demonstrating bifurcation in practice, along with a range of associated pathologies. Chapter 6 carries out a similar process for rationality review, providing qualified evidence of intra-doctrinal bifurcation. In combination, these chapters question the basis of debates around the competing merits of proportionality and rationality review, restoring focus upon the institutional impacts of judicial discretion in the exercise of individual doctrine. In both Chapters 5 and 6, I nonetheless find some evidence of the Court developing a jurisprudence

⁴⁵ DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon 1986) 114-17.

⁴⁶ A Barak, *Judicial Discretion* (Yale University Press 1987) 10-11.

⁴⁷ H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart 2015).

which, rather than overriding or deferring to executive decision-making, *rewards* effective institutional functioning. Chapter 7 builds upon these foundations, developing an approach to administrative law which, rather than bifurcating, seeks to stimulate effective administrative practice.

In terms of substantive effects of judicial activity upon executive decision making, statutory interpretation is very possibly the most impactful judicial practice.⁴⁸ Chapters 8 to 10 therefore turn to the question of statutory interpretation in the Supreme Court. These chapters develop a hypothesis that the current practice of statutory interpretation in the UK, predicated on a standard of legal correctness, will lead to bifurcation. Chapter 8 deconstructs the objectivity of statutory interpretation, arguing that it is an inherently creative practice. This is important, given the open-textured nature of much statute, because the application of a standard of legal correctness judicialises questions which Parliament has arguably delegated to the executive. Chapter 9 sets out survey evidence demonstrating that the Supreme Court predominantly treats statutory interpretation as a legal question, and uses a selection of case studies demonstrating the extent to which this supposedly neutral legal analysis imports a high level of judicial discretion. Chapter 10 sets out a theoretical argument that current approaches to statutory construction have failed to keep pace with constitutional evolution, supporting this with case studies from the Supreme Court demonstrating ways in which current practice is leading to bifurcation. As with substantive review, Chapters 9 and 10 discover some evidence of the Court taking an approach, albeit a subordinate one, which rewards effective institutional functioning on the part of the executive. Chapter 10 seeks to develop this by recommending ways in which a functionalist model of interpretation could lead to more effective policy outcomes.

I conclude by reemphasising that empirical analysis of Supreme Court caselaw suggests deficiencies within administrative law's ability to provide consistent and effective legal regulation of the executive. An inherent bifurcation, incorporated into UK administrative law since its inception, continues at apex court level to influence and restrict both legal doctrine and academic debate. Doctrine in practice can shuttle between weak and strong forms of review. Debate turns on abstract concepts which can overlook such impacts. A reconstituted version of functionalism, putting a concept of institutional competence at the heart of administrative law, could provide a vital ameliorative.

⁴⁸ G Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1982).

Chapter 2. The Nature of Bifurcation

2.1 Introduction

In *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* Lord Diplock notoriously proclaimed that the greatest achievement of the courts during his lifetime was the establishment in the UK of a functioning system of administrative law.¹ The central contention of this chapter is that curial approaches to this task have been plagued by a distinction between questions of law and policy which limits the courts' ability to provide consistent and effective regulation of the administrative state.

My general bifurcatory hypothesis, with its four interlocking facets, was set out in Chapter 1. Bifurcation comprises a number of strands, but at base it refers to judicial approaches to regulation of administrative decision-making which risk both being overly active or overly passive. First, bifurcation arises when law and policy are conceptualised in discursively separate fields. Second, its core effect is that judicial scrutiny of executive policy can oscillate between strong review (which risks judicialisation in the sense described in the introduction) and judicial deference (which relies on political accountability which may be sub-optimal). Third, bifurcation is functionally sub-optimal, because it risks either leaving serious flaws in decision making processes untested, or dictating outcomes to decision makers. Fourth, bifurcation exacerbates differences in judicial attitude toward the appropriate extent of executive discretion.

This chapter sets out bifurcation's historical development, building to the hypothesis above (which is subsequently tested using the method advanced in the next chapter). The core thread is that Diceyan jurisprudence, in eschewing administrative law, established a disjunction between law and policy which leads judicial scrutiny of discretionary decision-making to bifurcate unpredictably between weak (deferential) and strong (judicialising) forms of review. While a form of administrative law more geared toward regulation of administration discretion developed over time within the common law, bifurcation between deference and judicialisation has insinuated itself within the contours of legal doctrine and its application. Similarly, as human rights have come to take a prominent role in judicial regulation of government decision making, a requirement to apply a correctness standard to discretionary decisions risks judicial review's collapse into deference or judicial values overriding policy aims. While deference and legalism are both appropriate in some contexts, I contend that administrative law has insufficiently prioritised questions of institutional functioning, meaning that their application is inconsistent.

¹ [1982] AC 617 (HL) 628.

2.2 Dicey and Dialectical Constitutionalism: Setting the Framework

The historic slowness with which administrative law has developed in the UK is often laid at the door of Professor Dicey.² The long shadow Dicey casts over UK public law makes his well-known account of the UK constitution an apt starting point. Dicey is famous for two key concepts: the sovereignty of Parliament and the rule of law. The former has both positive and negative aspects, since Parliament has: ‘...the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’³ The rule of law, on the other hand, comprises three principles. First, that no-one is to be subject to arbitrary power.⁴ Second, no man is above the law.⁵ Third, that the general principles of the constitution (essentially, individual rights to liberty and property) are the results of judicial decisions.⁶ The tensions between these three aspects of the rule of law are significant and will be explored below.

With these two concepts Dicey sets up a binary of a Hobbesian Parliament, with theoretically untrammelled powers, and strong courts enforcing rules enacted by Parliament and defending the private rights of individuals via the common law.⁷ At the very core of the Diceyan constitution are two robust sources of power, dominant in their respective spheres of operation.⁸ Policy making lay uniquely in the jurisdiction of the legislature. It was the preserve of the courts to interpret the law and apply common law principles of rights protection.

The competing principles of the Diceyan constitution leave little or no space for the operation of discretionary powers by the executive (notwithstanding that, logically, a sovereign Parliament could both confer such powers and require the courts to interpret them liberally). Part of the explanation here is that Dicey’s immediate context was the limited Victorian state in which his ideas formed, dominated by a Parliament which managed most public affairs.⁹ Dicey’s personal mistrust of discretionary power thus played a normative role in his account of the constitution.¹⁰ But there is a descriptive oversight here too. Dicey’s account also overlooked the exponential

² E.g. Sir Ivor Jennings, *The Law and the Constitution* (5th edn, University of London 1963).

³ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Classics 1982) 3-4.

⁴ *ibid* 110.

⁵ *ibid* 114.

⁶ *ibid* 115.

⁷ See LB Tremblay, ‘General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law’ (2003) 23 *Oxford Journal of Legal Studies* 525. See also M Lewans, *Administrative Law and Judicial Deference* (OUP 2016). Lewans sees Dicey as shuttling between an Austinian ‘uncommanded commander’ and Blackstonian natural law upholding individual rights. His account of this Diceyan ‘dialectic’, and its transmission through the subsequent history of public law have been influential here. What Lewans’s account misses, however, is the extent to which this is caused by administrative law’s complex relationship with policy.

⁸ M Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 338, 344.

⁹ See C Harlow and R Rawlings, *Law and Administration* (3rd edn, CUP 2009) ch 1.

¹⁰ See further DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon 1990) 200-201.

growth in size and complexity of government during the period of his life, and the concomitant necessity for the conferral on the executive of broad areas of discretionary power.¹¹

The effect of this strongly influential Diceyan jurisprudence has been a bifurcated foundation for modern UK public law which, I suggest, has never been entirely remedied. The courts should defer before a sovereign Parliament on matters of policy or substance. But there is a simultaneous need for strong judicial review on matters of law by the courts.¹² This core tension at the heart of the Diceyan model goes some way to explaining its longevity; a constructive ambiguity providing something for the taste of many a jurisprudential outlook. Yet, an internal instability comes to the fore when this deeply bifurcated model is applied to the burgeoning areas of discretionary administrative policy making. The executive, in the early twentieth century, was responsible for increasing amounts of delegated legislation, and administrative tribunals were acting judicially while bearing responsibility for questions of policy. For a judge faced with a challenge to executive action, the bipolar Diceyan model gives rise to two potentially conflicting answers. Either legal principle is to restrain executive discretion, or, given that the discretion in question was conferred by a sovereign Parliament, the judge should submissively defer.

While Dicey's account of the constitution was, as he would subsequently admit, descriptively inaccurate it nonetheless exercised (and exercises) a strong influence over public law in both theory and practice.¹³ Indeed, the strong/weak; formalistic/deferential binary inculcated by the Diceyan dialectic has been termed by Carol Harlow the 'classic model' of judicial review, dominating judicial approaches in the first half of the twentieth century.¹⁴ Dean Knight has usefully mapped three ways in which this style of review was prone to bifurcation: the concept of jurisdiction; distinctions between law, fact and discretion; and functional dichotomies.¹⁵ The three aspects of the classic model differ subtly but all posit a clear divide between law and policy which characterises Diceyan dialecticism. Jurisdictional review predates Dicey, but the model is nonetheless characteristic of, and perpetuates, his theoretical model.

It is inherently bifurcated, in requiring the court to determine the conceptual limit of an authority's jurisdiction; decisions within those limits are permissible, those outwith such limits are precluded.¹⁶ Distinctions between law, fact and discretion adopt a similar conceptual approach. At this stage of judicial review's development, if a question is one of fact or discretion, then it is

¹¹ For criticism see Sir Ivor Jennings, *The Law and the Constitution* (5th edn, University of London 1963). See also AV Dicey, 'The Development of Administrative Law in England' (1915) 31 *Law Quarterly Review* 148.

¹² S. Sedley, 'Policy and Law' in S. Sedley (ed), *Ashes and Sparks: Essays on Law and Justice* (CUP 2011) 255; and M Loughlin, *Public Law and Political Theory* (Clarendon 1992) ch 1.

¹³ See R Weill 'Dicey was not a Diceyan' [2003] *Cambridge Law Journal* 474.

¹⁴ C Harlow, 'A Special Relationship?' in I Loveland (ed), *A Special Relationship* (OUP 1995) 79, 83.

¹⁵ DR Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018) 47-56.

¹⁶ See e.g. *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 (HL).

exclusively for the decision maker. If it is a question of law, then it is for the court.¹⁷ Finally, functional dichotomies were another means displaying the Diceyan model's inherent bifurcation. In this instance the standard of review depended on the *type* of body being reviewed and the *nature* of the task it was undertaking. Again, this is predicated on the possibility that such matters can be defined in advance of their application in individual cases, while in reality it has long been recognised that the distinctions themselves are confusing and arbitrary.¹⁸ Classically, this form of conceptualism emerged in cases such as *Local Government Board v Arlidge*, wherein the House of Lords refused to apply principles of natural justice to the Board's proceedings on the basis that this would involve holding it to an inappropriate model of judicial decision making.¹⁹ All three types of case illustrate the Diceyan dialectic in its early form; faced with the dilemma of judging substance, the courts apply rigid legal standards. The effect of these standards is to draw doctrinal bright-lines which ensure substantive review diverges into rigidly conceptual standards of legal correctness and strong deference. This has the virtue of appearing neutral, but in reality it means that the law fails to engage with the exercise of administrative discretion in an effective way. While this conceptual approach would evolve as the century progressed, the taint of its central bifurcation continued to echo in administrative law doctrine.

2.3 Developing Judicial Review: How the Dialectic Evolved

2.3.1 Introduction: Lacking an Administrative Law

The bipolar Diceyan model, structurally ill-designed for purposes of administrative law, became increasingly outdated and unrealistic as the twentieth century progressed.²⁰ The state was growing both in size and in the nature and extent of its functioning. Reliance on solely Parliament and the courts no longer made constitutional sense. Parliament's role had evolved from dealing with a relatively small number of private bills, to managing an expanding administrative state.²¹ It had neither capacity nor expertise to consider every matter of public business, resorting to the delegation of both legislative powers and quasi-judicial making to officials.²² There was accordingly a shift in Weberian terms from *formal rationality*, wherein the legislature establishes fixed rules in advance which are applied consistently by administrators, to *substantive rationality*, in which the complexity of the problems facing government could only be addressed by conferring discretionary power on officials to deal with a wide variety of situations.²³ This led in turn to

¹⁷ E.g. *Liversidge v Anderson* [1942] AC 206 (HL).

¹⁸ DM Gordon, 'The Relation of Facts to Jurisdiction' (1929) 45 *Law Quarterly Review* 459. More recently, see P Craig, 'Ultra Vires and the Foundations of Judicial Review' [1998] *Cambridge Law Journal* 63.

¹⁹ [1915] AC 120 (HL).

²⁰ Dicey recognised this in time. See AV Dicey, 'The Development of Administrative Law in England' (1915) 31 *Law Quarterly Review* 148.

²¹ M Loughlin, *Foundations of Public Law* (OUP 2010) 440–445.

²² FJ Port, *Administrative Law* (Green and Co 1929) ch 4.

²³ Galligan (n 10) ch 2. See also G Ganz, 'Allocation of Decision-Making Functions' [1972] *Public Law* 215.

concerns about regulation and accountability. As the extent of state power grew, it was insufficient to rely simply on private law claims to protect individual rights.²⁴ For some commentators, alarmed at the prospects of rising administrative power, the answer was simply to roll back the state.²⁵ The Donoughmore Committee – set up to address such alarms – largely fell back on Diceyan bromides, optimistically trusting that private law, along with a little more care on Parliament’s part when it came to delegation would be sufficient.²⁶

It was clear, however, that neither stemming the tide of governmental expansion, nor simply muddling through would be realistic. A range of commentators through the middle years of the twentieth century argued for reform. For some, a new model of administrative law was needed. This new model would need to both recognise the existence of discretionary powers but regulate their use; straddling the divide between law and policy.²⁷ William Robson, in particular, directly criticised the Donoughmore Committee for failing to get to grips with the problem.²⁸ He advocated reform of the existing departmental tribunals so that they would operate with a ‘judicial mind’.²⁹ With variations of emphasis, similar ideas were prevalent across the political spectrum. Both the National Council for Civil Liberties (as it was) and the Inns of Court Conservative and Unionist Society published pamphlets advocating judicial reform.³⁰ At least one commentator even went so far as to argue that the courts should carry out correctness review of administrative decisions.³¹ There was also substantial discussion on non-judicial options for reform, such as ombudsmen.³² Until around the middle of the 20th century, however, the courts maintained a relatively passive attitude to administrative discretion. While the courts would see interpretation of statute as a matter uniquely within their purview, review beyond this was limited to protection of individual interests.³³ On questions of policy or substance, the courts were generally deferential. In that sense, the Diceyan dialect, adopting Lewans’s phrase, retained much of its original form.

²⁴ See e.g. TT Arvind and L Stirton, ‘The Curious Origins of Judicial Review’ (2017) 133 LQR 91, 93-94.

²⁵ See e.g. G Hewart, *The New Despotism* (Ernest Benn Ltd 1929); CK Allen, *Bureaucracy Triumphant* (OUP 1931).

²⁶ *Report of the Committee on Ministers’ Powers* (Cmnd 4060, 1932).

²⁷ E.g. CT Carr, *Concerning English Administrative Law* (Columbia University Press 1941); Port (n 22); W Robson, *Justice and Administrative Law: A Study of the British Constitution* (Macmillan 1928).

²⁸ See W Robson, ‘The Report of the Committee on Ministers’ Powers’ (1932) 3 Political Quarterly 346.

²⁹ Robson, *Justice and Administrative Law* (n 27) ch 5.

³⁰ J Whyatt, *The Citizen and the Administration* (Stevens 1961); Inns of Court Conservative and Unionist Society, *The Rule of Law* (Conservative Political Centre 1955).

³¹ See FH Lawson, ‘What is Wrong with Our Administrative Law’ in *Many Laws: Selected Essays Vol 1* (North Holland Publishing Co 1977) 279, 284.

³² See Whyatt (n 30).

³³ See Harlow (n 14); Harlow and Rawlings (n 9) 96–98; B Schwarz and H Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon 1972) 320; M Taggart ‘Reinventing Administrative Law’ in N Bamforth and P Leyland, *Public Law in a Multi-Layered Constitution* (Hart 2003) 311, 312-313.

2.3.2 *Judicial Review, the Textbook Tradition and the Transmission of Bifurcatory Logic*

Nowhere was this attitude more influential than in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.³⁴ The *Wednesbury* standard, as formulated by Lord Greene, is a decision ‘so unreasonable that no reasonable authority could ever have come to it.’³⁵ That is a particularly defendant-friendly standard, designed to respect pluralist decision making.³⁶ The following judicial thinking is apparent. On issues upon which reasonable persons may disagree, it is not for the courts to interfere unless a decision lies outside the boundaries of sensible disagreement.³⁷ Similarly, the courts are institutionally ill-suited to the resolution of policy questions, so adopting a high threshold prevents overbearing legal standards from ossifying executive decision making.³⁸ Yet Lord Greene’s discussion in *Wednesbury* of the standards to which public bodies would be held accountable went somewhat further than the bare reasonableness standard. As he puts it:

When an executive discretion is entrusted by Parliament to a body such as the local authority in this case [...] the law recognizes certain principles upon which that discretion must be exercised [...]. What then are those principles? They are well understood. [...] The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. [...] Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question.³⁹

While the case and the standard it requires have become synonymous with weak review, it simultaneously articulates a stronger standard based on concepts of good governance. *Wednesbury* is itself a bifurcated model.⁴⁰ It embodies the degree to which the courts at the time were

³⁴ [1948] 1 KB 223 (HL).

³⁵ *ibid* 234 (Lord Greene MR).

³⁶ See e.g. P Craig ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’ [2015] Public Law 60, 69-70.

³⁷ See e.g. Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL) 1064.

³⁸ See e.g. M Elliott, ‘The Human Rights Act 1998 and the Standard of Substantive Review’ [2001] Cambridge Law Journal 301.

³⁹ *Associated Provincial Picture Houses Ltd* (n 34) 228 (Lord Greene MR).

⁴⁰ Sir John Laws, ‘Wednesbury’ in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon 1998) 185, 186–7.

submissively deferential on questions of substance. At the same time there are background indications that administrative law could incorporate a much broader notion of rationality which prioritises *judicial* notions of administrative effectiveness.⁴¹

This bifurcated logic continues to hamper review as it develops from the mid-century onwards. Developing the old prerogative writs originally used to keep magistrates within jurisdiction, the courts developed the common law standards, articulated in Lord Greene's speech, to impose structure and rationality on administration.⁴² This has become known as the 'textbook' approach, in light of the work of compilation and analysis carried out by William Wade and Stanley de Smith, but also because of the strong influence these texts have subsequently exerted. The seminal 'quartet' of cases decided by the House of Lords in the 1960s set the tone for the gradual development seen during rest of the century. In *Anisminic Ltd v Foreign Compensation Commission*, Lord Reid made significant inroads into the distinction between errors within and outwith jurisdiction.⁴³ In *Ridge v Baldwin* the Court resurrected procedural fairness rules, clarifying that these applied to administrative as much as judicial proceedings.⁴⁴ In *Conway v Rimmer* the House of Lords asserted the powers of the courts on disclosure decisions.⁴⁵ And in *Padfield v Minister for Agriculture, Fisheries and Food* the Court held that ostensibly unlimited statutory discretion was restricted by the overarching legislative scheme.⁴⁶ The resurgence of the common law has since seen increased forms and intensity of review.⁴⁷ The range of areas and bodies that are potentially subject to judicial scrutiny has expanded. The prerogative has come under increased judicial control.⁴⁸ Clauses ousting the courts' jurisdiction have seen limited success.⁴⁹ The courts have felt able to hear claims impinging on delicate areas of policy.⁵⁰ The available heads of review have increased exponentially. Judicial review has been used, for example, to find irrational the weight afforded to relevant considerations by the decision maker,⁵¹ to impugn flaws in the decision

⁴¹ This process is not perfectly chronological. See e.g. *Board of Education v Rice* [1911] AC 179.

⁴² See EG Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press 1963).

⁴³ [1969] 2 AC 147 (HL).

⁴⁴ [1964] AC 40 (HL).

⁴⁵ [1968] AC 910 (HL).

⁴⁶ [1968] AC 997 (HL).

⁴⁷ J Jowell 'Administrative Law' in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2004) 387.

⁴⁸ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583.

⁴⁹ Although see *R (Privacy International) v Foreign and Commonwealth Secretary* [2019] UKSC 22, [2019] 2 WLR 1219.

⁵⁰ *R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Rees-Mogg* [1994] QB 552 (HC), [1994] 2 WLR 115.

⁵¹ See e.g. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL) 764 (recently confirmed by the Supreme Court in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437); *Westminster City Council v British Waterways Board* [1985] AC 676 (HL); *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2017] PTSR 1166, 1178; *R v Chief Constable of Sussex, ex p International Traders Ferry* [1999] 2 AC 418 (HL) 452; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL).

maker's logic,⁵² to quash rules as being vague for uncertainty,⁵³ to develop principles of legitimate expectation,⁵⁴ and to provide redress where a decision maker has acted on insufficient evidence.⁵⁵

Accordingly, runs the traditional account, in response to judicial passivity in the first half of the century, the courts increasingly seek to ensure 'administrative fair play', subjecting discretionary decision making to a concept of rationality.⁵⁶ Hence Lord Diplock's bold proclamation in my introduction.⁵⁷ On this account, the textbook model of review conforms to Kenneth Davis's conceptualisation of administrative law. On Davis' view the law conditions otherwise broad administrative discretion in accordance with values of consistency, formal rationality and due process.⁵⁸ It does this, in Davis approach, in two ways: demarcation and good administration.⁵⁹ Demarcation, or jurisdictional, questions follow the Diceyan approach in addressing the question of whether an administrator has power to embark on a particular endeavour at all. While all errors of law are now jurisdictional,⁶⁰ the question of demarcation is nonetheless distinct (at least at a conceptual level) in dealing with the scope of valid powers, rather than the manner of their exercise. Questions of good administration, on the other hand, go to process and errors in reasoning. This model, however, underestimates the ways in which reinvigorated common law principles can be deployed in a way which radically restricts the scope of policy decisions, in a way that the 'ordinary' *Wednesbury* standard would eschew. The standards of rationality and good governance to which courts subject administrative decision-making, acting as a vector for the accumulated values, assumptions and ideologies of the judiciary, inevitably have an impact on the substance of those decisions.⁶¹ Questions of merit and questions of good governance cannot be easily distinguished; the legal structuring of the administrative mind will necessarily direct that mind in particular directions.

⁵² See e.g. *R v Parliamentary Commissioner for Administration, ex p Balchin* [1998] EWHC Civ 152, [1998] 1 PLR 1 27; *R v Secretary of State for Trade and Industry ex p Lonrho* [1989] 1 WLR 525 (HL) 539–540; *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, [1992] ICR 816 (CA) 824; *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397 [46]; *R v Ministry of Defence, ex p Walker* [2000] 1 WLR 806 (HL) 812.

⁵³ *McEldowney v Forde* [1971] AC 632 (HL) 643; *Hall v Shoreham* [1964] 1 WLR 240 (CA) 245.

⁵⁴ *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA).

⁵⁵ *Khawaja v Secretary of State for the Home Department* [1984] AC 74 (HL) 98; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL) 1047; *Simplex GE Holdings v Secretary of State for the Environment* (1989) 57 P&CR 306 (CA); *Edwards v Bairstow* [1956] AC 14 (HL) 29; *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 [66].

⁵⁶ HWR Wade, *Constitutional Fundamentals* (Stevens 1980) 62; HWR Wade and CF Forsyth, *Administrative Law* (11th edn, OUP 2014) 10–13.

⁵⁷ *Inland Revenue Commissioners Appellants v National Federation of Self-Employed and Small Businesses Ltd. Respondents* [1982] AC 617 (HL) 628.

⁵⁸ KC Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press 1969) ch 3–5.

⁵⁹ DJ Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 OJLS 257, 261.

⁶⁰ *Anisimic Ltd v Foreign Compensation* [1969] 2 AC 147 (HL). Conclusively settled in *R v Lord President of the Privy Council, Ex p Page* [1993] AC 682 (HL).

⁶¹ N Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in K Hawkins (ed), *The Uses of Discretion* (OUP 1992) 361.

Yet, this developing intensity of scrutiny *also* retained the formal respect on policy questions which characterised the Diceyan worldview.⁶² *Wednesbury* articulates this principle, and it is carried forward even as the scope and principles of review expand. In *Busbell v Secretary of State for the Environment*, for example, Lord Diplock draws a bright line between questions of law and policy in the context of an inquiry about the route of an M40 extension.⁶³ The policy/law binary is both prevalent and resilient. The courts have remained watchful in avoiding scrutiny of ‘high policy’ questions.⁶⁴ They will tread carefully when engaging in ‘polycentric’ decision making for which they consider themselves institutionally unsuited.⁶⁵ Recent challenges to public bodies demonstrate the way in which the judiciary continue to fall back on formalistic distinctions between legality and policy to structure the intensity of review.⁶⁶ Indeed, it is often asserted by the judiciary that judicial review has no concern for the merits of decisions, dealing only with legality and due process.⁶⁷

There is thus a central conflict at the heart of this model of administrative law. This is not a bespoke set of institutions and principles working as an integrated system of policy delivery.⁶⁸ Rather, it follows the tramlines of an earlier dialectic by a potential to bifurcate, especially in hard cases, into *either* inherent deference or significant judicial intrusion on policy questions.⁶⁹ The problem, as discussed in my introduction, is the inconsistent and unprincipled approach this leads to in terms of policy itself; at times legalistically overriding executive discretion, at others leaving clear policy failures without redress. The judicially developed principles of common law review are ‘loose and open-textured’.⁷⁰ They are obviously not entirely unrestricted, given the doctrine of precedent and the attraction of fixed normative principle to the legal mindset.⁷¹ But public law principles are not inevitably determinative in themselves, especially in hard cases. They operate to some extent in a ‘penumbra’ of judicial discretion.⁷² Common law standards thus leave more or less room for policy depending on context and judicial fiat. The resultant model incorporates both strong and weak standards of review whose application depends partially on

⁶² For discussion see J King, *Judging Social Rights* (CUP 2012) 125.

⁶³ [1981] AC 75 (HL) 98 (Lord Diplock).

⁶⁴ E.g. *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 (HL).

⁶⁵ See e.g. *R v Cambridge Health Authority ex p B* [1995] 1 WLR 898 (CA). On polycentrism see LL Fuller ‘The Forms and Limits of Adjudication’ (1978-1979) 92 *Harvard Law Review* 353; J King, ‘The Justiciability of Resource Allocation’ (2007) 70 *Modern Law Review* 197.

⁶⁶ E.g. *Smith and another v Ministry of Defence* [2013] UKSC 41, [2014] AC 52 [76] (Lord Hope).

⁶⁷ E.g. *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020 [56] (Sir Terence Etherton MR, Irwin LJ, Singh JL).

⁶⁸ See e.g. L Neville Brown and JS Bell, *French Administrative Law* (5th edn, Clarendon 1998).

⁶⁹ See M Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 338, 344; P Craig, ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’ [2015] *Public Law* 60, 69-70.

⁷⁰ *ibid* 265.

⁷¹ JAG Griffith ‘Constitutional and Administrative Law’ in P Archer and A Martin (eds) *More Law Reform Now!* (Berry Rose 1983) 49; Laws (n 40); Taggart (n 33) 86.

⁷² HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) ch 7.

judicial discretion (this argument is tested in Chapter 6). Neither will necessarily and consistently lead to effective policymaking.

This tangle follows from the lack of a coherent, stable overarching guiding principle at the heart of the Diceyan dialectic.⁷³ Some commentators have attempted to anchor judicial review in the concept of *ultra vires*, seeking legitimation for common law standards within Parliamentary intent.⁷⁴ To find such legitimacy in actual intent is a fallacy. The principles of review are too multifarious for this to be realistic, and in any event there are too many cases where judicial review appears at odds with expressed Parliamentary intention.⁷⁵ A ‘modified’ version of this approach attempts to deal with this problem by acknowledging that the courts develop principles of review, but it is simply assumed that unless they are specifically excluded Parliament ‘intends’ their application.⁷⁶ This formulation, however, fails to deal with the malleability of the relevant principles. Theorists who prefer to find the source of administrative law principles in the common law itself face an equivalent problem in terms of doctrinal variability.⁷⁷ In either case, there is room for disagreement as to what doctrine requires in the circumstances of individual proceedings.

The concept of relevant considerations is illustrative.⁷⁸ The relevancy doctrine is based upon a principle of statutory purpose.⁷⁹ If a decision maker fails to take into account a matter which, in a court’s view, statute required then an error of law has been made. Yet judges can take a more or less restrictive view of statutory purpose. They may assert that a consideration was clearly and obviously relevant.⁸⁰ Or they may take a more relaxed approach, leaving questions of relevance largely to the decision maker.⁸¹ Or they can eschew statutory interpretation entirely and adopt a *Wednesbury* rationality standard, essentially dooming a claim to futility. The extent to which the question of relevance is one for the decision maker can thus be manipulated to structure the intensity of review.⁸² ‘Relevant considerations’ is, of course, governed by a system of rules to assist a judge as to the correct intensity of application.⁸³ But it is nonetheless crucial to

⁷³ A Perry, ‘Plan B: A Theory of Judicial Review’

<file:///C:/Users/timot/Documents/Tim%20PhD/Drafts/Responsive%20law/perry-plan-b-11-22a.pdf> accessed 10th May 2018. See also Galligan (n 59) 271–272.

⁷⁴ See the essays in CF Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000).

⁷⁵ See *Anisminic Ltd v Foreign Compensation* 60.

⁷⁶ E.g. M Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001).

⁷⁷ E.g. P Craig, ‘Theory, “Pure Theory” and Values in Public Law’ [2005] Public Law 440.

⁷⁸ For the core principle see *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 (HC).

⁷⁹ See *Padfield* (n 46) 1030 (Lord Reid).

⁸⁰ E.g. *R (HSE) v Wolverhampton City Council* [2012] UKSC 34, [2012] 4 All ER 429.

⁸¹ E.g. *Re Findlay* [1985] AC 318 (HL).

⁸² Compare *R v Gloucestershire County Council, Ex parte Barry* [1997] AC 584 (HL) and *R v East Sussex County Council, Ex parte Tandy* [1998] AC 714 (HC).

⁸³ For an overview see M Elliott and JNE Varuhas, *Administrative Law: Text and Materials* (5th edn, OUP 2017) 236–260.

acknowledge that this context sensitive manipulability imports a role for judicial attitude in the application of doctrine. *Padfield*, mentioned above, is a case in point. The Agricultural Marketing Act 1958 provided for the Milk Marketing Board to investigate the levels of subsidy given to regional milk producers to reflect transport costs, ‘if the Minister so directs’ in light of a complaint. Lord Reid, for the majority, determined that the ‘policy and objects’ of the Act were for the Court to determine, and that the Minister had to exercise his powers in line with the policy so identified.⁸⁴ Lord Morris dissented, determining that the clear wording of the statute left the matter for the Minister’s determination.⁸⁵

It may be objected that the unifying principles here are the separate (though related) principles of good governance and individual justice. On this view, while the principles of review may be malleable, principles of effective governance and individual justice on a case by case basis operate as organising and legitimating principles. The objection is flawed. These overarching concepts are themselves contestable. The nature and requirements of justice itself are subject to significant disagreement.⁸⁶ Principles of ‘good’ governance are, to an extent, in the eye of the beholder. This shifts the core question over the extent of judicial control of policy, in conceptual terms, up a level. While doctrine can be used to ensure sound administration, or uphold principles of justice, the model of review that picked up pace from the 1960s onwards has a dialectical relationship with merits questions. On the basis of judicial discretion, either principles of governance or justice trump policy aims, or the courts defer on matters of policy.

While modern principles of review are undoubtedly more sensitive than the earlier jurisdictional approach, there is thus a replication of the bifurcated logic that has permeated the development of administrative law in the UK. On one hand, the evolution of common law judicial review represents bifurcation on a macro-constitutional plane, in that the courts asserted themselves as guardians of principle, upholding Parliamentary intention and imposing good governance values on an otherwise unfettered administrative state. Yet, at the same time, by failing to develop a mode of review that grappled head on with policy questions, this approach *itself* bifurcated into strong and weak review. It is not my argument that the courts have invariably performed ineffectively in terms of state regulation. However, this approach runs risk on two fronts. Overly strong review risks the undue imposition of legalistic values on the administrative state. But undue deference risks failing to correct clear policy flaws.

There is a deep irony here, touched on in my discussion of Dicey above. Louis Jaffé noted, in his critique of the passivity of English judges, that the difference between them and their American

⁸⁴ *Padfield* (n 46) 1032-1033 (Lord Reid).

⁸⁵ *ibid* 1038 (Lord Morris).

⁸⁶ See e.g. M Sandel, *Justice: What's the Right Thing to Do?* (Penguin 2010).

counterparts was that the US constitution envisaged a greater role for the judges in the operation of the state.⁸⁷ In one sense, he was right. Yet, in developing a mode of judicial engagement predicated in a Diceyan eschewal of policy concerns, the UK's approach to public law *also* involves significant judicial involvement with questions of substance in a strongly deterministic manner. The core problem was that it embedded *both* deference and activism in administrative law principle, without a clear concept of how these should be deployed to *effectively* police discretionary decision making.

2.4 The Functionalist Tradition and Administrative Discretion

2.4.1 Introduction

While the Diceyan 'textbook' model of public law has sought to restrain discretionary government, the subordinate 'functionalist' tradition focuses on restricting judicial discretion. The functionalist views government not as a threat to individual liberty, but as a means of enhancing aggregate liberties via the maximisation of collective interests.⁸⁸ On this view, the role of law is less focused on regulating state policy and protecting individual interests, but on playing a constructive role in the delivery of administrative aims. The functionalist model conceives the judicial relationship with ideas of policy or discretion in a very different way from the textbook tradition.

Primarily the aim is to avoid judicial interference with administrative expertise, relying on alternative forms of control. To the extent that functionalism and the textbook approach represent the 20th century's dominant theoretical archetypes of public law, their respective attitudes to questions of policy can be roughly characterised as models of control and deference. The two schools themselves thus represent bifurcation at a theoretical level. While the textbook tradition accepted that policy was a matter for the administration, its model of engagement is interventionist. Functionalism, on the other hand, seeks a more deferential approach to policy questions. However, while the functionalists sought to make greater space in the constitution for administrative policy making, they were unable to avoid judicial control entirely. In grappling with this problem, they *also* fall into the Diceyan dialectic which I have argued inhibits the textbook approach.

2.4.2 The Functionalist Critique of Diceyan Jurisprudence

A primary aim of the functionalist tradition, which emerged in the interwar period, was to critique the way in which jurisprudential conceptualism was hindering public administration.⁸⁹ Its

⁸⁷ L Jaffé, *English and American Judges as Lawmakers* (Clarendon 1969) 83.

⁸⁸ For an overview see M Loughlin, *Public Law and Political Theory* (Clarendon 1992) ch 6–7; 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361.

⁸⁹ F Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.

central thesis was that abstract constitutional concepts, such as the rule of law and separation of powers, failed to accommodate a purposive view of government action. While for a Diceyan the rule of law was a vital means by which the judiciary would constrain the administrative state within parameters fixed by Parliament, for the functionalists this conceptual approach was both descriptively inaccurate and normatively regressive.⁹⁰ Discretionary power had become a constitutional fact in light of social change, and government was treated differently in the courts than were individual litigants.⁹¹ From a normative perspective, the functionalists saw the rule of law as a façade for conservative attempts to undermine necessary social reform.⁹² The concept of the separation of powers came under similar fire from the functionalist perspective. The conceptual rigidity of the separation model failed to grapple with practical questions of matching institutions to tasks.⁹³ Worse still, ideas predicated in separation of powers conceptualism, such as jurisdiction, could be manipulated in order to prevent administrators doing their job.⁹⁴

In both cases, the central contention was that constitutional conceptualism inhibited the development and delivery of policy. In particular, it placed undue power into the hands of the judiciary. This, the functionalists argued, had demonstrable practical impacts. Canadian John Willis' classic essay on statutory interpretation, a paradigm example, deconstructs neutral principles of linguistic determinism. He argues that statutory interpretation could be manipulated to determine the extent of administrative choice. Again, the practical consequence of this was that the judiciary was inhibiting social reform.⁹⁵ Functionalists in the UK raised similar points. Harold Laski, an influential member of the functionalist school, even sat on the Donoughmore Committee. While the Committee's approach was resolutely Diceyan, Laski added an appendix to its final report, arguing that restrictive methods of interpretation were inhibiting the objectives of social legislation.⁹⁶ Nor was statutory interpretation functionalism's only target in terms of practical critique. As noted above, the concept of jurisdiction could be contracted or expanded in order to suit a judicial view as to the appropriate limits of administrative discretion.

The relevance and influence of the American realist jurisprudence is felt here. In the late nineteenth-century a brand of strong legal formalism had emerged in the US, which conceived of law as akin to a natural science. The idea was that the proper role of the judge was to apply formal logic, based on existing cases, to derive the correct legal answer to new circumstances.

⁹⁰ I Jennings *The Law and the Constitution* (5th edn, University of London 1963) ch 2.

⁹¹ W Robson, 'The Report of the Committee on Ministers' Powers' (n 28).

⁹² H Laski, 'Judicial Review of Social Policy in England: A Study of *Roberts v Hopwood*' (1925–26) 39 *Harvard Law Review* 832; *Democracy in Crisis* (George Allen and Unwin 1933) 128–9.

⁹³ E.g. JDB Mitchell, *Constitutional Law* (W Green and Son Ltd 1964) 31–37.

⁹⁴ J Willis, 'Canadian Administrative Law in Retrospect' (1974) 24 *University of Toronto Law Journal* 225.

⁹⁵ J Willis, 'Statute Interpretation in a Nutshell' (1938) 16 *Canadian Bar Review* 1.

⁹⁶ *Report of the Committee on Ministers' Powers* (n 26) 135.

The obvious attractions of this approach were its neutral and predictability. The legal realists took the formalist school to task for a range of purported failings. Jurisprudentially, the realists argued that the formalist school was naïve as to the malleability of judicial concepts, overlooking the discretion available to a judge when interpreting and applying precedent. And politically, the realist movement was committed to an emergent administrative state. This would require a blurring of the dividing lines between law and politics, to prevent legalism undermining administrative policy.⁹⁷ The UK functionalists were taking lines based on these cues. Their view was that legal conceptualism disguised judicial discretion which was deployed, at best, inconsistently. At its worst, this phenomenon was a conservative ploy to undermine socialistic policy.⁹⁸ Either way, the core problem was a failure to develop a mode of legal reasoning which recognised the role of the administration in policy development.

2.4.3 *The Functionalist Mode of Public Law*

The functionalist critique of post-Diceyan jurisprudence sought to remedy the problems of a legal model which eschewed substantive policy making, while simultaneously deploying doctrinal concepts which could significantly restrict the scope of administrative discretion. Conceptualism, while purporting to neutrality, cuts across policy. Judicial discretion undermines and at worst replaces administrative discretion. The functionalists thus sought to illuminate the ways in which legal logic can impose upon the administrator the values of the lawyers.⁹⁹ As the realists had pointed out, policy and law do not exist in isolation. Rather, the deployment of legal concepts structures administrative policymaking. The greater the imposition of judicial rules and processes on discretionary decision making, the more judicial values will dominate public administration.¹⁰⁰ What then the role for the lawyer in the functionalist vision? In drawing attention to the interrelationship of law and policy, the functionalists brought to the fore central questions about the identity and attributes of the persons tasked with determining public interest outcomes. Their philosophy thus had an institutional bent which structured their proposed realignment of law's aims.

The functionalist conception of the role of law in the constitution was an inverted version of the Diceyan model. Various approaches were proposed rather than one coherent model. Courts themselves were encouraged to pay greater attention to the relative institutional competence of each constitutional actor.¹⁰¹ Practically, this would involve greater attention on the impacts of

⁹⁷ See W Twining, *Karl Llewellyn and the Realist Movement* (2nd edn, CUP 2012).

⁹⁸ See JAG Griffith, *The Politics of the Judiciary* (5th edn, Fontana 1997).

⁹⁹ For discussion see A Hutchinson, 'Mice Under a Chair: Democracy, Courts, and the Administrative State' (1990)

40 *University of Toronto Law Journal* 374.

¹⁰⁰ See G Ganz, 'Allocation of Decision-Making Functions' [1972] *Public Law* 215.

¹⁰¹ See e.g. JAG Griffith, 'Judicial Decision-Making in Public Law' [1985] *Public Law* 564, 565.

doctrine on administrators. Ivor Jennings, for example, argued not that all judicial intervention was malign, but that it needed to recognise an appropriate role allocation between judges and administrators. In Jennings' view there was a need for public law to develop an *administrative* law, sensitive to the needs of administrative actors. Thus '[t]he problem to be discussed is the division of powers between administrators and judge and, given that judges must exercise some functions, the *kind* of courts and judicial procedure necessary to make the exercise of the functions more efficient.'¹⁰² Some commentators went further, arguing for a bespoke jurisdiction which would straddle the divide between the judiciary and the administration. JDB Mitchell, for example, argued that the history of judicial review had artificially severed a single form of decision making, thereby preventing the courts from developing and applying a concept of 'administrative morality'.¹⁰³ He argued for a specifically administrative jurisdiction capable of handling policy questions.¹⁰⁴ William Robson, as noted above, proposed a system of specialist tribunals to enhance the effectiveness of administrative law.¹⁰⁵

The wider implications of a functionalist jurisprudence would involve not simply greater judicial self-awareness or jurisdictional redesign, but greater reliance on non-judicial means of redress. This 'green light' approach to regulation focused not on strict supervision by the courts but on the delivery of policy within a framework of democratic accountability.¹⁰⁶ Functionalism thus sought to rely more heavily on political forms of accountability. This was not to encourage executive tyranny but, suspicious of judicial antipathy to socially progressive policy, to focus on democratic accountability. For John Griffith, for example, the accountability question was to be dealt with via increasing public knowledge and participation in political processes. The answer was to focus on enhanced governmental transparency and freedom of the press.¹⁰⁷ Similarly, Parliament should play a greater role in policy scrutiny via increased use of the committee system and changes to public bill procedures.¹⁰⁸ Reliance on such controls could make for a highly deferential judiciary. In that sense functionalism constituted the deferential mode in standard with the textbook tradition. Yet, as I shall explain, functionalism (like the textbook tradition) was prone to its own internal bifurcation.

¹⁰² WI Jennings, 'Courts and Administrative Law – the Experience of English housing legislation' (1936) 49 *Harvard Law Review* 426, 430 (my emphasis). See also Jennings (n 90) 245-246; and J Willis, 'Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional' (1935) 1 *University of Toronto Law Journal* 53.

¹⁰³ JDB Mitchell, 'The Causes and Effects of the Absence of a System of Public Law in the United Kingdom' [1965] *Public Law* 95, 113.

¹⁰⁴ Mitchell, *Constitutional Law* (n 93) 270–271. See also JDB Mitchell 'The Flexible Constitution' [1960] *Public Law* 332, 349–350.

¹⁰⁵ Robson, *Justice and Administrative Law* (n 27) ch 5.

¹⁰⁶ On 'red light' and 'green light' models see Harlow and Rawlings (n 33) ch 1.

¹⁰⁷ JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 16.

¹⁰⁸ JAG Griffith, 'Constitutional and Administrative Law' (n 71) 49.

2.4.4 *The Need for Judicial Control of Discretion: Bifurcation Redux*

The functionalist attitude was one which encouraged a judicial self-denying ordinance. Policy questions were more appropriately dealt with by the political constitution. In that sense, functionalism represents the deferential limb of twentieth century public law jurisprudence in counter-opposition to the judicial-centric textbook model. This, accordingly, completes a picture of bifurcation at a constitutional macro-level (i.e. the textbook tradition and the functionalist model broadly represent, respectively, judicial and political approaches to administrative regulation). However, the logic of bifurcation is recursive. Like the textbook tradition, the functionalist paradigm *itself* bifurcates. The difficulties with the functionalist vision are self-evident. The question facing administrative law at the beginning of the twentieth century was the burgeoning state and the outmoded nature of accountability mechanisms. Given the practical limitations on political accountability, the realistic options were either unbridled executive discretion or the development of an administrative jurisdiction. Within functionalist work which proposed such a jurisdiction, the tendency is for the very judicial-centric logic which the functionalist school sought to critique to creep back in. The functionalists were aware that individuals needed protection from the state.¹⁰⁹ Robson argued that departmental tribunals would be an appropriate venue to seek legal redress, provided that administrators could apply a ‘judicial mind’.¹¹⁰ Mitchell developed a concept of ‘administrative morality’.¹¹¹ Willis tacked a similar line.¹¹² By the middle of the 20th century even Laski, while still suspicious of judicial bias, was arguing for greater controls on administrative power.¹¹³

This is not to suggest that individuals do not need protection from the state. But it is conflicted in advocating judicial caution *and* judicial intrusion. While the functionalists had made the important insight that policy and law could not be easily distinguished in the public sphere, they failed to develop a judicial model which does not rely on precisely that distinction. Again, policy proves the sticking point for public law. While a functionalist jurisprudence sought to create greater space for administrative discretion, in the end it lapses into familiar logic of bifurcation.

2.4.5 *Functionalism: Conclusion*

The functionalists were a product of their time, when the administrative state was developing. Yet several of their insights remain relevant. My thesis is that by failing to develop a coherent method of dealing with substantive policy questions public law in the UK has a tendency to ‘bifurcate’ between strong and weak forms of review. The functionalist contribution was to

¹⁰⁹ See W Robson, ‘Administrative Justice and Injustice: Commentary on the Franks Report’ [1958] Public Law 12.

¹¹⁰ Robson, *Justice and Administrative Law* (n 27) ch 5.

¹¹¹ Mitchell, *Constitutional Law* (n 93) ch 17.

¹¹² Willis, ‘Three Approaches to Administrative Law’ (n 102) 80.

¹¹³ See H Laski, *A Grammar of Politics* (5th edn, George Allen and Unwin Ltd 1948) 390.

recognise, following the realists, that distinctions between law and policy are inherently artificial. Public law concepts and doctrines do not subsist independently of their objects. They involve discretion and can intrude to a greater or lesser degree on administrative decision-making. In so doing, they can act as a vector for lawyers' values. Whether that occurs as a side-effect of a conceptualist approach or as part of a more insidious political agenda is beside the point. The core insight is to refocus the questions toward institutional function and relative competence. Seeing policy and law as operating on a continuum, the functionalists tried to move away from legal conceptualism, reconceptualising judicial review such that it operates in a facilitative rather than solely regulatory manner.¹¹⁴ Yet, in the end, the functionalist critique collapsed into a bifurcated structure. On one hand, the functionalist response could recommend straightforward judicial deference, as against the textbook tradition's more interventionist leanings. On the other, by reintegrating a role for judicialisation the school ended up itself with a vision that itself appeared inherently bifurcated.

2.5 Taking Policy Seriously: The Rights Revolution, Proportionality and Bifurcation

2.5.1 Introduction

The textbook approach to administrative review has been the dominant approach in post-war jurisprudence. The functionalist approach has been largely subordinate.¹¹⁵ The other major development has been the gradual mainstreaming of rights discourse within UK constitutionalism. Fundamental rights protections have long played a constitutional role. But this has largely been in a negative rather than positive sense; individuals were protected from state interference unless it could point to legal authority.¹¹⁶ Since the UK's ratification in 1951 of the European Convention on Human Rights (ECHR), a more positive rights culture has developed.¹¹⁷ Successive governments had refused to incorporate the ECHR into domestic law, and the courts confirmed the UK's constitutional dualism in expressly ruling out judicial incorporation.¹¹⁸ Nonetheless, as an unincorporated instrument the ECHR provided a source of inspiration in terms of developing existing principles or clarifying ambiguity.¹¹⁹ This state of affairs proved unsatisfactory, and the calls of judges, civil society and other commentators, along with the election of a Labour government in 1997 which had committed to incorporation,

¹¹⁴ See P McAuslan, 'Administrative Law, Collective Consumption and Judicial Policy' (1983) 46 *Modern Law Review* 1, 7.

¹¹⁵ On which see Loughlin (n 88) ch 7.

¹¹⁶ E.g. *Entick v Carrington* (1765) 19 St Tr 1029 (Court of Common Pleas); A Tomkins and P Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart 2015).

¹¹⁷ On the development of the Convention see F Klug, *A Magna Carta for all Humanity* (Routledge 2015).

¹¹⁸ See *R v Home Secretary, ex p Brind* [1991] 1 AC 696 (HL).

¹¹⁹ E.g. *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 (HL). For useful commentary see M Hunt, *Using Human Rights Law in English Courts* (Hart 1997); and T Poole, 'Legitimacy, Rights and Judicial Review' (2005) 25 *Oxford Journal of Legal Studies* 697.

eventually resulted in the passing Human Rights Act 1998 ('HRA').¹²⁰ This allowed individuals to seek a remedy for alleged breaches of those rights listed in the 1998 Act in the UK courts. In what follows, I argue judicial discretion in such challenges has, again, been exercised in a manner resonating with the bifurcatory logic of the administrative constitution.

2.5.2 *A Dworkinian Diversion*

Before considering the development of rights protections under the HRA, a consideration of Ronald Dworkin's influential distinction between rights and policy will be used to frame the analysis. Dworkin sought, via his 'right answer' thesis, to reconcile the counter-majoritarian dilemma to which judicially enforced rights protections give rise.¹²¹ The core of the 'dilemma' is that policies agreed by democratically accountable actors of the political constitution may be overridden by judicial interpretation of individual rights norms. The 'policy' of the largely unaccountable judges can thus take precedence over that of the people's representatives. Dworkin's solution was that every question coming before a court will have a right *legal* answer, without any need to turn to matters of policy or expedience.¹²² In 'hard cases' where a clear rule is not readily found in legal materials, the answer will be discovered in the underlying 'principles' of the legal system.¹²³ Judicial use of policy, for Dworkin, is undesirable for both constitutional reasons and reasons of legal predictability.¹²⁴

The attraction of Dworkin's work, in terms of defending judicially imposed rights protections, lies in his characterisation of the courts as forums of principle. Yet the formalist divide between law and policy posited here has come under sustained criticism.¹²⁵ Much of the substance of rights is itself inherently contestable.¹²⁶ And even were that not the case, the process of balancing rights against policies is discretionary and value driven. Understanding that this Dworkinian distinction elides the discretionary nature of rights jurisprudence illuminates the jurisprudential trends that emerged under the HRA.

2.5.3 *Proportionality in the UK*

Much of the jurisprudence and debate arising from HRA cases arises out of the application of the principle of proportionality.¹²⁷ Many of the rights protected in the HRA are qualified. Where a

¹²⁰ See e.g. F Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (Penguin 2000).

¹²¹ See AM Bickel, *The Least Dangerous Branch* (2nd edn, Yale University Press 1986).

¹²² *ibid* 22.

¹²³ R Dworkin, *Taking Rights Seriously* (Duckworth 1977) 22.

¹²⁴ *ibid* 85.

¹²⁵ See K Greenawalt, 'Discretion and Judicial Discretion: The Elusive Quest for the Fetters that Bind Judges' (1975) 75 *Cambridge Law Review* 359; K Greenawalt, 'Dworkin's Rights Thesis' (1976) 74 *Michigan Law Review* 1167; K Greenawalt, 'Policy, Rights, and Judicial Decision' (1977) 11 *Georgia Law Review* 991; J King (n 62) 126; N McCormick, *Legal Reasoning and Legal Theory* (Clarendon 1978), ch 9.

¹²⁶ On which see Griffith, 'The Political Constitution' (n 107).

¹²⁷ See Chapter 4.

claimant argues that a public body has acted in a manner infringing a protected right, the reviewing court will have to balance the protected right against the aim pursued by that body or legislation. In the UK, this follows a structured four-stage process of determining: (i) the aim of a policy; (ii) the existence of a rational connection between the measure selected to pursue that aim and the aim itself; (iii) whether the specific negative impacts of a measure are necessary or whether the same aim could be achieved in a less impactful manner; and (iv) an assessment of whether the overall balance of outcome and impact is proportionate.¹²⁸ Proportionality itself is considered comprehensively in the Chapters 4 and 5. For present purposes, there are two key points. First, while the proportionality approach has been conceptualised, advocated and defended in a range of different ways, its common attraction is the structured, analytical manner in which it assesses the relationship between aims and impacts.¹²⁹ Second, while proportionality review is designed to dig deeper in into the substance and justification of a policy decision, it nonetheless replicates the bifurcatory inclinations I argue hinder the effectiveness of public law's conceptualisation of, and interaction with, questions of substantive policy.

Proportionality review is likely to involve greater consideration of the merits of policy decisions.¹³⁰ A comparison of the well-known (pre-HRA) decisions of, respectively, the Court of Appeal and the European Court of Justice on the UK's ban on gays in the military, elucidates the difference. The Court of Appeal had dismissed the claim on the basis that, however problematic, the ban was not unreasonable given the reasons of operational effectiveness cited by the Ministry of Defence.¹³¹ When the claimants took the case to Strasbourg, however, the decision was found to be incompatible with Article 8 ECHR following a more clinical investigation in terms of its ends, means and impacts.¹³² Similarly, the House of Lords' comments on the nature of proportionality review in *R (on the application of Daly) v Secretary of State for the Home Department* forecast the heightened intensity of substantive review under the 1998 Act.¹³³ While accepting that cases involving proportionality review will not necessarily be decided differently under the common law, Lord Steyn explains that the 'intensity of the review is somewhat greater' in the context of the ECHR.¹³⁴ In particular, proportionality review differs from traditional review in that the courts: (i) may need to assess the grounds on which a decision was made; (ii) may have to

¹²⁸ See *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [45] (Lord Wilson); *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [20] (Lord Sumption) [74] (Lord Reed).

¹²⁹ See e.g.: R Alexy, *A Theory of Constitutional Rights* (OUP 2010); A Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012); D Beatty, *The Ultimate Rule of Law* (OUP 2005); P Craig, *Administrative Law* (6th edn, Sweet and Maxwell 2008) 637; and E Mureinik, 'A Bridge to Where - Introducing the Interim Bill of Rights' (1994) 10 South African Journal on Human Rights 31.

¹³⁰ *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 [54] (Lord Mance).

¹³¹ *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (CA).

¹³² *Smith and Grady v UK* (2000) 29 EHRR 493 [129]-[139].

¹³³ [2001] UKHL 26, [2001] 2 AC 532.

¹³⁴ *ibid* 27 (Lord Steyn).

assess the ‘relative weight accorded to interests and considerations’; and (iii) will have to make a decision as to whether a policy or decision pursues a legitimate aim, and establish that the impacts of that policy are proportionate relative to its purpose.¹³⁵

This predicted evolution of judicial power bore substantive fruit. In *Huang v Secretary of State for the Home Department*, the House of Lords considered challenges to deportation decisions of two failed asylum seekers on the basis of compliance with Article 8 of the ECHR.¹³⁶ The decisions were originally challenged in the Immigration Appeals Tribunal (IAT), which had jurisdiction to determine whether they would breach Article 8.¹³⁷ The IAT had considered the question on the basis of whether the decisions fell within the range of acceptable proportionate outcomes. The House of Lords rejected this approach. The IAT should have applied a correctness standard on the Article 8 point.¹³⁸ Further, the House was unimpressed by the Secretary of State’s submission that the court should recognise a freestanding doctrine of ‘deference’ on sensitive questions of immigration policy. The IAT’s role was to decide whether Home Office officials had come the correct answer to the question before them, taking into account and giving weight to their opinions in the normal judicial manner.¹³⁹ *Huang* thus represents a strongly legalistic model of correctness review; the courts weighing competing rights and interests and determine the appropriate balance between the two.¹⁴⁰

Yet, armed with the means of conducting precision scrutiny of substantive decision making, the courts have developed and applied a concept of ‘deference’ to manage the heightened intensity of the proportionality model.¹⁴¹ While proportionality review applies a correctness standard, this is tempered by judicial deference which reinstates distinctions between law and policy. The idea stems in the ‘margin of appreciation’ applied by the European Court of Human Rights in socio-economic cases.¹⁴² The domestic courts have consistently affirmed that the margin of appreciation is uniquely relevant to a supranational court, which inevitably has a suboptimal understanding of the social and political needs, norms and practices of individual member states.¹⁴³ Yet something of the concept’s submissive deference has nonetheless been incorporated into domestic deference doctrines. In so doing, it repeats and develops the historic patterns of constitutional bifurcation in the UK outlined in this chapter. This is not to say that bifurcation in early twentieth and early twenty-first centuries is identical. Demonstrably, modern principles of

¹³⁵ *ibid.*

¹³⁶ [2007] UKHL 11, [2007] 2 AC 167.

¹³⁷ Human Rights Act 1998, s 6.

¹³⁸ *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [11]-[12] (Lord Bingham).

¹³⁹ *ibid* [14]-[16] (Lord Bingham).

¹⁴⁰ See also e.g. *R (Nasser) v Secretary of State for the Home Department* [2009] UKHL 23, [2010] 1 AC 1.

¹⁴¹ See A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 165-268.

¹⁴² *Handyside v UK* (Application No 5493/72).

¹⁴³ E.g. *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

administrative law hold the executive accountable in a way unthinkable in pre-war jurisprudence. But this very improvement can itself occlude a central, recurring dynamic in terms of judicial consideration of substance.

There is a burgeoning literature on the idea of deference. While commentators differ on its theoretical basis and proper mode of application, the central principle is that a reviewing court ought take account of any factors exhorting them to respect a public body's decision.¹⁴⁴ The kinds of factors relevant here fall into three broad categories: epistemic (i.e. the decision maker holds specific relevant knowledge which the court does not); institutional (i.e. the decision maker possesses particular expertise or some other functional qualification); or constitutional (i.e. for normative constitutional reasons, such as the separation of powers).¹⁴⁵ The question of *how* these factors are deployed is subject to debate. Some argue deference is built into legal principle, and thus forms an integral part of a court's decision on a proportionality point.¹⁴⁶ For others, favouring a more institutionally sensitive account, the relevant indicia of deference need to be identified and articulated.¹⁴⁷ A particularly influential version of the latter variety has been that of 'due deference', coined by Murray Hunt as a potential reconciliation of legalistic models of public law with those which rely more on political accountability.¹⁴⁸ Decrying spatial models which strictly demarcate the operation of the courts and the administration, Hunt prefers an approach in which constitutional actors earn deference from the court by setting out a clear justification for their actions.¹⁴⁹ Taking account of a range of indicia of deference, such as: (i) the democratic accountability of a decision; (ii) the nature of the right in question; (iii) expertise; and (iv) relative institutional competence, the court determines whether the justification put forward is sufficiently strong to warrant interference with a right.¹⁵⁰ The problem here, as Trevor Allan has

¹⁴⁴ E.g. D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed), *The Province of Administrative Law* (Hart 1998) 279; R Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 *Modern Law Review* 859; M Hunt 'Sovereignty's Blight: Why Contemporary Law Needs the Concept of "Due Deference"' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 338; J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity' [2003] *Public Law* 592 67; Lord Steyn, 'Deference: A Tangled Story' [2005] *Public Law* 346; TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' [2006] *Cambridge Law Journal* 671; R Clayton, 'Principles for Judicial Deference' [2006] *Judicial Review* 109; J Rivers, 'Proportionality and Variable Intensity of Review' [2006] *Cambridge Law Journal* 174; J King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409; A Young, 'In Defence of Due Deference' (2009) 72 *Modern Law Review* 554; T Hickman, *Public Law after the Human Rights Act* (Hart 2010) ch 5; A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222; A Brady, *Proportionality and Deference under the Human Rights Act 1998: An Institutionally Sensitive Approach* (CUP 2012); P Daly, *A Theory of Deference in Administrative Law* (CUP 2012); A Young, 'Will You, Won't You, Will You Join the Deference Dance' (2014) 34 *Oxford Journal of Legal Studies* 1; and H Wilberg, 'Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide' in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015) 267.

¹⁴⁵ See P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 249.

¹⁴⁶ See e.g. Allan (n 144); Hickman (n 144).

¹⁴⁷ See e.g. Kavanagh (n 144); King (n 144).

¹⁴⁸ Hunt (n 144) 339.

¹⁴⁹ *ibid* 338–340

¹⁵⁰ *ibid* 351–354.

shown, is that such institutional accounts easily slip back into submissive deference by affording *prima facie* deference via the range of factors that courts are required to take into account ('non-justiciability dressed in pastel colours').¹⁵¹ That is, the idea of 'due deference' involves engaging with a series of institutional questions that alienate the judge's attention from the immediate question of whether rights have been violated. In that sense, the concept thus resonates with earlier doctrine which sought to isolate and immunise 'policy' questions from review.

It would be wrong to assume that deference is always submissive. Deference is a multi-factored doctrine which can help a judge calibrate the appropriate intensity of review in individual cases. However, it cannot provide conclusive direction prior to its deployment. Conceptually, the judge has to apply a *discretionary* correctness standard, tempered by a *discretionary* doctrine of deference. At a conceptual level a bifurcatory pattern again emerges in the face of substantive policy. As I have shown, the judiciary have been willing to undertake a legalistic form of proportionality review, applying a strong correctness standard. At the same time, the idea of deference outlined here has played a role in the development of a more submissive model of judging. In *R v DPP ex parte Kebilene*, for instance, Lord Hope took a straightforwardly spatial approach to deference; clearly demarcating judicial and governmental spheres of activity.¹⁵² But even the more institutionally sensitive versions of 'due' deference can fall into a passive attitude to administrative decision making. At times, while conducting a proportionality exercise, the courts have come close to articulating something like a 'political questions' doctrine.¹⁵³ They have shown a frequent willingness to defer to expertise.¹⁵⁴ For example, in *R (SB) v Governors of Denbigh High School* the House of Lords gave significant weight to a school's process of designing its uniform policy, notwithstanding that the school had not specifically considered impacts on individual rights.¹⁵⁵ They have also deferred for epistemic reasons, where the court considers that an administrator has knowledge of or access to particular information pertinent to the decision under review.¹⁵⁶ Deference is also given for constitutional reasons.¹⁵⁷ For example, in *R (Carlile) v Secretary of State for the Home Department* a majority in the Supreme Court showed a willingness to cede control to the political constitution over the question of whether an Iranian dissident should be given entry clearance in order to address Parliament.¹⁵⁸ The bifurcatory potential of the correctness/deference standard is seen in Lord Kerr's dissent in this case. While the majority take

¹⁵¹ Allan (n 144) 689.

¹⁵² *R v DPP ex parte Kebilene* [2000] 2 AC 326 (HL) 380 (Lord Hope).

¹⁵³ See e.g. *Miranda v Secretary of State for the Home Department* [2014] EWHC 255 [40] (Lord Justice Laws).

¹⁵⁴ See *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [118]-[119] (Baroness Hale).

¹⁵⁵ [2006] UKHL 15, [2007] 1 AC 100 [29]-[31] (Lord Bingham).

¹⁵⁶ E.g. *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [29] (Lord Bingham).

¹⁵⁷ See *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868; *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] PTSR 322.

¹⁵⁸ [2014] UKSC 60, [2015] AC 945 [28]-[29] (Lord Sumption) [104]-[105] (Baroness Hale).

an institutionally deferential approach, Lord Kerr issues a strong dissent arguing that while the executive's views were relevant, the decision on a rights point was fundamentally one for the court to decide for itself.¹⁵⁹ In his view, the government had got the balance wrong.

These cases illustrate instability at the heart of rights jurisprudence in the UK. In the 1970s, Dworkin had argued that the courts, forums of principle, would never need to fall back on questions of expedience. Policy could be set aside, and cases decided on pure points of law and principle. Yet this is unrealistic. Outwith a hardcore of rights relating to life, liberty, torture or servitude, the substance of rights, and their balancing with broader questions of public interest, are deeply contested questions of public values and policy aims.¹⁶⁰ The fundamental problem of the Dworkinian model is that by fixating on principle, it either prioritises legal values over the policy it seeks to eschew, or falls into an uneasy deference. While recent rights jurisprudence bifurcates in precisely this manner, this is not solely a rights-based phenomenon. Rather, this falls into a common pattern of bifurcation.

2.6 Conclusion: The Bifurcational Hypothesis

The logic of bifurcation has troubled administrative law in its modern history from the late nineteenth century. Dicey's analysis of the constitution laid down a dialectic between weak review on questions on policy, and strong review on questions of statutory interpretation and property rights, which has influenced and distorted administrative law since. For the early part of the twentieth century, judicial conceptualism largely resembled the Diceyan model. Yet, recognising the growth of the administrative state and the centrality of discretionary government, the courts developed a stronger, 'textbook', model of review. In doing so, however, they established a reformulated model of bifurcation. They remained deferential on questions of policy, yet the doctrines developed since the 1960s to impose stronger standards of due process and good governance operated precisely to limit the scope of administrative policy making. Review, especially in hard cases, thus bifurcated into weak rationality and strong judicial standards of governance. While the reformed judicial review badged itself predominantly process, rather than merits, focused, its effect was nonetheless to restrict the scope of administrative discretion according to judicial conceptions of justice. Review could become either relatively strong or relatively weak, depending on the extent to which judicial doctrine and discretion defined a decision as substantive. The functionalist school, opposed to the imposition of judicial logic and values onto administrative policymaking, sought a more institutionally sensitive model of review. On one hand, the debate itself bifurcated at a macro-level along the lines of the stronger, Diceyan review of the textbook tradition and the more administrative friendly functionalist model. Yet the

¹⁵⁹ *ibid* [152] (Lord Kerr).

¹⁶⁰ See Griffith, 'The Political Constitution' (n 107).

functionalist school itself, like the textbook tradition, bifurcated in its recognition that administrative law had to operate with an overriding conception of justice. Finally, a bifurcated logic appeared in the rights-based jurisprudence that grew throughout the 1980s and 1990s, finding full expression with the passing of the HRA. While rights review was predicated on a correctness standard, a doctrine of deference grew which led to a further reinvention of the logic of bifurcation.

Contemporary debates over the proper constitutional role of judicial review demonstrate the same structural phenomenon. The contrasting positions taken by the textbook writers and the functionalists have been refined and perpetuated by, respectively, common law and the political constitutionalists. The positions taken in the debate vary subtly, but those commentators broadly preferring the common law constitution see the courts as the primary means of controlling the administration via principles of judicial review.¹⁶¹ For some, such as Sir John Laws, the courts develop and apply doctrine based on normative standards and values.¹⁶² Others focus more on the ways in which standards of judicial review contribute to values of good administration.¹⁶³ For the political constitutionalist, the inevitable role of the courts in regulating administration should be as minimal as possible.¹⁶⁴ The primary means of accountability should be the more democratic political processes.¹⁶⁵ Human rights are better protected by political actors, rather than the courts.¹⁶⁶ Set out in those terms, the legal versus the political constitutionalist debate maps onto the strong/weak model of review. However, as Alison Young has demonstrated, common law and political constitutionalists do not differ vastly as to actual function of review.¹⁶⁷ Young observes that, while the constitutional foundations of the opposing theorists differ, the nature of review they advocate is similar in practice. This point exposes a deeper problem. There is no single unified model of review based on differing constitutional foundations. Rather, the model is unstable and can lapse into bifurcation *because* based on conflicted foundations.

In light of this, the core hypothesis of this thesis is that bifurcation continues to frustrate UK administrative law. It will mean that the application of administrative law norms can oscillate

¹⁶¹ See e.g. TRS Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) *Oxford Journal of Legal Studies* 563; P Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24 *Oxford Journal of Legal Studies* 237.

¹⁶² Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72; Sir John Laws, 'The Constitution: Morals and Rights' [1996] *Public Law* 622.

¹⁶³ D Oliver, 'Is Ultra Vires the Basis of Judicial Review?' [1987] *Public Law* 543.

¹⁶⁴ See the model in A Tomkins, 'The Role of the Court in the Political Constitution?' (2010) 60 *University of Toronto Law Journal* 1; A Tomkins, 'What's Left of the Political Constitution?' (2013) 14 *German Law Journal* 2275.

¹⁶⁵ See e.g. K Ewing, 'The Resilience of the Political Constitution' (2013) 14 *German Law Journal* 2111; G Gee and G Webber, 'What is a Political Constitution?' (2010) 20 *Oxford Journal of Legal Studies* 473; M Goldoni and C McCorkindale, 'Why We (Still) Need a Revolution' (2013) 14 *German Law Journal* 2197; A Tomkins, *Our Republican Constitution* (Hart 2005).

¹⁶⁶ R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

¹⁶⁷ A Young, *Democratic Dialogue and the Constitution* (OUP 2017) ch 3.

between strong and weak forms of review. It will be functionally sub-optimal, risking both leaving serious flaws in decision making processes untested, or dictating outcomes to decision makers. It can exacerbate differences in judicial attitude toward the appropriate extent of executive discretion. To be clear, I am not merely talking here to the inevitability of judicial disagreement over, for example, balancing competing considerations or on the precise meaning of a vague or complex statutory provision. Rather, I am referring to fundamental disparities in terms of how judges see the appropriate role of the law in regulating administrative policy making. The next chapter sets out the method I used to test this hypothesis.

Chapter 3. General Methodology and Assumptions

3.1 Introduction

Theoretical debates about the legitimacy of judicial review often take place at a level of generality which precludes engagement with the practical operation of judicial discretion. They have been critiqued for a lack of reality.¹ Theories of judicial review must therefore be based upon and inform applied decision making.² For this reason, the process of testing my bifurcatory hypothesis has taken inspiration from empirical approaches to legal analysis. Such research is prevalent in the US,³ but has been less commonplace in the UK.⁴ The last decade has, nonetheless, seen an increase in reliance upon empirical method by legal researchers.⁵ I did not consider that formal quantitative and qualitative method would be appropriate for testing my core hypotheses. This is because, as explained in my hypothesis, my study remains rooted in doctrinal analysis. Nonetheless, to avoid simply picking isolated cases which cohered with my hypothesis, I undertook a systematic survey of a discrete body of recent Supreme Court cases. This would enable me to give a sense, albeit without making any statistically significant claims, the extent to which my hypothesis can (or cannot) be generally sustained.

3.2 Survey Method: General

My overarching bifurcatory hypothesis involves a cluster of ideas, centred around an unstable approach on questions of policy. The central idea is that the deployment of doctrine by UK judges can oscillate between strong and weak forms of judicial review. This leads to associated problems in terms of administrative law's effectiveness to regulate executive decision making. The survey side of this project primarily considered whether doctrinal approaches I hypothesise are likely to have these effects are routinely occurring in practice.

To do this, I surveyed a body of Supreme Court cases involving challenges to the activity of public bodies on the basis of: (i) a breach of the Human Rights Act 1998 (HRA); (ii) substantive

¹ B Friedman, 'The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship' (2001) 95 *Northwestern University Law Review* 933.

² W Sadurski, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275, 278.

³ See e.g. J Segal and HJ Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (CUP 1998).

⁴ See e.g. L Blom-Cooper and G Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon 1972); A Paterson, *The Law Lords* (MacMillan 1982); D Robertson, *Judicial Discretion in the House of Lords* (OUP 1998); A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013).

⁵ E.g. T Poole and S Shah, 'The Impact of the Human Rights Act on the House of Lords' [2009] *Public Law* 347; T Poole and S Shah, 'The Law Lords and Human Rights' (2011) 74 *Modern Law Review* 79; C Hanretty, 'The Decisions and Ideal Points of British Law Lords' (2013) 43 *British Journal of Political Science* 703; C Hanretty 'Haves and Have-Nots Before the Law Lords' (2014) 62 *Political Studies* 686; S Shah, T Poole and M Blackwell, 'Rights, Interveners and the Law Lords' (2014) 34 *Oxford Journal of Legal Studies* 295; RJ Cahill-O'Callaghan, 'Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity' (2015) 35 *Legal Studies* 1; TT Arvind and L Stirton, 'Legal Ideology, Legal Doctrine and the UK's Top Judges' [2016] *Public Law* 418; H Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart 2018).

review under common law; (iii) interpretation of statute.⁶ The first two heads of review concern the substance of administrative decisions. The third category is, at face value, more formalistic, concerning neutral linguistic interpretation rather than the exercise of a discretion. I take the view, however, that in hard statutory interpretation cases a court is adjudicating on questions of value and policy in a manner analogous to challenges to discretionary decision making.⁷ The specific nature of the survey work depended on the nature of the doctrine in question, as set out below.

As to the body of cases under consideration, I analysed challenges brought against public bodies (excluding those based in private law) handed down by the Supreme Court between 1 January 2014 and 31 December 2018. This five-year period was selected for three reasons. First, it is sufficiently recent to be of more than historical interest; the decisions from this half decade will inform and direct the lower courts in the immediate future. Second, during the time period covered by my dataset the ‘pool’ of justices from which individual benches could be comprised was reasonably stable, with the only changes occurring late on in the period. Lord Toulson sadly died in office in September 2016. Lord Clarke and Lord Neuberger left the Court in September 2017. Lord Mance and Lord Hughes both left the Court in the Summer of 2018, meaning they served for the majority of the period. Lord Sumption left the Court in December 2018 meaning he served for effectively the entire period. On the other hand, no new justices joined the court until late in the period. Lady Black, Lord Lloyd Jones and Lord Briggs joined in October 2017. Lady Arden and Lord Kitchin joined the Court in October 2018, which meant that none of their judgments were considered. Third, I wanted a period that would provide sufficient cases to allow me to make broader assertions about the nature of substantive review, without generating an overburdening amount of material. The fewer the number of cases, inevitably, the weaker the conclusions, but this had to be balanced against my capacity to review the material.⁸ The Supreme Court hands down around 70-80 decisions a year, roughly half of which are public law cases. I was thus expecting this period to yield *around* 150 relevant cases. In the event I had a pool of 131 cases. The majority of the cases handed down were challenges to either central government or to local authorities, though other branches of the executive were represented.⁹ I included decisions

⁶ I.e. In effect these were claims in public law brought against public bodies. By ‘public law’ I mean that amorphous body of doctrine that known as ‘judicial review’ (see Civil Procedure Rules, Part 54). ‘Public body’ means defendants amenable to such a claim. I have included claims that would have fell within those definition had not some equivalent procedure been available. Some of the decisions considered would not, in reality, have started out life as a Part 54 claim. They may, for example, have been appeals to the Immigration Tribunal from a decision of the Secretary of State.

⁷ See Chapters 8 and 9.

⁸ L Epstein and AD Martin, ‘Quantitative Approaches to Empirical Legal Research’ in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 902, 909.

⁹ Defendants included: devolved administrators (e.g. *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622); local authorities (e.g. *R (Champion) v North Norfolk District Council* [2015] UKSC 52, [2015] 1 WLR 3710);

of the Northern Ireland and Welsh Assemblies, and the Scottish Parliament. While judicial review of the substance of these bodies' decisions is limited in terms of the range of grounds that a court may consider,¹⁰ their legislative power is subject to legal limitations.

3.3 Case Study Method: General

On the assumption that my case survey did not undermine my overarching hypothesis, my intention was to use both individual case studies and evidence of trends in jurisprudence to assess the interrelationship between the Court's application of doctrine and the nature of its decisional outputs. In short, my research assesses whether there is evidence in the case law which demonstrates that the dominant doctrinal approaches are producing bifurcation.

As to the decision to make use of case studies, Horowitz advocates their use in considering the policy impacts of judicial decisions because: (i) they are the courts' own 'unit of analysis'; (ii) they enable matching of the ways in which the process of adjudication framed and addressed a problem as against alternative means of addressing the same problem; and (iii) they allow deep scrutiny of the types and characteristics of analysis deployed by the court.¹¹ What one loses by this method, on the other hand, is the extent to which case studies are representative of wider trends.¹² For that reason I have also sought evidence of bifurcation occurring across a rigorous selection of cases, flagging (where appropriate) other cases which could have been used as case studies, and also those cases which work against my hypothesis.

A potential problem with this approach, as in the case of formal qualitative analysis, is the risk of researcher being drawn towards evidence which supports his or her assumptions.¹³ I attempted to mitigate this by setting out in advance the kind of evidence (or 'markers') that would support my hypotheses would look like. I was looking for evidence of doctrine leading, particularly in the hands of different judges in the same case, to a bifurcated intensity of review (i.e. being used by some judges to promote deference, and others to sustain strong legalism). This would flag up different ways, following Horowitz, of addressing a problem and thereby demonstrate the fault-lines exposed when legal doctrine interacts with substantive policy measures. I was also looking for evidence that the impact of bifurcation was a failure to engage productively with institutional

police forces (e.g. *DB v CC Police Service of Northern Ireland* [2017] UKSC 7); regulators (e.g. *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455); healthcare providers (e.g. *Doogan and another v Greater Glasgow and Clyde Health Board* [2014] UKSC 68, [2015] AC 640); statutory undertakers (e.g. *The Manchester Ship Canal Company Ltd v United Utilities Water Plc* [2014] UKSC 40, [2014] 1 WLR 2576); courts (*R (BSB Ltd) v Central Criminal Court* [2014] UKSC 17, [2014] AC 885); and the Director of Public Prosecutions (e.g. *R (Belhaj) v Director of Public Prosecutions (No 1)* [2018] UKSC 33 [2018] 3 WLR 435).

¹⁰ See *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [152] (Lord Reed).

¹¹ D Horowitz, *The Courts and Social Policy* (Brookings Institution 1977) 33-56.

¹² *ibid* 73. See also J Gerring, *Case Study Research: Principles and Practices* (CUP 2008).

¹³ See M Miles, 'Qualitative Data as an Attractive Nuisance: The Problem of Analysis' (1979) 24 *Administrative Science Quarterly* 590, 591.

functioning, in the sense that the Court finds serious flaws in decision making processes but leaves these entirely untested, or dictates outcomes to the decision maker in a way which precludes administrative discretion.

A final question requiring consideration here is causation in the context of judicial review's practical impacts. There are two aspects to causation. The first is whether administrative law doctrines lead to particular dynamics, examinable within the context of individual cases, relative to questions of policy. The second is whether those impacts have wider effects on the actions of policymakers; whether legal norms resonate more widely in the policymaking community rather than solely in individual decisions. Questions around causality in this field are notoriously difficult.¹⁴ Vermeule goes so far as to suggest that causation in the second sense cannot be tested.¹⁵ For this reason, this thesis looks primarily, as I have explained, at causation in the first sense.

Causation in the second sense is nonetheless relevant, as it goes to the extent and importance of the study. There are a number of studies dubious about the institutional impacts of judicial review.¹⁶ There are also empirical studies that have been more positive.¹⁷ There is evidence that judicial review has a symbolic effect on policymakers.¹⁸ And, more importantly, it is clear that legal decisions can affect the discursive field for administrative action, impacting upon the process by which policy is made.¹⁹ Some political scientists have gone so far as to argue that legal doctrine has negatively impacted policymaking.²⁰ Given the conflicting evidence, the best that can be said is that the matter is unclear. In the absence of clear evidence either way, I take the view that it is better to assume that legal decisions *can* impact wider decision making rather than risk complacency.²¹

¹⁴ E.g. S Halliday, 'The Governance of Compliance with Public Law' [2013] Public Law 312, 313.

¹⁵ A Vermeule, 'Judicial Review and Institutional Choice' (2002) 43 William and Mary Law Review 1557, 1558

¹⁶ See G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008). In the UK see e.g. M Sunkin and A Le Sueur, 'Can Government Control Judicial Review' (1991) 44 Current Legal Problems 161–83; M Sunkin and K Pick, 'The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund' [2001] Public Law 736; G Richardson and D Machin, 'Judicial Review and Tribunal Decision Making: A Study of the Mental Health Review Tribunal' [2000] Public Law 494; S Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004).

¹⁷ V Bondy, L Platt and M Sunkin, 'The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences' (Public Law Project 2015) <http://www.publiclawproject.org.uk/data/resources/210/Value-and-Effects-of-Judicial-Review.pdf> accessed 5 March 2018; M Sunkin, 'Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004) 42.

¹⁸ P Cane, 'Understanding Judicial Review and its Impact' in Hertogh and Halliday (n 17) 15.

¹⁹ MW McCann, 'Reform Litigation on Trial' (1992) 17 Law and Social Inquiry 715 thus takes issue with Rosenberg on this point.

²⁰ S James, 'The Administrative and Political Consequences of Judicial Review' (1996) 74 Public Administration 613, 626–7.

²¹ G Richardson and M Sunkin, 'Judicial review: Questions of Impact' [1996] Public Law 79, 84.

3.4 Sub-hypotheses: Method and Specific Areas of Doctrine

The previous section covered the general method used to consider my overall hypothesis. However, that hypothesis is wide-ranging, and I developed sub-hypotheses in respect of the three forms of review considered (i.e. proportionality cases under the HRA; common law substantive review; and statutory interpretation) which feed into the larger jurisprudential picture.²² The remainder of this chapter outlines those sub-theses, setting out the variations on the general approach which I employed in each class of case.

3.4.1 *Proportionality under the HRA*

The HRA protects a range of qualified rights, with which a public authority may only interfere if its activity is justified via a proportionality assessment. The proportionality exercise, in the UK courts, has settled into a four-stage analysis: (i) legitimacy of aim; (ii) rational connection of aim and measure; (iii) necessity and (iv) proportionality in the sense of striking a fair balance.²³ Broadly, the first two parts of the test are comparable to traditional rationality review.²⁴ They thus focus more on institutional rationality in itself rather than on the degree of a measure's intrusion upon the civil rights of an individual complainant. The second two aspects of the test, on the other hand, concern predominantly the justifiability of impacts on subject autonomy.²⁵

I pose two sub-hypotheses in respect of this test. The theoretical basis for these is discussed in full in Chapter 4, but an overview assists here. My first sub-hypothesis is that the rights-centric nature of this form of review will focus scrutiny on the third and fourth aspect of the test rather than the first and second.²⁶ The implications of that are the subject of my second sub-hypothesis. In focusing on individual impacts, and in particular on the question of balancing policy objectives and individual rights, the court will open itself to the risks of incommensurability (i.e. weighing competing considerations that cannot be compared on a common scale). This approach, I suggest, produces a number of bifurcation's 'pathologies': (i) oscillation between strong and weak review ('intra-doctrinal bifurcation'); (ii) potential foregrounding of judicial preference ('attitudinal bias'); and (iii) an inconsistent relationship between the courts and governmental functioning, risking both leaving serious flaws in decision making processes untested or legalistically dictating outcomes to decision makers.

²² See L Epstein and G King, 'The Rules of Inference' (2002) 69 University of Chicago Law Review 191.

²³ See *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [45] (Lord Wilson); *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [20] (Lord Sumption) [74] (Lord Reed).

²⁴ See C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1, 8.

²⁵ A Brady, *Proportionality and Deference under the Human Rights Act 1998: An Institutionally Sensitive Approach* (CUP 2012) ch 2.

²⁶ A cognate dynamic is seen in the test applied in e.g. Article 14 ECHR cases. E.g. *R (on the application of Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831.

To test the first of these sub-hypotheses, I followed the general survey method set out above, subject to modifications. I considered only those cases where the Court was required to determine whether a measure was justifiable relative to an identified rights interference and, accordingly, carried out a substantive proportionality exercise. While the nature of the exercise is slightly different depending on the right engaged, the potentially relevant rights were Articles 8, 9, 10, 14 and Articles 1 and 2 of Protocol 1 ECHR. This meant that instances in which the issue turned on whether a Convention article was engaged,²⁷ or whether a governmental act was ‘in accordance with the law’,²⁸ or where a Convention right was mentioned only in passing,²⁹ are not discussed in detail. The way in which the Court interprets the extent of an enumerated right will, of course, tell us something about its views on appropriate scope of rights protection.³⁰ However, consideration of ‘pure’ proportionality cases goes to the ways in which the Court is deploying its discretionary powers relative to the substantive legality of policy choices. I have not looked at tax cases, as these tend to turn on technical points of interpretation. I have also avoided substantive criminal cases, since while they can and do engage public law principles, like the tax cases they are often dominated by technical points of law.³¹

To obtain a sense of the Court’s focus, I noted in any judgment dealing with a proportionality assessment which element(s) of the test appeared to be core or decisive. Separate judgments were assessed individually. A ‘decisive’ aspect means a point which: (i) involved real contestation in terms of resolving the case; and (ii) received substantive consideration in a judgment. If more than one aspect was material, I considered it as a separate ‘judgment’. Naturally, this process involved an element of subjectivity and impressionistic analysis which would not be acceptable in a formal empirical study.³² However my aim here is not precise statistical analysis but to use the Court’s focus across the spectrum of the proportionality exercise as a rough heuristic to assess whether it was interested more in institutional functioning or rights balancing. If my survey suggests this to be the case, the risks of bifurcation are heightened. The analysis is discussed in Chapter 4, and the results set out at Appendix A. Broadly, the survey suggested that the Court’s main focus is on the balancing aspect of the process.

²⁷ E.g. *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.

²⁸ E.g. *Shahid v Scottish Ministers* [2015] UKSC 58, [2016] AC 429.

²⁹ E.g. *R (C) v Secretary of State for Justice* [2016] UKSC 2, [2016] 1 WLR 444 (Article 6 mentioned but not discussed); *R (Barclay) v Lord Chancellor and the Secretary of State for Justice (No 2)* [2014] UKSC 54, [2015] AC 276 (potential Article 6 point at large, but becomes moot because the Court finds that the claim would be better heard on Sark); *Williams v Hackney London Borough Council* [2018] UKSC 37, [2018] 3 WLR 503 (Article 8 mentioned in passing).

³⁰ See e.g. *R (Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9, [2017] AC 256; *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455.

³¹ Though the pattern of focus in these cases supports the line taken in this and the next section. See e.g. *R v Doherty* [2016] UKSC 62, [2017] 1 WLR 181.

³² L Epstein and AD Martin, *An Introduction to Empirical Legal Research* (OUP 2014) 97-106.

A caveat is needed. My contention is not that the balancing process, *per se*, is solely a question of judges weighing competing values and determining which trumps the other.³³ The importance of the ‘culture of justification’ model (on which see Chapter 4) is to establish that balancing can take into account, for example, the extent of consideration and debate that the executive has undertaken in determining whether to interfere with a protected interest.³⁴ For the moment, I am hypothesising that the Court inclines toward a model of proportionality review which, by focusing its energies on the question of balance, will risk bifurcation. The question, should my survey suggest such an inclination, is whether there is *additional* evidence in the cases suggesting bifurcation (i.e. divergence into weak and strong forms of review, disagreement between judges, and an inconsistent approach to policy questions). This key point, which was the substance of my second sub-hypothesis, was tested via the use of selected case studies and observation of general trends in the jurisprudence (see Chapter 5).

3.4.2 *Substantive Review at Common Law*

In the case of substantive review under common law, my sub-hypotheses turn on the conflicted nature of the reasonableness standard itself. Reasonableness review at common law incorporates two standards of review: an intrinsically deferential standard of substantive rationality (‘Bare *Wednesbury*’), and a much stronger set of doctrines based on a combination of statutory purpose and principles of good governance (‘Governance *Wednesbury*’). It is, thus, internally bifurcated (i.e. in the sense of being constituted by both weak and strong forms of review).³⁵ This is further complicated by the ways in which the historically deferential reasonableness standard now incorporates a more intense form of review in decisions interfering with fundamental interests (‘Common Law Rights’).³⁶ This form of rationality review approximates proportionality by requiring courts to balance the competing claims of policy goals and individual impacts.³⁷ On that basis, it may give rise to the problem of incommensurability I argue arises in proportionality review under the HRA (see above and Chapter 4).

My investigation considers whether these doctrines are applied: (i) in a strongly legalistic manner which precludes administrative decision making (‘legalism’); (ii) deferentially; or (iii) in a way which stimulates the active deployment by the executive of its own institutional expertise

³³ See A Kavanagh, ‘Reasoning about Proportionality under the Human Rights Act 1998: Outcomes, Substance and Process’ (2014) 130 Law Quarterly Review 235.

³⁴ See E Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 South African Journal on Human Rights 31.

³⁵ Sir J Laws, ‘*Wednesbury*’ in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of William Wade QC* (Clarendon 1999) 185, 186.

³⁶ H Woolf and others (eds), *De Smith’s Judicial Review* (7th edn, Sweet and Maxwell 2013) paragraphs 11-036–11-057.

³⁷ See e.g. *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 [133] (Lord Neuberger).

(‘institutionally activating’). A ‘legalistic’ approach involves the Court determining whether an executive decision maker has complied with legal principles of good governance or rights norms which themselves possess substantive content.³⁸ Such an approach will impose on a decision maker a requirement to, for example, reach a positive standard of justification,³⁹ or take into account particular matters.⁴⁰ A deferential approach is characterised by the Court holding that a matter is essentially one for executive or political determination. It is the inverse of the ‘legalistic’, requiring merely that a decision is comprehensible in context rather than that it reach a substantive standard.⁴¹ It involves giving the defendant a wide margin of appreciation. An institutionally activating approach straddles the two other categories. Here, the Court applies a deferential standard, but only where it is content on examination that an authority has carefully and conscientiously deployed its institutional faculties in service of a decision.⁴² The question of which these three categories a judgment falls into is henceforth referred to as an assessment of ‘doctrinal variegation’.

I worked with two sub-hypotheses. First, legalistic and deferential approaches would predominate, indicating intra-doctrinal bifurcation. Second, this could stimulate further bifurcatory pathologies related to those hypothesised in the case of HRA proportionality. Namely, evidence of a contradictory relationship with questions of institutional functioning, and exacerbation of divergent judicial attitudes. If supported, these sub-hypotheses would suggest support for my overarching hypothesis.

To test the first sub-hypothesis, I conducted a survey of cases involving substantive review at common law (i.e. cases involving either: (i) Bare *Wednesbury*; (ii) Governance *Wednesbury*; and/or (iii) Common Law Rights). Case selection here naturally involved an element of subjectivity and intuition, given the diverse nature of common law principles. Relevant cases from my dataset were identified by selecting cases falling with the classes described above. The sample was cross-checked by carrying out a search in Westlaw for cases including the words ‘*Wednesbury*’, ‘irrational’, or ‘reasonable’ and initially included within my dataset to ensure as wide a net as possible. Cases which mentioned *Wednesbury* in passing were included in the dataset and addressed in the narrative of Chapter 6.

³⁸ E.g. *Elsick Development Company Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] UKSC 66, [2017] PTSR 1413.

³⁹ E.g. *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.

⁴⁰ E.g. *Sustainable Shetland v Scottish Ministers* [2015] UKSC 4, 2015 SC (UKSC) 51.

⁴¹ E.g. *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344.

⁴² E.g. *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority* [2015] UKSC 75, [2016] 2 All ER 631.

An occasional difficulty here was determining whether a case involved application of the Governance *Wednesbury* standard, or turned purely on a dispute over statutory interpretation. The potential problem here is that statutory interpretation cases were subjected to separate analysis (see below). Where such a distinction problem occurred, the determinative characteristic was between cases involving a dispute over the meaning of a word or provision (treated solely a statutory interpretation case) and cases where argument turned on whether an otherwise broad, or open-textured, discretionary power was limited by an implicit statutory purpose or consideration. Comparative examples are found in cases involving local authority homelessness provision. In *Nzolameso v Westminster City Council* the Court considered the extent of an authority's duty to house the claimant in its borough 'where reasonably practicable'.⁴³ This case was a substantive review case (as well as an interpretation case), because its indistinct terms appeared to leave matters to authority. Indeed, the Court of Appeal had addressed the case on a *Wednesbury* standard.⁴⁴

In *Haile v Waltham Forest London Borough Council*, on the other hand, the Court had to determine the meaning of 'intentionally homeless'.⁴⁵ This was treated solely as an interpretation case. While both decisions impact the extent of an authority's discretion, the key difference is that in *Nzolameso* that discretion appears *prima facie* relatively wide. In *Haile* it more obviously bound up with the wording of the provision. The distinctions here are fine and, inevitably, the choices involved an element of subjectivity. But the aim here was not statistical analysis, but to obtain a general sense across a rigorous body of cases of the Court's approach. In any event, the effect of this approach generally was to exclude cases that *might* have been considered 'Governance *Wednesbury*' cases. To include them would provide more support for my hypothesis.

For each case, I determined whether each substantive judgment, following the principle of doctrinal variegation, was: (i) legalistic; (ii) deferential; or (iii) institutionally activating. Separate judgments were each treated individually. Judgments which applied more than one mode of substantive review were treated as if consideration of each mode of review was a separate judgment.⁴⁶ Again, this approach, as with the HRA proportionality cases, is open to objections of being subjective and impressionistic. Such problems are not denied, but I am not attempting statistical analysis or linear regression. Rather, I am deploying a surveying approach to obtain a general impression of whether my assumptions about the dynamics of common law review are

⁴³ [2015] UKSC 22, [2015] PTSR 549.

⁴⁴ [2015] PTSR 211.

⁴⁵ [2015] UKSC 34, [2015] AC 1471.

⁴⁶ Found in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355; *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10, [2017] 1 WLR 771; *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108; and *Nottingham City Council v Parr* [2018] UKSC 51, [2018] 1 WLR 4985.

supported in the Supreme Court's case law. This survey provided some support for my first sub-hypothesis. The outcomes are discussed in full in Chapter 6, and the analysis set out at Appendix B.

The second sub-hypothesis (i.e. that intra-doctrinal bifurcation would limit law's effectiveness in terms of regulating institutional functioning, exacerbating the impacts of judicial attitude) was tested via consideration of individual cases and observation of general trends, following the general case study method described above (see Chapter 6).

3.4.3 *Statutory Construction and Illegality*

The final aspect of substantive review I consider is the question of statutory interpretation. This is not obviously a question of substantive review in the sense of the first two areas of doctrine addressed above. However, in 'hard' cases where a statute is unclear or open-textured, statutory meaning must be determined by an interpreter. That process will impact the extent of administrative discretion akin to that of a court undertaking substantive review. Statutory interpretation in the UK has historically been treated as a question of law, and thus a matter for judicial determination.⁴⁷ As explained in Chapter 2, this approach was critiqued by the functionalist school for its capacity to inhibit administrative creativity. In this sense, statutory interpretation ordinarily involves application of a correctness standard (i.e. in the sense that there is a single right answer to the meaning of a statutory provision) to questions over the proper extent of executive discretion. If my thesis is correct, such an approach will risk, and result in, bifurcation. My sub-hypotheses in this category were, accordingly: (i) that recent decisions of the Supreme Court prioritise judicial views as to the meaning of statute in public law cases; (ii) that evidence exists in those cases that the Court is engaged in a quasi-policy making process; and (iii) that this can give rise to bifurcation's pathologies.

These sub-hypotheses were considered via a combination of the general survey and case study methods, subject to the following amendments. Cases were selected for inclusion where the decisive question turned on a point of statutory interpretation (i.e. where the judges' selection of interpretation from two or more conflicting possibilities would determine the successful party). The potential overlap with common law reasonableness cases is discussed above. I excluded cases where the Court considered whether legislation could be construed in an HRA compatible manner. In that case, the Court is carrying out a specific legislative mandate in the HRA, whereas my focus is the Court's general practice in interpreting statute. I also, as above, excluded tax and substantive criminal law cases for the reasons given there.

⁴⁷ J Bell and G Engle, *Cross on Statutory Interpretation* (3rd edn, Butterworths 1995).

For each case, I sought to identify the approaches taking by the judge(s) giving a judgment, using four broad categories: (i) textual; (ii) contextual/purposive; (iii) values; and (iv) facilitative. The first three categories are *closed* methods of interpretation because, notwithstanding differences in their nature and method, from an administrator's perspective they all result in meaning being imposed externally by a court. A textual approach is based entirely on the plain meaning of a provision in a statute.⁴⁸ A contextual approach relies on wider contextual material to determine objective parliamentary intent. This could involve the immediate statutory context and scheme, legislation on *pari materia* topics, background documentation explaining the statute's policy, the legislative history (e.g. reasons for alteration of a bill during its passage through Parliament), caselaw interpreting a statute, changes in societal norms requiring an update in the meaning of words, or the practical consequences of competing interpretations.⁴⁹ A values approach prioritises constitutional principle and rights protections.⁵⁰ The fourth approach, the facilitative approach, on the other hand, gives weight to the executive views of the meaning of a statute in determining its meaning.⁵¹ It is thus *open* in the sense of allowing more diverse input into the explication of statute. I considered, for each judgment, whether the dominant approach (in the sense of determining the meaning of a statute) was closed or open.

This process facilitated testing of my sub-hypotheses which, while not empirical analysis in any formal sense, allowed me to obtain a sense of whether my doctrinal analysis is likely to be of wider validity. The first sub-hypothesis (i.e. (i) that recent decisions of the Supreme Court will prioritise judicial views as to the meaning of statute in public law cases) was tested via surveying cases in my selection to obtain a sense of whether the Court takes generally a closed or open approach. The analysis is set out at Appendix C. The results showed, predictably, an overwhelming dominance of closed approaches.

The second sub-hypothesis (i.e. that there will be evidence in those cases that the Court is engaged in a quasi-policy making process) was tested via both surveying to obtain a sense of the Court's dominant approaches and also consideration of its reasoning in specific cases. Chapter 8 demonstrates how all supposedly neutral methods of interpretation involve a degree of creativity on the interpreter's part. The extent of that creativity, however, generally increases in contextual/purposive and values-based approaches as opposed to textual based approaches. Accordingly, if the Court tends to make more use of those approaches than any other this would *suggest* support for this sub-hypothesis. The outcomes are discussed fully in Chapter 9 (and the

⁴⁸ E.g. *R (B and others) v Westminster Magistrates' Court* [2014] UKSC 59, [2015] AC 1195 [17] (Lord Mance).

⁴⁹ A good example of a case exhibiting a range of factors is *R (N) v Lewisham London Borough Council* [2014] UKSC 62, [2015] AC 1259.

⁵⁰ E.g. *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

⁵¹ E.g. *Isle of Wight Council v Platt* [2017] UKSC 28, [2017] 1 WLR 1441.

analysis set out at Appendix C). In summary, while text always plays a role in Supreme Court interpretation, it is extremely rare for it to take a purely textualist approach. On the other hand, a contextual/purposive approach virtually always played a role. The Court also makes significant use of values-based approaches. This surveying approach was bolstered via evaluation of instances in the caselaw where interpretation appeared to involve significant judicial discretion.

The caveats set out above about the limitations of the analysis are relevant again here, in terms of the potential for subjectivity and impressionistic evaluation. However, my aim was to pick up all the materials and sources that have played a role in interpretation, rather than make any spurious quantitative claims regarding the Court's precise methodology. The point was to obtain a systematic (if rough) overview in order to attain a sense of the leeway allowed to the 'first-interpreter' i.e. those members of the executive required to give practical realisation to statute, in order to situate my doctrinal analysis within broader trends in the Court's jurisprudence.

The third sub-hypothesis (i.e. that the Court's application of a 'correctness' based approach to interpretation could give rise to bifurcation) was tested via the general case study approach (see Chapter 10). In this case, relevant evidence would be judicial manipulation of interpretative method leading to both judicialisation and deference.⁵²

3.5 Conclusion

My methodology allowed testing of the hypothesis developed in Chapter 2 in a way that allows me to set my doctrinal hypothesis within the context of the Court's decision making across a rigorous selection of cases. My approach remains primarily doctrinal in the sense that I am investigating *how* certain administrative law doctrines impact upon administrative decision making. However, the empirical literature identified above alerted me to the problem that doctrinal work can misrepresent the reality of judicial decision making in practice by focusing on a limited number of cases. The surveying approach, inspired by empirical approaches to analysis, helps mitigate against this. It provides a wider lens for commentary on the interrelationship of the Supreme Court and the administrators impacted by its decisions, and gives a sense of the broader resonance of my analysis.

⁵² E.g. *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787.

Chapter 4. Taking a Balanced Look at Proportionality

4.1 Introduction

Judicial review of the substantive decisions of executive policymakers engages deep questions about the judicial role in a democracy and exposes the fault line between commentators who oppose the judiciary re-making substantive administrative decisions,¹ and advocates of the judiciary subjecting such decisions to rights/values based review.² In the UK, particularly since the passing of the Human Rights Act 1998 (HRA), the broader activism/deference debate has often focused upon whether substantive review should be entirely proportionality based (a unified approach) or, alternatively, proportionality should be reserved for rights cases and rationality review deployed elsewhere (an inter-doctrinal bifurcated approach).³ Inter-doctrinal bifurcationists are often characterised as favouring a more restricted judicial role than the advocates of an expansive proportionality-based approach.⁴ However, both unified and bifurcated camps consider that their preferred model of review is the most appropriate means of traversing what Michael Taggart termed the ‘rainbow’ of review.⁵ Both view their preferred approach as contextually and institutionally sensitive, capable of matching the standard of review to the circumstances of a claimant’s case.

Commentators have observed that the unification/bifurcation debate obscures the core practical questions of how a public body is alleged to have erred and how intensively their actions should be scrutinised.⁶ While such observations are valuable, the differences between these approaches cannot be so easily smoothed over. The deficiencies of these rival approaches are foundational, requiring a profound reassessment rather than doctrinal refinement. The very nature of the current debate in the UK reflects and perpetuates the deep ‘bifurcation’ at the heart of substantive review sketched in Chapter 2. In this and the succeeding two chapters, I demonstrate via analysis of the UK Supreme Court’s public law jurisprudence between 2014 and 2018 that whichever doctrine is deployed the internal instabilities of UK administrative law doctrine risk oscillation, in hard cases, between a strongly deferential approaches to questions of ‘substance’ or ‘policy’ and a model wherein judicial values are substituted for those of decision makers. This

¹ E.g. AM Bickel, *The Least Dangerous Branch* (2nd edn, Yale University Press 1986).

² E.g. R Dworkin, *Taking Rights Seriously* (Duckworth 1977).

³ See S Nason, *Reconstructing Judicial Review* (Hart 2016) 193-211 and the collected essays in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart 2015).

⁴ For an overview see J Alder, ‘The Sublime and the Beautiful: Incommensurability and Human Rights’ [2006] Public Law 697; D Mead, ‘Outcomes Aren’t All: Defending Process-Based Review of Public Authority Decisions under the Human Rights Act’ [2012] Public Law 61; J Goodwin, ‘The Last Defence of Wednesbury’ [2012] Public Law 445; R Williams, ‘Structuring Substantive Review’ [2017] Public Law 99 and JTH Lee, ‘Substantiating Substantive Review’ [2018] Public Law 632.

⁵ See M Taggart, ‘Proportionality, Deference, Wednesbury’ [2008] New Zealand Law Review 423.

⁶ E.g. Williams (n 4).

deeper bifurcation has demonstrable negative implications for public law's effectiveness in the regulation of administrative government.

This and the next chapter focus on the proportionality side of the debate. This chapter begins by exploring the competing arguments on the merits of proportionality review in general.

Proportionality allows for structured balancing of policy aims and protected rights. However, it nonetheless risks 'incommensurability'; requiring judges to weigh conflicting interests that cannot be adjudicated without reference to subjective value judgments. In so doing, it also risks *internal* intra-doctrinal bifurcation between deference and activism by heightening the influence of judicial attitude. I argue that the debate between unificationists and bifurcationists, in focusing on broad doctrinal distinctions rather than systematic consideration of outcomes, tends to obscure this problem. Building on my assessment of the literature on proportionality, I posit two hypotheses which have implications for both the application of the proportionality standard and for the unification/bifurcation debate. The first is that the proportionality model in the UK focuses on the process of balancing individual rights and public goals, to the detriment of questions of institutional functioning on its own terms. The second is that this balancing model can give rise to three 'pathologies' of proportionality: (i) oscillation between strong and weak review ('intra-doctrinal bifurcation'); (ii) potential foregrounding of judicial preference ('attitudinal bias'); (iii) an inconsistent relationship between the courts and governmental functioning. As currently applied, proportionality gives rise to decisions which fail to test serious flaws in decision making and others in which the Court dictates outcomes to decision makers.

If these hypotheses can be sustained, the implications for administrative law are profound. At a practical level, evidence of the pathologies of proportionality brings into question whether this method of review, as currently practised, achieves the structured reconciliation of rights and public interest aims celebrated by its advocates. Proportionality review, as 'rainbow' theories hold, is clearly context sensitive.⁷ Yet, rather than consistently 'running the rainbow', this hypothesis would suggest that in hard cases the proportionality model risks falling back on underlying judicial attitudes. In doing so, it can oscillate between weak and strong review; either leaving genuine policy failures unchallenged or undermining the effective operation of the public authorities. More broadly, support for these hypotheses would add meat to the broader contentions in chapter two regarding UK administrative law's failure to get to grips with questions of policymaking and institutional competence which, it is submitted here, should be at its conceptual core.

⁷ For a useful summary see DR Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018) 158-165.

4.2 The Nature of Proportionality Review

4.2.1 Introduction

Proportionality based review has spread across Western legal systems throughout the latter twentieth century. While mooted at common law,⁸ it was only broadly incorporated into UK law with the passing of the HRA.⁹ It is now the preeminent method of substantive review.¹⁰ Indeed, while proportionality primarily concerns rights claims, it has spread beyond those confines and stands on the verge of being adopted as a wider ranging standard for judicial review of substantive decision making.¹¹ In keeping with its rights-based origins, however, proportionality remains structured around the identification of some species of protected interest. Where an interest is subject to interference by a public authority, that authority must show that its aims are legitimate, that the interference is connected to that aim and no greater than necessary, and that a fair balance is struck between the aims and the impact.¹² The question of whether the balance is fair is a question of law.¹³ This section sets out the arguments for and against proportionality's use in substantive review, as background to enable subsequent evaluation of the academic debate and jurisprudence in the UK.

4.2.2 *The Ultimate Rule of Law: The Merits of Proportionality*

At the most general level, advocates of proportionality review welcome its ascent as the dawning of an era of constitutionalisation in which citizens have increased guarantees against overbearing state action.¹⁴ With all too many examples over the course of the 20th century of the frailty of individual liberties in the face of overreach by public bodies, proportionality is welcomed for the *prima facie* weight afforded protected rights and values.¹⁵ By forcing states to justify any action interfering with human autonomy, the model institutionalises the moral value of the individual in political discourse. The literature compromises, broadly, two strands of justification for a proportionality-based approach: (i) those based on the value of its structured approach to balancing policy goals and rights; and (ii) those based on the requirement it places on the executive to justify its acts.

⁸ E.g. *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374 (HL) 411 (Lord Diplock).

⁹ See e.g. the early acceptance in the Court of Appeal in *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185, 202 (Laws LJ)..

¹⁰ See T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943; A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72.

¹¹ E.g. *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 [281] (Lord Kerr).

¹² See *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [45] (Lord Wilson); *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [20] (Lord Sumption) [74] (Lord Reed).

¹³ *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167.

¹⁴ E.g. J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *Public Law* 671, 682.

¹⁵ F Schauer, 'Proportionality and the Question of Weight' in G Huscroft, BW Miller and GCN Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 174, 177.

The first strand advocates proportionality on the basis that its formal structure, combined with a finely calibrated process of balancing rights and aims, reconcile the legitimacy concerns surrounding rights jurisprudence. As summarised above, proportionality review in the UK now constitutes a four-stage exercise for a judge to apply when assessing the legitimacy of state action. For some supporters, the *structured* aspect of the doctrine allows proportionality to reconcile the counter majoritarian dilemmas arising in substantive review.¹⁶ While substantive review risks judicial intrusion on the merits of an executive act, requiring judges to adopt a formal structure ensures that rights norms can be enforced without falling back on judicial bias.¹⁷ This approach ensures transparency in both administrative and judicial decision making (i.e. because knowing the test that a judge will apply requires administrators to take a similar approach).¹⁸ It also helps direct analysis so that relevant aspects in rights cases are considered at the appropriate stage of assessment.¹⁹ Structure brings, in short, analytical rigour in terms of guiding otherwise unfocused judicial discretion.

Other commentators focus in particular on the balancing aspects of the proportionality approach; whether an individual is bearing too much of a burden in the name of a public good. Robert Alexy's justification along these lines has been particularly influential. In *A Theory of Constitutional Rights*, Alexy conceives the rights balancing process as a question of reconciling competing principles. According to his 'law of balancing', the key is that '[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.'²⁰ This basic law is retained in Alexy's later work, with a layer of precision added. The court affords weight to relevant competing interests, which are then compared by means of a formula which determines whether a decision is legally acceptable.²¹ Proportionality review thus allows a judge to determine, objectively, whether a public body has come to an answer which maximises the two competing principles. Alexy is clear that this is not a question of obtaining the single correct answer to questions of balancing rights and aims. However, he does predicate his thesis on proportionality's potential for rational analysis of the permissibility of rights infringements.²²

¹⁶ On which see Bickel (n 1). As to the benefits of structured analysis, see e.g. DM Beatty, *The Ultimate Rule of Law* (OUP 2004) 172; J Rivers, 'Proportionality and Variable Intensity of Review' [2006] Cambridge Law Journal 174, 176; P Craig, *Administrative Law* (6th edn, Sweet and Maxwell 2008) 637.

¹⁷ For a judicial justification see *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 [54] (Lord Mance).

¹⁸ E.g. F Michelman, 'Foreword: Traces of Self-Government' (1986) 100 Harvard Law Review 4, 34; T Poole, 'Tilting at Windmills?: Truth and Illusion in the Political Constitution' (2007) 70 Modern Law Review 250, 268.

¹⁹ A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 256.

²⁰ R Alexy, *A Theory of Constitutional Rights* (OUP 2002) 102.

²¹ R Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 2 International Journal of Constitutional Law 572, 576–577; R Alexy, 'The Construction of Constitutional Rights' (2010) 4 Law and Ethics of Human Rights 19; and R. Alexy, 'Proportionality and Rationality' in VC Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 13.

²² Alexy, *A Theory of Constitutional Rights* (n 20) 402.

Other influential commentators have mounted similar arguments based on the analytical rigour of the balancing model. Aharon Barak finds merit in the structured nature of the proportionality analysis, but places particular value on the balancing process. He conceptualises the balancing model in terms of ‘marginal social importance’. On this approach, the marginal social importance of the benefits of a policy aim are compared with the marginal social importance in preventing the harm to a protected right. If the benefits achieved by a measure outweigh the harms to a right with which it interferes, the measure is proportionate.²³ Again, the general tenor of the defence made here is on the basis of a rational, quasi-mathematical, weighing of competing considerations.

The boldest claims are those found in the work of David Beatty, who describes the balancing approach as the ‘ultimate rule of law’; a method of making each constitution operate ‘at its best’.²⁴ On Beatty’s approach, the balancing model achieves objective rationality by converting abstract legal principle into material fact.²⁵ The role of the Court when balancing competing principles is to carry out a cost-benefit analysis based on the respective benefits and losses to the parties involved in a dispute.²⁶ Beatty’s specific defence of proportionality is cognate with the positions advanced by Alexy and Barak, but his overarching claims for its capacity to achieve constitutional legitimacy for state action reach new levels of hyperbole.

A second, and increasingly influential, strand in the literature focuses on proportionality’s demand for justificatory reasoning on the part of state actors. Here, proportionality’s value lies in the obligations imposed on decision makers to meet a justificatory threshold as the cost of interference with private interests.²⁷ This idea of a culture of ‘justification’ is particularly associated with the work of Etienne Mureinik.²⁸ Mureinik, in seeking to address the legitimacy issues raised by rights-based review, sought to reconcile at a practical level the conflicts arising from Dworkin’s austere severance of principles and policies (on which see Chapter 2). Recognising that Dworkin’s ‘right answer’ thesis would be hard to sustain in jurisdictions outside the United States, Mureinik sought to develop a model which was less driven by all-encompassing legal values but nonetheless require administrators to adhere to constitutional norms.²⁹

²³ A Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) ch 12.

²⁴ Beatty (n 16) ch 5.

²⁵ *ibid* 4.

²⁶ *ibid* e.g. 59. A useful analysis is FJ Urbina, *A Critique of Proportionality and Balancing* (CUP 2017) 27-28.

²⁷ A Barak, ‘Proportionality and Principled Balancing’ (2010) 4 *Law and Ethics of Human Rights* 1.

²⁸ See E Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31.

²⁹ D Dyzenhaus, ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ (1998) 14 *South African Journal on Human Rights* 11.

Mureinik's approach requires decision makers to justify any departure from constitutionally protected standards. It thereby seeks to inculcate a culture of administrative elaboration and reasoning predicated on the moral and democratic principles which ought to underpin and legitimate lawful government action.³⁰ A requirement to give reasons for decisions demonstrates an official's competence, and also their understanding and appreciation of the legal and constitutional values and stake.³¹ It allows the court to determine, in that context, whether the reasons given are rationally and constitutionally legitimate.³² This attempt to reconcile legislative (or executive) and judicial supremacy is, for some, one of the reasons for proportionality's rise and proliferation.³³

A related concept is Mattias Kumm's idea of 'Socratic contestation'. In this version of the justificatory approach rights are deemed to have little weight in themselves. Rather, they act as bartering tool to leverage practical reasoning on the part of the state. The judicial role is to interrogate closely whether the justification given for policy initiatives is inherently sound, or whether it is based on illicit reasons of tradition, morality, or rent-seeking. On this account, a reviewing judge is looking to tease out decision making based on ideology rather than reason.³⁴ Like Mureinik's culture of justification model, Kumm's approach bases a normative defence of proportionality on the quality of the reasoning it elicits from state actors.

4.2.3 *Imbalanced Balancing: Proportionality's Critics*

Proportionality is not universally admired. For its critics, far from constituting the 'ultimate rule of law' the balancing approach fails to provide effective rights protections, but also overestimates the ability of the judiciary in determining questions of substance. Arguably, the polarised nature of this critical literature mirrors and explains the risks of bifurcation proportionality review runs in practice. Four broad criticisms are levelled at the proportionality approach.

First, proportionality, in attempting to reach a balance between individual liberties and state policy aims, is said to under-protect and devalue fundamental rights.³⁵ On this view, proportionality undermines the deontological rights norms by treating them as defeasible assets

³⁰ See M Taggart, 'Reinventing Administrative Law' in N Bamforth and P Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart 2003) 311, 332-335.

³¹ D Dyzenhaus, M Hunt and M Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 Oxford University Commonwealth Law Journal 5, 29.

³² RH Pildes, 'Avoiding Balancing, The Role of Exclusionary Reasons in Constitutional Law' (2004) 45 Hastings Law Journal 711.

³³ M Cohen-Eliya and I Porat, 'Proportionality and the Culture of Justification' (2011) 59 The American Journal of Comparative Law 440, 467. For judicial comment see e.g. *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 [114]-[119] (Lord Reed); and *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 [280] (Lord Kerr).

³⁴ M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 Law and the Ethics of Human Rights 140.

³⁵ Dworkin's 'rights as trumps' thesis captures this. See Dworkin (n 2) 223-247.

to be bartered against public goods.³⁶ The fundamental, moral force of individual rights is, on this view, degraded via translation into the technocratic language of the balancing exercise.³⁷ From this perspective it is noteworthy that in certain jurisdictions the emergence of a balancing model occurred in order to prevent rights absolutism.³⁸

Second, there is a group of criticisms sharing common ground in terms of proportionality's scope for increasing judicial intervention in a wider array of matters, including those not traditionally considered fundamental rights. This is simply the flipside of the suggestion that proportionality undervalues core rights. The de-constitutionalisation of fundamental rights (i.e. in the sense that rights are not treated as a core body of norms that cannot be violated, but may be balanced against aims) means that the balancing model intrudes into wider classes of interest.³⁹ A mode of analysis that is designed to deal with rights, when applied in other classes of case, extends the matters categorised and treated as rights. Further, as well as increasing the areas amenable to judicial scrutiny, the proportionality approach is said to allow the judge an inappropriate width of discretion.⁴⁰ On this view, this undermines the certainty and predictability of law. At its highest, this is said to involve judicial trespass on territory properly occupied by the legislature, since it effectively allows the courts to evaluate questions of values or politics taken by elected representatives.⁴¹

The third critique is that the proportionality exercise, particularly in its balancing aspect, is irrational. Against the structured rationalism that advocates like Alexy, Barak and Beatty have commended, the argument here is that it is impossible to translate rights and interests into a mathematical exercise, given that questions of value and political morality inevitably intrude.⁴² The balancing exercise necessarily involves a subjective comparison and weighing of competing values, which cannot be compared using any common standard of rationality.⁴³ On this view,

³⁶ See e.g. GCN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179; 'On the Loss of Rights' in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (n 14) 123; 'Proportionality and Absolute Rights' in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (n 21) 75.

³⁷ GCN Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2010) 103.

³⁸ M Cohen-Eliya and I Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 *International Journal of Constitutional Law* 263, 281.

³⁹ E.g. M Antaki, 'The Rationalism of Proportionality's Culture of Justification' in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (n 14) 284.

⁴⁰ E.g. MV Tushnet, 'Anti-Formalism in Recent Constitutional Theory' (1985) 83 *Michigan Law Review* 1502, 1509; I Porat, 'The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law' (2006) 27 *Cardozo Law Review* 1393.

⁴¹ E.g. TA Aleinikof, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943, 989; PM McFadden, 'The Balancing Test' (1988) 29 *Boston College Law Review* 585, 641; Webber (n 37). Unsurprising, perhaps, given proportionality's German origins. On this see M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (CUP 2013) ch 4.

⁴² GCN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (n 36) 191.

⁴³ See notably J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W Rehg tr, MIT Press 1998) 259. See also e.g. G Huscroft 'Proportionality and the Relevance of Interpretation' in Huscroft,

proportionality is as uncertain and unpredictable as any other form of substantive review.⁴⁴ A less dramatic, and thus more credible, version of this criticism is that the proportionality model tends to import specifically legal values *without* considering the wider range of interests of importance to political actors. This means that proportionality's claims to rationality are inevitably incomplete (rather than entirely without merit).⁴⁵

This third criticism blurs with a fourth, which is vital to the analysis in this chapter. Accusing the proportionality approach of irrationality can be pushed too hard. Proportionality review relies on a logical structure and the balancing exercise, which is generally the focus of such accusations, involves a reasoned process of weighing competing principles.⁴⁶ Yet there is a core of truth in the irrationality challenge. A more focused, and stronger, version of this critique is found in the literature on incommensurability. On this analysis the problem with the balancing exercise is that it weighs against each other matters that cannot be compared on any common scale. As Cass Sunstein puts it, incommensurability occurs 'when the relevant goods cannot be aligned along a single metric *without doing violence to our considered judgments about how these goods are best characterised*.'⁴⁷ Once such goods must be compared and contrasted, value judgments, emotion and questions of morality come into play.⁴⁸ In the context of a proportionality assessment, the weighing of ends and impacts, or the assessment of whether a justification for a rights interference has been made out, inevitably involve such factors.

Timothy Endicott identifies three specific 'pathologies' arising from incommensurability: (i) 'spillover' of balancing into questions for which it is unsuitable; (ii) uncertainty; and (iii) impacts in terms of judicial deference.⁴⁹ This means, on one hand, rather than being insufficiently deontological, that proportionality can increase the chances of judges deploying rights as 'trumps' via an abstract balancing process.⁵⁰ In weighing the interests of autonomy and dignity against wider aims, the process can operate deontologically in practice.⁵¹ On the other, as Endicott notes,

Miller and Webber (eds), *Proportionality and the Rule of Law* (n 14) 186; M Tushnet, 'Making Easy Cases Harder' in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (n 21) 303.

⁴⁴ C Forsyth, 'The Exercise of Administrative Power in the Era of Human Rights Protection' in M Kidd and S Hoorst (eds), *Stella Luris—Celebrating 100 Years of Teaching Law in Pietermaritzburg* (Juta and Co 2010) 61.

⁴⁵ See e.g. B Schlink, 'Proportionality in Constitutional Law: Why Everywhere but Here' (2012) 22 *Duke Journal of Comparative and International Law* 291, 299; BW Miller, 'Proportionality's Blind Spot: 'Neutrality' and Political Philosophy' in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (n 14) 370.

⁴⁶ See, for example, Paul-Erik N Veel, 'Incommensurability, Proportionality, and Rational Legal Decision-Making' (2010) 4 *Law and Ethics of Human Rights* 176.

⁴⁷ CR Sunstein, 'Incommensurability and Valuation in Law' (2006) 92 *Michigan Law Review* 779, 796 (my emphasis).

⁴⁸ See e.g. J Finnis, 'Commensuration and Public Reason' in R Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press 1997) 219.

⁴⁹ T Endicott, 'Proportionality and Incommensurability' in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (n 14) 311.

⁵⁰ See e.g. M Kumm and AD Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (n 14) 67.

⁵¹ *ibid* 88.

the problem of incommensurability can lead to increased deference. The balancing model then, rather than necessarily reconciling the accountability questions raised by judicial power, runs dual, contradictory risks. On one hand, it risks mono-dimensional, legal-centric decision-making which measures all matters on the Procrustean bed of legal values. In so doing, it can actually *shut down* administrative deliberation.⁵² On the other, it risks heightened, and potentially misplaced, deference in recognition of the application of an inapt yardstick to questions of policy.⁵³ For these reasons, it has been argued that proportionality review is inherently unstable.⁵⁴

4.2.4 Conclusion

Both sides of the argument carry weight. The structure of proportionality analysis is clearly more rigorous and transparent than a vaguer standard of ‘unreasonableness’ or ‘irrationality’. Yet proportionality’s critics are right to point out the limitations of the doctrine, which should make us wary of claims that proportionality should be the sole head of substantive review. In particular, claims to complete objectivity cannot address criticisms regarding the incommensurability of the competing interests at stake. Inevitably a value judgment has to be made by the reviewing court. I will say more on this in due course, but a necessary preliminary is to provide an overview of the debates between unificationists and bifurcationists to anchor this abstract discussion within a UK context. Once this is done, I will draw out a number of themes from the proportionality literature, before using them as a framework for critical analysis of the unification/bifurcation debate and, via empirical analysis of my Supreme Court dataset, the practice of proportionality review in the UK.

4.3 Unification or Bifurcation: The Arguments for a Doctrinal Hard Border

4.3.1 For a Unified Model of Review

At the outset I noted that recent debates on proportionality in the UK have turned on the question of whether proportionality should constitute the sole head of substantive review (unification), or subsist alongside the older *Wednesbury* model (inter-doctrinal bifurcation). To some extent the unification/inter-doctrinal bifurcation debate intersects with arguments over the merits of proportionality. However, the debate requires separate explication here because the directions in which it takes arguments about substantive review are distorting evaluation of proportionality review in the UK on its own terms.

The arguments in favour of proportionality generally carry weight for lawyers who consider that all substantive review in public law should adopt a balancing approach. Such arguments tend to

⁵² R Levy and G Orr, *The Law of Deliberative Democracy* (Routledge 2017) 48-53.

⁵³ E.g. M Luteran, ‘The Lost Meaning of Proportionality’ in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (n 14) 21, 37.

⁵⁴ E.g. KD Ewing and J-C Tham, ‘The Continuing Futility of the Human Rights Act’ [2008] Public Law 668, 682.

be sharpened in a UK context via juxtaposition with the traditional *Wednesbury* standard, which is said to be flawed in terms of its inherent deference, its unpredictability, and its opacity. On this view, there is no good reason to retain *Wednesbury*. Since the proportionality method can be applied with variable intensity, its advantages should lead to its wholesale adoption as public law's standard of substantive review.⁵⁵ Fundamental constitutional values should permeate legal standards, and there is thus no need to differentiate between rights review and deference-maintaining irrationality review.⁵⁶

Those who take this view and consider that proportionality should 'run the rainbow', such as Paul Craig, also tend to be more willing to acknowledge that the practice of judging involves enforcing societal values.⁵⁷ Craig has been a strong and consistent voice in favour of unification, in line with his strong advocacy of proportionality more generally. For him, the reality is that common law review is as substance-focused as proportionality. Reasonableness is about weight and balance just as much as proportionality, and incommensurability thus poses a challenge for review at common law as much as under the HRA. The key difference, however, is the rational, predictable and transparent structure of the proportionality exercise.⁵⁸

4.3.2 For Inter-doctrinal Bifurcation

In the UK the weight of academic opinion has tended to favour the retention of *Wednesbury* alongside proportionality. A range of arguments have been made in support of this. The central points relate to conceptual suitability, separation of powers, technical fitness, and propriety in terms of constitutional development.

A key argument made by inter-doctrinal bifurcationists is the question of conceptual suitability. The questions at stake in rights cases and other challenges to exercises of public power are conceptually and normatively different. *Wednesbury* and proportionality review stem from different theories of constitutional control. The former concerns the courts' supervisory jurisdiction over the exercise of public power, whereas the latter is a defence to a rights claim. This means that inter-doctrinal bifurcation is normatively preferable.⁵⁹ To conceptualise public

⁵⁵ See e.g. P Craig, 'Proportionality, Rationality and Review' [2010] *New Zealand Law Review* 265.

⁵⁶ Dyzenhaus et al, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (n 31) 6.

⁵⁷ See e.g. P Craig, 'Political Constitutionalism and Judicial Review' in C Forsyth et al (eds), *Effective Judicial Review: A Cornerstone of Good Government* (OUP 2010) 19, 35.

⁵⁸ Craig, 'Proportionality, Rationality and Review' (n 55); 'The Nature of Reasonableness Review' (2013) 66 *Current Legal Problems* 131.

⁵⁹ JNE Varuhas, 'Against Unification' in Wilberg and Elliott (eds), *The Scope and Intensity of Substantive Review* (n 3); 'Judicial Review at the Crossroads' [2015] *Cambridge Law Journal* 215; 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in J Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 45.

law *solely* in rights terms is to impose uniformity on a complex, manifold structure, thereby excluding other more pressing and legitimate concerns over effective administration.⁶⁰

While it is easy to see this point in terms of retaining a more deferential model of review for non-rights cases, the suitability point cuts both ways. For some, *Wednesbury* review should be retained not for its deference, but because there are some circumstances in which proportionality's structure will fail to hold government properly to account. Decisions in which a challenge is brought against government *inaction*, is one example.⁶¹ Another is decisions which are bizarre but not disproportionate in context.⁶² For some commentators, then, the issue is that extending proportionality beyond its appropriate boundaries could have unintended consequences, such as the watering down of protections for fundamental rights.⁶³

The second core argument relates more directly to *Wednesbury*'s deferential nature, which is seen as being preferable to proportionality's tendency toward substantive, or merits review.⁶⁴ This point is frequently conceived in 'separation of powers' terms; the courts are institutionally and constitutionally inapt for the tacking of substantive questions.⁶⁵ On this view, *Wednesbury* preserves a delicate balance between the institutions of state.⁶⁶ It should be maintained, alongside proportionality, for those cases where less intensive scrutiny is appropriate.⁶⁷ In cases where proportionality's application is not specifically authorised by Parliament, legitimacy questions arise.

A variant on this separation of powers argument is found in the work of those who favour an institutionally focused approach. For Jeff King, for example, the key to determining the appropriate standard of review is to weigh the benefits and drawbacks of applying a particular model of review in a given context. There are risks, on this view, of applying strong form review outside the context of fundamental rights or legitimate expectations, such as ossification or judicialisation of administrative discretion.⁶⁸ Mark Elliott usefully characterises the conflict here as one between 'judicial supervision' and 'agency autonomy'; retention of the *Wednesbury* standard for non-rights cases respects the latter.⁶⁹

⁶⁰ T Poole, 'The Reformation of English Law' [2009] Cambridge Law Journal 142, 156.

⁶¹ See M Fordham, 'Wednesbury' [2007] Judicial Review 266.

⁶² See T Hickman, *Public Law After the Human Rights Act* (Hart 2011) ch 7.

⁶³ Hickman, 'Problems for Proportionality' (n 67) 321-324.

⁶⁴ See e.g. P Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 Law Quarterly Review 223.

⁶⁵ See e.g. J Goodwin, 'The Last Defence of Wednesbury' [2012] Public Law 445; J King, 'Proportionality: A Halfway House' [2010] New Zealand Law Review 327.

⁶⁶ M Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' [2001] Cambridge Law Journal 301.

⁶⁷ T Hickman, 'Problems for Proportionality' [2010] New Zealand Law Review 303, 314-315.

⁶⁸ King (n 65) 334.

⁶⁹ Elliott (n 66) 303.

A further argument, arguably a sub-strand of the conceptual point above, for inter-doctrinal bifurcation focuses on the practical difficulties of applying proportionality review in cases not clearly involving interference with a fundamental right. Such arguments thus tend to go to technical appropriateness, but nonetheless address the normative suitability of a unified model of review in the UK's constitutional context. A common argument here is that without a rights 'anchor', there is neither a benchmark against which a proportionality assessment can be carried out, nor a normative justification for the more searching review proportionality entails.⁷⁰

Finally, an argument sometimes made in favour of inter-doctrinal bifurcation goes to the legitimacy of pathways for constitutional evolution. Philip Sales, for example, has argued that for proportionality to become the sole means of substantive review represents such a significant constitutional development that it is properly one that only Parliament could, or should, carry out.⁷¹ Proportionality review is, on this view, appropriate in ECHR and EU cases because it bears the stamp of Parliamentary approval in these contexts.

4.3.3 *The Limitations of the Inter-doctrinal Bifurcation Debate, Intra-doctrinal Bifurcation & Hypotheses*

Debates over inter-doctrinal bifurcation both obscure and reveal key aspects of substantive review in the UK. They cloud thinking on substantive review by turning questions about the appropriate nature and strength of review into abstract doctrinal debate. Mark Elliott has argued that this can preclude consideration of the institutional and constitutional issues at large in any given case.⁷² Rebecca Williams has similarly noted that it can prevent context-sensitive judicial focus on what has gone wrong in substance and how intensively that should be scrutinised.⁷³

These criticisms only go so far, because the participants in the debate *are* concerned about context. The deeper problem is that normative concerns expressed by the discussants are suppressed by the terms in which the debate is framed. Both sides in the debate wish to ensure that substantive review is restrained or vigilant depending on the circumstances of a claim.⁷⁴ Both therefore argue that their model of review is capable of traversing Taggart's 'rainbow' of review.⁷⁵ Unificationists believe that proportionality should 'sweep the rainbow', but nonetheless consider that proportionality review can be modulated to reflect the seriousness of the issue at stake. Inter-doctrinal bifurcationists also consider that the appropriate standard of review should differ

⁷⁰ M Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 477–478; Hickman, 'Problems for Proportionality' (n 67) 321–324.

⁷¹ Sales (n 64).

⁷² M Elliott, 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' in Wilberg and Elliott (eds), *The Scope and Intensity of Substantive Review* (n 3) 61, 70.

⁷³ Williams (n 4).

⁷⁴ Borrowing Dean Knight's terminology (n 7).

⁷⁵ Taggart (n 5).

depending on context. They simply prefer the low intensity end of the rainbow to be dealt with by the deferential *Wednesbury* approach. They would nonetheless want proportionality review, where applicable, to vary in intensity. Similarly, both sides in the debate seek to be sensitive to concerns of institutional propriety. Inter-doctrinal bifurcationists support *Wednesbury*'s retention because in cases where no fundamental right is at stake this ensures appropriate respect for institutional competence, retaining a stronger mode of review for rights cases. Unificationists consider proportionality's structured method recommends its substitution for *Wednesbury*, but nonetheless require it to adopt context-appropriate respect for institutional choices.

Yet the arguments, pitched at a doctrinal level, distract from the ways in which proportionality review, rather than consistently providing for careful calibration relative to context, can itself polarise (especially in hard cases) into strong and weak forms of review. In so doing it is influenced by, and perpetuates, the bifurcational constitutional logic described in chapter 2. That polarisation, I will suggest, can lead to a set of associated bifurcational pathologies which carry implications for the quality of judicial scrutiny of executive action. Without demurring from my position that the doctrinal arguments here are unhelpful in some ways, this polarisation also (and I shall say more on this in due course) undermines arguments that proportionality should operate as the sole standard of substantive review. The critical literature I surveyed above on proportionality allows me to tease out these problems, with three themes emerging.

Before proceeding to explain those themes, it is worth reemphasising here my reasons for repurposing the term 'bifurcation' from debates over whether substantive review should become entirely a question of proportionality. As noted above, a core contention of advocates of the retention of two standards of review is the normative desirability of *Wednesbury*'s inherent deference. To that extent, the debate between commentators who prefer two standards of review and those who prefer a unified model turns on whether one prefers more or less intensive review. My appropriation of the term bifurcation to refer to review which oscillates between strong and weak forms of review thus highlights the ways in which the debate itself is caught in the very same dynamic which I suggest can hamper substantive review in practice.

I have said that three important themes emerge from the literature. First, proportionality model is a model of rights/aims balancing. The debates on whether a unified mode of review should be adopted frequently turn on the normative and practical pros and cons of the balancing approach, but no-one disputes that it is a key element of the doctrine. Across the literature it is tolerably clear that balancing is the central defining facet of the proportionality test which distinguishes it from other modes of review. This is the novel method of analysis that proportionality brings to the jurisprudential table.

Second, while this central balancing process rightly places a justificatory burden on the political actors of the constitution, it implicates the courts in substantive decision making via the weighing of incommensurable values. While views differ on whether the balancing process is irrational or not, and the relative objectivity of the judicial role in its application, it is not seriously disputed that judicial discretion plays a role in weighing protected interests against public interest aims.⁷⁶ While claims that the proportionality test is more objective, more clearly structured and more transparent than a general ‘reasonableness’ test may well be sustainable, the incommensurability point is inescapable at some level. The intrusion into questions of substance is a common theme in the pro-bifurcation literature, lying at the heart of objections against proportionality’s expanded use on the basis of conceptual and technical appropriateness, conflation with merits review, and constitutional propriety. Yet, importantly, these objections diverge into accusations *both* that the balancing method is too strong, and that it is too weak. As noted above, a standard of correctness review predicated on judicial discretion has been critiqued for undermining political decision making, but also for crowding out methods of review focused on process rather than substance.

Even the influential ‘justification’ or ‘Socratic’ models, which focus more on the standard of justification for a rights infringement rather than balancing *per se*, require a judge at some point to determine the nature and extent of the justification proffered.⁷⁷ Ultimately, an assessment of whether an administrator’s justifications are sufficiently compelling to override a protected interest must entail determination of the persuasive force of those reasons.⁷⁸ Kumm’s version of the approach, for example, comes down to a demand that the justification for infringement with a protected interest is reasonable, taking into account all the relevant circumstances.⁷⁹ Taken at face value, that is either akin to the *Wednesbury* test, in which case all the justification need be is not unreasonable in the circumstances. Or it requires evaluation of the substantive sufficiency of that justification, in which case the standard is effectively one of correctness.

Third, while proportionality is critiqued in some quarters for not being formally deontological, it will have what might be termed a deontological effect at some stage of the assessment process. Whether the exercise seeks to establish the sufficiency of a public body’s justification or to determine, as Alexy would have it, whether that body has come to a legitimately balanced answer is beside the point. Either way, the judge must determine the threshold at which a protected

⁷⁶ See Luteran (n 53) 21.

⁷⁷ For a critique of the ‘justification’ model see Urbina (n 26) 207.

⁷⁸ See TRS Allan, ‘Democracy, Legality and Proportionality’ in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (n 14) 205, 222.

⁷⁹ M Kumm, ‘Is the Structure of Human Rights Practice Defensible? Three Puzzles and their Resolution’ in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (n 21) 51.

interest operates preclusively relative to questions of public interest. In that sense, there is a deontic core to the proportionality model. Yet debates over the relative merits of proportionality include *both* the claim that it is insufficiently deontological *and* that it involves judges using rights claims to preclude political decision making. It is somehow, again, both too weak *and* too strong, because faced with the prospect of deontological balancing a judge will either have to determine that a protected interest trumps a policy goal, or defer to the decision maker on the basis that the judiciary should be wary of undertaking merits review.

These three critiques are linked to proportionality review being applied as a standard of correctness (i.e. in the sense that it for a court to determine whether or not a right has been infringed). That has been the established approach in the UK since the pivotal case of *R (Huang) v Secretary of State for the Home Department*.⁸⁰ As explained in Chapter 2, this correctness standard is tempered in a UK context by a doctrine of deference, which seeks to incorporate recognition of relative institutional competence into substantive review. As Baroness Hale and Lord Carnwath explain in *R (MM) (Lebanon) v Secretary of State for the Home Department*, the judicial balancing process ought to take into account the degree to which a decision maker has made use of expertise available to them.⁸¹ Yet they cite for authority on this point *R (Begum) v Denbigh High School Governors*.⁸² This is telling, because *Begum* falls into a line of cases along with *Huang* itself, *Belfast City Council v Miss Behavin' Ltd*,⁸³ and *R (Nasseri) v Secretary of State for the Home Department*,⁸⁴ wherein the House of Lord confirmed that a correctness standard (as opposed to a process based approach) was the appropriate approach in qualified rights cases. The proportionality approach in the UK thus incorporates conflicting, non-integrated concepts of correctness and deference which run the risks, I suggest, outlined in this section.

On this basis, two sub-hypotheses (stemming from my broad bifurcation hypothesis) about the application of proportionality review in the UK may be posited. The first sub-hypothesis is that proportionality review will turn on the rights/aims balancing aspects of the four-stage test set out in *Bank Mellat*. This has two implications. The proportionality exercise, in the UK courts, has settled into a four-stage analysis: (i) legitimacy of aim; (ii) rational connection of aim and measure; (iii) necessity and (iv) proportionate in the sense of striking a fair balance.⁸⁵ For purposes of analysis, I assumed the first two stages are broadly comparable to rationality review.⁸⁶ Like

⁸⁰ [2007] UKHL 11, [2007] 2 AC 167.

⁸¹ [2017] UKSC 10, [2017] 1 WLR 771.

⁸² [2006] UKHL 15, [2007] 1 AC 100.

⁸³ [2007] UKHL 19, [2007] 1 WLR 1420.

⁸⁴ [2009] UKHL 23, [2010] 1 AC 1.

⁸⁵ See *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [45] (Lord Wilson); *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [20] (Lord Sumption) [74] (Lord Reed).

⁸⁶ Cora Chan describes these aspects of the test as 'threshold questions that are implicit in traditional standards of review' in her 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 *Legal Studies* 1, 8.

traditional rationality review, they focus more on institutional rationality rather than on the degree of intrusion upon the civil rights of individual complainants. The second two aspects of the test concern the justifiability of impacts on subject autonomy. If surveying suggests that this hypothesis is supported, this implies that proportionality's critics are correct that its defining aspect is the judicial weighing of incommensurable values. A further implication is that, at least at apex court level, those who favour proportionality to any extent on the basis of its structured transparency require scrutiny.

The second sub-hypothesis deals with the balancing aspects of the proportionality approach. Proportionality advocates argue that balancing facilitates careful weighing of aims and aspirations in order to determine whether a rights interference constitutes a rights violation. It is, on this view, context sensitive, calibrated depending on the nature of the right at stake. Critics of the doctrine, particularly those who like Endicott focus on incommensurability, suggest that proportionality's precision is overegged. On that basis, my hypothesis, in hard cases, is that proportionality can increase the risks of a trio of interrelated pathologies ('proportionality's pathologies'). The first is the core problem of intra-doctrinal bifurcation, wherein review risks becoming overly active or actively passive. The second is attitudinal bias. The third is an inconsistent approach to clear policymaking flaws. The problems arise when judicial analysis is applying legal standards or doctrine to resolve questions involving the comparison of incommensurable values. Intra-doctrinal bifurcation involves polarisation *within* the proportionality model (since, faced with the task of reconciling irreconcilable values, the judiciary must either defer to, or 'trump', other constitutional actors). Attitudinal bias involves exacerbation of differences in judicial proclivity.⁸⁷ The third related pathology involves *both* a failure to impugn failures of institutional functioning by being unduly deferential on policy questions, *and also* the use of contestable legal interests to preclude or constrain political decision making. Within the space left by bifurcation's two extremes, the fundamental need for sound governmental policy making can elude the proportionality model. In terms of the inter-doctrinal bifurcation debate, *Wednesbury*'s potential to focus on institutional functioning suggests that having two standards of substantive review is preferable to moving to a position where only proportionality is used. But it must be borne in mind that *Wednesbury* itself is potentially subject to intra-doctrinal bifurcation; it is a central contention of this thesis that the inter-doctrinal debates can preclude this wider issue.

⁸⁷ See Hickman, 'Problems for Proportionality' (n 67) 321–324..

4.4 Testing the Theory: Intra-doctrinal Bifurcation in the Supreme Court

These sub-hypotheses were tested using the methodology set out in Chapter 2. The central finding of the analysis carried out is that there is clear quantitative evidence in the cases from my reference period to substantiate, in part, the first sub-hypothesis. My survey suggests that the substantive argument generally takes place at the balancing stage of the argument (the analysis is set out in Appendix A). The Court eschews extensive consideration at the aim/connection aspects of the proportionality exercise, focusing its attention to a significant degree on the necessity/balance question.⁸⁸ The dominant paradigm is for the Court to briefly consider the aim/rational connection question before, having determined that the low threshold applicable at these stages has been met, deciding a case on the contested questions of necessity, and *in particular*, the fair balance of a measure.⁸⁹ This finding is emphasised by *dicta* where the Court confirms expressly what is implicit in the trend in the decided cases. In *Beghal v Director for Public Prosecutions*, for example, Lord Kerr comments that: '[a]s is usually the case, the real debate centres on the third and fourth issues: is the breadth of the powers no more than is necessary to achieve the aim; and has a fair balance been struck between the rights of the individual and the interests of the community.'⁹⁰

The Court's dominant approach to proportionality is structurally and substantively a question of rights-balancing. The key is determining whether the impacts of policy X on individual Y are justified in terms of the fair balance.⁹¹ This is not, to be clear, to say that policy-making processes are not considered at the necessity/balancing end of the test.⁹² As Gardbaum has demonstrated, the requirement for balancing policies and interests can, for example, enhance democratic deliberation, by requiring appropriate justification to be developed and debated.⁹³ The merits of the 'culture of justification' model in particular are to some extent borne out in this regard. However, the key point here is that scrutiny has the quasi-deontological hue (in the sense described above) of rights/aims balancing, and the Court is not engaging in a sustained and rigorous manner with the full spectrum of the proportionality exercise.⁹⁴

This is important for four interrelated reasons. It means that claims that proportionality's advantages over other forms of substantive review in terms of structure require scepticism. If the

⁸⁸ See M Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studies* 1.

⁸⁹ See Appendix A.

⁹⁰ [2015] UKSC 49, [2016] AC 88 [121] (Lord Kerr).

⁹¹ Lending support to concerns about the potential for rights based judicial models to undermine process-based models. See e.g. Mead (n 4).

⁹² E.g. *R (Mott) v Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022.

⁹³ S Gardbaum, 'Limiting Constitutional Rights' (2007) 54 *University College of Los Angeles Law Review* 789; 'A Democratic Defence of Constitutional Balancing' (2010) 4 *Law and Ethics of Human Rights* 77.

⁹⁴ See e.g. Chan (n 86).

first two stages of the process are, in practice, rarely at issue, then claims from proportionality's structured objectivity merit close scrutiny. It suggests, furthermore, that the focus of review is less concerned with institutional functioning. From an inter-doctrinal bifurcationist perspective this might be seen in a positive light. On this view, *Wednesbury* scrutiny is more appropriate for addressing public wrongs rather private rights (indeed, to the extent that I take a position in the inter-doctrinal debates, this point carries weight). However, given that the widening scope of the ECHR's field of application,⁹⁵ and suggestions in the jurisprudence that proportionality *could* supplant *Wednesbury*,⁹⁶ failing to consider institutional failures as well as impacts on individuals would make for a less rich administrative law. Finally, and relatedly, in confirming that the standard of review is tilted toward this form of judicial balancing/discretion, it hints at a dilution of claims regarding proportionality's overall objectivity; proportionality review would appear to be dominated by the balancing of incommensurables. This point, which covers the 'pathologies' of proportionality and forms the core of my second sub-hypothesis, requires more detailed qualitative assessment. This is the task of the next chapter.

4.5 Conclusion & Preliminary Observations

Proportionality review is playing an increasingly dominant role in settling disputes over rights, both globally and in the UK. For its critics this represents an illegitimate intrusion of the judiciary into policymaking. For others, it is the best means available for reconciling the competing claims of individual rights and public interests. In the UK, these debates around proportionality have taken local colour in the clashes between the competing claims of the inter-doctrinal bifurcationists, who want to constrain proportionality to rights cases, and those who support a unified model in which all substantive review applies a proportionality model. I have argued that this debate obscures important questions regarding the intensity of substantive review, and specifically misses potential intra-doctrinal bifurcation *within* the proportionality model. Ironically, the concerns of those on either side of the dispute regarding the need for context sensitive substantive review, showing appropriate respect for relative institutional competence, are leading the debate's protagonists to overlook relevant trends *within* proportionality review. This is why I have repurposed the term 'bifurcation' from the literature to refer to the potential for review to lapse into either strong or very weak review; the academic debate is overlooking *and perpetuating* a dynamic of bipolarity within UK administrative law. Using the term in this way helps show how the inter-doctrinal bifurcation debates are implicated in the problematic historical development I discussed in Chapter 2.

⁹⁵ See e.g. the widening class of interest to which Article 8 ECHR applies in D Harris et al, *Law of the European Convention on Human Rights* (OUP 2018) 503-510.

⁹⁶ E.g. *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 [114]-[119] (Lord Reed).

In particular, notwithstanding contrasting views on the retention of *Wednesbury*, both unificationists and inter-doctrinal bifurcationists argue that proportionality provides a structured, context sensitive model of review which facilitates delicate balancing of rights and aims. However, a key criticism within the extensive literature on proportionality is the fundamental incommensurability of the balancing aspect of the test; the requirement for judges to weigh principles which cannot be compared on any common scale. I have hypothesised that the practice of proportionality in the UK is likely to become dominated by the necessity/balancing stages of the doctrine, demonstrating a general inclination on the part of the Court to overlook the more institutionally focused aim/connection stages. While the balancing stage *can* be institutionally focused, in the sense of determining whether an effective policy process has been followed, focus on this stage of the proportionality test operates as a heuristic to determine whether the Court is inclined to think more in terms of institutional process or in terms of weighing competing values. A second sub-hypothesis, building on the first, is that focusing on balancing will increase risks of three associated bifurcationary pathologies.

In this chapter I have considered 5 years' worth of Supreme Court cases which involve the application of a proportionality approach to claims under the HRA. So far, I have shown that the first sub-hypothesis is supported, and briefly considered the potential ramifications in terms of review. In short, in attitudinal terms the Court shows a *prima facie* tendency to overlook institutionally focused aspects of review. This suggests, in turn, that the *conditions* for proportionality's intra-doctrinal pathologies are in place. In terms of the overarching arc of this thesis, this also tends to confirm that the bifurcated effects of the Diceyan dialectic continue to manifest themselves within the UK constitution, and that this stems from a mode of administrative law that has incompletely addressed the interrelationship of law and policy. The next stage of the analysis involves more intensive consideration of whether these hypothesised pathologies are emerging in the Supreme Court jurisprudence

Chapter 5. Proportionality's Pathologies

5.1 Introduction

The previous chapter critically examined the unification/inter-doctrinal bifurcation debates occupying discussion of substantive review in the UK courts. I argued that the debate obscures questions about the appropriate level of scrutiny applied in individual cases, including claims about the possibility for proportionality review to traverse Taggart's rainbow of judicial responses.¹ Such claims rely on two propositions. First, that proportionality provides for structured review, regulating the application of both administrative and judicial discretion. Second, that it provides for a rational balancing exercise that can be adjusted to reflect the importance of the relevant interests at stake. I hypothesised that balancing would come to dominate the proportionality approach, meaning that the exercise becomes predominantly a question of weighing aims/impacts. My second hypothesis was that the dominance of the balancing exercise would give rise to interrelated bifurcatory pathologies of: (i) intra-doctrinal bifurcation; (ii) attitudinal bias; and (iii) inconsistency relative to flawed institutional functioning.

A survey of cases from the UK Supreme Court in 2014-2018 involving qualified rights under the Human Rights Act 1998 ('HRA') provided support for the first of my hypotheses. This provides *prima facie* evidence that the Supreme Court is inclined (I put it no higher than that) toward rights/aims balancing rather than the more inherently institutionally-focused aspects of proportionality review. This chapter examines the material from across my sample of cases demonstrating the occurrence of proportionality's 'pathologies', relying on case studies to demonstrate their aetiology in practice. In summary, the dynamics of proportionality provide some evidence of these pathologies via: (i) the high threshold facing a claimant attempting to impugn a policy in the abstract; (ii) the ways in which the justices deploy the manifestly unreasonable standard; and, (iii) the emergence of a polarised jurisprudential logic in standard proportionality review. These dynamics suggest that claims about proportionality's ability to 'run the rainbow', whether alongside or instead of *Wednesbury*, require careful scrutiny on a case-by-case basis. In short, proportionality risks telescoping between the extremes of leaving clearly substandard decision making unscrutinised, and precluding political decision making by deploying rights as 'trumps'. In terms of the overarching arc of this thesis the key point is UK administrative law doctrine's bifurcated and intermittently unstable relationship with its object of regulation.

¹ M Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] *New Zealand Law Review* 423.

5.2 Proportionalities Pathologies

5.2.1 *Attacking Abstract Policy*

The first trend that provides evidence of the pathologies emerging in practice is the extremely high threshold for impugning policy at an abstract level. The point is superficially unsurprising, given the force of norms regarding the appropriate judicial role in ‘high policy’ cases and draws on longstanding jurisprudence.² But this is, perhaps, only because public lawyers are so used to thinking in bifurcated terms (see Chapter 2). This feature of proportionality review is relevant given arguments regarding its revolutionary potential in scrutinising policy decisions.³ For all this talk, current proportionality doctrine in some respects occupies a traditional place in legal discourse in holding the state to account. It takes, at times, a purely Diceyan approach to differentiating questions of law and questions of discretion.⁴ Accordingly, it operates pre-eminently within the logic of bifurcation.

R (MM) (Lebanon) v Secretary of State for the Home Department, for example, exemplifies the way in which the Court focuses on the autonomy/rights balancing end of the proportionality assessment to the detriment of policy-making in its own right.⁵ The case concerned minimum income levels of persons wishing to sponsor the entry of a non-EEA spouse into the UK. A challenge was made to the proportionality of the level at which the Home Secretary had set the applicable thresholds.⁶ It is noteworthy here for Lord Carnwath and Baroness Hale’s observation that it will be rare for regulations prepared by the Secretary of State (in effect, the general policy) to be susceptible to attack on proportionality grounds.⁷ The courts, they say, must be wary of impugning such decisions because: (i) it falls within the Secretary of State’s constitutional responsibility; and (ii) the need to respect Home Office expertise.⁸ On the other hand, in individual cases there is the potential for rights violations to occur.⁹ What is happening here is a bifurcation *within* proportionality review; the Court weighs its institutional legitimacy in terms of specific clashes between rights/aims, which will be adjudicated on a strong correctness standard,¹⁰ and recognises that its input has less validity in cases which concern abstract policy. This logic translates into its mode of analysis, with review tending to bifurcate into ‘rightness’ (i.e.

² See e.g. *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 (HL); *R v Cambridge Health Authority ex p B* [1995] 1 WLR 898 (CA).

³ See e.g. DM Beatty, *The Ultimate Rule of Law* (OUP 2004).

⁴ On which see the discussion in Chapter 2.

⁵ [2017] UKSC 10, [2017] 1 WLR 771.

⁶ *R (MM) (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10, [2017] 1 WLR 771. The aim and rational connection are dealt with in paragraphs [83]-[84] of Lord Carnwath and Baroness Hale’s judgment. The remainder of the analysis concerns the balancing exercise.

⁷ *ibid* [57] (Lord Carnwath, Baroness Hale). Similar claims are made in the related case of *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 WLR 823.

⁸ *ibid* [75] et seq (Lord Carnwath, Baroness Hale).

⁹ *ibid* [57] (Lord Carnwath, Baroness Hale).

¹⁰ See *R (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100.

has the decision maker intruded into individuals' protected zone of autonomy) and deferential rationality (i.e. whether the decision is devoid of reason).

A similar phenomenon is seen *Ali v Secretary of State for the Home Department*, in which six out of the seven justices on the bench apply a submissively deferential standard at the level of policy making.¹¹ The Secretary of State had attempted, in effect, to 'fix' the proportionality balancing exercise for Article 8 ECHR issues arising from the deportation of foreign nationals with UK national family members. She sought to do this via the inclusion of strict assessment criteria in the Immigration Rules, while leaving decision makers discretion to depart from the Rules in exceptional cases. For the majority, the fact that the new Rules continued to allow individual exceptions ensured their legality.¹² At the level of the policy the Court was extremely reluctant to interfere.¹³ The trajectory of the underlying bifurcatory logic is laid bare; the Court writes itself out of the frame on pure policy questions, and its focus is trained at the rights-balancing aspect of any proportionality assessment.

This point is apparently reasonable in terms of legal policy and longstanding precedent. Yet, the discursive dissonance here (i.e. with legal/policy discourses being treated as conceptually discrete) and the intra-doctrinal bifurcation, are of a piece with an outmoded dialectical Diceyan constitutionalism which doctrinal evolution has purportedly eschewed.¹⁴ The central point is that the Diceyan dialectic described in Chapter 2 relied on conceptual distinctions which were prone to judicial manipulation, making review either non-existent or highly restrictive. The implications of this conceptualism are seen in those cases where the Court manipulates the putative distinction between high policy and individual rights in order to structure the intensity of its review. Lord Kerr's dissent in *Ali* illustrates the point. The majority were content that the new rules themselves, operating at a level of generality (and, accordingly, abstract policy) were subject to no more than a limited intensity of review. Lord Kerr, in dissent, placed greater emphasis on the need for careful consideration of individual cases. In doing so, he exposes the conceptual fragility of the majority approach. While they were content to take a restricted approach to high level policy, Lord Kerr points out that the effect of the policy is to impose a series of strict rules upon family life.¹⁵ The policy therefore necessarily pre-empts a series of issues that will only crystallise at the level of individual decisions. A set of rules can be conceptualised either as 'high-level' policy, or the conglomeration of a multitude of individual decisions. A justice's approach to this question will determine the standard of review. Lord Kerr's approach itself arguably falls foul

¹¹ [2016] UKSC 60, [2016] 1 WLR 4799.

¹² *Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799 [53] (Lord Reed).

¹³ *ibid* [46] (Lord Reed).

¹⁴ DR Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018) 47-56.

¹⁵ *Ali* (n 12) [147] (Lord Kerr).

of the logic of bifurcation in seeking to reaffirm the correctness standard applied in *R (Huang) v Secretary of State for the Home Department*.¹⁶ But his dissent is nonetheless helpful here in exposing the artificiality of the majority approach and its relationship with, and perpetuation of, bifurcated models of review. In cases such as these, proportionality is not used as a delicate instrument for the interrogation of public policy outcomes, but finds itself in thrall to the ‘Diceyan dialectic’ identified by Lewans (described in Chapter 2).

5.2.2 *Manifestly Without Reasonable Foundation*

The potential for intra-standard bifurcation is also apparent in the ‘manifestly without reasonable foundation’ cases involving social and economic policy. This standard originates in the ‘margin of appreciation’ doctrine used by European Court of Human Rights in cases involving member states’ social policy.¹⁷ The concept has been adopted by the UK courts, and it appears in my dataset. A general point requires noting at the outset. This mode of review is inherently deferential. But it has the effect that substantive curial debate turns on the justification for a policy (essentially, a balancing point).¹⁸ Its core logic, even at a purely conceptual level, thus incorporates an uneasy tension between (weaker) rationality-style review and (stronger, decision-substituting) rights review. This unstable coexistence of deferential and quasi-deontological review is likely to exacerbate underlying judicial attitudes toward regulation of the executive. For justices inclined to deference to administrative decision making, the proportionality test in socio-economic cases morphs into a bare rationality test.¹⁹ For justices inclined to a more intense scrutiny, there is much greater chance that individual rights will override the claims of the public interest. This theoretical bifurcation is borne out in practice, with the relevant cases in my dataset demonstrating all three of proportionality’s pathologies. This has implications both in terms of the Court’s ability to consistently ‘run the rainbow’ by employing proportionality, and for proportionality to satisfactorily address instances where administrative discretion has been exercised in a way which is flawed or inconsistent.

The basic dynamic is seen in *R (SG) v Secretary of State for Work and Pensions*, in a way which confirms the implications that bifurcated doctrinal models hold for fostering effective administrative functioning.²⁰ The Supreme Court had to determine whether the Government’s controversial ‘benefits cap’ policy, which fixed maximum benefit levels per household, was unlawfully discriminatory. The Court held that the relevant legal standard was whether the

¹⁶ *ibid* [153] (Lord Kerr). *Huang* is reported at [2007] UKHL 11, [2007] 2 AC 167.

¹⁷ E.g. *Stec v UK* (2006) 43 EHRR 47, [2006] ECHR 1162

¹⁸ *R (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492 [34] (Lord Wilson).

¹⁹ KG Young, ‘Proportionality, Reasonableness, and Economic and Social Rights’ in VC Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 248..

²⁰ [2015] UKSC 16, [2015] 1 WLR 1449.

Secretary of State's decision was 'manifestly without reasonable foundation'.²¹ This frames the case as one in which the Court will afford leeway to the executive, particularly since the policy in question was set out in secondary legislation and thus subject to Parliamentary scrutiny. The key issue is thus the balance struck between public aims and individual impacts. This sets the stage for judicial polarisation in terms of the intensity of review.

Lord Reed, who gave the lead judgment for the majority, devoted three paragraphs to the question of 'legitimate aim',²² and around ten times as many to the question of 'fair balance'.²³ His discussion is rich and detailed. However, the decisional crux of his judgment comes in its conclusion, which emphasises the need for deference in an area of socio-economic policy to weigh heavily on the balancing exercise.²⁴ I have suggested that a problem of bifurcation is that it fails to focus sufficiently on whether an institution whose decision is under challenge has taken its decision in an effective manner. It is therefore both fascinating and frustrating that Lord Reed's judgment appears to come close to giving weight to such institutional considerations, only to lapse into bare deference. As part of the background to his judgment, Lord Reed provides detail of various government documents, reports and analyses supporting the policy.²⁵ Further, he comes close to taking into account the extent to which Parliament scrutinised the policy's implications.²⁶ Such matters could form the basis of an institutionally enabling mode of analysis, rewarding a decision maker for active policy making which had been subject to extensive scrutiny. Yet Lord Reed confirms that these matters are considered only to establish the 'aim' of the policy.²⁷ In the final analysis, Lord Reed is content to leave the final decision with the government and Parliament.²⁸ The importance of this in institutional terms becomes clear in Lord Carnwath's consideration of the same issues. Lord Carnwath finds that the Treasury's evaluation of the policy's impacts had not been sufficiently thorough. Indeed, it had taken no account at all of the individual impacts of the scheme.²⁹ Nor, in his view, had the Parliamentary debates covered the human rights implications of the fixed threshold.³⁰ In the end, he too is (unwillingly) unable to impugn the policy on these points, but his mention of them highlights the extent to which Lord Reed's lead judgment is driven, in effect, by submissive deference. In Chapter 7 I will set out the beginnings of an approach to review which addresses proportionality's pathologies by taking a more institutional focus. If Lord Carnwath (and indeed, Lord Reed) had been willing to

²¹ *ibid* [11] (Lord Reed).

²² *ibid* [63]-[66] (Lord Reed).

²³ *ibid* [67]-[96] (Lord Reed).

²⁴ *ibid* [92]-[93] (Lord Reed).

²⁵ *ibid* [19]-[25] (Lord Reed).

²⁶ *ibid* [26], [95] (Lord Reed). Lord Hughes takes a similar line at [155].

²⁷ *ibid* [16] (Lord Reed).

²⁸ *ibid* [96] (Lord Reed).

²⁹ *ibid* [109] (Lord Carnwath).

³⁰ *ibid* [123]-[127] (Lord Carnwath).

give greater weight to the limits of Parliamentary debate here, and potentially find against the Secretary of State *on this basis* then that would have constituted such an approach.

The logic of bifurcation emerges in the judgments of the dissenters in *SG*, Baroness Hale and Lord Kerr. For them the determining factor is the influence of the UN Convention on the Rights of the Child (UNCRC). In Baroness Hale's judgment, the balancing exercise is undertaken with the best interests of children as a driving factor, finding that the impacts of the policy outweigh its aims.³¹ Lord Kerr goes several, constitutionally significant, doctrinal steps further in finding the UNCRC to be both directly applicable and substantively breached.³² Again, the dissenters considered questions of process, but only by way of a brief concurrence with the views of Lord Carnwath.³³ In the end the determining factor was an international human rights norm. For the majority, discursive dissonance requires deference to social policy; policy trumps law. For the minority, discursive dissonance requires compliance with international legal norms; law trumps policy.

At the outset (see Chapter 2) I hypothesised that intra-doctrinal bifurcation was not a question simply of judicial disagreement over finely balanced questions, but a more fundamental clash of conceptions of the judicial role. This point starts to become clear on analysis of *SG*. For Lord Reed and the majority, as we have seen, the decision here is fundamentally one for the executive to take absent manifest absurdity. This is mode of review which, notwithstanding Lord Reed's careful consideration of the policy itself, fundamentally relies on the political constitution to police the executive. In the conceptions of Baroness Hale and Lord Kerr the role of the law and the judiciary is very different; it is to hold the executive to substantive standards of equality and protection for children sourced in international law. This is not a question of a minor disagreement over a discrete legal point, but a substantive disjuncture in terms of the role of administrative law in the state. This, I suggest, is precisely the kind of conflict to which our bipolarised model of administrative law can give rise.

A counterexample to *SG* in terms of outcome, which further helps understand the dynamics at work here is *In re McLaughlin*.³⁴ This case turned on whether it was a breach of Article 14 for an allowance payable to widowed parents to be accessible only by surviving partners who had been married to the deceased. Yet here the ordinarily weak, deferential 'manifestly without reasonable foundation' standard, as applied by the majority in *SG*, escalates into a much stronger model of review.

³¹ *SG* (n 20) [229] (Baroness Hale).

³² *ibid* [254], [257] (Lord Kerr).

³³ *ibid* [225] (Baroness Hale) [233] (Lord Kerr).

³⁴ [2018] UKSC 48, [2018] 1 WLR 4250.

For the majority, for whom Baroness Hale gives the judgment, the policy was unlawfully discriminatory. The question is framed as being one of whether the aim, and the impacts to which it gives rise, strike a fair balance.³⁵ The ‘manifestly without reasonable foundation’ standard applies here, since this is a social security case, and the Court explains it will therefore consider very carefully which institution is best placed to strike a balance.³⁶ When it comes to the meat of the majority judgment, the determinative issue is whether a justifiable balance had been struck between ends and effects.³⁷ The majority holds, on the assumption that the policy’s purpose is the provision of care for children of surviving parents, that the justification provided by the Northern Ireland executive is irrational. The children of a married and an unmarried widow(er) are in an analogous position, and discrimination is thus unjustified. This outcome is bolstered by protections in international law for children’s rights.³⁸

Lord Hodge issued a lone dissent. For him, the purpose is not so much about the position of the children involved, but that of the widow(er).³⁹ From this perspective, the situations of the potential beneficiary are not analogous.⁴⁰ Lord Hodge refers to *Shackell v United Kingdom*, in which the ECHR had recognised as relevant the status of a surviving partner.⁴¹ This approach leaves the state much greater freedom of action. Technically, if the claimant is not in an analogous position to a widowed parent who was married to their deceased partner, then the Article 14 ECHR point drops away. Lord Hodge nonetheless goes on to consider the question in terms of balance/justification. But this plays out in a predictably deferential manner given his reframing of the policy’s underlying aim. Lord Hodge is examining whether the difference in treatment is manifestly unreasonable. With that analysis now focused on the distinction between married couples or civil partners, and cohabitants, this standard is easily met. The distinction means, on Lord Hodge’s view, that the claimant and the relevant comparator are in different positions in terms of the wider social security context, and therefore that the provision made for them is a question for the government.⁴² Further, practical administration is more difficult when the authorities need to assess whether a partner is genuinely cohabiting.⁴³

A comparison of the approaches of the majority and Lord Hodge illuminates the undercurrents of the bifurcatory approach. The key question for the Court is whether an appropriate balance has been struck in terms of differential treatment. For the majority, inclined to see the outcomes

³⁵ *In re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250 [32] (Baroness Hale).

³⁶ *ibid* [34] (Baroness Hale).

³⁷ *ibid* [38]-[39] (Baroness Hale).

³⁸ *ibid* [40] (Baroness Hale).

³⁹ *ibid* [59]-[60] (Lord Hodge).

⁴⁰ *ibid* [74] (Lord Hodge).

⁴¹ No 45851/99 hudoc (2000) DA.

⁴² *In re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250 [83]-[87] (Lord Hodge).

⁴³ *ibid* [87] (Lord Hodge).

as discriminatory, this requires inferring (or imposing) particular policy goals in order to determine that the balancing test is not met.⁴⁴ The question becomes one of, effectively, interpretation. By interpreting the policy as relating to the needs of widowed persons' children, the standard of review becomes extremely strong. Framed in this way, the outcomes of the policy are absurd, distinguishing between the needs of children who have lost one parent purely on the basis of whether their parents formalised their relationship. On Lord Hodge's approach, however, the state cannot lose the case. The argument is not that either the majority or Lord Hodge were incorrect; in every decision where the panel splits there is clearly an arguable case for different outcomes. Rather, the point is to demonstrate the impacts of the balancing exercise in terms of the dynamics of scrutiny. Review has a centrifugal tendency, spinning the focus away from central questions of *how* an institution under review has gone about its task.

This judicial dynamic is seen in other cases involving the 'manifestly with reasonable foundation' standard.⁴⁵ In *R (MA); R (Rutherford) v Secretary of State for Work and Pensions; R (A) v Secretary of State for Work and Pensions*, where the Court considered challenges from a series of claimants to the Government's 'bedroom tax', evidences all three of the proportionality's pathologies in operation.⁴⁶ The case demonstrates the potential for rights standards to diverge into desiccated, formal rationality on one hand, and rights-centrism on the other. Yet, it also shows the ways in which *both* of those models exhibit bifurcation in terms of an unstable coalition of very strong and very weak intensity of review. It demonstrates, furthermore, related impacts in terms of the Court's potential to support effective governance.

The policy under challenge capped housing benefit for social housing tenants whose properties exceeded statutory limits on the number of bedrooms relative to the size of an occupying family.⁴⁷ The Government recognised that there may be individuals whose needs required additional support, but had decided these could be addressed via discretionary housing payments (DHPs) from local authorities. The challengers alleged that the policy was discriminatory in its impacts. The question for the Court was whether there had been a breach of Article 8 and Article 14, either in terms of the policy in itself or as a result of any of the claimants' individual circumstances. The relevant test was the whether the policy failed to pursue a legitimate aim, or whether it lacked a reasonable relationship of proportionality between the means employed and

⁴⁴ *ibid* [12] (Baroness Hale).

⁴⁵ See also *Sims v Dacorum Borough Council* [2014] UKSC 63, [2015] AC 1336 [16] (Lord Neuberger); *In re: Recovery of Medical Costs for Asbestos Diseases* [2015] UKSC 3, [2015] AC 1016 [51]-[56] (Lord Mance); *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, [2017] 3 WLR 1486.

⁴⁶ [2016] UKSC 58, [2016] 1 WLR 4550.

⁴⁷ The policy was implemented via changes to the Housing Benefit Regulations 2006 (SI 2006/213) by the Housing Benefit (Amendment) Regulations 2012 (SI 2012/3040) and the Housing Benefit (Amendment) Regulations 2013 (SI 2013/665).

the aim sought to be realised.⁴⁸ The standard applied was thus whether the rights interference was ‘manifestly without reasonable foundation’.⁴⁹

Given the nature of the light touch standard adopted, all members of the Court determined in short order that the policy in the abstract was not unlawful.⁵⁰ However, all of the justices agreed that the claims made by Mrs Jacqueline Carmichael and the Rutherford family succeeded on their own facts, since their respective situations were analogous to disabled persons for whom an exception to the policy *had* already been made.⁵¹ In the case of Mrs Carmichael, this was because her needs meant that her husband could not share a bedroom with her. In the case of the Rutherfords, this was the result of the need to accommodate a carer. The Carmichael/Rutherford cases thus constitute one of the rare examples of the Court determining a case on what looks like a traditional rationality ground. To fail to make an exception for persons whose circumstances were structurally similar to existing exceptions lacked logic in the traditional *Wednesbury* sense.⁵² These outcomes illustrate the complexity of bifurcation’s dynamics, and the ways in which it imposes a polarising logic of deference/activism upon decision making. Generally, the court takes a most deferential approach to the set of claims in this case, in line with the ‘manifestly unreasonable’ standard. Yet when it hits upon what it identifies as a lapse of formal logic the intensity of review escalates from deference to correctness. The difficulty is that such formalism is out of place in the context of polycentric social policy. It imposes individual judicial logic, with its own value system, upon that of practical administrative decision making.⁵³ Indeed, the malleability of formal reasoning is demonstrated by the rejection of Mrs Carmichael’s claim by a strong Court of Appeal bench.⁵⁴ The standard of review thus incorporates both strong and weak standards, but even when a weak standard is imposed bifurcated outcomes emerge.

In the other cases before the Court, no equivalent formal flaw in the government’s reasoning was identified. In these cases, the Court’s task was to consider the substantive question of whether the claimants’ needs outweighed the Secretary of State’s aims, in terms of both his housing policy and the means adopted in its implementation (i.e. a bright line rule in terms of bedroom numbers, supported by DHPs as necessary). The quasi-deontological logic of the presumptively more demanding balancing process leads to an oppositional mode of review in which the Court

⁴⁸ R (*MA*); R *Rutherford v Secretary of State for Work and Pensions*; R (*A*) *v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550 [29] (Lord Toulson).

⁴⁹ *ibid* [29] (Lord Toulson) [29]-[38].

⁵⁰ *ibid* [29] (Lord Toulson) [41].

⁵¹ *ibid* [29] (Lord Toulson) [47].

⁵² Though note that the Court of Appeal had rejected Mrs Carmichael’s claim in R (*MA*) *v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, [2014] PTSR 584 (CA).

⁵³ For the dangers see N Lacey, ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’ in K Hawkins (ed), *The Uses of Discretion* (OUP 1992) 361.

⁵⁴ See R (*MA*) *v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, [2014] PTSR 584.

is determining whether the duties imposed upon public authorities by individual rights preclude the realisation of government aims.

Four claimants argued various different reasons why they needed additional bedrooms. As they were unable to convince the Court that their needs were sufficiently weighty to outweigh the aims of the policy, these were given short shrift. In these cases, the Court was unwilling to substitute judgment, as part of its balancing assessment, for the government.⁵⁵ Yet the claim of A and her son, who were protected under a ‘sanctuary scheme’ providing accommodation for women at severe risk of domestic violence, demonstrates the potential for the balancing approach to bifurcate between low and high intensities. A occupied a three-bedroom property that had been specially adapted to provide a high level of security. She was thus occupying too many bedrooms for purposes of the Secretary of State’s scheme. For Lord Toulson and the Justices in the majority A’s circumstances were a logical irrelevance; given the aims of the policy there was no objective reason for A to inhabit a three-bedroom property.⁵⁶ The mode of analysis is notably light touch and submissively deferential; since there was no logical contradiction in the Secretary of State’s position, his decision could not fail the ‘manifestly without reasonable foundation’ standard.⁵⁷

Baroness Hale (with Lord Carnwath) dissents in A’s case. The dissenters agreed with the rest of the Court that the social policy context of the case necessitated a ‘manifestly without reasonable foundation’ standard. They were operating, in name at least, on the same deferential register as the majority. In their analysis, however, the key in A’s case was the recognition given in both domestic and international law to the state’s positive obligations to provide protection for vulnerable persons from abuse. For this reason, they held that failing to prevent A from being caught by the policy constituted unjustifiable discrimination on the grounds of sex.⁵⁸ While the logic of the balancing exercise in the social policy context drives the majority to apply a notably deferential means of review, Baroness Hale and Lord Carnwath substitute judicial values for those of the Secretary of State. For them, external legal standards necessitate a reformulation of the Secretary of State’s housing policy. So they are not, in line with Robert Alexy’s model of the balancing process, carefully allocating weights to the competing interests in order to determine whether the policy is rationally defensible.⁵⁹ Rather, they were simply deploying protections for minors provided by other legal sources as trumps. As with the case of *SG*, it is important to recognise that this is not simply a question of judges taking different views on a tricky balancing

⁵⁵ *R (MA)* (n 48) [50]-[55] (Lord Toulson).

⁵⁶ *ibid* [29] (Lord Toulson) [61]-[62].

⁵⁷ *ibid* [29] (Lord Toulson) [66].

⁵⁸ *ibid* [29] (Baroness Hale) [73]-[75].

⁵⁹ See Chapter 4 for discussion of Alexy.

point. Rather, the Lord Toulson and Baroness Hale are articulating radically different views on the judicial role. For Lord Toulson the executive would need to have committed a fundamental lapse of logic before he would impugn its decision; this relatively weak approach to scrutiny of policy. For Baroness Hale and Lord Carnwath the executive had to meet substantive legal standards found in both domestic and international law; a significantly stronger standard.

This is precisely the dynamic that can emerge in the balancing exercise. Requiring judges to engage with the merits of a decision, against the grain of over a century of constitutional thought, pushes them to defer to decision makers or deploy some abstract legal standard which undermines administrative policies. It also poses a problem for arguments about proportionality's potential to operate as a context sensitive standard. In this case, the challenge involves questions of 'high' socio-economic policy. The challenge also related to regulations which had been scrutinised and debated by Parliament. These would be *prima facie* reasons for the proportionality standard to be applied deferentially, yet the outcome of the Court's deliberation is polarisation. The practical problem with all of the positions taken in this judgment, both by the majority and the dissenters, is that they fail to deal satisfactorily with the process of policymaking.

On this point, there is a route of scrutinising the Secretary of State's approach, in cases like *A*, which avoids the bifurcation to which the logic of a rights/aims balancing approach drives. All members of the Court agree that *A*'s claim for support is strong (in terms of practical need rather than enforceable legal rights). Lord Toulson tells us so in terms.⁶⁰ He goes on to say that *A*'s needs necessitate support.⁶¹ He is, albeit *in obiter*, effectively mandating provision under the DHPs. For Baroness Hale, on the other hand, the DHPs are a suboptimal standard of provision.⁶² As she notes, the state has already provided protection for *A*, the Secretary of State did not seriously contend that he would not continue to provide for her, and the costs of provision would have to be met one way or another.⁶³ Given these points, the Secretary of State's project lacks deliberative coherence (in a substantive, rather than formal sense) on its own terms. The policy is adopted as a measure intended to achieve money savings.⁶⁴ But, as noted by the Justices and accepted by the Secretary of State, no such savings will be achieved in *A*'s case. Indeed, given that her case (and cases like it) would need to be subject to individual consideration, the policy adopted will lead to unnecessary administrative costs. Baroness Hale uses some of this reasoning in her finding that *A*'s rights have been infringed. But the problem,

⁶⁰ *ibid* [29] (Lord Toulson) [58].

⁶¹ *ibid* [29] (Lord Toulson) [59].

⁶² *ibid* [29] (Baroness Hale) [77].

⁶³ *ibid* [29] (Baroness Hale) [76]-[77].

⁶⁴ See, for example, Explanatory Memorandum to the Housing Benefit Amendment Regulations 2012 (SI 2012/3040) http://www.legislation.gov.uk/ukdsi/2012/9780111525784/pdfs/ukdsiem_9780111525784_en.pdf accessed 29 March 2018.

as we have seen here, with couching this in terms of international rights norms is the nature of the message is the form ‘right X means government cannot do Y’. It is institutionally preclusive. On the other hand, if the Court were to frame the decision in terms of the Secretary of State’s own policymaking process, requiring him to reconsider its underlying logic in light of its practical impacts, this could be institutionally *stimulative*. Again, I will discuss the potential for such an approach in Chapter 7, but in terms of the outcome of A’s case this would have involved finding *against* the Secretary of State, but on the basis of a flaw in terms of the underlying policy process and logic rather than (per Baroness Hale and Lord Carnwath) on the basis that her rights outweighed the policy aims.

5.2.3 *Bifurcation at the Level of the Standard Proportionality Exercise*

The dynamic seen in the ‘manifestly’ line of cases is repeated in cases applying the ordinary proportionality standard. These cases are analytically crucial, in applying the proportionality model without any *prima facie* consensus among the Court about the nature of the balancing exercise (akin to that in the ‘manifestly’ test). It is telling therefore to see evidence all three of proportionality’s pathologies playing a direct role in the outcome of some claims.

The pathologies emerge in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*.⁶⁵ The claimant argued that the Home Secretary’s decision to deny entry into the UK to an Iranian dissident invited to address members of Parliament breached Article 10 ECHR. The Court split on the application of the proportionality balancing exercise between the justices who saw this as quintessentially a question for the Secretary of State, and those more content to substitute their judgment in light of the balance she struck. For Lord Sumption, in particular, the national security context necessitated significant deference to the executive on the balancing question; only a decision without any rational basis whatsoever could fail the test.⁶⁶ Lord Neuberger and Baroness Hale come to the same conclusion, if not in quite such emphatic terms, giving the government leeway on the balancing question in the circumstances.⁶⁷ Lord Kerr, on the other hand, is swayed more by the need to give effect to free speech rights in finding for the claimants.⁶⁸ For him, the Government provided limited justification for its decision to deny entry clearance, whereas free speech has *prima facie* weighty constitutional importance. All three

⁶⁵ [2014] UKSC 60, [2015] AC 945. It is not a lone example. See also *R (Nicklinson) v Ministry of State for Justice* [2014] UKSC 48, [2015] AC 657; *R (on the application of AR) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; *In re Recovery of Medical Costs for Asbestos Disease (Wales) Bill* [2015] UKSC 3, [2015] AC 1026; *Beghal v Director of Public Prosecutions* [2015] UKSC 49, [2016] AC 88; the judgments of Baroness Hale and Lord Reed in *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27, [2019] 1 All ER 173; and *R (on the application of Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831.

⁶⁶ *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 [32], [46] (Lord Sumption).

⁶⁷ *ibid* [68] (Lord Neuberger) [109] (Baroness Hale).

⁶⁸ *ibid* [171]-[172] (Lord Kerr).

pathologies thus emerge in this case. In terms of the first pathology, one group of judges takes a highly deferential approach to balancing, whereas another takes a much more rights-centric approach (intra-doctrinal bifurcation). As to the second pathology, the difference in approach appears to be based on judicial views as to the appropriate intensity of review (attitudinal bias). In both cases the kind of disagreement here is noteworthy. Again, the difference between Lord Sumption for the majority and Lord Kerr in dissent cannot be characterised merely as a disagreement over balancing the competing demands of free speech and national security. For Lord Sumption, the test that the claimant had to overcome was in effect a stringent rationality test. For Lord Kerr, free speech is fundamental in a democracy and the onus was on the Secretary of State to provide a justification which outweighs its demands. This is, I suggest, an effect of intra-doctrinal bifurcation; opposed conceptions of review and the judicial role.

The third pathology lurks in the judicial *dicta*. Lord Clarke agrees reluctantly with the majority, but expresses significant concerns about the robustness of the Government's evidence.⁶⁹ The unstable structural logic of proportionality drives toward judicial polarisation between deference and values displacement, in this case eliding procedural flaws in the policy making process. Again, the concept of a 'rainbow' of review, at least insofar as this is currently given effect in proportionality paradigms, is not necessarily always as effective in practice as its proponents argue. Conversely, an institutionally activating approach (on which generally see Chapter 7) would have focused on Lord Clarke's concerns, finding against the Secretary of State on the basis that the government's evidence was not based on careful deployment of its institutional capability.

R (Tigere) v Secretary of State for Business, Innovation and Skills is another case study which illuminates the arguments here.⁷⁰ The case concerned the access to student loans for university applicants subject to immigration control. To qualify for a loan under the Education (Student Support) Regulations 2011 ('the Regulations') a student had to have: (i) been lawfully ordinarily resident in the UK for three years before the day the academic year begins; and (ii) be settled in the UK on that day.⁷¹ The effect of this was that students with limited or discretionary leave to remain in the UK were ineligible. The claimant was a Zambian national who had lived in the UK since 2001 (when she was aged six). She had been educated in the UK, achieved good grades, and had been offered a number of university places. However, her mother had overstayed, and Ms Tigere was thus unlawfully present in the UK until 2012. At this point she regularised her immigration status.

⁶⁹ *ibid* [111] (Lord Clarke): '[...] I am extremely sceptical about the reasons given on behalf of the Secretary of State for refusing to permit Mrs Maryam Rajavi to visit the United Kingdom in order to meet a number of members of Parliament and to discuss democracy and human rights in Iran. However, I have reached the conclusion that there is no basis on which the court could properly allow the appeal and that the appeal should be dismissed.'

⁷⁰ [2015] UKSC 57, [2015] 1 WLR 3820.

⁷¹ Education (Student Support) Regulations 2011 (SI 2011/1986) r 4(a).

This meant she had only discretionary leave to remain at the time she would otherwise have applied for a student loan. She was thus ineligible to apply for indefinite leave to remain until 2018. The point before the Court was whether the Secretary of State's policy breached Article 2, Protocol 1 ECHR or, alternatively, unjustifiably discriminated against her contrary to Article 14 ECHR.

The Court split 3:2 on the outcome. The point of divergence was the willingness of the Justices to afford the Secretary of State a measure of discretion in setting the thresholds which, he believed, would achieve his policy aims. This willingness informed their choice and deployment of doctrine. First, though this is an area of social/economic policy, Baroness Hale (with whom Lord Kerr agreed) determines that the 'manifestly without reasonable foundation' standard is inapt because of the educational context.⁷² While Baroness Hale comes very close to holding for the claimant on the rationality aspects of the proportionality test, on the basis that the claimant's position is not in reality any different to that of a UK national, her judgment ultimately turns on the question of fair balance.⁷³ In particular, she holds that there was no practical administrative difficulty in drafting an exception to the policy to address the claimant's needs, and that the impacts of the bright line selected by the Secretary of State outweighed the limited benefits of the policy, given the claimant's longstanding attachment to the UK.⁷⁴ The impacts of a break in education for the affected claimants would be significant, and the potential loss to society of young people failing to take up higher education places weighed heavily in the balance.⁷⁵ On the other hand, a change to the scheme would affect the policy in only a limited number of cases (we are not told on what evidence the Baroness Hale relies).⁷⁶ Proportionality balancing requires either a measure balancing of competing interests or, on the culture of justification-type approach, scrutiny of the decision maker's rationale. The majority judgment in *Tigere* demonstrates that there is no neutral metric which a judge can use to deploy proportionality in this way. While she gives lip service to the need to afford weight to administrative deliberation,⁷⁷ the substantive reasons for Baroness Hale's decision suggest that she simply considers education to be more valuable than immigration control.

In dissent, Lords Sumption and Reed considered that the manifestly without reasonable foundation test *is* applicable here.⁷⁸ I nonetheless do not categorise this as a 'manifestly without reasonable foundation case', since the Court's failure to agree on the appropriate standard

⁷² [2015] UKSC 57, [2015] 1 WLR 3820 [28] (Baroness Hale, Lord Kerr).

⁷³ *ibid* [35] (Baroness Hale, Lord Kerr).

⁷⁴ *ibid* [38]-[42] (Baroness Hale, Lord Kerr).

⁷⁵ *ibid* [41] (Baroness Hale, Lord Kerr).

⁷⁶ *ibid* [38] (Baroness Hale, Lord Kerr).

⁷⁷ *ibid* [32] (Baroness Hale, Lord Kerr).

⁷⁸ *ibid* [77] (Lords Sumption and Reed).

demonstrates starkly the polarising effects of the balancing exercise on the justices.⁷⁹ That said, it is significant that the dissenters do not just differ from the majority in terms of how to strike a balance the rights and interests at stake, but in terms of the standard of review. For them, the question is not whether the Secretary of State has *correctly* balanced competing considerations, but whether the balance he has struck is ‘manifestly unreasonable’.⁸⁰ For Lords Sumption and Reed, there were significant practical benefits to an exclusionary rule, like that adopted by the Secretary of State, in terms of certainty and stability. There would be winners and losers on both sides of the line drawn, but the administrative benefits on the proportionality scales outweighed negative outcomes for individuals, such that the overall outcome was not disproportionate.⁸¹ In light of these assertions, for which they offered no evidence, along with the need for deference on questions of political and administration judgment, they hold that the Secretary of State’s decision is not unlawful.⁸² Second order constitutional and institutional reasons for deference thus motivate the dissenting judgment.

Framing this case in terms of individual rights to education, and the balancing of measure and impact upon such rights, the Court deploys a zero-sum logic which increases the risk of the judges taking opposing sides. The question is whether the Court weighs the right to education of individual foreign nationals more highly than the Secretary of State’s goals of achieving administrative certainty and prioritising claimants with a strong UK connection. In short, competing views as to the dominance of the legal and political constitutions shape the outcome of the case. Pitched at the rights-balancing end of the proportionality spectrum, three familiar pathologies emerge. This matters in terms of the interrelationships and functioning of the organs of state. In this case in particular it is clear that proportionality balancing incorporates a high degree of judicial discretion, because it allows significant variability in terms of the matters than can be weighed on either side of the scales. Rather than allowing for precise balancing of policy and protected interests, in requiring judges to take a view on matters of substance the doctrine exacerbates judicial philosophy in terms of constitutional authority. And this leads to polarisation, jurisprudentially and also in terms of the bench itself. As noted above, the demands in terms of intensity of review from the majority and minority demonstrate, at base, very different conceptions of law’s demands upon the state. Further, it demonstrates a failure to optimise the procedural effectiveness of the relevant policy making process.

⁷⁹ Indeed, both Lord Sumption (in e.g. *R (Lord Carlile of Berriew)* (n 66)) and Lord Reed (in e.g. *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* (n 65)) separately take a similar attitude in cases not involving the ‘manifestly’ standard.

⁸⁰ *Tigere* (n 72) [91] (Lords Sumption and Reed).

⁸¹ *ibid* [95] (Lords Sumption and Reed).

⁸² *ibid* [100] (Lords Sumption and Reed).

This failure was not inevitable given the context, though was made more likely by the dynamics of the jurisprudential approach. A problem for government policy in *Tigere* was that two contradictory objectives appeared to be coming into conflict. On one hand, the aim of the loans scheme was to allow persons with a strong connection to the UK to access educational facilities at the highest level, maximising their potential contribution to the UK economy.⁸³ The other was the Coalition Government's strong rhetoric on reducing total immigration (the so-called 'hostile environment' policy).⁸⁴ These conflicting aims came into a dysfunctional coexistence in the policy scrutinised by the *Tigere* Court. This comes through in the evidence of the expert witness, quoted by Baroness Hale and Lord Kerr, that the strength of the UK labour market meant that Ms Tigere, having completed her degree, would stay in the UK.⁸⁵ The question, given that the conflict was now a clear choice between fostering a strong economy and restrictive immigration control, is which of those goals the Government wished to prioritise. However, the explanatory memorandum accompanying the Regulations, made no mention of the immigration point.⁸⁶ The key problem here is that a policy contradiction requires consideration. The government is better placed than anyone else to resolve that contradiction, since it goes to the questions of its preferred policy aims. The real problem is that, so far as anyone knows, it has not attempted to do so. An institutionally sensitive approach to deciding the case would have, as did the majority, found against the government. But it would have focused on the policy contradiction, and made clear this is what needed to be resolved, rather than on rights/aims balancing.

Importantly, it is also clear from the explanatory memorandum that this contradiction was not raised for discussion during Parliamentary consideration. This point might have been a better focus for the Court (as they were, albeit unsatisfactorily, in the case of *SG* considered above).⁸⁷ Baroness Hale came close to dealing with the case as a question of ends/means rationality, which would have allowed her to deal with the case in terms of institutional functioning rather than rights/aims balancing. This could have forced the Government to address the flaws in its decision-making processes, without determining the correct ends of those processes. But she ultimately elects to focus on the balancing point. Determining the case in this manner, framed as a question of clashing rights and aims, forecloses political debate. Baroness Hale's conclusions

⁸³ For a useful overview see S Hubble and A Connell-Smith, 'Widening Participation Strategy in Higher Education in England?' (*House of Commons Library* 24 January 2018) <https://researchbriefings.files.parliament.uk/documents/CBP-8204/CBP-8204.pdf> accessed 29 March 2019.

⁸⁴ See the discussion by S Lambe, 'Tigere: Strategic Litigation for the Rights of Young People in the UK?' (*Oxford Human Rights Hub* 16 December 2017) <http://ohrh.law.ox.ac.uk/tigere-strategic-litigation-for-the-rights-of-young-people-in-the-uk/> accessed 29 March 2018.

⁸⁵ *Tigere* (n 72) [41] (Baroness Hale, Lord Kerr).

⁸⁶ Explanatory Memorandum to the Education (Student Support) Regulations 2011 (SI 2011/1986) http://www.legislation.gov.uk/uksi/2011/1986/pdfs/uksem_20111986_en.pdf accessed 29 March 2018. No public consultation was undertaken (although the explanatory memorandum notes discussion with stakeholders).

⁸⁷ This raises issues around Article 9 of the Bill of Rights, but the Court managed those in *SG* (n 20) itself.

suggest that the Secretary of State must implement a ‘carve out’ to his policy to respect the trespass committed against the claimants’ rights (indeed, the practical possibility of this formed part of the majority’s *ratio*). The judgment thus substituted legal discourse and values for those of the policy maker.⁸⁸ It shut down debate, in the sense that a more rationality/process centred finding might have encouraged the Secretary of State to reconsider the policy and, in particular, to have clarified his aim prioritisation. Thus clarified and brought to the fore, this might have improved the depth of information provided to Parliament and sharpened debate.

For Lord Reed and Lord Sumption the key is the Government’s ability to fix a bright line, but their deferential approach is the alternative course of the same aetiology that leads Baroness Hale to substitute judgment for that of the Secretary of State. They too frame the case as one of balance, but faced with the question of values substitution they decide that this is pre-eminently a question for executive discretion. I do not go so far as to suggest here that their judgment would have been different had they taken the approach I am advocating. I do suggest that the internal logic of rights/aims balancing reduced the chances of the Court reaching a compromise position. Balancing requires the Court to either substitute judgment and thus preclude enhanced decision making and debate, or frames the question as one requiring submissive deference. Thus, far from fostering a culture of justification,⁸⁹ the proportionality model as deployed here translates a richly textured policy problem into a stark binarism. When the Court is faced with an all or nothing exercise of prioritising rights or ends, which inevitably brings judicial values to the fore, it is at least arguable that this is likely to exacerbate judicial difference.

This latter point is contentious (and the counterfactual is unverifiable). Some judges, whatever the mode of analysis, are more likely than others to find against the executive.⁹⁰ As to foreclosing political discourse, however, there is clear evidence that the mode of judgment had precisely the impact suggested by the analysis above in terms of subsequent handling within the political constitution. To implement the judgment, the Secretary of State made the Education (Student Fees, Awards and Support) (Amendment) Regulations 2016 (‘2016 Regulations’).⁹¹ The 2016 Regulations amended the previous policy to provide eligibility for minors with a period of 7 years residence prior to a loan application.⁹² Potentially the Secretary of State, having reflected on the Court’s judgment, had decided to reconcile the policy contradiction described above in this way.

⁸⁸ On values see Dawn Oliver, *Common Values and the Public-Private Divide* (CUP 1999).

⁸⁹ E. Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31.

⁹⁰ See T T Arvind and L Stirton, ‘Legal Ideology, Legal Doctrine and the UK’s Top Judges’ [2016] *Public Law* 418.

⁹¹ Education (Student Fees, Awards and Support) (Amendment) Regulations 2016 (SI 2016/584).

⁹² A longer period applied for adult applicants.

The modalities of the Court’s approach nonetheless played a contributory role in the post-litigation policy process. The explanatory memorandum accompanying the 2016 Regulations, tellingly, states in the ‘Policy Background’ section that: ‘A consequence of the Court finding in Ms Tigere’s favour is that the Secretary of State has been required to consider adopting a more tailored criterion for eligibility for student support which will avoid breaching the Convention rights of other similar applicants.’⁹³ The language is important: there has been a ‘breach’ of rights; the Secretary of State is ‘required’ to adopt a particular kind of approach. For a parliamentarian reading this, the natural inference is that (without contradicting the Court and thus contravening the Government’s obligations in domestic and international law) there is little scope for deliberation here. A more open, aim/rationality focused judgment *could* have been given, and *could* have avoided this outcome. Advocates of rights-based litigation on the basis that a ‘dialogue’ between courts and decision makers can incrementally improve outcomes have shown that judicial holdings are rarely the end of the policy making process.⁹⁴ But this is surely dependent on the nature of the holding. There is evidence here that current approaches to proportionality *can* shut down the policy process, foreclosing rather than facilitating dialogue and deliberation.

5.2.4 Proportionality’s Pathologies: Overview

In Chapter 2 I argued that the logic of bifurcation is incorporated in proportionality review in the UK via the correctness approach to balancing taking in *R (Huang) v Secretary of State for the Home Department*,⁹⁵ and principles of deference. The unstable coexistence of these competing ideas replicates, in modern rights jurisprudence, the Diceyan dialectic described in that chapter. The preceding discussion has shown three ways in which the dynamics of recent jurisprudence in the Supreme Court continue to display a bifurcated approach to policy issues. David Mead has convincingly argued that the outcome-based approach taken in *Huang* represented an unfortunate turn in UK jurisprudence, which hindered the development of a process-based jurisprudence which focused on institutional focusing. It may be, when it comes to substantive review that a non-rights based model like *Wednesbury* is more apt to this task (and for this reason I would incline to the side of those arguing for retention of a two-standard model of substantive review). However, there is potential among the cases in my dataset for an approach to be taken that

⁹³ Explanatory Memorandum to the Education (Student Fees, Awards and Support) (Amendment) Regulations 2016 (SI 2016/584) www.legislation.gov.uk/uksi/2016/584/pdfs/uksem_20160584_en.pdf accessed 29 March 2018. Interestingly, the Government adopted wholesale a suggestion in Lord Hughes’s judgment in adopting an interim policy before finalising a replacement.

⁹⁴ The classic article is P Hogg and A Bushell, ‘The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such A Bad Thing After All)’ (1997) 35 Osgoode Hall Law Journal 75. For this point see in particular L McDonald, ‘Rights, ‘Dialogue’ and Democratic Objections to Judicial Review’ (2000) 32 Federal Law Review 1.

⁹⁵ *Huang* (n 16).

focuses more on effective institutional processes, which both respects the *prima facie* value of rights but takes a functional approach to policymaking. This is discussed in the next section.

5.3 A Limited Heterodoxy: Scrutiny of Aims and Rationality as a Heuristic Device

5.3.1 Introduction

In the previous chapter, I used the frequency with which the Supreme Court relies on the first two stages of proportionality review, as opposed to stages three and four, as a proxy to assess whether claims about proportionality's structure are justified and the extent of the role which 'balancing' is playing in the adjudicative process. It acted as a heuristic device to assist in assessing the nature and focus of review being deployed by the Court, since the first two stages *broadly* concern the internal rationality of the decision maker, whereas the second two look more upon the impacts on affected parties. The first two stages relate more to questions of institutional competence, the second two are more deontological in nature. A series of hypotheses about the effects of relying on the balancing method have been discussed above. In the final section of this chapter, I evaluate the limited number of cases in which the first two stages of the proportionality *did* play a more substantive role.

While the Court's focus is predominantly concerned with rights/aims balancing, the evidence is not entirely one way. There is a relatively small number of cases in which either the Court, or individual justices, are willing to subject the aim/rational connection phase of proportionality review to substantive scrutiny (16 out of 87 'judgments').⁹⁶ The relevance of this body of cases is that the focus on institutional functioning allows an assessment of proportionality's potential for taking a more functional approach which is *less* prone to bifurcation. It considers whether in this subordinate mode of judging there is a means of reconciling bifurcation. To be clear, it is not the case that simply focusing review at the institutional 'end' of the proportionality spectrum will *per se* indicate that the Court is taking an institutionally enabling approach. And, as noted above, the balancing exercise can be used in an institutionally enabling manner. The point, for the moment, is to use the Court's deployment of the aim/rational connection mode of analysis as a heuristic to gain a sense of its ability to think institutionally within a rights context.

5.3.2 Legitimate Aims

Legitimate aim is rarely, and predictably given the scope for reasonable disagreement here, subject to serious contestation. It is often controversial where it is in issue.⁹⁷ *R (Bibi) v Secretary of*

⁹⁶ I should note that in *R (Nicklinson) v Ministry of Justice* [2017] UKSC 38, [2015] AC 657, reflecting the emotive subject matter, the Justices take a varying range of approaches.

⁹⁷ The court splits in *R (Bibi) v Secretary of State for the Home Department*; *R (Ali) v Secretary of State for the Home Department* [2015] UKSC 68, [2015] 1 WLR 5055; and in *R (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492 [32] (Lord Wilson). Though see, arguably, a recent claimant win on an aim point in *R (Steinfeld and another) v Secretary of State for International Development* [2018] UKSC 32, [2018] 3 WLR 415.

State for the Home Department; R (Ali) v Secretary of State for the Home Department involved a challenge to Home Office rules regarding English language tests for foreign spouses of British nationals.⁹⁸ For all members of the Court, the balance between individual rights and policy aims is central to the case.⁹⁹ The rational connection, in common with normal Court practice, receives short shrift.¹⁰⁰ However, for Baroness Hale and Lord Wilson (in a minority on this point) there is a genuine question as to whether the Secretary of State has a legitimate aim, and while they ultimately decide in her favour they subject the question to in-depth analysis.¹⁰¹ This gives rise to a schism in the Court, with both Lords Hughes and Hodge, and separately Lord Neuberger, strongly critical of the rigour of Baroness Hale and Lord Wilson's analysis.¹⁰² For them, the executive needs a free hand when it comes determining the value of a policy aim.¹⁰³

A similar dynamic appears in *R (A) v Secretary of State for Health*, concerning the Secretary of State's refusal to provide abortions on the National Health Service for women ordinarily resident in Northern Ireland.¹⁰⁴ The majority, rejecting the claim, deal with the first three elements of the proportionality analysis in short order, before focusing on the core issue of the fair balance.¹⁰⁵ Lord Kerr (joined by Baroness Hale), in dissent, determines that the policy in fact did not have a legitimate aim (though it is noteworthy that he primarily reaches this conclusion on the basis of his, somewhat strained, construction of the relevant legislation).¹⁰⁶

Limited review on this point is understandable. The question of societal aims and goals is pre-eminently one which admits of a range of views, and it is hard to conceive of a sensible measure against which such aims can be assessed. Indeed, this is precisely the reason why the balancing exercise gives rise to the problems outlined above. Impugning a policy on the basis of its aim could amplify those difficulties. It is nonetheless worth noting, in terms of the dynamics shaping the focus of review, the potential for a jurisprudence which takes account of the extent to which a public authority has committed thought and resources in determining public interest aims.

5.3.3 *Rational Connection*

It is relatively unusual for a claim to be determined on the basis of the rational connection aspect of the proportionality test. More claims do however succeed on this point than in the case of claims that an authority had pursued an illegitimate aim. This aspect of the test also tends to

⁹⁸ *Bibi* (n 97).

⁹⁹ *ibid* [49]-[55] (Baroness Hale, Lord Wilson).

¹⁰⁰ *ibid* [46] (Baroness Hale, Lord Wilson).

¹⁰¹ *ibid* [30]-[45] (Baroness Hale, Lord Wilson).

¹⁰² *ibid* [63]-[65] (Lords Hughes and Hodge), [96]-[97] (Lord Neuberger).

¹⁰³ *ibid* [97] (Lord Neuberger): '[...] the court should accord to the executive a wide measure of discretion when deciding on the likely value of a policy such as that embodied in the rule.'

¹⁰⁴ [2017] UKSC 41, [2017] 1 WLR 2492.

¹⁰⁵ *ibid* [32] (Lord Wilson).

¹⁰⁶ *ibid* [87] (Lord Kerr).

receive more judicial discussion than the aim question. Again, this is perhaps predictable given the appropriate wariness of judges to rule out particular aims entirely. Conversely, the rational connection point does more straightforwardly allow scrutiny of an authority's internal policy deliberations, without inevitably undermining its views on substantive outputs. Using the rationality question as a heuristic thus allows a bird's eye view of the possibility of rights-based review which takes an approach focused on institutional effectiveness. And among those cases where the aspect of the test does play a substantive role, there is evidence of the Court's ability to adopt an approach which encourages authorities to maximise their institutional capability without determining outcomes.

In *Mathieson v Secretary of State for Work and Pensions*, for example, the Court considered the proportionality of regulations cutting Disability Living Allowance payments for carers (in this case, those payable to the claimant's parents) when the care recipient had been hospitalised for a prescribed period of time.¹⁰⁷ Lord Wilson noted that the aim of the policy was to avoid overlapping care provision, but that the Secretary of State had failed properly to consider evidence that the parents were providing no less care than when their daughter lived at home.¹⁰⁸ This is precisely the kind of work an ends-focused public law can achieve; given a specific public policy goal, encouraging the executive to take an active, evidence based approach to policy design, while avoiding the triple deficiencies of rights-balancing. In short, this provides for activist green light review; requiring the decision maker deliberate actively about their policy decisions, without pre-empting what those decision ought not be.¹⁰⁹

This is not an isolated case. In *R(T) v Chief Constable of Greater Manchester Police* the Court as a whole finds that a blanket requirement for disclosure of criminal convictions and cautions in an enhanced criminal record check lacked a rational connection to its aim.¹¹⁰ A claim on this head is successful in *R (Johnson) v Secretary of State for the Home Department*.¹¹¹ And in *In re Brewster* a claim succeeds against the Northern Ireland Executive because it could not demonstrate a justification for non-married cohabitantes to register in order to benefit from a pension scheme.¹¹² The requirement to demonstrate a sufficient justification for a policy appears to risk the pathologies described above in my discussion of balancing. Yet the key point is that the Northern Irish legislature had never actually considered the rationale for this provision.¹¹³ This, I submit, it

¹⁰⁷ [2015] UKSC 47, [2015] 1 WLR 3250

¹⁰⁸ *ibid* [37] (Lord Wilson).

¹⁰⁹ On green light review see C Harlow and R Rawlings, *Law and Administration* (3rd edn, CUP 2009) ch 1.

¹¹⁰ [2014] UKSC 35, [2015] AC 49 [142] (Lord Reed): 'I cannot however see any rational connection between minor dishonesty as a child and the question whether, as an adult, the person might pose a threat to the safety of children with whom he came into contact.'

¹¹¹ [2016] UKSC 56, [2017] AC 365.

¹¹² [2017] UKSC 8, [2017] 1 WLR 519.

¹¹³ *In re Brewster* [2017] UKSC 8, [2017] 1 WLR 519 [48]-[50] (Lord Kerr).

precisely the kind of work that public law needs to mainstream. The effect of the decision is to stimulate institutional functioning and deliberation; the Court would have been deferential, had the Assembly thought about the problem.

While such institutionally collaborative review may not always find favour with a majority of the Court, there are minority judgments exhibiting its potential. Lord Kerr, in particular, is more likely to apply greater scrutiny at the aim/rational connection stage of the analysis (though, as noted above, he has himself commented that the balancing question will most often be the key aspect). In *Gaughran* Lord Kerr hands down a dissent in which, contrary to the four Justices in the majority who focus on the necessity/balance aspect of the proportionality test, he subjects the Chief Constable of Northern Ireland's data retention policy to a rational connection assessment.¹¹⁴ His dissent in *Ali v Secretary of State for the Home Department* is another case in point.¹¹⁵ In this case the Secretary of State attempted to impose a level of *prima facie* balancing in determining the compatibility with Article 8 of deportation decisions. While the other six Justices in that case (see above) were content to allow the Secretary of State to exercise a significant level of control over discretionary decision making on deportations via the Immigration Rules, Lord Kerr considered that this unduly hampered full consideration of relevant factors. In particular, he considered that the existence of a rational connection to legitimate aims needed to be considered in *every* individual case:

[i]t is important for the decision-maker to scrutinise the elements of public interest in deportation relied upon in an individual case, and the extent to which these factors are rationally connected to the legitimate aim of preventing crime and disorder. That exercise should be undertaken before the decision-maker weighs the public interest in deportation against the countervailing factors relating to the individual's private or family life, and reaching a conclusion on whether the interference is proportionate.¹¹⁶

Such an approach runs the risk of legalising policy development, and to that extent risks falling foul of the pathologies identified in this chapter. Indeed, Lord Kerr's approach in the case would be significantly more demanding for decision makers than the majority approach. As I have explained, it is not the case that merely making greater use of the rational connection test would achieve the kind of active green light review propounded here. Yet the potential for proportionality to be more profoundly institutionally focused can be seen here. What Lord Kerr's decision would achieve is to force the Secretary of State into active deliberation of the reasons

¹¹⁴ *Gaughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29, [2016] AC 345 [64]-[70] (Lord Kerr). The claim fails.

¹¹⁵ [2016] UKSC 60, [2016] 1 WLR 4799.

¹¹⁶ *ibid* [165] (Lord Kerr).

behind their decisions. Where I would part company with him is in the judicial attitude to such deliberation where it is carried out. It is clear from Lord Kerr's judgment that he would wish to see each aspect of the deliberative process, including the balancing exercise, subject to a correctness standard. My point is that the Court should be more willing to defer to a decision maker *if* active deliberation has taken place.

The rationale for focusing on the rational connection aspects of the test is to determine the potential for the Court to 'think institutionally' within a rights context, even when carrying out the balancing exercise. It is important to find both that such potential exists, and that within the cases there are judgments which lead to institutionally activating outcomes. By this I mean that the Court is taking an approach which seeks to encourage the institutions of government to operate actively; to deploy their expert faculties in a dynamic and transparent manner, seeking the best policy outcomes achievable in the circumstances. It is not, emphatically, my contention that rights balancing is incapable of achieving this. Indeed, it is vital to my project that it *can* be deployed in such a manner.

In cases such as *R (Mott) v Environment Agency* the balancing exercise is deployed in such a way as to achieve precisely these outcomes.¹¹⁷ Similarly, in *R (MM) (Lebanon) v Secretary of State for the Home Department*, Baroness Hale and Lord Carnwath note that the balancing process itself ought take into account the degree to which a decision maker has made use of expertise available to them.¹¹⁸ Yet, as noted in the previous chapter, at the moment they articulate this principle one is reminded of the risks here. They cite for authority on this point *R (Begum) v Denbigh High School Governors*.¹¹⁹ This is telling, because *Begum* falls in a line of cases along with *R (Huang) v Secretary of State for the Home Department*,¹²⁰ *Belfast City Council v Miss Behavin' Ltd*,¹²¹ and *R (Nasseri) v Secretary of State for the Home Department*, wherein the House of Lord confirmed that a correctness standard was the appropriate approach in qualified rights cases. While matters such as those referred by Baroness Hale and Lord Carnwath to in *MM* might be taken into account, the question of whether a correct balance between aims and impacts was struck was ultimately for the courts to decide. My overarching point, here, is that this approach to the balancing exercise can occlude consideration of functional effectiveness which is desirable in decision makers, and that public law thus requires attitudinal refocusing to ensure an institutionally sensitive approach is taken during all stages of the proportionality exercise.

¹¹⁷ [2018] UKSC 10, [2018] 1 WLR 1022.

¹¹⁸ [2017] UKSC 10, [2017] 1 WLR 771.

¹¹⁹ [2006] UKHL 15, [2007] 1 AC 100.

¹²⁰ *Huang* (n 16).

¹²¹ [2007] UKHL 19; [2007] 1 WLR 1420.

5.4 Conclusion

In the previous chapter, I argued that the balancing exercise forming a core of the proportionality exercise involves a greater imposition of judicial values upon decision making than is generally the case in the application of a legal standard. Even when this approach is used to require a sufficiently compelling justification for interference with a protected right, this leaves open the question of the nature and extent of the justification considered sufficient in the circumstances. An initial survey of recent Supreme Court cases determined that the focus on judicial attention in HRA cases is predominantly on the balancing aspect of the proportionality test. I therefore hypothesised that the implications of adopting a predominantly balancing approach could give rise to the interrelated bifurcatory pathologies of: (i) oscillation between strong and weak review ('intra-doctrinal bifurcation'); (ii) potential foregrounding of judicial preference ('attitudinal bias'); (iii) an inconsistent relationship with institutional functioning (i.e. in the sense that the Court finds serious flaws in decision making processes but either leaves this untested or dictates outcomes to the decision maker).

In this chapter, I have conducted a review of the Court's output during my reference period, which shows that there is evidence of each of these pathologies occurring. The simple point is that, faced with the broad judicial discretion afforded by proportionality analysis, there is a demonstrable risk that review will diverge unpredictably into very weak and very strong forms of rights protection. This is the central aspect of what I have termed intra-doctrinal bifurcation; a tendency to overly active or overly passive judicial engagement with administrative decision making. This is undesirable in terms of case-specific outcomes and the impacts of legal norms on institutional functioning more generally, in giving rise to *both* judicial activism relative to the political constitution *and* a failure to grapple with suboptimal decision making. It perpetuates and amplifies the deeper constitutional bifurcation discussed in Chapter 2. These problems can be, as I have suggested, overlooked by debates over unification/inter-doctrinal bifurcation, and by discussions regarding the 'rainbow' of substantive review. Indeed, I have elected to co-opt the term 'bifurcation' to refer to this dynamic in order to emphasise that debates over inter-doctrinal bifurcation do not merely overlook the problems of intra-doctrinal bifurcation; the dynamics of the debate actually help perpetuate it (i.e. in the sense that many of those who advocate two standards of substantive review prefer to retain *Wednesbury* for its deference, whereas advocates of a single standard based on proportionality *tend* to advocate a stronger form of review). The problems identified in this chapter also go to the general effectiveness of UK administrative law relative to its object of regulation.

However, I have also shown some evidence that in certain cases the Court is willing to deploy those aspects of the proportionality approach which avoid rights/aims balancing, focusing more

on effective institutional operation (in particular, the rational connection test). In this jurisprudence, there lies potential for an approach to review based more on ensuring active policy-making, and thus reduces the potential for bifurcation.

To reemphasise, the aim here is not simply to suggest that all stages of the proportionality exercise need to be considered carefully (though that is a part of the analysis), or that simply avoiding balancing provides a solution. Analysing the caselaw via comparison of the different aspects of the proportionality test is a heuristic device to flag up two points. First, that a fundamental disjunction occurs when policy is subjected to legal reasoning. While there may be circumstances in which a protected right must outweigh a public interest, to reason solely in these disjunctive terms is suboptimal in terms of law's potential to maximise overall institutional functioning. Second, this device helps illuminate the potential benefits of adopting a judicial attitude which takes seriously the role of administrative law in assist the effective delivery of policy. The key word here, of course, is 'effective', a concept which I will explore and develop in Chapter 7. In the next chapter, however, I turn to consider the role played by bifurcation in substantive review at common law.

Chapter 6. *Wednesbury*: Deference and Deontology at Common Law

6.1 Introduction

The last chapter analysed the shortcomings of the proportionality balancing exercise, in terms of its purported reconciliation of questions of law and policy. By framing administrative review in terms of a conflict between incommensurable values, between public interests and private rights, the model risks oscillation (particularly in hard cases) between strong and weak-form review. In both cases, questions of institutional functioning can be elided. The dominance of inter-doctrinal bifurcation, focusing on the normative and practical arguments for the continued coexistence of proportionality and *Wednesbury* review, in debates about judicial review (as discussed in Chapter 4), disguises these deeper problems in terms of proportionality's effectiveness. Again, my adoption of the term bifurcation in the wider sense of oscillation between strong and weak forms of review is intended to both expose the limitations of the inter-doctrinal bifurcation debates and, as I have flagged previously, the ways in which they replicate the bipolar nature of substantive review.

In this chapter, I consider whether this same problem arises in *Wednesbury* review in the Supreme Court. On a standard inter-doctrinal bifurcationist view, the *Wednesbury* standard of rationality is worthy of retention because of its inherent deference.¹ Review on questions of substance is, from this perspective, necessarily light touch for reasons of constitutional imperative and judicial inexpertise.² But *Wednesbury* review also encompasses wider standards of administrative rationality. The standard thus risks an unstable relationship with questions of substantive policy. It can be either profoundly hands off, or highly prohibitive, depending on the manner in which doctrine is utilised. Like proportionality, it is thus a model of review with potential to bifurcate into deference and diktat. For this reason, I infer that it is prone, at least on a theoretical level, to *intra*-doctrinal bifurcation (i.e. variation between strong and weak forms of review, and similar bifurcationary pathologies to those seen in proportionality context (i.e. failing to prioritise institutionally sensitive modalities of review and, potentially, exacerbation of tensions between judicial approaches). If this is true, it has implications for the various claims underpinning the unification/inter-doctrinal bifurcation debate. Again, arguments about whether substantive review should comprise one or two standards both overlook, and help to sustain, *intra*-doctrinal bifurcation. Awareness of this bipolarising tendency is thus important in terms of encouraging the judiciary to greater awareness of the institutional implications of approaches to doctrinal application.

¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (HL) 234 (Lord Greene MR).

² Lord Irvine of Lairg, 'Judges and Decision Makers: The Theory and Practice of *Wednesbury* Review' [1996] Public Law 59.

To test this point, this chapter assesses patterns emerging in relevant Supreme Court cases within my 2014-2018 dataset. The first section considers debates on the merits of *Wednesbury* review. The second section revisits the question of inter-doctrinal bifurcation which has dominated debate in this area, and discusses the potential for intra-doctrinal bifurcation and its related pathologies. Drawing upon a survey of recent decisions and selected case studies, the third part assesses whether this caselaw demonstrates evidence of intra-doctrinal bifurcation. In summary, there is qualified evidence of such a trend, though this is less pronounced than in the case of proportionality. As in the case of proportionality, however, there is evidence in the case law of potential for a more institutionally focused approach, sitting between deference and judicialisation, which actively seek to stimulate active governance without determining for the executive precisely what that looks like.

6.2 The Nature of *Wednesbury* Review

6.2.1 Introduction

As discussed in chapter 2, *Wednesbury* review combines a range of ideas. On one hand, it refers to a 'bare' standard of rationality; a decision 'so unreasonable that no reasonable authority could ever have come to it.'³ This test articulates a self-denying ordinance on the part of the courts which respects traditional boundaries between the roles of judges and administrators. It is predicated on a sheer distinction between law and discretion which leaves the former for the courts and the latter to the executive. On the other, an alternate conception of *Wednesbury* applies a wider set of rules relating to relevant and irrelevant considerations, bad faith, disregard of public policy, and so forth.⁴ Textbook accounts of administrative law principles, following Lord Diplock's categorical division in the *GCHQ* case of substantive review principles into question of illegality and irrationality, *tend* to separate these questions.⁵

This reflects the sense in which *Wednesbury* review is implicated in a logic of intra-doctrinal bifurcation (i.e. a tendency to lapse into overly active or overly passive review), but it also underestimates the permeable membrane between the two modes of review. It erects a distinction between restrained and vigilant standards which is inherently malleable.⁶ What distinguishes critics and supporters of *Wednesbury*, I suggest, tends to be whether they focus on its deference, or its potential to inculcate principles of sound governance. The debate, along with that between bifurcationists and unificationists, can obscure *Wednesbury's* doctrinally instability,

³ *Associated Provincial Picture Houses Ltd* (n 1) 234 (Lord Greene MR).

⁴ For an overview see HWR Wade and CF Forsyth, *Administrative Law* (11th edn, OUP 2014) 318-331.

⁵ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL). See e.g. M Elliott and JNE Varuhas, *Administrative Law: Text and Materials* (5th edn, 2017 OUP) chs 7 and 8. A notable exception is HWR Wade and CF Forsyth, *Administrative Law* (11th edn, OUP 2014).

⁶ See P Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] Public Law 60, 69-70.

comprising an unpredictable admixture of weak and strong standards. Again, my reason for repurposing the term ‘bifurcation’ to incorporate intra-doctrinal as well as inter-doctrinal review is to engage with, and critique, the limits of the unificationist/bifurcationist debate.

6.2.2 *Against Substantive Common Law Review*

The bare *Wednesbury* standard has suffered sustained criticism. Its inbuilt deference constitutes, for some, a normative problem in terms of holding the executive to account. Anthony Lester and Jeffrey Jowell, for example, take *Wednesbury* to task for its failure to provide sufficient protection for civil and political rights.⁷ But this same problem applies equally when the bare *Wednesbury* standard is applied to other types of claim. On its face, the rationality standard allows authorities very wide discretion.⁸

The flipside of criticisms of *Wednesbury*'s deference go to its transparency. ‘Unreasonable’ action cannot be defined prior to its identification in individual cases. The standard may thus also be criticised for not properly reflecting the principles actually applied by judges.⁹ This is an undesirable state of affairs from the perspective of the rule of law. Neither the executive, nor those citizens whom it serves, would understand the standards of rationality which will apply. The executive would not be able to structure decision making in such a way to maximise its chances of complying with legal standards. Citizens would not know what standards they can demand from their government, or assess the likelihood of mounting a successful legal challenge.

An alternative version of this criticism is that rather than not reflecting the standards applied by the judges, *Wednesbury* unreasonableness simply does not contain any fixed standards. On this view, substantive review at common law lacks principle and internal coherence.¹⁰ The implication of this is that the judges are applying whatever standards seem most relevant in the circumstances in order to achieve just outcomes. The drawbacks in terms of predictability and transparency are obvious. But a further risk here goes to judicial ideology. Without any guiding standard, the open textures of rationality review both facilitate and obscure the illicit importation, consciously or otherwise, of judicial social and economic preferences.¹¹

6.2.3 *The Counter-revolution: Wednesbury Rebooted*

Wednesbury has not stood still since its articulation by Lord Greene. Much of the growth and development of administrative law principles since the 1960s, and the increasing

⁷ A Lester and J Jowell, ‘Beyond *Wednesbury*: Substantive Principles of Administrative Law’ [1987] Public Law 368, 380.

⁸ See e.g. J Jowell, ‘Administrative Law’ in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2005) 373, 382-3; P Craig (n 6) 69-70.

⁹ E.g. T Poole, ‘The Reformation of English Law’ [2009] Cambridge Law Journal 142, 146.

¹⁰ See e.g. A Le Sueur, ‘The Rise and Ruin of Unreasonableness’ [2005] Judicial Review 32.

¹¹ Lester and Jowell (n 7) 380.

constitutionalisation of the United Kingdom, has occurred within the broad outlines of the *Wednesbury* model.¹² Evolving standards of judicial regulation of government have thus been possible because of the model's elasticity.

First, *Wednesbury* has developed a multi-faceted mode of analysis, capable of targeting flaws in the policy-making process.¹³ Thus for some commentators *Wednesbury's* value lies in its foregrounding of institutional competence and addressing of 'public wrongs'.¹⁴ Its manifold nature, on this account, allows the judiciary to require administrators to adhere to principles of transparency, reasoning and evidence-based decision making.¹⁵ Paul Daly, for example, argues that *Wednesbury* incorporates a range of 'indicia' of good governmental values deployed by the courts as required by context. He identifies five such indicia: illogicality, disproportionality, inconsistency with statute or of policy, differential treatment, and unacknowledged or unexplained changes of policy.¹⁶ If a claimant can identify one of these indicia, Daly argues, they stand a chance of making good their challenge unless the defendant can provide a sufficiently convincing justification. On this account, far from being vague, *Wednesbury* possesses a structured logic for the assessment of policymaking; a set of categorical grounds of review imposing normative standards of institutional functioning.¹⁷

Second, the courts developed variable intensities of *Wednesbury* review to accommodate a perceived need for heightened rights protection (particularly in the decade preceding enactment of the Human Rights Act 1998 (HRA)).¹⁸ This allowed the courts to apply a stricter standard to claims involving breaches of fundamental rights, while retaining a lighter touch approach to questions of 'high' policy.¹⁹ *Wednesbury* thus constitutes, in certain contexts, a proportionality 'lite' model known as 'anxious scrutiny'.²⁰ This model requires that decision makers clearly and coherently justify interferences with fundamental rights. On this view, *Wednesbury* represents the fundamentally Kantian heart of the common law, a substantive conception of the rule of law which ensures individual autonomy and equality via, for example, presumptions against state

¹² Jowell (n 8) 384-395.

¹³ See the cases cited in H Woolf and others (eds), *De Smith's Judicial Review* (7th edn, Sweet and Maxwell 2013) paragraphs 11-036–11-057.

¹⁴ M Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] *New Zealand Law Review* 424.

¹⁵ DWL Wang, 'From *Wednesbury* Unreasonableness to Accountability for Reasonableness' [2017] *Cambridge Law Journal* 642, 668.

¹⁶ P Daly, 'Wednesbury's Reason and Structure' [2011] *Public Law* 238.

¹⁷ P Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24 *Oxford Journal of Legal Studies* 237, 244. See also P Craig, 'The Nature of Reasonableness Review' (2013) 66 *Current Legal Problems* 131.

¹⁸ See DR Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018) 158-162.

¹⁹ The very light touch 'super-*Wednesbury*' standard is deployed in 'high policy' (e.g. macro-level resource allocations) cases – see e.g. *Secretary of State for the Environment, ex p London Borough of Hammersmith and Fulham* [1991] 1 AC 521 (HL). A more searching review is undertaken in fundamental rights cases – see e.g. *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA).

²⁰ M Fordham and T de la Mare, 'Anxious Scrutiny, the Principle of Legality and the Human Rights Act' [2000] *Judicial Review* 40.

interference with individual liberties and requirements of consistent dealing.²¹ The open-ended nature of *Wednesbury*—facilitating gradual judicial development in line with core societal values—ensures that the judiciary do not neglect law’s moral relevance.²²

Both these ideas have in common a concept of the common law as a vector for societal or governmental values.²³ These are both fundamental moral values which society recognises and protects as an inherent aspect of being human, and the more technocratic values or principles of good governance which the judiciary have developed over time. As Sarah Nason has demonstrated in the context of High Court cases, applied judicial review principles look less like the textbook version of administrative law, but rather seek to advance values of justice and good governance by scrutinising the quality of the reasoning behind policy choices.²⁴

6.3 The Relevance of the Unification/Inter-doctrinal Bifurcation Debate

A key area of debate in recent years in terms of substantive review by the courts is whether *Wednesbury* reasonableness should be retained alongside proportionality review (for further detail see Chapter 4). For many, *Wednesbury* remains useful as a residual category.²⁵ Arguments here tend to interrelate with the arguments above regarding the normative and practical benefits of *Wednesbury* itself. *Wednesbury*’s inherent deference is its attraction for some commentators advocating an inter-doctrinally bifurcated model, with proportionality’s stronger intensity of scrutiny being reserved for rights cases.²⁶ For others, *Wednesbury* should be retained because it *adds* something to judicial review.²⁷ On this view, it allows for the importation of values of good governance in a way that the proportionality model, structured around a protected interest, does not necessarily achieve. There are fewer advocates for unification, but those who do so consider *Wednesbury*’s drawbacks so significant that it should be abandoned. On this view, the structured approach of proportionality review recommend its adoption for all substantive review.²⁸

However, these arguments, like those regarding *Wednesbury*’s normative and practical value, both underplay and replicate the ways in which *Wednesbury* itself provides for a complex intra-doctrinally bifurcated model.²⁹ On one hand, the courts can be submissively deferential on

²¹ See in particular Sir J Laws, ‘Wednesbury’ in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of William Wade QC* (Clarendon 1999) 185, 191.

²² *ibid* 196.

²³ On the idea of values of legality, fairness and rationality underpinning public law doctrine, see D Oliver, *Common Values and the Public-Private Divide* (CUP 1999).

²⁴ S Nason, *Reconstructing Judicial Review* (Hart 2016) 148-192.

²⁵ A good discussion is in J Jowell, ‘Proportionality and Unreasonableness: Neither Merger nor Takeover’ in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart 2015) 41, 59.

²⁶ See e.g. Lord Irvine (n 2) 65.

²⁷ E.g. T Hickman, ‘Problems for Proportionality’ [2010] *New Zealand Law Review* 303, 321-324.

²⁸ E.g. P Craig, ‘Proportionality, Rationality and Review’ [2010] *New Zealand Law Review* 265; and ‘The Nature of Reasonableness Review’ (2013) 66 *Current Legal Problems* 131.

²⁹ Sir J Laws, ‘Wednesbury’ in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon 1998) 185, 186-7.

questions of substance. But on the other, administrative law incorporates, preserves and disseminates broader values, relating to both human autonomy and institutional rationality. *Wednesbury* is thus characterised by three strands: (i) the submissively deferential bare *Wednesbury* standard; (ii) *Wednesbury* in its wider purpose/relevance modality; and (iii) common law rights protections.

While the core problem remains a tendency to shuttle between strong and weak forms of review, the dynamics of such intra-doctrinal bifurcation are intricate. This model is bifurcated in terms of the differentiated intensity of review between bare *Wednesbury* and the other two strands. The logic of bifurcation is, however, recursive. Common law rights review, in theory, constitutes a more intensive method of review than either bare *Wednesbury* or the wider ‘good governance’ model, because it deals with those fundamental rights which the courts have historically been most anxious to protect. But like proportionality review under the HRA, common law rights review can itself bifurcate for the same reasons as set out in Chapters 4 and 5. Where protected interests are in play, and a court is forced to weigh these against public interest aims, there is a risk that attention shifts from institutional operation to the question of whether an abstract quality outweighs a social goal. As I demonstrated in Chapter 5, the structural logic here can produce intra-doctrinal bifurcation, attitudinal bias and a functionally sub-optimal relationship with the exercise of administrative discretion.

At a doctrinal level *Wednesbury* in its wider good governance model (strand (ii)) has its own complex relationship with bifurcation. The idea, in the work of Daly and others, that *Wednesbury* review can inculcate principles of administrative rationality in the executive has something in common with Kenneth Culp Davis’s influential work regarding the potential for judicial standards to structure amorphous administrative discretion.³⁰ Such standards, over time, crystallise into clearer and tighter rules. Without determining the substance of administrative policy, the theory goes, law can bring clarity and rationality to its realisation. While this approach has its merits, it also risks substituting judicial for administrative discretion.³¹ Much depends upon whether the structuring of discretion predominantly emerges from within the administration, or whether it is imposed judicially. Further, even if rules emerge from within the administration itself, it is not necessarily practically effective for them to apply strictly thereafter. Strand (ii) can thus constitute the complementary strong arm to bare rationality’s weak model of review, imposing judicial values on state actors. Or, given its inherent flexibility, it can be used in a more

³⁰ KC Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press 1969) 56-57.

³¹ N Lacey, ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’ in K Hawkins (ed), *The Uses of Discretion* (OUP 1992) 361.

institutionally sensitive manner, pushing public authorities into action, but doing so in a way that does not unhelpfully impose particular values upon them.

The key here is that a bifurcated dynamic is embedded *within* the *Wednesbury* model. To critique *Wednesbury* for its inherent deference, or to debate the relative merits of proportionality and *Wednesbury* review on the basis of their relative strength neglects the potential emergence of a conflicted logic within the *Wednesbury* standard itself. As Sir John Laws has shown, *Wednesbury* incorporates both the rule of reason as a fundamental principle of law and judicial reluctance to intervene.³² Paul Craig too detects doctrinal conflict within the *Wednesbury* standard. The courts will rarely find a decision irrational *per se*, given the risks of merits review. Yet the boundary between irrationality and wider questions of illegality is fragile. Given that questions of purpose or relevance are accepted constitutionally as being within the courts' purview, the modalities of review can swing unpredictably between different standards.³³ And, as discussed in chapter 2 when the modalities of review shuttle between strong and weak intensity questions of institutional functioning arise. A standard which is both profoundly hands off and prohibitively restrictive can have an unstable and inefficient relationship with the substantive policy questions to which it will be applied.

6.4 Hypotheses and Outcomes

On the basis of the foregoing, I posed two hypotheses (see Chapter 3). First, that legalistic and deferential approaches would predominate, suggesting intra-doctrinal bifurcation. Second, relatedly, that this could give rise to similar pathologies in the Supreme Court's approach to common law as seen in the HRA proportionality cases. In this case, evidence of institutional functioning going untested in the face of bifurcated review, and exacerbation of distinct judicial attitudes. These were tested in accordance with the methodology outlined in the introduction (the full analysis is set out at Appendix B).

The analysis is best conceptualised via the three-strand model described above i.e.: (i) bare *Wednesbury*; (ii) 'Governance *Wednesbury*' (i.e. *Wednesbury* in its purpose/relevance modality); and (iii) common law rights. Bifurcation takes place between bare *Wednesbury* and *Wednesbury* in its wider sense, which involves a shift into more legalistic (i.e. in the sense set out in Chapter 3, where a decision maker is held to substantive, judicially designed standards) forms of review which can preclude administration deliberation. In the case of bare *Wednesbury*, the Court's approach is generally deferential, and rarely legalistic. In the case of governance *Wednesbury*, a deferential approach is rare, whereas a legalistic approach is much more common. This intra-

³² Laws (n 21) 186.

³³ Craig (n 6) 69-70.

doctrinal bifurcation between bare and wider *Wednesbury* can operate sub-optimally in terms of scrutinising administrative decision making. This is demonstrated with reference to the case of *In R (Rotherham Metropolitan Borough Council) v Secretary of State for Business Innovation and Skills*.³⁴

However, the dynamics within the second strand (wider *Wednesbury*) are complex. This mode of *Wednesbury* review is capable of variable, context-sensitive application focused upon maximising institutional competence. As was the case with proportionality under the HRA, it is not uncommon for the wider *Wednesbury* standard to operate between the poles of bifurcation, stimulating institutional and governmental effectiveness without (unnecessarily) imposing legalistic values upon administrative discretion. However, it is not consistently deployed in this way.

The Court's approach on the third (common law rights) strand is nascent, occurring in only a small number of cases and generally discussed *in obiter*. This impacts upon my ability to draw conclusions. However, some tentative comments may be made. First, as a model which seeks to replicate proportionality-centred approaches, in framing judicial scrutiny as a zero-sum choice between deference and decision substitution, the common law rights model clearly risks bifurcation. At the time of writing there is some evidence of this. The mode of review generally applies a legalistic standard of correctness. Yet the direction of travel in terms of outcomes is toward the deferential end of review. Indeed, there is evidence in my dataset that the wider *Wednesbury* approach might more effectively and sensitively be used to regulate effective administration. Yet, as seen elsewhere, within the few common law rights cases decided during my reference period, there is some evidence of the potential for this standard of review to operate in institutionally sensitive ways.

6.4.1 Bare Rationality

Subject to limited caveats discussed below, claimants are unlikely to win on rationality *simpliciter*. In one set of cases, irrationality receives a mention because it has been finally determined at earlier stages of proceedings. I infer that this is because either the claimants decided to focus on stronger heads of review, or because the Supreme Court refused permission.³⁵ In other cases it is mentioned but receives no serious or substantive consideration (including cases where a common law claim adds nothing to an HRA claim).³⁶ Where it is treated as a live head of review, the legal

³⁴ [2015] UKSC 6, [2015] PTSR 322.

³⁵ See *R (Ismail) v Secretary of State for the Home Department* [2016] UKSC 37, [2016] 1 WLR 2814; *R (Champion) v North Norfolk District Council* [2015] UKSC 52, [2015] 1 WLR 3710; *R (Nouazli) v Secretary of State for the Home Department* [2016] UKSC 16, [2016] 1 WLR 1565; *Makhlouf v Secretary of State for the Home Department (Northern Ireland)* [2016] UKSC 59, [2017] 3 ER 1; *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 WLR 823; *R (Mott) v Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022.

³⁶ See *Sims v Dacorum Borough Council* [2014] UKSC 63, [2015] AC 1336 [16] (Lord Neuberger); *R (Trail Riders Fellowship) v Dorset County Council* [2015] UKSC 18, [2015] 1 WLR 1406 [28] (Lord Clarke); *Mathieson v Secretary of State*

standard applied is not testing for a defendant. As noted above, judgments applying a bare *Wednesbury* standard were rarely legalistic. And this included the *sui generis* case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 4)* (see below).³⁷ A claimant will not generally succeed on it. The justices' approach here is thus almost entirely deferential in terms of doctrinal variegation, with almost all challenges based on this head failing.³⁸ A selection from these cases makes the point strongly.

In *R (Kaiyam) v Secretary of State for Justice*, which concerned the provision of suitable rehabilitative facilities for prisoners detained for public protection purposes, Lords Mance and Hughes confirm the vanishingly small probability of success on a bare rationality point. In the course of comparing domestic grounds of challenge and review under the HRA, they note:

As a matter of domestic public law complaint may be made in respect of any systemic failure, any failure to make reasonable provision for an individual prisoner so egregious as to satisfy the *Wednesbury* standard of unreasonableness [see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223] or any failure to apply established policy. The question is whether liability for breach of article 5 is similarly limited.³⁹

Few public authorities would be expected to fall foul of 'egregiousness review'. Likewise, in *R (MM) (Lebanon) v Secretary of State for the Home Department*, an HRA case in which the standard of review applied is deemed equivalent to a rationality test, the Court tests the immigration policy on a 'not taken on a whim' test.⁴⁰ Dismissal of the claim is assured.⁴¹ Nor is it unusual for the Court to frame bare rationality in such terms; similar formulations arise in a number of cases.⁴²

for Work and Pensions [2015] UKSC 47, [2015] 1 WLR 3250; *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, [2015] 1 WLR 5055 [57] (Lord Wilson and Baroness Hale); *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority* [2015] UKSC 75, [2016] 2 All ER 631 [41]-[43] (Lord Sumption); *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865 [22] (Lord Carnwath); *R (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492 [65] (Lord Kerr).

³⁷ [2016] UKSC 35, [2017] AC 300.

³⁸ See *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344 [41] (Lord Mance); *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2016] PTSR 322 [22]-[24] (Lord Sumption) [61]-[62] (Lord Neuberger) and [112] (Lord Clarke); *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 [129] (Lord Mance); *R (Keyu) v Secretary of State for the Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 [129] (Lord Neuberger); *R (MM) (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10, [2017] 1 WLR 771 [98] (Lord Reed, Baroness Hale); *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, [2017] 3 WLR 1486 [33] (Lord Carnwath); *Nottingham City Council v Parr* [2018] UKSC 51, [2018] 1 WLR 4985. More intensive rationality analysis occurs in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453, but the case is *sui generis* in concerning the standard for reopening earlier proceedings.

³⁹ [2014] UKSC 66, [2015] AC 1344 [41] (Lord Mance, Lord Hughes).

⁴⁰ [2017] UKSC 10, [2017] 1 WLR 771.

⁴¹ *ibid* [98] (Lord Reed, Baroness Hale).

⁴² See e.g. *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 [129] (Lord Mance); *R (Keyu)* (n 38) [129] (Lord Neuberger); *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, [2017] 3 WLR 1486.

R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 4) is a case that appears to suggest a stronger model of bare rationality trend. However, on analysis, it turns out to be an exception that proves the general rule. In this case, the Court considered whether a failure by the UK Government to disclose materials relevant to earlier proceedings concerning its treatment of the Chagos Islanders necessitated their reopening. The review carried out by Lord Mance is, effectively, pure substantive review of the Secretary of State's decision-making, and the reviewing process is thorough. However, this case is *sui generis* in terms of the intimidating evidential and conceptual issues involved in considering whether materials not before the House of Lords when assessing a complex, multifactorial decision by the Secretary of State would have made a difference to the Law Lords' consideration of that decision.⁴³

The two cases in which bare rationality review succeeds are *R (CPRE Kent) v Dover District Council*,⁴⁴ and *Nottingham City Council v Parr*.⁴⁵ *R (CPRE Kent) v Dover District Council*, where the Court determined that a planning authority's failure to provide reasons for a surprising decision gave rise to *doubt* as to whether it was rational.⁴⁶ In one sense, this conforms to the general trend in terms of the Court's reticence about finding a decision irrational, and thus falls into the deferential limb of the bifurcatory model. The judgment finds not that the decision was unreasonable *per se*, but the lack of reasons gave rise to sufficient doubt as to whether this is the case that it could not stand. Yet, in terms of the bare rationality cases, *CPRE* is an excellent example of the way in which bare rationality review can demand evidence from the executive that it has exercised its faculties without substituting legal for administrative decision making. It may, on that view, come close to exemplifying the 'institutionally activating' class of case. In *Nottingham City Council v Parr* a rationality challenge succeeds in respect of a condition imposed on a planning condition. In that case, the Court held that a planning condition limiting the length of time for which students could inhabit accommodation was superfluous, given the inherently short-term nature of student tenancies. That is demonstrably a legalistic approach.

The final point to be made about bare rationality is that there is one case in which a claim fails, but the Court clearly demonstrates the potential of institutionally activating review. In *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority*, the Court considered whether a challenge to the Authority's decision that claimant's acquisition of a ferry operation's assets was a merger for purposes of the Enterprise Act 2002.⁴⁷ The question of irrationality was key to the case, and Lord Sumption's analysis elucidates precisely the work that a functional,

⁴³ In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453.

⁴⁴ [2017] UKSC 79, [2018] 1 WLR 108.

⁴⁵ [2018] UKSC 51, [2018] 1 WLR 4985.

⁴⁶ *CPRE Kent* (n 44) [60], [68] (Lord Carnwath).

⁴⁷ [2015] UKSC 75, [2016] 2 All ER 631.

institutionally activating jurisprudence can achieve.⁴⁸ The Court of Appeal had taken a formalistic approach, determining that the Authority's decision did not follow logically from its fact finding.⁴⁹ Lord Sumption rejects this, affording deference to the Authority's expertise, on the basis that this had been deployed with significant 'depth'.⁵⁰ What is important here is that Lord Sumption is not deferring because the Authority has expertise, but because that expertise has been clearly and effectively deployed.

6.4.2 *Intra-common Law Bifurcation 1: The Broader Wednesbury Standard*

The broader *Wednesbury* standard constitutes the nuts and bolts of judicial review, comprising those core heads of review on which a claimant may sensibly mount a claim with a chance of success. The underlying basis for these principles is disputed, as discussed in Chapter 2.⁵¹ For some, they are the product of Parliament's express or implicit intention. This *ultra vires* approach relies fundamentally on a democratic justification for judicial review. The role of the courts, on this view, is to ensure that government acts within the four corners of the powers afforded it by Parliament. Their opponents in the common law school highlight the illusory nature of this approach, seeking instead common law sources of administrative law principle.⁵² However, even those in the *ultra vires* school who do locate the ultimate legitimating principle of judicial review in parliamentary sovereignty admit that their model cannot entirely explain the range of heads of review used by the courts. They argue, now, that the judges do create principles of review, but that Parliament's validation of these may be inferred whenever it legislates without expressly excluding their application.⁵³

There are two interrelated points to be noted here. First, whether the basis of judicial review principles lies in the intention of Parliament or the common law, the courts evidently consider their deployment to be a legitimate use of judicial power. This lends some support to proponents of the *ultra vires* model, insofar as reliance on parliamentary intention (whether express or implied, real or mythic) is a straightforward means of justifying judicial intervention. Either way, once the courts move beyond the scrutiny of substantive decision making, and into the application of broader principles of review, the need for deference significantly declines. Second, while these arguments focus upon the underlying legitimacy of doctrine, there is broad agreement at scholarly level that the development of administrative law principles involves judicial discretion.⁵⁴ It will

⁴⁸ *ibid* [41]-[44].

⁴⁹ *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority* [2015] EWCA Civ 487 [198]-[200] (Sir Colin Rimer).

⁵⁰ *Société Coopérative de Production SeaFrance SA* (n 47) (Lord Sumption).

⁵¹ The key writings are collected in CF Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000).

⁵² E.g. D Oliver, 'Is the Ultra Vires Principle the basis of Judicial Review?' [1987] Public Law 543.

⁵³ E.g. M Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001); C Forsyth and M Elliott, 'The Legitimacy of Judicial Review' [2003] Public Law 286.

⁵⁴ E.g. P Craig, 'Ultra Vires and the Foundations of Judicial Review' [1998] Cambridge Law Journal 63.

always be a bounded form of discretion, operating within the terrain permitted by precedent, statute and institutional propriety. But it is nonetheless capable of variable application in terms of scope and intensity.

It is important, then, to note the Court's significantly decreased reticence over intervention when it moves to the broader version of *Wednesbury* review. Where pure unreasonableness is transmuted into a traditional, less obviously controversial standard of review the Court shows less restraint in substituting judicial for executive or political judgement. This reinforces the analysis in Chapter 2 regarding the bifurcated roots of UK administrative law.

The underlying doctrines are, nonetheless, fluid. Paul Daly's analysis demonstrates that they may be deployed to foster principles of good governance in policy makers and administrators.⁵⁵ What he does not address directly is that in imposing such values a court can leave more or less space for the operation of the political constitution, given the relative flexibility of common law review. That choice is not limited to either directing the manner of government's function or advocating blind deference. Rather, as in the case of proportionality review, doctrine leaves the Court a margin of choice as to whether the method and outcome of review precludes, or enhances, the discretionary functioning of both executive policymaking, but also the functioning of the political constitution more broadly. Review under the material consideration doctrine may, for example, involve a court telling a decision maker that consideration X was material, or it may simply check whether a decision maker has put effort into determining which considerations are or are not material. In summary, while the Court's use of the broader *Wednesbury* standard is predominantly of the former variety, a more institutionally sensitive undercurrent is also present in the case law.

6.4.3 Strong/preclusive *Wednesbury*

Turning to the cases, there is a clear trend of Governance *Wednesbury* (i.e. as explained in Chapter 3, the more intensive face of the *Wednesbury* doctrine based on a combination of statutory purpose and principles of good governance) operating as a strong standard. In terms of doctrinal variegation, these cases are thus predominantly legalistic.

In one subset of cases, the Court treats the question as one of interpretation, expounding the purpose or meaning of statute in order to structure administration discretion. Within this subset, review takes one of two related forms, both traditional heads of judicial review. The first form involves the court interpreting statute in order to determine whether a consideration either must, or most not, be taken into account by a decision maker.⁵⁶ The second form of review here

⁵⁵ Daly (n 16).

⁵⁶ E.g. *In the matter of Raymond Brownlee for JR* [2014] UKSC 4, [2014] NI 188; *Elsick Development Company Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] UKSC 66, [2017] PTSR 1413; *JP Whitter (Water Well*

involves those cases where the Court determines that the executive has misunderstood the purpose of a statutory provision.⁵⁷ Both approaches involve the pre-eminently judicial task of interpreting legislation (there is thus some overlap here with Chapters 8, 9 and 10, though as explained in Chapter 3 the focus here are those cases where *implied* purpose is used to structure an apparently broader discretion).⁵⁸ However, the cases reaching an apex court will, at least in the majority of instances, be ‘hard’ in a Dworkinian sense;⁵⁹ permitting of more than one possible answer. In any event, the cases selected for inclusion in my common law dataset are not ones which turn specifically on the meaning of a specific word or phrase; they are cases where the Court had to delve into questions of implicit purpose or relevance. Where the Court applies a correctness standard to questions of relevance and purpose, it thus prioritises its own discretion in a way which, potentially, dictates policy outcomes. If the meaning and requirements of an Act permit of reasonable disagreement, taking a strongly legalistic approach translates administrative into judicial discretion. This point is at its most forceful on those occasions where the Court takes a controversial line.⁶⁰ A comparison of these cases with the majority of those involving bare rationality demonstrates the bifurcational dynamic described in Chapter 2, whereby a very restrained model of rationality lost ground to a ‘good governance’ model, but continued to coexist with it.

The Court’s tendency to prioritise its own discretion over that of administrators goes beyond questions of implied statutory purpose. A second subset of cases extends the Court’s authority to interpretation of administrative policy itself. The Court confirmed that the meaning of policy is a question of law in *Tesco Stores Ltd v Dundee City Council*.⁶¹ This approach has been continued and developed during my reference period.⁶² Such an approach promotes values of administrative certainty and predictability, lending some support to those commentators who advocate *Wednesbury*’s potential to inculcate principles of good governance in decision makers. However, this is a clear example of the ways in which a legalistic approach to doctrine operates to close down administrative discretion in a way which is, potentially, suboptimal in policy terms (e.g. given the risks of a court misunderstanding a policy’s aims in a given context).

Engineers) Ltd v Revenue and Customs Commissioners [2018] UKSC 31, [2018] 1 WLR 3117; *Nottingham City Council v Parr* [2018] UKSC 51, [2018] 1 WLR 4985.

⁵⁷ E.g. *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947 [39] (Lord Reed); *R (Nzolameso) v Westminster City Council* [2015] UKSC 22, [2015] PTSR 549 [33] (Baroness Hale); *R (Ingenious Holdings PLC) v Revenue and Customs Commissioners* [2016] UKSC 54, [2016] 1 WLR 4164.

⁵⁸ On which see Chapters 9 and 10.

⁵⁹ R Dworkin, *Taking Rights Seriously* (Duckworth 1977) ch 4.

⁶⁰ E.g. *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 [52]-[53] (Lord Neuberger).

⁶¹ [2012] UKSC 13, [2012] PTSR 983.

⁶² E.g. *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546; *R (O) v Secretary of State for the Home Department* [2016] UKSC 19, [2016] 1 WLR 1717; *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865. Though see further discussion of *R (O) v Secretary of State for the Home Department* below.

My point here is not, necessarily, to question the outcome of any of these cases. I do not deny there are cases where, for example, an administrator has failed to take account of a material consideration which is plainly relevant to a decision. They nonetheless illustrate the transmutation of the rationality doctrine into a stronger, value substituting standard, with the attendant (if not inevitable) potential to preclude the exercise of administrative rationality. In that sense, a familiar bifurcatory pattern emerges. *Wednesbury* is operating a two-speed dynamic. If the case is dealt with as a matter of bare rationality, then the claimant will almost certainly lose. If the case is dealt with as a matter of broader *Wednesbury* concepts, review can become a question of correctness. On one view, that is absolutely as it should be. Substantive review should represent a high threshold for a claimant, whereas those cases involving points of law more properly fall within the purview of the courts. The problem with this view is the flexible and interchangeable nature of public law doctrine. As a matter of judicial discretion, the standard of review can become very weak, or very strong. The problems with this are seen, qualitatively, in those cases where bench splits, with the opposing viewpoints deploying alternative doctrinal approaches. In short, what we see here is evidence of intra-doctrinal bifurcation and its related pathologies.

6.4.4 Case Study: Rotherham

A representative case here demonstrates the bifurcating dynamic of doctrine here, as well as the ways in which this inhibits effective policy scrutiny.⁶³ In *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business Innovation and Skills* the Court considered the domestic allocation of European Union funding designed to reduce inter-regional disparities and inequalities.⁶⁴ The core issue was the way in which the Secretary of State had allocated funding for the 2014-2020 funding period. He had applied a 5% reduction in funding for each of the home nations, and a blanket increase of 15.7% for each English region. The English regions of Merseyside and South Yorkshire had, however, been subject to specific additional funding during the 2007-2013 period to reflect economic disadvantage relative to the rest of the UK which was not properly accounted for in the way that the EU's funding calculations operated. This additional funding 'tapered' throughout the 2007-2013 period, and the Secretary of State had determined that their 2014-2020 allocation would be based on a 2013 baseline, when their funding was at its lowest. This led, these regions argued, to an unequal treatment of their actual economic need relative to other deprived regions in the UK, such as the Highlands and Islands, and to other English regions. The case was decided via the application of the EU law principle of equal treatment but this principle was treated as being jurisprudentially equivalent to common law irrationality.⁶⁵ In

⁶³ The dichotomy is seen elsewhere e.g. in the majority and minority approaches in *Regina (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492.

⁶⁴ *R (Rotherham Metropolitan Borough Council)* (n 34).

⁶⁵ *R (Rotherham Metropolitan Borough Council)* (n 34) [26], [29] (Lord Sumption), [162] (Lord Mance).

practice, the Court divides not on the application of doctrine to the facts of the case, but on the relevant aspect of doctrine to apply to those facts. For the majority, holding for the Secretary of State, this is a question of pure unreasonableness. For the minority, holding for the claimant, this is a question of legislative purpose. Depending on the nature of the approach taken, review is either meaninglessly weak or irresistibly strong. And as we have seen in other case studies, this is not merely a question of judges differing on a finely balanced question of application of the law. Rather, they apply entirely different standards of scrutiny; one based on whether the Secretary of State had acted irrationally, the other essentially determining whether he had *correctly* understood the nature of his legal obligations. At the same time, the case demonstrates a broader failure on the Court's part to either possess or develop an appropriate language for the assessment of policy decisions.

The Court finds for the Secretary of State in *Rotherham* on a narrow 4:3 split. The majority judgment is deeply permeated with the language of *prima facie* deference, in light of the 'high' policy context. Lord Sumption (with whom Lord Hodge and Lord Clarke agreed, the latter through a brief concurring judgment) set out three reasons why the Court needed to give the Secretary of State leeway: (i) this was a 'discretionary decision of a kind which the courts have traditionally been particularly reluctant to disturb' involving 'technical judgments about matters of social and economic policy';⁶⁶ (ii) the judgment was of a 'particularly delicate kind' involving allocation of scarce financial resources;⁶⁷ and (iii) the Secretary of State was only the first decision maker, with the European Commission's sign-off required before allocations were finalised.⁶⁸

These are all valid reasons, and it is trite to say that the Court should both recognise the institutional superiority of the executive in terms of policy making, and should not overturn decisions simply because it disagrees with them. But the danger inherent in the first and second of these reasons is that by adopting the question in this *prima facie* acquiescent manner, it risks falling into what David Dyzenhaus calls 'submissive deference'; a primarily *spatial* differentiation of function rather than one based on effective deployment of expertise.⁶⁹ In reality, these reasons are only as persuasive as the executive can demonstrate in the circumstances of individual decision making. The third of these reasons, furthermore, surely should not preclude an expectation that the Secretary of State will adopt a robust decision-making process of his own.

Moving to the substantive analysis, Lord Sumption made clear that the claimants would have to do more than point to inequalities of treatment, and would need to show 'something unlawful

⁶⁶ *ibid* [22] (Lord Sumption).

⁶⁷ *ibid* [23] (Lord Sumption).

⁶⁸ *ibid* [24] (Lord Sumption).

⁶⁹ D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed), *The Province of Administrative Law* (Hart 1997) 286.

about the process or reasoning' by which the decision was reached.⁷⁰ As to the decision to reduce Scotland, Wales and Northern Ireland's funding by 5%, Lord Sumption applied a formalistic model of analysis. His benchmark was that a simple fixed reduction across the board is rational unless it is shown: '(i) that the basis on which he did so did not unjustifiably discriminate between the four countries, and (ii) that the financial implications for the individual regions of the United Kingdom were consistent with the 2013 Regulation.'⁷¹ Similarly, as to the fixed 15.7% uplift for each of the English regions it was: '[...] impossible to say that the Secretary of State's decision was outside the broad range of decisions that he could lawfully make.'⁷² Further, since an increase in funding in Liverpool or Rotherham would mean less funding for other areas, the decision to effect an identical uplift across England was not illogical.⁷³ This is formalist logic; Lord Sumption is effectively saying that regardless of the circumstances of individual regions, a decision to apply an identical percentage uplift to a differential baseline is nonetheless rational since the same number is used in each case.

Lord Neuberger, who also dismisses the claim, is occasionally more critical than of the Secretary of State than Lord Sumption.⁷⁴ Nonetheless, given the context, his judgment is also significantly deferential in light of the Secretary of State's primacy as decision maker, with possession of the 'information, the contextual appreciation, the expertise and the experience which the court lacks.'⁷⁵ These points are sharpened given that question concerned finance and resource allocation, and was thus profoundly polycentric in nature.⁷⁶ Lord Neuberger proceeds to make a further set of preliminary points, however, which qualify his reasons for affording respect to the primary decision maker. He notes that the broad brush nature of the Secretary of State's decisions were partly taken to allow 'transparency, convenience and simplicity'; that in their lack of nuance these would avoid 'disruption' vis-à-vis the existing settlement; and, finally, they reflected the lack of change in the UK's economic differentials throughout the previous funding period.⁷⁷

These points are important. First, affording deference to executive expertise and to the simplicity of the model adopted seems contradictory. Of course, one might say that the Secretary of State's expert opinion was that a simple decision constituted the best means of addressing a complex issue he was uniquely placed to understand. Yet it smacks of not having deployed the very

⁷⁰ R (*Rotherham Metropolitan Borough Council*) (n 34) [29] (Lord Sumption).

⁷¹ *ibid* [34] (Lord Sumption).

⁷² *ibid* [42] (Lord Sumption).

⁷³ *ibid* [43] (Lord Sumption).

⁷⁴ He criticises, for example, the Secretary of State at paragraph [69] for a failure to consult.

⁷⁵ *ibid* [61] (Lord Neuberger).

⁷⁶ *ibid* [62] (Lord Neuberger).

⁷⁷ *ibid* [67] (Lord Neuberger).

expertise which the Court considers relevant to the intensity of its review methodology. Second, any refusal to change tack will avoid some disruption, so this is a truism of little weight when evaluating the Secretary of State's decision making (given Lord Sumption and Lord Neuberger put so high a value on this). And finally, given that the entire aim of the policy was to reduce regional economic differentials, the lack of any change in those inequities during the preceding 12 years surely indicated that a change of policy needed to be at least explored.

Lord Neuberger's views on the proper role of the Court play out in the meat of the decision. He notes that the decision to impose a like reduction across all four UK nations involves constitutional implications of a policy/political nature with which the Court should be slow to interfere.⁷⁸ Although the disparities to which the decision gave rise made Lord Neuberger 'pause for thought', in light of the wide margin of discretion afforded to the Secretary of State in such circumstances the outcome was not unlawful.⁷⁹ As to the second decision on the English regions, Lord Neuberger was troubled by the differential impacts of the model chosen for Merseyside and South Yorkshire, but he is ultimately content with this on the basis of the Secretary of State's institutional competence, and the fact that other regions suffered real-terms reductions equivalent to, or worse than, that suffered by the claimants.⁸⁰ For him, there was inevitably an element of 'rough justice' in the decision, but ultimately these are questions in which the Court must be slow to intervene.⁸¹

Lord Neuberger's conclusion provides a glimpse of an analysis that would achieve better scrutiny of the decision-making process. While, as he reiterates, the Secretary of State is allowed a margin of discretion here, the process by which the decision was taken was markedly sub-optimal:

[...] with the expertise and information available to the Secretary of State, one would have hoped for a more sophisticated and considered, and a more consultative, approach to the question of how to apportion such a large sum of money between different regions of the United Kingdom.⁸²

This may be seen as a warning shot for decision makers of the risks of improperly considered decisions but, in real terms, the judgment's recurring deferential riff is that only a crashing lapse of logic would have seriously risked a negative decision. It would have been more effective in terms of fostering good decision making if Lord Neuberger had taken a more nuanced approach. His arguments about deferring in light of expertise ring hollow in light of his conclusion that

⁷⁸ *ibid* [78] (Lord Neuberger).

⁷⁹ *ibid* [92] (Lord Neuberger).

⁸⁰ *ibid* [84]-[85], [100]-[108] (Lord Neuberger).

⁸¹ *ibid* [100] (Lord Neuberger).

⁸² *ibid* [110] (Lord Neuberger).

expertise has not been deployed. He could, on the other hand, have factored more substantively the Secretary of State's failure to exercise his expertise into the rationality of his decision. As noted above in respect of the approach I advocated in *Tigere*, this would not involve unduly activist judicial decision substitution. Rather, requiring the Secretary of State to deploy his resources properly would: (i) improve the quality actual decision (without imposing 'rightness' review; and (ii) improve, indirectly, political scrutiny by improving the materials available to Parliament if and when it considers the decision.⁸³

There is less emphasis of the importance of deference in the dissenting judgments. There is also limited evidence of a willingness to undertake review which directly takes account of effective policymaking. Indeed, two of the Justices translate bare rationality review into the broader *Wednesbury* standard, turning on a question of statutory purpose. Such an approach means that the unlawfulness identified sounds, ultimately, in the judicial register of statutory construction rather than in the administrative area of policy making. The deep problem here is that legal and policy discourse are resonating on different planes. For the majority the context justifies a mode of review which involves legal discourse acting, effectively, under erasure. For the minority, a model of legal correctness model dictates outcomes in the policy realm. And this is one of the pathologies of intra-doctrinal bifurcation; the judges are adopting very different conceptions of the role of judicial review. On one hand it is submissively deferential, on the other strongly legalistic. This is jurisprudentially sub-optimal in terms of public law's capacity for improving (without dictating) outcomes.

For Lord Mance (with whom Baroness Hale agrees), the 'margin of discretion' point is less compelling than it was for the majority, given the informality of the decision-making process, and its impacts.⁸⁴ Indeed, at this stage of his judgment his scrutiny of the deployment of expertise is precisely the kind of analysis review predicated on stimulating active policymaking might look like. He points out that the effect of the Secretary of State's decision is to fail to consider the actual needs of Merseyside and South Yorkshire in a way which he does do in the case of Northern Ireland and the Highlands and Islands.⁸⁵ So the indolent 'rule of thumb' which was sufficient to appease the majority is, for Lord Mance, insufficient.

Lord Mance ultimately frames his decision, however, in terms of the meaning and purpose of the underlying EU Regulation. He finds that a more nuanced approach on the Secretary of State's part would have led to an outcome: 'which was consistent with the Fund-specific mission of

⁸³ Lord Sumption notes that the Secretary of State's decision is more properly subject to scrutiny by Parliament at paragraph [23].

⁸⁴ R (*Rotherham Metropolitan Borough Council*) (n 34) [112], [142] (Lord Mance). Lord Carnwath makes a similar point at paragraph [167].

⁸⁵ *ibid* [149]-[152] (Lord Mance).

cohesion and the goal of growth and jobs set by Regulation No 1303/2013 [...]’.⁸⁶ Thus, while Lord Mance rightly critiques the markedly inactive policy-making process, his attempt to conceptualise the question as one of statutory interpretation shifts into a hyper-legalised realm.⁸⁷ This has a similar effect to the Court’s tendency to frame public law challenges in terms of rights/aims balancing. In attempting to keep himself within the permissible framework of traditional legal methods (i.e. construing statute), Lord Mance dilutes his deconstruction of the Secretary of State’s poor-quality policy processes, while simultaneously supplanting administrative with legal answers. Lord Mance’s approach thus highlights the ways in which the Court’s approach to doctrine fails to consistently deploy an administrative law which, eschewing bifurcation, takes every opportunity to foster a culture of active administrative policy making. If Lord Mance’s approach had found sympathy with a majority of the Court, this may have resulted in the Secretary of State rethinking the policy in a more nuanced way. However, the problem with framing the issue in this legalistic manner is, as with *Tigere*, that it risks foreclosing deliberation.

A more promising note is sounded in Lord Carnwath’s, who asserts that the underlying issue is not, ultimately, a question of legal classification, but a pragmatic point about effective decision making:

[i]t matters not, in my view, whether this [i.e. the anomalies thrown up by the decision] is expressed as an issue of unequal treatment or lack of proportionality under European law, or inconsistency and irrationality under domestic law, the anomalies are in my view sufficiently serious to have required explanation which has not been given, and which renders the resulting decisions ‘manifestly inappropriate’ under EU and domestic principles.’⁸⁸

This picks up on the points made by both Lord Neuberger and Lord Mance about the Secretary of State’s failure to make use of the significant policymaking resources. Lord Carnwath, while open perhaps to the criticism of relying on freewheeling pragmatism, is more willing to get to the core issue of institutional effectiveness than were either the majority (who fall back on submissive deference) or the minority (who bypass the question of effectiveness in favour of statutory purpose). Indeed, his approach hints at the kind of institutionally activating model of review which I start to develop in Chapter 7; the failure to make use of policymaking resources should have weighed more heavily in the Court’s thinking, and the Secretary of State’s decision should have been deemed irrational on the basis of institutional lethargy.

⁸⁶ *ibid* [157] (Lord Mance).

⁸⁷ We see a similar approach elsewhere. See, for example the judgment of Lord Kerr in *R (A)* (n 36).

⁸⁸ *R (Rotherham Metropolitan Borough Council)* (n 34) [112], [187] (Lord Carnwath). One wonders whether Lord Carnwath’s time as President of Tribunals has led him to a more institutionally sensitive approach.

Recontextualising the dynamics which emerge here, it is noteworthy that within the *Wednesbury* case law there is evidence of the pathologies identified in my discussion of rights/aims balancing. My suggestion there was that balancing could lead to: (i) intra-doctrinal bifurcation; (ii) attitudinal bias; and (iii) inconsistency relative to flawed institutional functioning. There was qualified evidence for these in the HRA caselaw. Above, I hypothesised that the dynamics of common law review had the potential to display similar pathologies. This happens in *Rotherham*. While there are no individual rights at stake, related pathologies nonetheless emerge, completing a picture of the potential flaws in the Court's substantive review model. Law and policy, in both the majority and minority judgments, operate at distinct discursive levels. In conceptual terms this sustains a binary opposition between which reflects the oppositional logic of rights deontology. Vitaly, it leads to intra-doctrinal bifurcation; the law either goes into effective abeyance or dictates substantive outcomes. This tends to exacerbate underlying judicial attitudes and divide the bench. As we have seen, it allows very different views over the role of judicial review to emerge in terms of the standards to which executive decision makers are held. Overall, the model negatively impacts the development of an institutionally sensitive, functionalist model of public law.

One objection to this discussion of *Rotherham* is that it is inconsistent to suggest that: (i) the pathologies discussed in the last chapter are the product of the zero-sum nature of quasi-deontological reasoning; and (ii) the intra-doctrinal bifurcation seen in *Rotherham* is part of the same problem even when the context is one of rationality review. One does not, however, preclude the other and both can be thought of as the by-products of the historical failure to develop a functional model of public law which, while showing appropriate awareness of institutional limitations, enhances effective deliberation (on which see Chapter 2). The argument thus comes full circle. The bifurcatory reasoning critiqued in the previous chapter (i.e. in terms of substantive review doctrine's potential to lead to unstable oscillation between strong and weak review) is both cause and outcome of a deeper historical problem. The core issue is that public law has long struggled to articulate a stable mode of substantive review. A focus on rights/aims balancing has been the approach latterly adopted for addressing that problem. But the deeper problem is a troubled dialectic between law/policy which drives and reproduces its own internal, polarising dynamic, producing a public law which can tend to absolutism in hard cases. Working in legal discourse predicated on alterity, the judiciary are caught within the logic of deference (and thus, as I have shown, miss opportunities to improve policy making, scrutiny and outcomes) or preclusion (which is clearly sub-optimal in terms of facilitating democratic decision making). This logic plays out, as we seen in the case of *Rotherham*, intra-doctrinally (i.e. in terms of review's potential to lapse into strong and weak forms). But it also plays out at the inter-doctrinal level in terms of the debates over inter-doctrinal bifurcation (i.e. whether substantive review should

constitute one or two standards). It is for this reason that I suggest these debates are both inhibiting analysis of substantive review in the UK, and why I have sought to deploy an expanded sense of the term ‘bifurcation’ in this project.

6.4.5 *Third-way Wednesbury: Deference and Institutional Activation*

While the Governance *Wednesbury* review is more likely to be legalistic in doctrinal variegation terms, and thus enhance the opposite end of the doctrinal spectrum from the deferential bare *Wednesbury* approach, there are cases in which legalism is not the dominant mode of review. First, within the Governance *Wednesbury* class of cases, the Court will on occasion take a solidly deferential approach.⁸⁹ More importantly, however, (as in the case of proportionality) there is also some evidence that of the Court deploying an institutionally stimulating approach. The approach in these cases applies doctrine in a way which maximises executive effectiveness, striking a third way between strong(er) and weak(er) review.

The third-way approach manifests itself in a number of forms. The core behaviours are either: (i) a defendant obtains judicial benefit of the doubt where it has taken a proactive approach to policy making; or (ii) the Court frames in its decision in such a way as to force the state to act proactively in this way without determining outcomes. In such cases the Court, acting neither deferentially nor dominantly, clears a space for the operation of the political constitution but then obliges policy makers to operate within that space.

Questions of materiality provide a good example here. The discussion above established that this doctrine has the potential for the courts, via the legitimate application of established principle, to effectively direct an authority to act in a particular way. An alternative approach to the question is for the courts to check whether an authority took an active approach to investigating and deliberating upon which materials might be material and in what way. This, as I shall suggest in Chapter 7, has the hallmark of an institutionally activating approach to substantive judicial review; making administrators function effectively.

In *R (Gallaber Group Ltd and others) v Competition and Markets Authority*, for example, the Court adopts a high-level form of review which eschews the transmutation of rationality into specific, legal values of inequality or unfairness. Deploying a relatively light touch approach, it is content that the authority acted rationally with regard to the materiality of, and proper approach to rectifying, its own previous error.⁹⁰ In particular, the Court took notice of the fact that the defendant had recognised its own error, and had taken steps to avoid its replication.⁹¹ Some have

⁸⁹ *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697 and *Poshteb v Kensington and Chelsea Royal Borough Council* [2017] UKSC 36, [2017] 2 WLR 1417.

⁹⁰ [2018] UKSC 25, [2018] 2 WLR 1583 [40]–[41] (Lord Carnwath), [50] (Lord Sumption).

⁹¹ *ibid* [56] (Lord Sumption).

critiqued the Court for failing to adopt a clear principle of equality and/or consistency, and it is fair to say that its approach was at the deferential end of the jurisprudential spectrum.⁹² However, even if it might have been pushed a little harder, this approach does have the virtue of rewarding the authority for self-reflection. A similar approach is seen in *In re Loughlin*, where the Court effectively finds that the question of materiality is one for the decision maker, given that in this case the decision had clearly been thoroughly researched and considered.⁹³

A variant on this approach is seen in Baroness Hale's judgment in *R (HC) v Secretary of State for Work and Pensions*, where the Court is relatively light touch in terms of a decision, but gives decision makers a clear steer as to how they may avoid litigation risk.⁹⁴ This represents something of a double edged sword in that it might be seen as simply *deferred* legalisation of policy making. But, in seeking to stimulate a culture of active governance rather than immediately dictate outcomes, the approach taken in *HC* shares something in common with the general tenor of the other cases discussed here.

There are also cases where the Court uses doctrine in such a way that the substantive legality of decision making is bound up with the degree of practical effort an authority puts into it. In *MN (Somalia) v Secretary of State for the Home Department*, for example, the Court confirms that a decision maker (the Immigration Tribunal, in this case) will be afforded deference by the Court *if* they deploy their expertise.⁹⁵ The key is that the Court is neither engaging in discursive dissonance, weighing judicial values against policy aims, nor is it blindly deferring to the executive. Rather, it is afforded room for discretionary action, provided that discretion is undertaken with appropriate care.

A judgment which straddles a fine line between legalism and institutionally activation is Lord Wilson's in *R (Moseley) v Haringey London Borough Council*.⁹⁶ The issue before the Court was the lawfulness of consultation on a council tax reduction scheme. Lord Wilson couches his decision in the language of administrative fairness.⁹⁷ However, he ultimately impugns the Council's consultation on the basis that it had presented tax reduction as the only approach to addressing a

⁹² See M Elliott, 'Consistency as a Free-Standing Principle of Administrative Law?' (Public Law for Everyone, 15 June 2018) <https://publiclawforeveryone.com/2018/06/15/the-supreme-courts-judgment-in-gallaher-consistency-as-a-free-standing-principle-of-administrative-law/> accessed 19 September 2018; J Bell, 'Administrative Blunders and Judicial Review: Analysing the UKSC Decision in Gallaher v Competition & Markets Authority' (Administrative Law Blog, 17 January 2019) <https://adminlawblog.org/2019/01/17/joanna-bell-administrative-blunders-judicial-review-analysing-the-uksc-decision-in-gallaher-v-competition-markets-authority/> accessed 5 February 2019.

⁹³ [2017] UKSC 63; [2017] 1 WLR 3963 [31]–[32] (Lord Neuberger).

⁹⁴ [2017] UKSC 73; [2017] 3 WLR 1486 [33] (Baroness Hale).

⁹⁵ *MN (Somalia) v Secretary of State for the Home Department* [2014] UKSC 30, [2014] 1 WLR 2064 [23]–[32], [44] (Lord Carnwath). See also *LA (Iran) v Secretary of State for the Home Department* [2014] UKSC 6, [2014] 1 WLR 384 [48]–[49] (Lord Kerr).

⁹⁶ [2014] UKSC 56, [2014] 1 WLR 3947.

⁹⁷ *ibid* [28] (Lord Wilson).

shortfall in funding from central government.⁹⁸ This is an institutionally activating approach (albeit close to the legalistic line) because it is not cutting across the authority's decision, but requiring it to open its mind to a wider range of relevant information. Lord Reed's decision in the case offers a useful counterpoint, because rather than treating the question as one of active decision making, he sees the need for a range of consultation options as a question of statutory purpose.⁹⁹ Lord Reed's finding, in practice, has the same effect as that of Lord Wilson, but there is an important distinction between framing the issue as a question of institutional functioning as opposed to one of black letter law.

There are other cases, it should also be noted, wherein the Court takes an apparently legalistic approach, but does so in a way which stimulates active decision making. For example, in *R (O) v Secretary of State for the Home Department* the Court applied a legalistic approach in determining the meaning of the Secretary of State's policy on the use of psychological reports in the treatment of detainees awaiting transportation.¹⁰⁰ Yet the effect of the Court's interpretation was to mandate practical enquiry by the Home Office, including in terms of facilitating release. *Nottingham City Council v Parr and another* is another case in point, where the Court considered whether the Housing Act 2004 allowed the application of conditions restricting use of regulated housing to a particular class of person.¹⁰¹ The Court took a broad approach to materiality, so while it was acting legalistically in determining the scope and application of statutory provision, it did so in a way which enhanced the range of authority discretion.

A similar effect is seen where the Court seeks additional justification for an apparently aberrant decision.¹⁰² This shares common ground with the concept of the 'culture of justification'.

Accordingly, the difficulty remains that the Court still has to determine the nature and extent of the justification required. However, if the emphasis of review is on the extent and intensity of an authority's *search* for a justification, and its subsequent publication for scrutiny, then the focus is on stimulating a particular mode of institutional policymaking, rather than the quality of the justification given in a particular case.

To some extent, there is always an element of judgment as to whether a decision is more or less institutionally enabling. While the lines between legalism, institutional enablement and deference are fuzzy, it is nonetheless clear the Court has a choice as to where it pitches its application of doctrine on the spectrum from strict legality to *laissez faire*. The dynamics of the case law demonstrate that there is a small number of cases where the Court takes something closer to a

⁹⁸ *ibid* [31] (Lord Wilson).

⁹⁹ *ibid* [39] (Lord Reed).

¹⁰⁰ [2016] UKSC 19, [2016] 1 WLR 1717.

¹⁰¹ [2018] UKSC 51, [2018] 1 WLR 4985

¹⁰² See *R (CPRE Kent)* (n 44).

middle road. While bifurcated dynamics, as I have shown, emerge within the Court's jurisprudence, there is nonetheless evidence that its effects can be mitigated (if not eradicated).

6.4.6 *Intra-common Law Bifurcation 2: The Common Law Rights Revival*

The second class of common law review cases which incline toward a more searching standard demonstrate potential for the Court's future jurisprudence to take an unhelpful turn, at least in institutionally optimising terms. The other trend in rationality review in a small number of cases (6 in my dataset) is a resurgence, predominantly *in obiter*, of common law rights protections.¹⁰³ This has been vaunted in some of the literature as evidence of the Supreme Court's emergence as a constitutional court.¹⁰⁴ The approaches of the justices vary subtly, but a key theme emerging from the cases is that rationality review is at its most intense, and largely indistinguishable from a proportionality approach, where fundamental rights are in play.¹⁰⁵ A common refrain is that *Wednesbury* is a variable standard, the intensity of which increases with the importance of the protected interest at stake.¹⁰⁶ On this approach, it is appropriate in individual rights cases to elide stronger form proportionality and *Wednesbury*.¹⁰⁷ The logic of the jurisprudence seems structurally equivalent to the necessity/balancing aspects of the proportionality model.¹⁰⁸ To that extent, the common law is being occupied by a proportionality model structurally inclined, as seen in Chapters 4 and 5, to bifurcation.

Without demurring from the benefits of constitutional protections, the institutionalisation of a polarising (per proportionality under the HRA) model of public law risks obstructing the emergence of a model focused on functional governance. Within this group of cases there is an interesting manifestation of the bifurcatory logic operating elsewhere in the Court's caselaw. Jurisprudentially, proportionality review is *prima facie* stronger than common law models, demanding sufficiency of justification from state actors and balancing competing interests. In terms of doctrinal variegation, the legalistic nature of the approach is confirmed *in obiter* statements in those cases where a common law rights approach is mooted.¹⁰⁹ Yet, the practical outcomes of the cases have largely demonstrated a *deferential* output. Within these extremes of

¹⁰³ See e.g. S Stephenson, 'The Supreme Court's Renewed Interest in Autochthonous Constitutionalism' [2015] Public Law 394, 395; R Masterman and S Wheatle, 'Unpacking Separation of Powers: Judicial Independence, Sovereignty and Conceptual Flexibility in the UK Constitution' [2017] Public Law 469; and JEK Murkens, 'Judicious Review: the Constitutional Practice of the UK Supreme Court' [2018] Cambridge Law Journal 349.

¹⁰⁴ E.g. Stephenson *ibid*.

¹⁰⁵ See e.g. *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 [51] (Lord Mance); *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] AC 1457 [59] (Lord Carnwath); *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1592 [94]-[96] (Lord Mance), [105]-[106] (Lord Sumption).

¹⁰⁶ *Kennedy* (n 105) [54] (Lord Mance); *Pham* (n 105) [94]-[96] (Lord Mance) [105]-[106] (Lord Sumption).

¹⁰⁷ *Kennedy* (n 105) [54] (Lord Mance); *R (Sandiford)* (n 89) [66] (Lords Carnwath and Mance); *Pham* (n 105) [98] (Lord Mance), [118]-[119] (Lord Reed).

¹⁰⁸ See in particular *R (Keyu)* (n 38) [133] (Lord Neuberger).

¹⁰⁹ E.g. *Pham* (n 105) [98] (Lord Mance).

legalism and deference the potential for sound policymaking can go untested. The dynamics of bifurcation operate intra-doctrinally in two ways. It takes place across the spectrum of *Wednesbury* review, since at a theoretical level the Court appears to be reserving intensive review for fundamental rights cases. Yet a bifurcation also occurs within common law proportionality itself. The logic here is recursive; a failure to develop a mode of effective engagement with policy replicates itself across the doctrinal bandwidth.

An example of *Wednesbury*'s transmutation in fundamental rights cases is *Kennedy v Charity Commission*, concerning the exemption in section 32 of the Freedom of Information Act 2000 for otherwise releasable information relating to a statutory inquiry.¹¹⁰ The claimants lose on the central point of statutory interpretation, but comments *in obiter* on common law rights, in particular by Lord Mance, are telling. Discussing free speech, Lord Mance decries the fact that claimants are bringing HRA claims when common law rights should be the first port of call.¹¹¹ He then conflates reasonableness review and proportionality. *Wednesbury* review is, he says, no longer the monolith it once was and the standard of review will intensify with the gravity of the interest at stake.¹¹² This is particularly so where fundamental rights are in play.¹¹³ Furthermore, the proportionality exercise offers a structured approach that *Wednesbury* lacks: 'by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.'¹¹⁴

For these reasons, Lord Mance claims that 'vague' principles of unreasonableness are inapt in some cases, and the proportionality standard more appropriate in cases involving 'common law rights' or 'constitutional principle'.¹¹⁵ The point is not developed substantively in *Kennedy* because counsel had focused on the construction point. However, the logic of Lord Mance's argument is that the intensity of review is structured with reference to the existence of a rights 'anchor'. The intensity of review increases where rights are engaged, with the key question being that of balancing 'benefits and disadvantages.' At the same time Lord Mance expressly eschews unreasonableness and its focus on administrative rationality (setting aside, for the moment, that this model of review displays its own version of bifurcation). The quasi-deontological structure of a rights-focused model shifting its moorings and moving into common law territory. What this may mean, taking a holistic view of common law doctrine, is an increased tendency toward polarisation. While on one view this conflation of the reasonableness and proportionality

¹¹⁰ *Kennedy* (n 105).

¹¹¹ *ibid* [46] (Lord Mance).

¹¹² *ibid* [51] (Lord Mance).

¹¹³ *ibid* [52] (Lord Mance).

¹¹⁴ *ibid* [54] (Lord Mance).

¹¹⁵ *ibid* [55] (Lord Mance).

standard may be vaunted as the emergence of a common law constitutionalism, it also represents the latest reformulation of a bifurcated model of administrative law.

The basal logic here in terms of intensity of review, and a subtle shift towards rights as opposed to more obviously institutionally focused models across the doctrinal canvass, is seen elsewhere in the common law rights cases. At the same time there is a tendency for proportionality review to bifurcate internally; while the standard is meant to place a tough justificatory burden on the executive (on which see Chapter 4) it nonetheless appears to incline to deference in terms of outcome. In *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* the Court considered a refusal by the FCO to provide funding for legal costs to a woman detained overseas.¹¹⁶ The majority holds that while irrationality is a ‘high threshold’, a more demanding proportionality review may be apt in legal assistance cases involving ‘imminent risk of death by execution’.¹¹⁷ This provides Mrs Sandiford little effective assistance. In *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* the Court determined a challenge to the UK’s decision not to veto UN Security Council sanctions applicable to the claimant.¹¹⁸ In that case Lord Carnwath confirmed that the standard of review intensifies where fundamental rights are engaged, albeit that in this case he considers the claim so far from made good that no standard of any kind is met.¹¹⁹ In *Pham v Secretary of State for the Home Department* the Court considered whether deportation of the claimant would unlawfully render him stateless.¹²⁰ This case sees the justices’ most emphatic confirmation of the doctrinal trends set out here in terms of the enhanced, intensive standard of review in fundamental rights cases. Lord Mance holds that: (i) loss of nationality is a fundamental issue and requires protection; (ii) this necessitates a strict standard of review; and (iii) proportionality will provide the required intensity of scrutiny.¹²¹ Lord Sumption’s judgment follows a similar logic, and similarly contoured by rights discourse.¹²² Lord Reed takes a different tack to Lords Mance and Sumption in adopting a model which more cleanly separates ordinary reasonableness review from a proportionality based approach, but the outcome is comparable in terms of applying a balancing model in rights claims.¹²³ *Pham*, therefore, confirms the suggestion in *Kennedy* that the Court are moving away conceptually, in some cases, from the *Wednesbury* model; the logicity/rationality aspects of substantive review are being gradually subordinated to a model philosophically geared towards quasi-deontological rights protections

¹¹⁶ *R (Sandiford)* (n 89).

¹¹⁷ *ibid* [66] (Lords Carnwath and Mance).

¹¹⁸ *R (Youssef)* (n 105).

¹¹⁹ *ibid* [59] (Lord Carnwath).

¹²⁰ *Pham* (n 105).

¹²¹ *ibid* [98] (Lord Mance).

¹²² *ibid* [107] (Lord Sumption).

¹²³ *ibid* [118]-[119] (Lord Reed). On legality see e.g. *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198 (CA).

and ‘right’ answers.¹²⁴ All of this is moot for the claimant’s purposes, because the Court did not consider the claimant to be stateless and dismissed his claim.

6.4.7 Case Study: *Keyu*

It is too early, and the cases too few, to judge how common law rights will develop in the Court. Yet as I have shown, the proportionality balancing model can lead to a peculiarly mono-dimensional version of administrative law, imposing a correctness standard which results in intra-doctrinal bifurcation. While it is normatively desirable for the common law to protect individuals’ rights from potential state abuse, if that is the sole or dominant mode of review this is potentially to the detriment of the range of functions that public law can perform. Indeed, it can actually leave review *less* effective. The potential impacts in terms of rectifying policy failure are illustrated most plainly in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs*.¹²⁵ In this case the Court considered the Foreign Office’s decision not to hold an inquiry into the killing of unarmed Malaysian civilians by the UK Armed Forces. While the majority judgments confirm the principles of the common law rights model discussed thus far, Baroness Hale’s dissent provides a valuable corrective. *Keyu* forms part of the group of cases discussed here which herald an emergent common law proportionality review, confirming the direction of travel seen in the cases discussed in this section.¹²⁶ Again, the general theme is that common law review can increase its intensity of review where constitutionally fundamental interests are at stake. Again, in practice this avails the claimant little. Yet the case features an interesting judgment from Lord Neuberger which is at pains to confirm the inappropriateness of the Court formally confirming proportionality’s supplanting of common law reasonableness. His judgment smacks of a President taking steps to avoid the Court being seen to overstep its constitutional limitations. However, in the present discussion it is useful for what it reveals about the dynamics of proportionality.

Lord Neuberger’s intervention is based on the direction of travel in the caselaw toward strong protections for liberal autonomy:

[t]he move from rationality to proportionality [...] would have potentially profound and far reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance

¹²⁴ *Pham* (n 105) [94] (Lord Mance).

¹²⁵ *Keyu* (n 38).

¹²⁶ *ibid* [281]-[283] (Lord Kerr).

which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest.¹²⁷

His reticence here is based predominantly on *Wednesbury*'s inherent institutional deference, and in so doing takes the same lines seen in academic debates around bifurcation, which focus on the divide between strong proportionality and weak *Wednesbury*.

In the case itself Lord Neuberger's judgment demonstrates the problems of intra-doctrinal bifurcation. His application of a bare rationality standard, predictably enough, makes the claimants' task virtually impossible. On one hand then, his careful eschewal of a proportionality standard confirms the potential for common law review to diverge into ineffectual rationality standard and, as he says, the strong merits-based proportionality review. Yet he also confirms the bifurcatory logic of proportionality itself. While Lord Neuberger determines that proportionality review is inapt in the case, he nonetheless holds that for reasons of institutional competence it would lead to precisely the same conclusion as the reasonableness test.¹²⁸ As noted above, Lord Neuberger has picked up on the discursive dissonance involved in the proportionality balancing exercise; its tendency to leap to the weighing of incommensurate values.¹²⁹ Yet, as discussed in the previous chapter, this weighing process can push the courts into extremes of either deference or legalism. In his deployment of the proportionality exercise here, Lord Neuberger falls into the former camp. Forced to balance incommensurable values, he retreats into submissive deference. His concerns about the adoption of a strong standard for reasons of constitutional propriety lead him to adopt a deferential standard. Yet, at the same time, he demonstrates that those same worries would lead him to apply that stronger standard in a deferential manner. In short, the intensive nature of the standard leads to its deployment in a deferential manner.

Baroness Hale's dissent both exposes the practical limits of Lord Neuberger's polarised approach and demonstrates a latent potential for a public law better calibrated to encourage thoroughness in the policymaking process. She eschews a proportionality approach, preferring to decide the case on ordinary rationality grounds.¹³⁰ Determining that the Secretary of State had not considered all the potential benefits that an inquiry would allow, she finds that his decision was irrational.¹³¹ Again, on one view, that is to impose a legalistic version of rationality on the decision maker. Such an approach is certainly borderline in terms of the distinction between legalism and

¹²⁷ R (*Keyu*) (n 38) [133] (Lord Neuberger). The greater intensity of rights protection to which the logic of proportionality can give rise was also affirmed in *Poshteb* (n 89).

¹²⁸ *ibid* [139] (Lord Neuberger).

¹²⁹ *ibid* [129] (Lord Neuberger).

¹³⁰ *ibid* [304] (Baroness Hale).

¹³¹ *ibid* [313] (Baroness Hale).

institutional stimulation. The core point, however, in terms of the broader dynamics operating within the common law model, is her judgment would have required the Secretary of State to more carefully explore the merits and demerits of options before him. Vitaly, while Baroness Hale adopts a theoretically less invasive model of review, her approach enables her to avoid the bifurcatory attitude that inhibits the rest of the bench and better scrutinise the Secretary of State's decision making. This dissent is thus key in demonstrating the potential for a mode of substantive public law review which respects that the choice is properly made by the Secretary of State, but nonetheless requires him to make it actively. It is thus the kind of institutionally activating approach I advocate in the next chapter. To the extent that I wish to take a position in the inter-doctrinal bifurcation debates over whether substantive review should use both proportionality and *Wednesbury* review, this kind of case also shows the value in retention of both standards.

I am not suggesting here, though, that the answer is simply to eschew proportionality in favour of rationality. Both rationality review and proportionality show evidence of bifurcation. It is central to my argument that bifurcation occurs intra-doctrinally, and that the key question is the *manner* in which doctrine is deployed. It is thus important to find an institutionally effective mode of inquiry in the other common law rights case of *R (UNISON) v Lord Chancellor*.¹³² This case concerned a challenge to prohibitively high fees at the Employment Tribunal. The fundamental rights context shapes the Court's reasoning but, while citing proportionality as an influence in terms of the Court's justificatory demands, Lord Reed ultimately impugns an inflated Employment Tribunal fees regime on both necessity grounds and, importantly, on the Lord Chancellor's failure to demonstrate basic economics and common sense.¹³³ The Lord Chancellor's aim was to transfer costs from tribunals to end users, and considered high fees would be 'patently' more effective in achieving this.¹³⁴ As Lord Reed explains, a little deliberation would disabuse the Lord Chancellor of this fallacy.¹³⁵ Like Baroness Hale's dissent in *Keyn*, the focus is not solely on balancing the demands of access to justice with the perceived need to reduce frivolous tribunal proceedings, but on the Lord Chancellor's institutional competence in pursuit of his stated policy aim. As with *Keyn*, in terms of doctrinal variegation, the case certainly falls into the contestable boundary between legalism and an institutionally activating approach. The problem with 'common sense' is that it can be as ideologically driven as any values-based decision. However, the case sees the Court highlighting a failure to take steps to align the aims of the policy and the justification provided for it. The judgment, in that sense, retains a functionalist

¹³² [2017] UKSC 51, [2017] 3 WLR 409.

¹³³ *ibid* [100]-[101] (Lord Reed).

¹³⁴ *ibid* [99] (Lord Reed).

¹³⁵ *ibid* [100] (Lord Reed).

focus on maximising institutional competence rather than simply determining that access to justice outweighs the need for costs savings.

While the evidence is not entirely all one way, the common law rights cases provide evidence of intra-doctrinal bifurcation. In this case, proportionality is expanding beyond the confines of cases falling in scope of the HRA (indeed, to some extent, beyond cases concerning fundamental rights), leading to an internal polarisation of common law substantive review. Yet, as in the case of HRA proportionality, the small number of cases that have come before the Court have tended to demonstrate bifurcation *within* common law proportionality itself. And, as seen in *Keyu*, this has an impact on the potentially for review to adopt an institutionally sensitive attitude to discretionary decision making. While presenting as a demanding and rigorous standard the logic of balancing nonetheless ends up following a practical pattern of deference.

6.5 Conclusion

While the unification/inter-doctrinal bifurcation debate, discussed in Chapter 4, turns on the normative value of retaining *Wednesbury* review in light of its inherent deference, this chapter has problematised that debate by demonstrating *Wednesbury's* intra-doctrinal bifurcation. The *Wednesbury* doctrine itself is an unstable admixture of very weak and very strong standards, whose deployment relies partly on judicial attitude, in keeping with the broader constitutional schism discussed in Chapter 2. In this chapter I have demonstrated that this coexistence of polarised standards can lead to suboptimal impacts in terms of administrative rationality; running parallel risks of leaving clear policy failure unchallenged, but also of undermining administrative discretion via application of excessive legalism. At the same time, I have shown the potential for each mode *Wednesbury* review to be deployed in a way which maximises the effective functioning of the administration (and, arguably, of the political constitution itself). Indeed, while I have argued that debates over whether substantive review should constitute one or two standards of review have been, in some ways, unhelpful, the findings of this chapter suggest that there are sound reasons for retaining *Wednesbury* alongside proportionality. In the next chapter, making use of the lessons of these cases, I seek to develop a reformed attitude to the deployment of administrative law doctrine.

Chapter 7. Articulating a New Model: Legitimacy and Judicial Review

7.1 Introduction

Administrative law has, I have suggested, long struggled to articulate an overarching conceptual ground to give coherence to the judicial role.¹ In particular, it lacks a general theory explaining the grounds of judicial review.² Legal and political constitutionalists debate the ultimate source of authority in the state, as explained in the introduction. For the legal constitutionalist the dominant norms are legal limits on political power.³ They thus emphasise the role of an independent judiciary in ensuring that the other actors in the constitution are maintained within limits imposed by the rule of law. In particular, government must act not only within limits imposed by Parliament, but also wider limitations on legitimate state action imposed by legal principle. For the political constitutionalist, the ultimate authority in the state is the people acting through their delegates in Parliament.⁴ On this view, while the judiciary plays a role in enforcing Parliament's intentions, the predominant means of ensuring government's accountability is political. In practice, however, the gulf between the two schools in terms of the actual practice of judicial review is not as wide as the theoretical debate may suggest.⁵

The conceptual debates between those who see the underlying principles of judicial review as predicated on the *ultra vires* concept, and those who prefer a common law justification, underline the point (on which see Chapter 2).⁶ Neither school differs greatly in terms of how they see the process of judicial review operating, nor seriously disputes any of the existing heads of judicial review.⁷ There are certainly differences between commentators on either side of debate in terms of the intensity with which they consider it is legitimate for the judiciary to scrutinise government action.⁸ But there is relatively limited debate over the principles and doctrines to be applied by the courts in individual cases.⁹

¹ D Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 Oxford Journal of Legal Studies 257.

² For an interesting discussion on this point see A Perry, 'Plan B: A Theory of Judicial Review' (Oxford Legal Studies Research Paper No 66/2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075886> accessed 10 May 2018.

³ See the discussion in Chapter 2.6.

⁴ See the essays collected in G. Gee and C. McCorkindale, 'The Political Constitution at 40' (2019) 30 KLJ 1..

⁵ A Young, *Democratic Dialogue and the Constitution* (OUP 2017) ch 1.

⁶ See C Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000).

⁷ N Barber, 'The Academic Mythologists' (2001) 22 Oxford Journal of Legal Studies 369; A Young, *Democratic Dialogue* (n 3).

⁸ See the competing approach of Adam Tomkins in 'The Role of the Court in the Political Constitution' (2010) 60 University of Toronto Law Journal 1 and Paul Craig, 'Political Constitutionalism' (n 3).

⁹ There is disagreement between the inter-doctrinal bifurcationists and those propounding a unified model of judicial review. This is something of a false binary.

The problem with this situation is the inherent flexibility of UK administrative law doctrine in practice, which as the previous chapters have shown allows bounded, but genuine, scope for judicial discretion. A court seeking guidance in the existing theoretical literature will find relatively limited assistance on this point.

As demonstrated in the previous Chapters 4, 5 and 6, a bifurcatory dynamic is operating within substantive review in the Supreme Court, which *can* lead to shuttling between legalistic and deferential modes of engagement with policy makers. This dynamic is leading to demonstrable problems, in terms of grappling with clear policy failures, but also by imposing legal resolutions to policy questions in a way which potentially hampers the effective operation of the administration and the political constitution. Nonetheless, the cases also demonstrate a subordinate jurisprudential model which, rather than oscillating between two potentially suboptimal extremes, operated to stimulate the institutions of state to deploy its expertise in a deliberative, transparent and participative manner. In what follows I set out a means of drawing out and prioritising that subordinate model. It is neither desirable nor possible to avoid the dynamics of bifurcation. There are, clearly, cases in which an individual right must trump public interest aims. Likewise, there are cases in which a court simply cannot second guess government policy without risking serious political and practical ramifications. The difficulty however lies in the middle ground between these extremes, where the discretion afforded judges by legal doctrine can as I have shown, lead to uncertainty and inconsistency. What I propose here is a judicial *attitude* which, combining the insights of both functionalist and pragmatist theory, focuses the primary role of substantive review as stimulating and enhancing the instrumental utility of discretionary decision making. Such an attitude is grounded in a richer concept of state legitimacy than is currently deployed by the Court.

7.2 The Concept of Public Law

When expounding, justifying or proposing principles of administrative review it is necessary to understand and explain an underpinning constitutional theory.¹⁰ Without a conception of the role of the state and the proper interoperation of its constituent parts it is impossible to provide a consistent justification for a particular model of judicial review. The aim of this chapter is to do that work. To inform the argument in this and the following section I briefly set out competing conceptions of public law, and the reasons why these are insufficient as a matter of constitutional theory.

As noted above and in Chapter 2, a key debate in terms of competing theoretical models of public law in the UK has been between the *ultra vires* conceptualisation, focused predominantly

¹⁰ P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon 1990) ch 1.

on the will of Parliament, and the common law, which superimposes wider legal principles upon a Benthamite legislative instructive model. The former idea is predominantly a positivist, source-based approach, whereas the latter is predicated on deeper values and principles expressed via judicial decisions. Neither theory satisfactorily deals with the nature and degree of control to be exercised by the courts over discretionary executive power, in operating at a level of abstraction which is unhelpful in most cases.¹¹ There is a relatively settled set of administrative law doctrines used to regulate such power. Yet, in the elucidation and application of legal principle, whether via interpretation or in the development of the common law, no-one seriously argues that the judiciary are not engaged in a process of bounded creativity.¹²

There is clearly a differentiation between judging via the application of legal principle and absolute discretion.¹³ But within the permeable boundaries of legal principle it is inevitable that the values and aims of the judiciary will shape the outcome of cases. There is room for reasonable disagreement about the scope of this discretionary area of judgment, but it is incoherent to argue that it does not exist at all. Given this, it must be accepted that there cannot be a *purely* legal conception of public law. Whatever the separation of powers concerns triggered by judicial scrutiny of substantive policy, once the judiciary are empowered to decide questions over the scope and application of rights and reasonableness, or the purpose of statutory provision, they are involved in a process of policymaking.¹⁴ Policy, law and fact are fuzzy, inextricably interrelated concepts, and judges cannot avoid intermeddling in all three.¹⁵ Indeed, given their inherent instability, such concepts can become simply a rhetorical device to support a division of labour between judge and administrator based on unacknowledged or undisclosed grounds.¹⁶

Dominant theories of law thus provide only limited assistance in theorising public law. Hart's source-based positivist model only gets us so far.¹⁷ While the rule of recognition requires prioritising rules found in statutory authority, this cannot provide a complete answer to the extent of public power. Statute, for example, is often open-textured or vaguely worded. This does not mean administrators possess an unbounded area of discretionary judgement, as the courts have consistently refused to allow this.¹⁸ Yet the fluidity of doctrine, along with the indeterminacy of

¹¹ See Barber (n 7).

¹² Lord Reid, 'The Judge as Lawmaker' (1972-73) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

¹³ See e.g. F Bennion, 'Judgment and Discretion Revisited: Pedantry or Substance' [2005] *Public Law* 707.

¹⁴ See e.g. M Shapiro, 'The Success of Judicial Review and Democracy' in M Shapiro and A Stone Sweet (eds), *On Law, Politics and Judicialization* (OUP 2002) 149.

¹⁵ S Elias, 'Administrative Law for "Living People"' [2009] *Cambridge Law Journal* 47.

¹⁶ See e.g. TRS Allan, 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' [2003] *Public Law* 429, 435-436.

¹⁷ HLA Hart, *The Concept of Law* (2nd ed OUP 2012).

¹⁸ HWR Wade and CF Forsyth, *Administrative Law* (11th edn, OUP) ch 11.

statutory text, often permits of significant judicial discretion. Hart recognised that the legal principle would not provide an answer to all cases, describing a ‘penumbra’ which would require a shift from rule-based judging to the use of purposes and policies.¹⁹ But that is question begging in an administrative context. The issue in administrative law disputes *is* the permissibility of a particular policy decision by the executive. When the black letter law runs out, there will be a competing range of policies and purposes potentially relevant to the permissibility of the decision under review. The alternative Dworkinian which eschews policy entirely and relies on principles to determine hard cases (see Chapter 2.5) fails to address the inevitable blurring of questions of law and policy.

Thus, in terms of conceptualising public law, two of the dominant schools of jurisprudential thought are insufficient. Both are clearly of relevance, yet in reality a Hartian source-based model and a Dworkinian rights-based model only replicate the public law debates described above which are of limited assistance at a practical level. An alternate concept of law is of more assistance. Scott Shapiro, drawing on the work of Michael Bratman, has developed a ‘planning’ theory of law. This sees the role of law and legal institutions as the coordination of social endeavour on a macro level. The basic principle is that large groups of people want to do things together, and the law acts as macro-level plan-making institution to make that happen. As Shapiro puts it: ‘legal systems are institutions of social planning and their fundamental aim is to compensate for deficiencies of alternative forms of planning in the circumstances of legality.’²⁰ Plans, in Shapiro’s model, have four distinctive features.²¹ First, they are positively created via acceptance by group decision making. Second, they have a partial, hierarchical and nested structure. Third, they settle conclusively what is to be done. And fourth, they are developed by a process which is designed to develop standards of conduct and evaluation. This conceptualisation of law is useful in a public law context. Firstly, it focuses on law as an institution which operates broadly as part of the mechanics of coordinating and delivering group endeavour. Secondly, it helps develop a more context sensitive concept of law than other jurisprudential models. In particular, in recognising that law ‘plans’ are partial, requiring supplement and elucidation, they allow conceptualisation of administrative law in terms of its role in the wider process of completing macro-level state planning. This facilitates, in turn, consideration of the role of

¹⁹ Hart (n 17) 136.

²⁰ S Shapiro, *Legality* (Belknap 2011). For a useful overview of the planning theory of law, see D Plunkett, ‘The Planning Theory of Law I’ (2013) 8 *Philosophy Compass* 149; ‘The Planning Theory of Law II’ (2013) 8 *Philosophy Compass* 159. The discussion here drawn on Adam Perry’s useful application of the plan-making model in a judicial review context. See Perry (n 2).

²¹ Shapiro (n 20) 128-9.

institutions in the design and delivery of plans, and in particular their relationship with concepts of *legitimate* plan-making.

7.3 Building an Institutional Model

Ultimately, judicial review must rest on an idea of legitimate power.²² It must adjudicate upon the validity of the defendant's plan-making, adopting Shapiro's formulation, in terms of authority, outcomes and processes. In a world with a perfect government, whose actions (or inactions) pleased all of its constituents to a perfectly satisfactory amount all of the time, there would be no need for public law adjudication. That this is impossible confirms law's role in determining when the exercise of power is valid in accordance with applicable rules and norms. That will, in the UK system, involve determining whether a body can point to a legitimate source of authority for its actions, or that a decision-maker has reached a conclusion which unjustly interferes with a protected right. Yet the question is rarely clear cut, and as noted above, the courts will ordinarily be applying a range of administrative law doctrines incapable of operating as straightforward rules. Given the discretionary nature of public judging, it then becomes imperative to keep in mind what role the law is playing in terms of the exercise of state power.²³

In terms of the modern bureaucratic state, I suggest that a legitimate role of the executive is the conceptualisation and delivery of policy in the public interest. In short, plan-making in Shapiro's terms. Given this, and the wide discretionary power in the hands of administrators and judges, neither source or rights-based approaches provide a sufficient account of administrative law principles, nor do they provide a lodestar for a judge determining how to exercise their discretion. There is a need therefore to prioritise an institutionally sensitive model of law grounded in the premise that the proper role of government is the delivery of effective policy.²⁴ In one sense, this is an anti-Dworkinian Dworkinian approach.²⁵ For Dworkin, legal principle tracks deep level constitutional norms along the axes of fit (i.e. does an interpretation of legal material cohere with other legal sources) and justification (i.e. the normative theory that best explains a legal outcome).²⁶ What I am suggesting here is that one of those norms in terms of justification is the distribution of institutional power that places significant policy-making authority in the executive,

²² On legitimacy generally, see: R Barker, *Political Legitimacy and the State* (OUP 1990); I. Green, *The Authority of the State* (OUP 2008); D Beetham, *The Legitimation of Power* (2nd edn, Palgrave MacMillan 2013).

²³ For a strong argument to this effect see M Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 454.

²⁴ On institutionalism generally see NK Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1994).

²⁵ The inspiration is A Vermeule, *Law's Abdication: From Law's Empire to the Administrative State* (Harvard University Press 2016).

²⁶ R Dworkin, *Law's Empire* (Hart 1988) 229.

but in doing so requires the executive to do this job in the best way possible. It thus, as a matter of *principle*, requires judges to focus on the delivery of effective *policy*.

Setting out the meaning of this in practice is the task of the remainder of this chapter. I am aiming to develop a theoretical model which puts the institutional legitimacy of the executive policymaker, in terms of delivering macro-level plans, at the heart of a concept of public law. Yet it also requires measuring judicial legitimacy in these same terms. A core conundrum in terms of judicial power is the ‘counter-majoritarian’ dilemma i.e. why should a judge be able to override choices of democratically accountable decision makers.²⁷ Mattias Kumm has, helpfully, inverted this dilemma in arguing that the question is not whether judicial intervention is legitimate, but whether government action is legitimate.²⁸ The key, I suggest, is to strike a middle course; the administrative law judge is implicated in the shared role of the legitimate delivery of effective plan-making.

7.4 Taking a Hard Look at Policy?

One way in which an idea of law could be implicated in this task is for the judiciary to adjudicate on the normative quality of the aims, processes, and outcomes, of executive policymaking. In short, ‘hard-look’ review.²⁹ As discussed in Chapter 2, a solution offered by some commentators to the difficulties of developing a legal model appropriate to the administrative state was to have judges consider substantive policy questions.³⁰ That begs more questions than it purports to answer, but it nonetheless demonstrates an early recognition of the need for law to focus more effectively on the questions posed by administrative power.

Some assistance can be drawn from work carried out by theorists in the late 1970s and 80s. Nonet and Selznick, in their seminal *Law and Society in Transition*, trace the development of law in society from ‘Repressive Law’ to ‘Autonomous Law’ to ‘Responsive Law’.³¹ Responsive Law is result-oriented, involving the seeking of substantive justice in individual cases via the identification of ‘implicit values in rules and policies’.³² Responsive Law is designed to make institutions function optimally in delivering policy goals; while those goals are established by government the aim of law is to ‘bring maximum objectivity to the elaboration of public policy, including more precise definition of received purposes and progressive clarification of political

²⁷ AM Bickel, *The Least Dangerous Branch* (2nd edn, Yale University Press 1986).

²⁸ M Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’ (2010) 4 *Law and the Ethics of Human Rights* 140, 168.

²⁹ On which see *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co*, 463 US 29.

³⁰ FH Lawson, ‘What is Wrong with Our Administrative Law’ in *Many Laws: Selected Essays Vol 1* (North Holland 1977) 279, 284.

³¹ P Nonet and P Selznick, *Law and Society in Transition: Toward Responsive Law* (Harper Colophon 1978) 51.

³² Nonet and Selznick (n **Error! Bookmark not defined.**) 78.

choices and strategic options.³³ Similar work has been undertaken in a specifically UK context by Ian Harden and Norman Lewis. In *The Noble Lie: The British Constitution and the Rule of Law*, they deploy what they term an ‘immanent critique’ of the Diceyan rule of law; in particular, its reliance on a mythical ability for citizens to shape policy through Parliament backed up, as necessary, by judicial review via *ultra vires* and common law rights.³⁴ They instead advocate a purposive version of the rule of law which, rekindling medieval associations between law and politics, seeks to foster collective learning and rational, efficient policy-making.³⁵

These approaches are helpful here in shifting us away from a bifurcated Diceyan model of public law which, as discussed in Chapter 2, continues to manifest itself in modern legal principle. In both cases, there is a refocusing of law toward institutional optimisation in terms of policy delivery. The problem, however, is that both fail to sufficiently take account of the obvious difficulties inherent in having courts so closely implicated in the policy process. Selznik and Nonet rely on a Dworkinian conception of justice which smacks of over-legalisation. Harden and Lewis develop a model akin to the American concept of ‘hard look’ review which, again, implicates the judiciary closely in the minutiae of policy. Thus, while these ideas are useful here in helping us develop a policy-oriented mode of administrative review (and, arguably, have been overlooked in the development of public law principle), they could lead to an over-judicialisation of policy-making which would be counterproductive.

7.5 Building a Model of Legitimacy-Based Review

I have argued, thus far, for greater focus on administrative law’s role in the shared endeavour of legitimate policy making, enhancing institutional competence in the substantive delivery of policy. In particular, I have seen this as a conceptual problem. Given that source or rights-based answers provide only incomplete answers to the question of legal legitimacy, and that legal doctrine in this area permits potentially wide judicial discretion, to continue to conceptualise law as separate and discrete from policy-making is to fail to address core questions of effective institutional plan-making. I have suggested that administrative law needs an overarching explanation and theoretical organising principle, and that this might be found in principles of institutional legitimacy. Executive legitimacy is, in part, a question of effective policymaking in the public interest. A sound overarching conception of judicial legitimacy has to be bound up with that idea. Yet I have dismissed the ‘hard look’ model as flying too close to legalisation of policy questions. In order to build a better model here, a closer look is needed at the question of legitimacy itself.

³³ *ibid* 112–113.

³⁴ I Harden and N Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson 1986) 33.

³⁵ *ibid* 54.

While an undercurrent of all administrative law doctrine is the question of legal legitimacy, relatively few commentators have put the concept expressly at the heart of their work.

Legitimacy is a diverse and contested term.³⁶ It has, however, received much greater attention in international law, particularly in an EU context. The question becomes more prominent in these areas because, among other reasons, the distance (in all senses) of supranational legal bodies from their constituents gives rise to greater scepticism as to the propriety of their endeavours. Yet, it is submitted here, this does not justify taking it for granted domestically. Such questions deserve greater prominence in the day to day exercise of administrative and judicial power.

Fritz Scharpf, writing in an EU context, provides a helpful conceptual schemata, dividing legitimacy into ‘input-oriented’ and output-oriented’ arguments.³⁷ Input-oriented legitimisation is essentially an argument from democracy.³⁸ Output-oriented argument, on the other hand, refers to the ability of the state to deliver successful outcomes.³⁹ It is associated with technocratic legitimacy, wherein governance is vindicated by Pareto-maximising regulatory outcomes.⁴⁰ The gap between these two forms of legitimacy is bridged by those who focus on process, or ‘throughput’, based legitimacy.⁴¹

This third form of legitimacy, which focuses on the space within which the process of substantive governance takes place, is key in terms of the focus here on legitimacy by institutional functioning. The themes in the literature, particularly in an EU context, are instructive. Vivien Schmidt, for example, has argued for legitimacy by ‘throughput’ which:

encompasses the myriad ways in which the policy-making processes work both institutionally and constructively to ensure the efficacy of EU governance, the accountability of those engaged in making the decisions, the transparency of the information and the inclusiveness and openness to ‘civil society’. As such, it constitutes a third and distinct criterion in the normative theoretical analysis of democratic legitimacy, alongside output and input.⁴²

³⁶ For a good overview see Beetham (n 22).

³⁷ F Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) ch 1.

³⁸ On which see D Beetham and C Lord, *Legitimacy in the European Union* (Longman 1998) ch 3.

³⁹ Scharpf (n 37).

⁴⁰ C Lord and P Maignette, ‘E Pluribus Unum? Creative Disagreement About Legitimacy in the European Union’ (2004) 42 *Journal of Common Market Studies* 183.

⁴¹ On process legitimacy see TM Franck, *Fairness in International Law and Institutions* (OUP 1995); TM Frank, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* 705; J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity 1997) ch 7. On the idea of ‘throughput’ see VA Schmidt, ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and “Throughput”’ (2013) 61 *Political Studies* 2.

⁴² VA Schmidt, ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and “Throughput”’ (2013) 61 *Political Studies* 2, 7.

This brings together a number of core ideas here which recur throughout the literature. For some, the key idea here is legitimacy by effective institutional deliberation, based on wide range of inputs.⁴³ Others emphasise the need for inclusive citizen engagement in the policy making process.⁴⁴ Others emphasise the need for transparency and accountability in these processes.⁴⁵ The central point is that policymaking attains legitimacy not just from democratic inputs, or the achievement or avoidance of particular outputs, but from the active deliberation, transparency and participation.

These forms of legitimacy roughly map onto the existing geography of judicial review. This mapping is imprecise, but the analogy holds at the level of general principle. *Input* legitimacy is fundamentally source based. To the extent that judicial review requires a decision maker to demonstrate a legally authoritative source of power, this is the dominant mode of engagement in legitimacy terms. But a purely source-based model of legitimacy represents a stark version of the rule of the law. *Output* legitimacy, on the other hand, deals with outcomes. On its face, this form of legitimacy is an inappropriate matter for judicial consideration, given its relationship with merits review. Yet where the courts undertake rights-based review, they are arguably dealing precisely in output legitimacy. A legitimate output, on this view is not one that violates fundamental rights or is otherwise beyond the permissible limits of constitutional norms. Input and output legitimacy might, then, be seen as analogues of the bifurcated poles of administrative law. The fit is imperfect, but it helps think through the implications here. Input legitimacy, in being primarily source (or democracy) based entails a limited means of review, with accountability for policy seen as properly to the political constitution. Output legitimacy, on the other hand, entails a much stronger scrutiny of outcomes and impacts, implying judicial assessment of whether these comply with substantive values of autonomy, dignity and rationality.

Process based legitimacy can be obviously associated with doctrines of due process, consultation, and so forth. Yet it is also relevant to substantive review, insofar as this relates to institutional functioning. Questions of relevant and irrelevant considerations, or proper purpose, under common law judicial review, for example, are also questions of effective internal administrative

⁴³ E.g. R Bellamy and D Castiglione, 'Legitimizing the Euro-'Polity' and its 'Regime' The Normative Turn in EU Studies' (2003) 2 *European Journal of Political Theory* 7; C Lord and P Magnette, 'E Pluribus Unum? Creative Disagreement about Legitimacy in the European Union' (2004) 42 *Journal of Common Market Studies* 183, 193-194.

⁴⁴ E.g. A H eritier, 'Elements of Democratic Legitimation in Europe: An Alternate Perspective' (1999) 6 *Journal of European Public Policy* 267, 277; M Landy and SM Teles 'Beyond Devolution: From Subsidiarity to Mutuality' in K Nicolaidis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 413, 426; EO Eriksen and JE Fossum, 'Democracy through Strong Publics in the European Union?' (2002) 40 *Journal of Common Market Studies* 401.

⁴⁵ E.g. Beetham and Lord (n 38) ch 4; S Smismans, 'European Civil Society' (2003) 9 *European Law Journal* 473; J Greenwood 'Organized Civil Society and Democratic Legitimacy in the European Union' (2007) 37 *British Journal of Political Science* 333; B Kohler-Koch 'The Organisation of Interests and Democracy in the European Union' in B Kohler-Koch and B Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman and Littlefield 2007) 255.

process. And in focusing on the mechanics of governmental operation, process legitimacy also shares conceptual ground with proportionality review so far as it requires, for example, decision makers to justify their decisions. As shown in earlier chapters, however, such principles can (and often do) oscillate between operating deferentially or restrictively. They *can* also be deployed in a way which stimulates institutional throughput. In conceptual terms, while these doctrines encompass all three kinds of legitimacy, they can all too easily rely solely on input or output-based legitimacy.

In doing so, they risk misunderstanding and misapplying the concept of legitimacy which should underpin judicial review. And they explain the pathologies discussed in earlier chapters.

Overreliance on input legitimacy can lead to bifurcation. Applying the material considerations doctrine, for example, to impose a judicial over an administrative view of materiality (save where a consideration of a matter is clearly mandated by statute) is to conflate input and process legitimacy. A court purports to be upholding democratic legitimacy, but in doing so is distorting process legitimacy. Conversely, placing too much faith in input legitimacy can *also* lead courts to be overly deferential, if they take a hands-off approach on the basis of democratic controls that may or may not be operating efficiently.

Overdependence on output legitimacy leads to similar pathologies. For example, to treat the outcome of the proportionality balancing exercise as a question for judicial determination is to conflate output and process legitimacy. Concepts of just outcomes come to override questions of effective process. This conflation can also, contrarily, lead courts to underenforce legal norms. Since the courts have been historically wary on questions of substance for reasons of institutional competence, to conflate output and process legitimacy can also lead to undue deference.

The process legitimacy literature demonstrates that a complete, balanced model of legitimacy will take account of all three strands. There will be cases in which input or output legitimacy are sufficient. But neither will be sufficient in all cases, and to attempt to employ such rationales will be inefficient and ineffective. Indeed, current judicial review practice, in its occasional collapsing of process into output or input legitimacy, is failing consistently to consider the full tripartite legitimacy model. That this failure involves an incomplete realisation of process legitimacy is crucial to my thesis, because it reflects and perpetuates a historical failure of public law principle to grapple with the internal effectiveness of administrative policymaking on its own terms, and in doing so risking under or over regulation. Legitimacy is a plural concept, whose component strands reinforce, complement and supplement each other.⁴⁶ Legitimate administrative law

⁴⁶ Scharpf (n 37) 12.

adjudication must itself rely on a full concept of legitimacy, which relies not only on inputs and outputs, but on fostering active, deliberative, participative and transparent governance.

Having mapped ideas of legitimacy on to administrative law concepts, it becomes easier to recognise their centrality to the practice of public law adjudication. Bringing them to the fore helps focus minds on the central question of *why* judicial review exists and how it should operate, yet they are rarely dealt with expressly in either the jurisprudence or academic literature in the UK context. By doing so, it is possible to see more clearly how existing approaches in administrative law are failing to articulate a coherent theory of law's role here. In particular, it shows that existing public law doctrine reflects a higher-level conceptual aporia, in terms of dominant jurisprudential models, to articulate an idea of the ways in which law should interoperate with state practice. Shapiro's idea of law as a plan-making institution, coordinating macro-level group endeavour, assists complete the jurisprudential picture. Consideration of law's role here in terms, not only of policing legitimate inputs and outputs, but in a shared *process* of effective policymaking, introduces greater conceptual order to open-ended doctrine and address the problems of bifurcation identified in earlier chapters.

7.5.1 *Practical Realisation (i): Taking Deference Seriously*

I have articulated a broader, richer concept of legitimacy to underpin judicial review doctrine, which has clearer regard to the executive's institutional role in completing the partial 'plans' laid down by Parliament. This leaves the problem of linking that theory to extant doctrine. To help forge those links, there is a rich source of institutionally focused thinking readily available in principles of deference. This section explains their relevance here, in terms of articulating the principal reasons underpinning executive legitimacy. I then turn to a final section setting out a means by which they could be used to reform existing doctrinal practice.

There is a burgeoning literature on the concept of deference (on which see Chapter 2). While commentators differ on its nature and proper mode of application, the central principle is that the courts take account of any factors, on a case by case basis, which should lead them to be wary of interfering too readily a public body's decision.⁴⁷ Three pillars of justification for judicial deference are identifiable: (i) epistemic; (ii) institutional; and (iii) constitutional.⁴⁸

Epistemic and institutional reasons can be taken together as they tend to bleed into each other. An epistemic reason for judicial deference is simply that the decision maker possesses knowledge to an extent or in a manner which a judge cannot achieve. Institutional reasons for deference are related, in being based on the possession by a decision maker of particular expertise, or some

⁴⁷ See the literature cited in Chapter 2 (n 144).

⁴⁸ See P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 249.

other functional criterion, qualifying them to take a particular decision. It thus recognises both the unique qualification of government to undertake particular activities, but also recognises the relative limitations of judicial expertise, the discrete nature of case by case adjudication, and the ‘triadic’ structure of the judicial process.⁴⁹ Lon Fuller’s concept of polycentricity straddles both areas here. Fuller describes the way in which a decision impacting one aspect of policy can lead to implications across a range of other areas.⁵⁰ Fuller quite probably overstates the degree to which the courts cannot, and government does, have knowledge of these impacts.⁵¹ But his model emphasises the limits of the judges and the judicial process to deal with substantive policy questions.

Constitutional reasons for deference rely on both normative constitutional principle but also related ideas of political legitimacy. Constitutional conceptualism plays a role here. For example, in separation of powers terms, Parliament has conferred a range of decision-making functions on the executive. It may then be considered constitutionally inappropriate for a judge to interfere with decisions duly taken by an executive decision maker. A problem with this version of constitutional deference is that it cuts both ways. If Parliament wanted a decision taken by the executive, then it might be assumed (to take a modified *ultra vires* approach) that it wanted it taken in a procedurally effective manner that resulted in outcomes that were not irrational. A stronger justification for this kind of deference is that the most appropriate means of accountability for executive decision making, especially by government bodies, is via political accountability. This is effectively an argument grounded in democracy, and particularly relevant in decisions having some form of political dimension. On this view, a court should restrain itself from interfering in a decision engaging societal values or political choice on the basis that, if relevant, the people’s representatives will carry out appropriate scrutiny. There are difficulties here in terms of the practical capacity and capability of the political constitution to hold government to account across its vast range of activities. Yet there is nonetheless an important point here in that, in some cases, democratic accountability is more appropriate institutionally than judicial accountability.⁵²

These freestanding ‘pillars’ of deference have been criticised on the basis that their relevance and weight in particular cases are themselves variable and subjective.⁵³ The manner I will use them here gets around this. My argument in this chapter is that the executive obtains a core aspect of its legitimacy from effective plan-making. The judicial role is to adjudicate upon the legitimacy, or

⁴⁹ N Barber, ‘Prelude to the Separation of Powers’ [2001] Cambridge Law Journal 59.

⁵⁰ LL Fuller, ‘The Forms and Limits of Adjudication’ (1978-1979) 92 Harvard Law Review 353, 395.

⁵¹ JWF Allison, ‘Fuller’s Analysis of Polycentric Disputes and the Limits of Adjudication’ [1994] Cambridge Law Journal 367, 382.

⁵² Komesar (n 24) 142.

⁵³ See Taggart, ‘Proportionality, Deference, Wednesbury’ (n 23) 477-478.

validity, of executive decisions. An incomplete, under-theorised concept of legitimacy will skew judicial decision making by lapsing too readily into over-legalism or judicial pacifism. The law must then take seriously its shared role in the delivery of substantive policy outcomes. As we have seen, and as the various factors making up the concept of deference help us understand, this cannot mean dictating those outcomes. But the various factors comprising deference not only provide a series of reasons for judicial passivity, but institutional behaviours that we would wish to see a legitimate policymaker display. The links with *process or throughput* legitimacy are clear.

Epistemic or institutional reasons for deference possess persuasive force only so far as government exercises its unique competence in a particular field. This is likely to mean *active* deliberation, taking into account a range of inputs from experts, stakeholders and citizens as appropriate. Likewise, democratic accountability is compelling only *if* it takes place and, importantly, only when executive decision making is sufficiently transparent for scrutiny to take place. To some extent, Murray Hunt's idea of 'due deference', described above, is relevant here.⁵⁴ Hunt eschews *prima facie* deference, and prefers an approach in which constitutional actors earn deference from the court by setting out a clear justification for their actions.⁵⁵ As noted in an earlier chapter, this approach can risk simply falling back into *prima facie* deference. However, it helps develop a model of doctrinal application which is grounded and organised by an overarching concept of legitimacy, and process legitimacy in particular.

7.5.2 *Practical Realisation (ii): Functionalism & Pragmatism as an Attitudinal Model Guiding the Application of Doctrine*

Within extant principles of deference, there is a rich source of the kinds of institutional behaviour which we would wish to see a legitimate policymaker display, and a legitimacy focused administrative law deliver. In practice, principles of deference are intended to help a judge determine when they need to be light touch, or even entirely non-interventionist. This is inadequate for my purposes, since what I want is a model of administrative law conceptualised in terms of giving effect, in the anti-Dworkinian Dworkinian manner described above, to principles of executive competence which underpin the structure of the UK constitution. To complete my task here, I need a way of organising doctrine, including doctrines of deference, which gives bite to a mode of administrative law that takes policy seriously. The functionalist critique of public law, and the principles of judicial pragmatism, do this.

The functionalist school of administrative thought was discussed in Chapter 2. Five important strands of functionalist thought are relevant to the analysis here. First, the risk of judicial

⁵⁴ Hunt (n 144) 339.

⁵⁵ Hunt (n 144) 338-340

concepts operating in a different register to those of policymakers. Second, the risk of a supplanting of executive by judicial values. Third, the importance of political means of control. Fourth, the failure of administrative law to develop a means of substantive review of policy choices. And finally, the constitutional importance of ensuring that institutions are enabled and required to function in a way which realises their institutional ends to the fullest.

The second relevant concept here is legal pragmatism. Pragmatism is less a single doctrine than an instrumentally focused perspective.⁵⁶ As Cornel West puts it, the common ground shared by the diffuse group of ideas known as pragmatism is: ‘a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action.’⁵⁷ The core idea is to treat concepts as tools for the attainment of ends, rather than ends in themselves.⁵⁸ The legal version of pragmatism draws on the insights of the legal realists as to the fundamental indeterminacy of legal principle, but seeks to remedy the problems to which this gives rise by taking an outcome based approach.⁵⁹ The positive tenets of legal pragmatism are as diffuse as its civilian counterpart, but a number of strands are identifiable: (i) law should be thought of as a means to an end, and concepts subordinated to outcomes;⁶⁰ (ii) a purposive approach to interpretation; and, relatedly (iii) an acceptance of fixed concepts or rules *if* stability is a primary policy aim, rather than because the law necessitates stability *per se*.⁶¹ Pragmatism, like functionalism, eschews rigid conceptualism and focuses on law’s utility in the accomplishment of human good and social goals.⁶²

The risk of pragmatism here is to simply advocate a ‘judge knows best’ unprincipled free for all. The work of the most well-known modern exponent of a pragmatic approach, Richard Posner, is a case in point. For Posner, the judicial rule is to ‘do the best he can do for the present and the future, unchecked by any felt duty to secure consistency in principle with what other officials have done in the past.’⁶³ And this leads to Posner’s strong focus on statistics, facts and policy when deciding cases.⁶⁴

The Posnerian approach is open to Atiyah’s criticism of pragmatism in apparently allowing judges to make whatever decision they see fit, applying principles so malleable that they can support a

⁵⁶ R Posner, *Law, Pragmatism and Democracy* (Harvard University Press 2005) 26.

⁵⁷ C West, *The American Evasion of Philosophy: A Genealogy of Pragmatism* (University of Wisconsin Press 1989) 5.

⁵⁸ L Menand, *The Metaphysical Club: A Story of Ideas in America* (Flamingo Press 2011).

⁵⁹ On realism and pragmatism see JW Singer, ‘Legal Realism Now’ (1988) 76 *California Law Review* 465.

⁶⁰ Posner, *Law, Pragmatism and Democracy* (n 56) 55.

⁶¹ This summary is drawn from TC Grey, ‘Judicial Review and Legal Pragmatism’ (2003) 38 *Wake Forest Law Review* 473, 478.

⁶² See e.g. Cohen (n **Error! Bookmark not defined.**); TC Grey, ‘Freestanding Legal Pragmatism’ (1996) 18 *Cardozo Law Review* 21.

⁶³ RA Posner, ‘Pragmatic Adjudication’ (1996) 18 *Cardozo Law Review* 1.

⁶⁴ See Posner, *The Problems of Jurisprudence* (n **Error! Bookmark not defined.**) 462.

range of outcomes.⁶⁵ Yet, if we take pragmatism's focus on ends and outcomes as relating not to *substantive* ends, but to maximising institutional effectiveness, then its relevance starts to become clear. Indeed, Atiyah compared the 'best outcome' approach of pragmatism unfavourably with an older concept of 'hortatory' law, a 'complex set of arrangements designed to provide incentives and disincentives for various types of behaviour.'⁶⁶ He saw the shift from hortatory to pragmatic law as relating to the rise of executive discretion, and thus to a requirement for judges to achieve justice case by case. This fails to recognise both the inevitability of the *need* for discretion in the modern state, but also the potential for systemic pragmatism, which is ends-focused in terms of stimulating effective, legitimate policy making.⁶⁷

7.5.3 *Developing a Passivactivist Attitude*

In drawing the multiple strands discussed above together, these two schools of thought provide an organising principle for judicial review based on institutional capacity.⁶⁸ The functionalists demonstrate the importance of taking an institutional approach, allocating jobs to the best placed constitutional actor(s). As I have shown, a legitimacy-based theory of public law must take into account the need to ensure that the administration performs its role, the delivery of policy, to the best of its institutional capacity. The pragmatic attitude urges us to eschew doctrinal inflexibility, embracing diversity and malleability in order to achieve the best outcome on a case by case basis. In the form advocated here, however, the relevance of pragmatism is in urging the adoption of an organising principle based on active, deliberative institutional functioning. The UK's constitutional settlement, in terms of actor roles, is predicated on Parliamentary plan-making i.e. setting the general direction of travel and scrutinising executive action, with the executive responsible for fleshing out those partial plans within fixed parameters. The courts determine where those parameters fall. A functional-pragmatic mode of judicial review would involve, in each case, maximising the effectiveness of each role when applying doctrine. This is achieved not by deferring to those institutions, but by incorporating sound institutional functioning into the application of legal principles

On its own this idea is insufficient, since it fails to take account of and prioritise the concept of legitimacy described above. Legitimacy is a central, if sometimes overlooked, organising principle underpinning judicial review. The role of government is the legitimate delivery of policy in the public interest. The role of the courts is to ensure that this process takes place within lawful boundaries. But the 'loose and open-textured' nature of administrative law principles leaves

⁶⁵ PS Atiyah, *Pragmatism and Theory in English Law* (Stevens and Sons 1987) 126.

⁶⁶ PS Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' (1979–1980) 65 *Iowa Law Review* 1249, 1249.

⁶⁷ See Posner, *Overcoming Law* (n **Error! Bookmark not defined.**) 400-401.

⁶⁸ CR Sunstein and A Vermeule, 'Interpretation and Institutions' (2003) 101 *Michigan Law Review* 885.

significant discretion in the hands of the courts as to where legality ends and policy begins.⁶⁹ As demonstrated in earlier chapters, that can lead to shuttling between strong and deferential review. If, however, doctrine is deployed with a better, fuller concept of legitimate government in mind, this brings greater depth and completeness to our bifurcated model. In particular, what I propose is an approach which both recognises the policy-making legitimacy of administration, and seeks to maximise the strength of that legitimacy.⁷⁰

Such an approach looks to ensure that, so far as possible, administrators take decisions which intensify the second order influence of the three pillars of deference. It will prioritise inculcation of sound policymaking processes, alongside policing the outer limits of legal powers. So, if a policy maker has actively deployed expertise in a careful and informed manner, and published its justification for scrutiny by relevant stakeholders and actors in the political constitution, then the courts should be slow to substitute judgment. On the other hand, courts should not be slow to impugn a decision maker who fails to utilise sound processes.⁷¹ This model thus draws inspiration from deliberative democracy in prioritising a form of constitutionalism based on participation and deliberation. Counterintuitively, then, the Court will be looking to the executive to give it reasons to defer, doing so to heighten the constitutional legitimacy of state action. Such an approach would better track the underlying legitimising logic of the constitution.

If the reasons for a court to defer enjoy a high level of persuasive force, this lessens the risk that legal discourse will frustrate the aims and functions of the other constitutional actors.⁷² Moreover, the stronger those reasons are, the lower the risks of poor governance, including rights violations. This approach will thus involve an *attitude of passivactivism*, possessing both negative and positive, active and passive (or red and green light) aspects. On the negative/active side, the Court should be deploying doctrine to ensure that executive is actively deliberating in a participative manner, seeking expert and citizen input, and acting transparently so as to maximise scrutiny. On the positive/passive side, the Court must always seek to make decisions which enable rather than disrupt, so far as possible, institutional effectiveness. There will be cases, of course, where a rights infringement or a *vires* problem will leave the Court no choice but to quash a decision (it will, that is, have to correct problems of input or output legitimacy). But even in such a case it should seek to ensure its findings are framed in the way that both leaves the most freedom for the executive to develop policy, and stimulates it to do so effectively.

⁶⁹ DJ Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 Oxford Journal of Legal Studies 257, 265.

⁷⁰ See JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

⁷¹ For this proposal, and the other material in this chapter, see T Sayer & CRJ Murray, '[A Tale of Two Doctrines: Reevaluating Bifurcation in Substantive Review before the Supreme Court](#)' *Public Law* (forthcoming).

⁷² See CR Sunstein, *Legal Reasoning and Political Conflict* (OUP 1996), and *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 1999).

This section examines how this approach might look in practice. As trailed above, a passivist attitude will seek (but not be limited to) ensuring that administrative policy makers deliberate actively, make use of expertise, seek to engage wider stakeholders, and facilitate scrutiny by political actors via transparent decision making. These five discrete points track epistemic, institutional and constitutional reasons for courts to defer. A key question here is how such an approach might have made a difference in those cases, discussed in earlier chapters, which I have argued demonstrate the problems of intra-doctrinal bifurcation.

Deliberation/expertise. As to deliberation, the essence of the passivist model is that a court should respect an administrator's decision where they have engaged in a thorough deliberative process.⁷³ That begs the question of how thorough such deliberation needs to be. That will depend on the nature of the interest that a claimant seeks to protect. While care must be taken when looking to foreign jurisprudence, the original version of 'hard look' review as developed in the US is instructive here. Hard look review now involves judicial consideration of, for example, the quality of the evidence which a decision maker has considered, which clearly involves supplanting judicial for administrative decision making.⁷⁴

Once the reviewing court is looking not at whether evidence has been considered, but on the quality of that evidence and the decision maker's consideration of it, it is very close to merits review. Prior to its development in this direction, however, hard look review required the courts to check that an administrator had *themselves* taken a 'hard look' at the entirety of a matter.⁷⁵ Such an approach operates well where the courts afford respect to a decision *if* the evidence demonstrates that it has been the subject of 'careful consideration'.⁷⁶ In the cases I have considered, for example, the Supreme Court was willing to defer to the Competition and Markets Authority's consideration of its own previous error, on the basis that it could demonstrate that it thought carefully about the implications.⁷⁷ Similarly, in *In re Loughlin* it was content to leave questions of materiality to the decision maker, *because* a matter had been thoroughly researched and considered.⁷⁸ The key is make such approaches central to substantive review.

A helpful way of conceptualising the passivist approach is by reconsidering a case I have argued demonstrates the pathologies inherent in current judicial practice, *R (Rotherham) v Secretary of State for Business, Innovation and Skills* (see the discussion above at 6.4.4). In that case, such an

⁷³ See WN Eskridge Jr and J Ferejohn, 'Constitutional Horticulture: Deliberation-Respecting Judicial Review' (Yale University Faculty Scholarship Series 1095/2009) https://digitalcommons.law.yale.edu/fss_papers/1095 accessed 4 February 2019.

⁷⁴ *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co*, 463 US 29 (1983).

⁷⁵ *Greater Boston Television Corp. v FCC*, 444 F 2d 841 (1970).

⁷⁶ *R v Chief Constable of Sussex* [1999] 2 AC 418 (HC) 434 (Lord Slynn).

⁷⁷ [2018] UKSC 25, [2018] 2 WLR 1583 [40]-[41] (Lord Carnwath) [50] (Lord Sumption).

⁷⁸ [2017] UKSC 63, [2017] 1 WLR 3963 [31]-[32] (Lord Neuberger).

approach would have impugned the Secretary of State's decision on the basis of a failure to make use of his institutional capabilities. This is a crucial example of how a passivist approach would have an impact on judicial review in practice. In that case, the majority took a highly deferential, light touch approach to review of the decision under challenge in light of the fact it related to high level policy decisions in the field of socioeconomics. The dissenters took a much stronger, legalistic approach in holding against the Secretary of State on the basis that he had failed to understand the purpose of the powers he was exercising. This is a clear example of what I term intra-doctrinal bifurcation. A passivist approach would have struck a middle path here, by focusing more on the Secretary of State's clear failure to deploy his policy making resources, which was noted by both the majority and minority judges.⁷⁹ On this approach, the Court would have impugned the Secretary of State's decision, but on the basis of insufficient evidence of thorough and careful deliberation. It therefore represents a more activist approach than that adopted by the majority. Unlike the minority decision, however, it would not *prevent* the Secretary of State from coming to the same decision on a redetermination. Rather, it would require him to adopt, and evidence, a more thorough process.

The reasons provided by an authority for its decision will inevitably be relevant here, though on a passivist approach the aim of judicial consideration would be less about the quality of the justification and more about whether it demonstrated that evidence based deliberation had taken place.⁸⁰ The approach thus shares common ground with ideas of deliberative constitutionalism.⁸¹ Such ideas involve a sophisticated model of accountability predicated on institutional functioning and effective deliberation.⁸²

The use of expertise plays a key role in deliberative constitutionalism. It relates directly back to the argument that principles of deference can be used to shape judicial attitude, since expertise is one of the core reasons used by courts to modulate the intensity of their review. A passivist approach will require, in particular, decision makers to seek and deploy expert sources of evidence. Again, the question arises of how a court can assess the extent to which expertise is used. Perry and Ahmed have suggested four criteria that a reviewing court could employ. They propose: sophisticated forms of reasoning; consideration of unfamiliar material; comparison of

⁷⁹ See [2015] UKSC 6, [2015] PTSR 322 [110] (Lord Neuberger [142] (Lord Mance)).

⁸⁰ CR Sunstein, *Designing Democracy. What Constitutions Do* (OUP 2001) at 6-7; *The Partial Constitution* (Harvard University Press 1993) ch 5.

⁸¹ RA Burt, *The Constitution in Conflict* (Belknap Press 1995); A Gutmann and D Thompson, *Democracy and Disagreement: Why Moral Conflict Cannot be Avoided in Politics, and What Should be Done About it* (Belknap Press 1996); J Habermas, 'Paradigms of Law' (1996) 17 *Cardozo Law Review* 771; and J Elster (ed), *Deliberative Democracy* (CUP 1998).

⁸² E.g. CH Mendes, *Constitutional Courts and Deliberative Democracy* (OUP 2015); R Levy and G Orr, *The Law of Deliberative Democracy* (Routledge 2017) ch 1; R Levy, H Kong and J King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018).

an administrator's reasoning with that of an acknowledged expert; and comparison of the administrator's reasoning with that of the reviewing body (to the extent that body possess expertise on a particular topic).⁸³ Some of these indicia appear to risk supplanting judicial for administrative expertise, coming close to merits review. Yet they also suggest potential indicators a court may rely on to find that expert thinking has been sought and utilised. It is perfectly possible, as Allan has shown, for a reviewing body to check whether expertise has been so used.⁸⁴

There is evidence supporting this in my dataset. In *R (MM (Lebanon)) v Secretary of State for the Home Department*, for example, Baroness Hale and Lord Carnwath point that expertise in policymaking will be relevant depending: '[...] on the extent to which matters of policy or implementation have been informed by the special expertise available to the department.'⁸⁵ This is in accordance with the advocated here. However, Baroness Hale and Lord Carnwath go on to explain that their approach finds authority in the case of *R (SB) v Governors of Denbigh High School*.⁸⁶ In that case, while the scope of the decision maker's expert consideration was relevant to the question of whether a rights interference was justified, the House of Lords confirmed that the final answer was for the courts to determine.⁸⁷ In short, the approach was a correctness standard, taking into account any freestanding reasons for deference as a matter of judicial fiat, rather than focusing primarily on the use of expertise and structuring the intensity of review accordingly.

What might a passivist approach to scrutiny of expertise look like? Again, reconsideration of a case critiqued in this thesis demonstrates how a passivist jurisprudence could improve the Court's performance. In *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* the Court considered whether preventing a high profile Iranian dissident from addressing members of Parliament was a disproportionate interference with Article 10 ECHR.⁸⁸ For the majority, this was a question on which the Secretary of State should be afforded significant deference, given the national security concerns involved.⁸⁹ For Lord Kerr in dissent, the demands of freedom of expression significantly restricted the scope of the Secretary of State's discretion.⁹⁰ I suggested these extremes were a symptom of intra-doctrinal bifurcation. The makings of a passivist approach can, however, be detected in the judgment of Lord Clarke. Lord Clarke agrees with the

⁸³ F Ahmed and A Perry, 'Expertise, Deference, and Giving Reasons' (Oxford Student Legal Research Paper Series Paper number 09/2011 October 2011) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941674 accessed 15 October 2018 6-9.

⁸⁴ T Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 *University of Toronto Law Journal* 41, 51-59.

⁸⁵ [2017] UKSC 10, [2017] 1 WLR 771 [75] (Baroness Hale, Lord Carnwath).

⁸⁶ [2006] UKHL 15, [2007] 1 AC 100.

⁸⁷ For criticism see D Mead, 'Outcomes Aren't All: Defending Process-Based Review of Public Authority Decisions under the Human Rights Act' [2012] *Public Law* 61.

⁸⁸ [2014] UKSC 60, [2015] AC 945

⁸⁹ *ibid* [46] (Lord Sumption) [68] (Lord Neuberger) [109] (Baroness Hale).

⁹⁰ *ibid* [171]-[172] (Lord Kerr).

majority that this is a case that demands deference, but he notes scepticism about the Secretary of State's reasoning, which appears to be formulaic and lacking specificity.⁹¹ On a passivist approach this failure to deploy her expertise would have been more problematic in terms of the legality of the decision. To interfere, lawfully, with a protected right she would have needed to demonstrate to the Court that she availed herself of the ample expertise available to her and clearly taken this into consideration in determining the issue before her. The deferential approach advocated by the majority (and Lords Sumption and Neuberger in particular) would have to be more clearly *earned* via a process of active governance. Conversely, if such a process were followed, a judge should be slow to impugn the Secretary's of State's weighing of national interests and individual rights.

Participation. A process of review grounded in effective deliberation must reward deliberation that has taken account of a wide array of represented interests.⁹² Policy that has been made with reference to those whom it may impact upon is genuinely democratic (in the sense of respecting plural viewpoints) in a way that deferring to decisions made by elected politicians is not (necessarily). Conversely, where an authority has failed to seek out and listen to such interests a court should be less deferential. UK law does not ordinarily require consultation save where this has been mandated by statute or arises from a legitimate expectation.⁹³ Again, there is some evidence to support such approaches in the Supreme Court. In *R (Moseley) v Haringey London Borough Council* the Court suggested that there could be circumstances in which consultation on proposed policy would require consideration of alternatives.⁹⁴ In the case Haringey's consultation on addressing a funding shortfall was found to have misled consultees by implying that its proposed reductions were the only potential option. Lord Wilson found that the Council's consultation document shut down alternatives to its proposal, and in doing so undermined the potential for effective deliberation.⁹⁵ Such an approach involves *actively* stimulating the council to follow good governance procedures, *without* dictating how the decision is taken in terms of relevant factors.

Transparency/democratic scrutiny. A core aspect of a passivist approach is to promote reliance on the effective functioning of the political constitution, by deploying legal norms to help ensure this happens. The underlying justification for review here is to ensure that the court is maximising

⁹¹ *ibid* [111] (Lord Clarke).

⁹² Eskridge and Ferejohn (n 73) 1275.

⁹³ See M Elliott and JNE Varuhas, *Administrative Law: Text and Materials* (5th edn, OUP 2017) 404-413.

⁹⁴ [2014] UKSC 56, [2014] 1 WLR 3947 [30] (Lord Wilson).

⁹⁵ *ibid* [31] (Lord Wilson).

democratic dialogue and debate.⁹⁶ Something of this idea is seen in the Court's general line that greater respect is afforded decisions not signed off by Parliament.⁹⁷ That, however, is a rather formalist approach. The question is whether the decision-making process has incorporated effective deliberation. As noted in Chapter 5, there is some evidence in the Court's handling of proportionality review that it may be prepared to take account of the democratic scrutiny that a measure has received when determining whether a fair balance has been struck between public ends and individual rights. This appeared, for example, to impact the review of regulations fixing a ceiling on the amount of social security benefits that a single household could receive.⁹⁸ On a passivist approach, the Court may well have gone further and held against the government on the basis of insufficiency of scrutiny. Such approaches naturally pose risks in terms of Article 9 of the Bill of Rights which require careful management. Yet they are in the process of being tested by the Supreme Court, and in their intermingling of legal doctrine and effective deliberation possess the potential to foster functional legal norms. An effective example is *Mathieson v Secretary of State for Work and Pensions*, where the Court held that time limits on the payment of Disability Living Allowance payments for carers when a care recipient had been hospitalised were disproportionate.⁹⁹ In doing so, it took account of misinformed material put by the government before Parliament when making the relevant regulations, which would undermine the quality of deliberation.¹⁰⁰

Mathieson also segues neatly into discussion the related idea of transparency. Again, the basic principle is that political means of accountability can operate well only where the government is upfront in terms of its rationale for, and supporting evidence behind, policy initiatives. To some extent *Mathieson* may be seen as falling into this category. On the other hand, in Chapter 5, I argued that the real problem at the heart of the decision-making processes in *R (Tigere) v Secretary of State for Business, Innovation and Skills* was government's attempt to pursue conflicting policy objectives in a single statutory instrument.¹⁰¹ The majority in that case, however, impugned the decision on the basis that rights to education outweighed the Secretary of State's stated aim of ensuring that only student with a clear link to the UK would achieve loans.¹⁰² The minority were more willing to defer to the Secretary of State on the basis of the practical benefits of a bright line rule.¹⁰³ A passivist approach would eschew, respectively, the activism of the majority and the

⁹⁶ Eskridge and Ferejohn (n 73) 1275. See also T Roux, 'In Defence of Empirical Entanglement: The Methodological Flaw in Waldron's Case against Judicial Review' in R Levy et al, *The Cambridge Handbook of Deliberative Constitutionalism* (n 82) 203.

⁹⁷ See *R (Aguilar Quila) v Home Secretary* [2011] UKSC 45, [2012] 1 AC 621 [46] (Lord Wilson).

⁹⁸ *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449.

⁹⁹ [2015] UKSC 47, [2015] 1 WLR 3250

¹⁰⁰ *ibid* [37] (Lord Wilson).

¹⁰¹ [2015] UKSC 57, [2015] 1 WLR 3820.

¹⁰² *ibid* [35] (Baroness Hale, Lord Kerr).

¹⁰³ *ibid* [95] (Lords Sumption & Reed).

deference of the minority. It would seek to enhance institutionally effectiveness, by focusing its energies on ensuring that the government grappled with that conflict and explained itself properly to Parliament..

7.6 Conclusion

Previous chapters have argued that the Supreme Court's approach to doctrines of substantive review can risk bifurcation into deference and judicial activism. I argued that this was due, in part, to the internal logic of deep-seated, but ill-conceived, distinctions between law and policy. While doctrine has evolved over time, those distinctions have nonetheless continued to re-emerge. In this chapter, I have proposed an alternative means of addressing substantive review which seeks to mitigate against the risks of bifurcation. In particular, I have argued that public law must be seen as an integral part of the process of 'planning'; coordinating behaviour at a macro-level in order to achieve public interest ends. Likewise, it must address head on its role in *legitimising* that plan-making process. While input and output-based forms of legitimacy are important, the question of legitimate plan-making must fully incorporate *throughput* models of legitimacy in order to function in a coherent way. Deploying a functionalist-pragmatist attitude, when applying doctrine, of enhancing institutional functioning is a means of operationalising such a model of legitimacy. This attitude requires a 'passivactisist' approach to doctrine; actively using legal norms to maximise a court's reasons to defer to administrative decisions and thereby enhancing standards of institutional effectiveness. The next chapter moves from the question of substantive review to a judicial practice of arguably even greater effect for administrative decision making: statutory interpretation.

Chapter 8. Statutory Interpretation and Objectivity

8.1 Introduction

The previous chapter set out a proposal whereby administrative law doctrine could enable the practice of substantive review to take a more functional, institution-focused approach to structuring judicial discretion in the application of doctrine. This and the next two chapters turn to an aspect of judicial practice which, arguably, has an even greater impact on the exercise of administrative discretion than substantive review: statutory interpretation. The question of statutory interpretation in the UK has not given rise to the kind of fundamental disputes regarding institutional role seen in equivalent discussions elsewhere (in particular, in the US).¹ This is an important oversight. While discussion of the nature and application of common law rules or constitutional principles appears to preoccupy academic debate over public law, statute predominates in almost every area of public sector endeavour.² Statutory interpretation is thus arguably the most impactful role the courts play in regulating government.³ Yet the particular issues raised by statutory interpretation in a public law context are insufficiently recognised, I will argue, in judicial practice.

The accepted judicial role when interpreting statute is giving effect to Parliament's intention.⁴ This role has expanded in recent years as the courts take greater interest in protecting fundamental rights and values, but Parliamentary intention nonetheless remains the lynchpin.⁵ However, what general accounts of interpretation underplay is the inherently creative nature of statutory construction.⁶ Framing interpretation as an objective search for intention insufficiently acknowledges the extent to which illumination of statutory meaning itself approximates an act of policy-making.⁷ Given the general judicial acknowledgement in public law doctrine that policy-making is primarily a matter for the political constitution, this approach requires greater discussion. My hypothesis is that this approach will further manifest a further dysfunctional bifurcation in UK public law between legal standards and policy aims which hampers optimal institutional functioning.

¹ On which see A Scalia, *A Matter of Interpretation: Federal Court and the Law* (Princeton University Press 1997).

² G Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1982).

³ The Hon M Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2002) 24 *Statute Law Review* 95, 96-97.

⁴ See e.g. J Bell and G Engle, *Cross on Statutory Interpretation* (3rd edn, Butterworths 1995) 23-31; D Bailey and L Norbury, *Bennion on Statutory Interpretation* (7th edn, LexisNexis 2017) ch 1; A. Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press 2018) 2-11.

⁵ E.g. Lowe and Potter, *ibid* 4.17-4.20.

⁶ They do recognise it to an extent, of course. See e.g. Bell and Engle, *Cross on Statutory Interpretation* (n 4) 29-31.

⁷ On which JL Mashaw, 'Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise' (2005) 55 *University of Toronto Law Journal* 497, 517; and 'Agency-centred or Court-centred Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Administration' (2007) 59 *Administrative Law Review* 889.

Given the importance of statutory interpretation to the functioning of the administrative state, the work of this and the two succeeding chapters tests that hypothesis. This chapter begins this process by outlining ideas of interpretative creativity and, concomitantly, setting out an argument for the impossibility of interpretative neutrality. The overarching argument is that the interpretation of text cannot achieve the level of objectivity assumed in traditional public law theory. Furthermore, I argue that the dynamics of judicial discretion deployed to resolve interpretative dilemmas approximates the process of executive policymaking. The succeeding chapters will test this prediction with reference to my Supreme Court dataset, and propose a functional model of interpretation drawing on the pragmatic-functional, passivist approach to doctrine set out in the previous chapter.

8.2 Creative Interpretation and the Policymaking of Statutory Construction

Interpretation involves understanding or recreating the words of an interlocutor. When meaning is unclear or ambiguous it is also a process which involves an element of bounded creation.⁸ For that reason, the question of who interprets is vital in normative constitutional terms; it requires careful consideration of the type of question being answered and the institutional characteristics necessary to its answering.

The partial, or interstitial, creativity of interpretation is widely acknowledged. Dicey was content to follow Pollock's suggestion that 'interpretation (whether performed by judges or by text-writers) makes new law'.⁹ Lon Fuller argued that the infirmities of language, purpose and foresight mean that interpretation is 'necessarily creative'.¹⁰ Dworkin saw the interpreting judge as an 'author', interpreting legal texts so as to achieve the best reading along the axes of fit and justification.¹¹ For Andrei Marmor interpretation means giving something meaning.¹² For Aileen Kavanagh the profound difficulty of distinguishing interpretation from law-making obliges the judiciary to be wary of activist readings.¹³ Kavanagh is writing here about the Human Rights Act 1998, which raises its own interpretative issues. Her point, nonetheless, has wider application.

This proposition can be carried too far.¹⁴ Interpretation is not unbounded.¹⁵ To hold otherwise would, at a constitutional level, afford the judiciary discretion that would be incompatible with a

⁸ See H Gadamer, *Truth and Method* (William Glen-Doepel tr, Sheed and Ward 1975) 263.

⁹ AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2nd edn, Macmillan 1914) 362 note 2.

¹⁰ LL Fuller, *The Morality of Law* (3rd edition, Yale University Press 1969) 82-91.

¹¹ R Dworkin, *Law's Empire* (Hart 1988) 229.

¹² A Marmor, *Interpretation and Legal Theory* (2nd edn, Hart 2005) 22.

¹³ A Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 *Oxford Journal of Legal Studies* 259, 271.

¹⁴ On the more extreme theory see S Levinson, 'Law as Literature' in F Schauer (ed), *Law and Language* (Dartmouth 1993) 353.

¹⁵ B Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) 129.

democratically elected legislature. But it is also wrong as a matter of semiology. Words may be elastic and meaning obscure, but rules of grammar and the limits of semantics place limits on the creative aspects of the interpretative process. For that reason, radical theories emphasising the instability of language are of limited use when investigating or theorising about statutory interpretation.¹⁶

Yet even critics who take radical instability theory to task, or emphasise the circumscribed nature of interpretation, nonetheless admit to the inherent vagueness of language and the implications of readerly creativity. Timothy Endicott observes that the difficulty in making strong claims for linguistic determinacy should not lead us to radical indeterminacy.¹⁷ But, of course, in advocating only modest claims for determinacy he must by implication acknowledge the possibility of *modest* indeterminacy. Joseph Raz notes a troubling tension between the ‘objectivity’ of the interpretative task and the existence of ‘interpretative plurality’ (i.e. the fact that many good readings may simultaneously coexist). And while Neil Duxbury emphasises that the judicial role is predominantly declaratory rather than innovatory, he agrees that interpretation is creative.¹⁸

It is trite to point out interpretation’s creativity. But it is a necessary preliminary to grappling with the more important point, identified by Jerry Mashaw, that each interpretation of a statute, of its purpose, scope and practical realisation, must also involve a process of policy-making.¹⁹ This is a bolder claim, moving on a step in arguing not only that judges’ have discretion in the development of the law, but in collapsing the boundaries between law and policy. To understand this, the process of statutory interpretation in the UK’s higher courts must be examined in greater detail.

8.3 Statutory Interpretation in the UK Courts: Practical Reasoning and Policy Making

8.3.1 *Basic approach*

The basic approach to statutory interpretation in the UK is relatively settled. The core principles are: (i) linguistic (i.e. based on plain meaning); (ii) contextual/systemic (i.e. looking to the wider statutory context to establish purpose); and (iii) values-based (i.e. based on principles of justice or constitutional principle).

¹⁶ See e.g. J Derrida, *Of Grammatology* (John Hopkins University Press 1976).

¹⁷ TAO Endicott, ‘Linguistic Indeterminacy’ (1996) 16 *Oxford Journal of Legal Studies* 667, 697. See also TAO Endicott, *Vagueness in Law* (OUP 2000).

¹⁸ N Duxbury, *Elements of Legislation* (CUP 2013) ch 1.

¹⁹ See Mashaw (n 7).

In the earlier parts of the twentieth century, the courts took predominantly a literal approach.²⁰ But the dominant approach now is the more pragmatic method of giving effect to the purpose of statute. In *R (Quintavalle) v Secretary of State for Health*, for example, Lord Bingham explained that:

The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. [...] The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment'.²¹

The key here is the identity of the person or institution determining 'purpose', and the means deployed to go about this. But that is for consideration at a later stage. For the moment, the point to note is that there is general agreement that purpose is an objective rather than a subjective concept. The courts are not looking for the actual intention of individual legislators, but the objective meaning of the words of statute in context. The idea is summarised by Lord Nicholls in *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd*:

[t]he task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective.²²

As part of this objective search for Parliamentary purpose, the interpretive role takes into account wider fundamental constitutional values. This is given effect, for example, via presumptions that Parliament did not intend certain outcomes unless stated expressly.²³ Inevitably, such an approach entails a more self-consciously assertive judicial role, relying expressly on matters that are neither textual nor directly relevant to a statute's passing. But it nonetheless relies on an imputed intention—non-textual, but such a part of the fabric of constitutional framework within which Parliament legislates that it may be presumed.²⁴

In the next section I problematise these three interpretative approaches (i.e. (i) linguistic; (ii) contextual/systemic; and (iii) values-based) in turn, demonstrating that for all their purported neutral reconstruction of an original intent, they each involve a degree of imaginative

²⁰ E.g. *Fisher v Bell* [1961] 1 QB 394 (HC).

²¹ [2003] UKHL 13, [2003] 2 AC 687 [8] (Lord Bingham).

²² [2001] 2 AC 349 (HL) 396-397 (Lord Nicholls).

²³ See e.g. *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131 (Lord Hoffman).

²⁴ E.g. TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013).

reconstruction. Further, the nature and deployment of the methodologies used by the courts bears more than a passing resemblance to the process of executive policy-making.

This problematisation of neutral interpretative principle leads to the central thesis of this chapter. The tools used by the courts to interpret text have the appearance of a set of rules and principles to excavate the past truth of a statute, via application of the constitutional principles and semantic norms of the present. A judge is, under cover of a set of rules aimed at objectivity, shuttling between enacted purpose and present needs. Yet the rules themselves are malleable, particularly in light of increased emphasis upon purposive and values-based approaches.²⁵ Further, the selection of which rule(s) to apply itself plays a role in determining outcomes. This is not to accuse the judiciary of bad faith or politicisation.²⁶ Rather, it demonstrates that statutory interpretation and administrative policymaking can both be characterised as the exercise of a bounded discretion within a statutory framework.

Officials, seeking to deliver on the instructions issued to them by Parliament in the form of enacted legislation, will engage in two activities. They look to establish Parliament's intention. And they seek to reconcile that intention with present policy needs.²⁷ The distance between that intention and those needs may be more or less significant, depending on the age of the legislation and the unforeseen nature of the needs, but the point holds in general. Framed in that way, I will argue, judges and policymakers are both engaged in a process of modulating past intentions and present needs. To be sure, the processes are far from identical. The aims/needs balance will be different, and a judge's task is rule and principle bound in a way that an administrator's is not. But the overlap receives insufficient recognition in UK doctrine.

8.3.2 *Plain Meaning and the Death of the Author*

The starting point in interpretation is fidelity to text, to the plain or natural meaning of the words of the legislature.²⁸ Normatively, an approach focusing on the plain-meaning of words respects, in an obvious sense, the choices made by the legislature. As Jeremy Waldron has argued, statutes represent the resolution of pluralist debate via an open and respectful process. A plain-meaning approach respects the dignity of that deliberative process.²⁹ Adherence to the language of statute ensures that Parliament's will is given effect, and that neither the judiciary nor the executive go beyond the limits of their authority. Further, it may be argued that since Parliament knows that its intentions can only be conveyed by the text of its legislation, the language it chooses reflect its

²⁵ Burrows (n 4) 6.

²⁶ See JAG Griffith, *The Politics of the Judiciary* (5th edn, Fontana 1997).

²⁷ On policymaking processes generally, see P Cairney, *Understanding Public Policy: Theories and Issues* (Palgrave 2012).

²⁸ See e.g. *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [2007] 1 WLR 1910 [5] (Lord Bingham). For an overview see Duxbury (n 18) chap 5.

²⁹ J Waldron, *Law and Disagreement* (Clarendon 1999) 122-129.

best efforts at anticipating judicial interpretation. Plain-meaning approaches respect that process more than any other.³⁰

There is relatively little debate on the centrality of textualism in the UK, with all the leading practitioner texts clear that it is the starting point of the interpretative task.³¹ If the words of a statute are clear, this ordinarily leaves little scope for judicial creativity. That accords with principles of legislative sovereignty and reduces the risks of judicial activism. The desire to suppress such activism has led some commentators (generally of a conservative bent), particularly in the US context, to advocate a strongly literal ‘textualist’ approach to the detriment of all others.³² Drawing on arguments regarding the impossibility of establishing group intention, and using public choice theory to argue for judicial respect of democratic outputs, the textualists advocate an approach which looks to strict adherence to natural meaning as a means of restricting judicial creativity.³³

Yet, in cases of semantic uncertainty, strict textualism is flawed. The seemingly straightforward normative justifications for plain-meaning approaches are problematic in both theory and practice. Firstly, linguistic expression is impossible without context and background.³⁴ As Sunstein puts it, there is no such thing as an acontextual or pre-interpretive text.³⁵ Secondly, textualism fails to deal with the fact of linguistic indeterminacy, whether as a result of syntactic ambiguity or because the court is faced with a situation unimagined by the legislature.³⁶ In reality, a plain-meaning approach can operate to disguise the assumptions made by an interpreter about context or, conversely, seek to suppress the wider context within which a provision takes effect. An example of the latter might be the tactical deployment of strongly literalist approaches criticised by functionalists in the first half of the twentieth century.³⁷ Textualism is thus, on its

³⁰ G MacCallum, ‘Legislative Intent’ in R Summers (ed), *Essays in Legal Philosophy* (Blackwell 1968) 242.

³¹ Bell and Engle, *Cross on Statutory Interpretation* (n 4) 50; Bailey and Norbury, *Bennion on Statutory Interpretation* (n 4) ch 1; D Lowe and C Potter, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (n 4) 3.9.

³² In the UK context see e.g. R Ekins, ‘Updating the Meaning of Violence’ (2013) 129 *Law Quarterly Review* 17.

³³ See e.g. JL Mashaw, ‘Textualism, Constitutionalism, and the Interpretation of Federal Statutes’ (1991) 32 *William and Mary Law Review* 827; WN Eskridge Jr, ‘The New Textualism’ (1990) 37 *University of California Los Angeles Law Review* 621; JF Manning, ‘Textualism as a Nondelegation Doctrine’ (1997) 97 *Columbia Law Review* 673; Scalia, *A Matter of Interpretation* (n 1).

³⁴ See F Schauer, ‘Statutory Construction and the Coordinating Function of Plain Meaning’ (1990) *Supreme Court Review* 231, 252; CR Sunstein, ‘Interpreting Statutes in the Regulatory State’ (1989) 103 *Harvard Law Review* 405, 423-424.

³⁵ CR Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press 1993) 121.

³⁶ See e.g. Bell and Engle, *Cross on Statutory Interpretation* (n 4) 50-59; WN Eskridge Jr, and PP Frickey, ‘Statutory Interpretation as Practical Reasoning’ (1990) 42 *Stanford Law Review* 321, 325. Eskridge makes a similar point in specific response to Waldron; see WN Eskridge Jr, ‘The Circumstances of Politics and the Application of Statutes’ (2000) 100 *Columbia Law Review* 558, 566.

³⁷ See e.g. I Jennings, ‘Courts and Administrative Law – the Experience of English Housing Legislation’ (1936) 49 *Harvard Law Review* 426.

face, the least creative method of statutory interpretation, but even this interpretative method is far from being entirely neutral.

8.3.3 *Context and Purpose*

The dominant approach in the UK, as explained above, is to look for the statutory purpose or policy. This addresses the limitations of the plain meaning approach, freeing the courts from the limitations of language to either adequately convey legislators' intentions or to anticipate every circumstance in which a statute may apply. But in so doing, it opens up the process of decoding text to a much wider range of sources, both internal and external to the statute, which in seeking to decrease ambiguity in reality open up potential multiple avenues of meaning.

The first point is that there is a critical weight of opinion, judicial and academic, against the possibility of identifying a 'true' legislative purpose, in the sense of the actual, subjective intentions of individual legislators. Individual legislators will have acceded to a legislative instrument for a range of reasons. Some may genuinely support the text of a measure, but others will vote for it to avoid harming the reputation of the government or to evade the displeasure of party whips.³⁸ And legislation will be applicable to instances that the legislature could not possibly have envisaged.³⁹ The quote by Lord Nicholls in *Spath Holme* above demonstrate the judicial consensus on this point. Further practical evidence is found in the wariness of the courts to apply the rule in *Pepper v Hart* allowing the use, in cases of genuine ambiguity, of speeches in Hansard delivered by ministers sponsoring a bill.⁴⁰

An alternative approach to identifying 'real' legislative purpose is found in the work of Richard Ekins. Ekins uses 'group theory' to explain the possibility of recognising the purposes of a defined group without conflating this with either the intentions of either its leading members or a majority.⁴¹ On his view, Parliament acts with a rational plan on the basis of agreed procedures to change the law in some way. In that sense, Parliament articulates a genuine, identifiable intention. Yet, as Burrows has explained, this sophistry gets nowhere in terms of the practice of interpretation.⁴² Even if Ekins is right, his approach does not assist with the question of how to identify that intention.

Identifying a subjective purpose is thus of limited assistance. Yet, as Raz persuasively argues, without some notion of an identifiable intention or purpose the conferral of constitutional power

³⁸ See Dworkin (n 11) 315-327; Kirby, (n 3) 98-99; MacCallum (n 30) 237-240; and, classically, M Radin, 'Statutory Interpretation' (1930) 43 Harvard Law Review 863.

³⁹ KA Shepsle, 'Congress Is a "They," Not an "It": Legislative Intent as Oxymoron' (1992) 12 International Review of Law and Economics 239, 252.

⁴⁰ [1993] AC 593 (HL).

⁴¹ R Ekins, *The Nature of Legislative Intent* (OUP 2012) 211-212. See also 'The Intention of Parliament' [2010] Public Law 709, 719.

⁴² Burrows (n 4) 17.

to legislate on a deliberative body makes no sense.⁴³ The better explanation is that the courts are looking for the objective policy of a provision; the aims and purposes of its passing.⁴⁴

Identifying that policy necessitates a careful consideration of the context in which a statute was passed.⁴⁵ The courts look to a wide range of materials to identify this. These include, *inter alia*, the text and content of the statute in which a provision appears;⁴⁶ the broader scheme of that statute;⁴⁷ legislation on *in pari materia* topics,⁴⁸ background documentation such as Law Commission Reports,⁴⁹ white or green papers;⁵⁰ and in limited circumstances statements in Hansard.⁵¹

The context of the statute and background policy discussions are not the limit of the purposive approach. The method may also require consideration of the statute's afterlife—the ways it has been construed by the courts,⁵² its practical application in novel circumstances, changes in the meaning of words, and broader societal change. In particular, it is presumed that legislation is 'always speaking'; understood relative to its current context.⁵³

Thus, where the dominant purposive paradigm is applied, meaning emerges out of a dialectic between past purposes and present conditions. This approximates Eskridge's concept of 'dynamic' interpretation, which involves looking for purpose, but integrating that purpose within the 'current web of beliefs'.⁵⁴ Burrows has recently characterised the approach of the UK courts in a similar manner.⁵⁵ Of course, some of the sources used to derive meaning are closer to a plain-meaning approach than others. However, the precise differentiation does not affect the thrust of the argument here. First, once interpretation shifts into matters of context, the judicial role involves selecting and evaluating relevant matters. Second, this involves not only consideration of the policy and purpose of a provision, but also the best means of giving effect to that provision in novel or unexpected circumstances. In short, while consideration of context

⁴³ See J Raz, 'Intention in Interpretation' in RP George (ed), *The Autonomy of Law: Essays in Legal Positivism* (OUP 1996) 249.

⁴⁴ Burrows (n 4) 15.

⁴⁵ *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 (HL) 461 (Viscount Simonds).

⁴⁶ *Quintavalle* (n 21) [8] (Lord Bingham).

⁴⁷ *R v Montila* [2004] UKHL 50, [2004] 1 WLR 3141 [33] (Lord Hope)

⁴⁸ *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 [113] (Majority judgment).

⁴⁹ *R v Secretary of State for Transport ex p Factortame Ltd (No 1)* [1990] 2 AC 85 (HL) 148C-149H (Lord Bridge).

⁵⁰ *R v T* [2009] UKHL 20, [2009] 1 AC 1310 [29]-[35] (Lord Phillips).

⁵¹ See Kavanagh (n **Error! Bookmark not defined.**) 183–185.

⁵² *R v G* [2003] UKHL 50, [2004] 1 AC 1034 [46] (Lord Steyn).

⁵³ E.g. *R v Ireland* [1998] AC 147 (HL); *Fitzpatrick v Sterling Housing Association Ltd* [1999] 3 WLR 1113 (CA); *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 (HL) 296A-C (Lord Steyn); *Yemsshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 WLR 433.

⁵⁴ WN Eskridge, 'Dynamic Statutory Interpretation' (1987) 135 *University of Pennsylvania Law Review* 1479.

⁵⁵ Burrows (n 4) 33.

bridges the divide between Parliament's intention and the literal meaning of a statute, the proliferation of contextual sources affords increasing scope for judicial discretion.

Commentators in the US have grappled with this point more than those in the UK. A number of reasons may be suggested, such as the greater politicisation of the judiciary in the US, the sharpened fears of judicial activism in the context of a judicially enforceable constitution, and as a result of the more direct influence of the realist movement. Nonetheless, the fundamental core of this critique of purposive technique is relevant in the UK context.⁵⁶ Much of this critique has, unsurprisingly, originated in the textualist school. For Frank Easterbrook, a focus on intention inescapably increases judicial discretion.⁵⁷ John Manning, arguing against the constitutional propriety in the US of the now defunct 'equity of the statute' type approaches (i.e. where a judge seeks to achieve justice in the case rather than follow the wording of a statute), notes that intention-based interpretation, involving selection from a range of diverse possible meanings, heightens the constitutional powers of the judiciary.⁵⁸ Similar points are sometimes made in the UK context.⁵⁹

Such critiques are not the sole preserve of the textualists. Cass Sunstein has shown that the various methodologies of contextual interpretation are all flawed in terms of their own ostensible objectivity. Structural approaches can assume a coherence that does not exist. Extrapolating purpose risks judicial invention. And historical approaches based on consideration of contemporary materials or debates can easily lapse into sub-delegation.⁶⁰ One might add, given the way in which objective purpose is derived from a range of applicable sources, that the potential for privileging particular sources over others, or combining those sources in novel ways, tends to undermine the objectivity thesis. For Eskridge and Frickey, intentionality fails, like plain meaning, to deal with ambiguity.⁶¹ The vagueness, indeterminacy and incompleteness of linguistic communication mean that intention is not just hard to find, but potentially impossible to find. They argue that a focus on intention can subsume other important constitutional values (on which see below).⁶² Finally, it is worth recalling Karl Llewellyn's demonstration that for each canon of interpretation, a separate canon may point in an opposite direction. Llewellyn's case was

⁵⁶ See Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1; M Aronson, 'Should We have a Variable Error of Law Standard?' in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015) 241.

⁵⁷ FH Easterbrook, 'The Role of Original Intent in Statutory Construction' (1988) 11 *Harvard Journal of Law and Public Policy* 59, 62; 'Text, History and Structure in Statutory Interpretation' (1994) 17 *Harvard Journal of Law and Public Policy* 61, 69.

⁵⁸ JF Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Columbia Law Review* 1, 8.

⁵⁹ See e.g. Ekins (n 41).

⁶⁰ Sunstein (n 34) 425-432.

⁶¹ Eskridge and Frickey (n 36) 325.

⁶² *ibid.*

overstated, perhaps, but he hit a fundamental truth insofar as he highlighted the impossibility of objectivity in the interpretative task.⁶³

8.3.4 *Legality and Values: The Inner Morality of Legislation*

A final accepted method of interpretation is the ‘presumed intention’, or values-based approach. Here, the Court presumes that Parliament never means, inadvertently, to assail generally accepted liberal values.⁶⁴ Parliament may assail such values expressly, but it will need to do so in clear terms.⁶⁵ This approach is a tenet of the ‘common law’ constitution, wherein the judicial role is not simply to neutrally give effect to democratic will, but a more substantive one of ensuring that public policy is delivered within a framework of liberal values, including fundamental rights and principles of good governance.⁶⁶ The principle has been used to protect a range of fundamental rights or principles, including: individual liberty,⁶⁷ property rights;⁶⁸ the presumption of *mens rea* in criminal offences;⁶⁹ fairness;⁷⁰ a right to notice of certain decisions;⁷¹ rights to legal professional privilege;⁷² and access to a court.⁷³

For Trevor Allan, a leading exponent of this approach, this is not a question of judicial creativity. Statutes do not have meaning prior to their realisation in individual instances; the judicial role is to complete that meaning by giving effect to constitutional principle.⁷⁴ Four points are relevant for my central argument. First, and straightforwardly, ‘filtering’ statute through fundamental principle is self-evidently a creative process. The common law itself is a work of bounded creativity.⁷⁵ Second, the constitutional principles which a judge is meant to use in reifying statutory meaning are both contested in terms of their nature and application. Whether a right is ‘fundamental’ or not is a disputed question.⁷⁶ And the question of whether Parliament meant to override a protected right is itself a matter of judgment.⁷⁷ Third, the adoption of these principles imports, in certain circumstances, standards exterior to the terms of the relevant statute. In *R*

⁶³ See KN Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed’ (1950) 3 *Vanderbilt Law Review* 395.

⁶⁴ E.g. *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115, 131E-G (Lord Hoffman).

⁶⁵ *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115, 131E-G (Lord Hoffman).

⁶⁶ For the history see Philip Sales, ‘Modern Statutory Interpretation’ (2017) 38 *Statute Law Review* 125. See also *Duxbury* (n 18) ch 2.

⁶⁷ *B v Secretary of State for Justice* [2011] EWCA Civ 1608, [2012] 1 WLR 2043.

⁶⁸ *Entick v Carrington* (1765) 19 *State Tr* 1029.

⁶⁹ *R v Brown* [2013] UKSC 43, [2013] 4 All ER 860.

⁷⁰ *Lloyd v McMahon* [1987] AC 625 (HL).

⁷¹ *Cooper v Wandsworth* [1863] 143 ER 414.

⁷² *R (Morgan Grenfell and Co Ltd) v Special Commissioner for Income Tax* [2002] UKHL 21, [2003] 1 AC 563.

⁷³ *Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534.

⁷⁴ See TRS Allan, *Law, Liberty and Justice: the Legal Foundations of British Constitutionalism* (Clarendon 1993) ch 4; *Sovereignty of Law* (n 24) ch 5.

⁷⁵ See Lord Reid (n **Error! Bookmark not defined.**) 22.

⁷⁶ *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [152] (Lord Reed).

⁷⁷ *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 AC 15 [27] (Lord Dyson).

(*UNISON*) *v* *Lord Chancellor*, for example, Lord Reed’s interpretation of the extent of the Lord Chancellor’s power to set tribunal fees arguably applied a proportionality assessment when determining the extent of the Chancellor’s discretion (i.e. in the sense that a more balanced policy would have fallen with the terms of the statute).⁷⁸ Fourth, the values-based approach to purpose takes its place alongside the other sources available to the judge when interpreting statute. This approach therefore adds (yet) another dimension to the potential for judicial discretion in the interpretive process, not only in itself, but as part of a palette of options which can be selectively combined to achieve a range of outcomes.

8.4 Conclusion: A New Perspective on Judicial Policy-making

Interpretative method constitutes a quest for objective purpose which remains shot through with judicial discretion. I noted at the outset that this dissolves sharp boundaries between interpretation and policymaking.⁷⁹ This is not to say that the judiciary is consciously pursuing its own policies. Nor is it simply the point that creative interpretation involves *some* creativity. The point is that the discretionary aspects of the interpretative process are a rough analogue of the process of executive policy-making.

In chapter 7, I used Scott Shapiro’s planning theory of law to illuminate the ways in which common law principles of judicial review themselves approximate a process of policy-making. This point is also relevant here. Shapiro sees law as the coordination of social endeavour on a macro level.⁸⁰ Laws constitute plans, and possess four distinctive features: they are positively created via acceptance by group decision making; they have a partial, hierarchical and nested structure; they settle conclusively what is to be done; and they are developed by a process which is designed to develop standards of conduct and evaluation.⁸¹ Applying the idea in the context of statutory interpretation, especially in a public law context, is instructive. It recognises that the ‘plans’ set out in statute, where these lack clarity in meaning or application, are partial. They require supplement and elucidation to develop and deliver their ends.

This insight develops the point made earlier that both administrative and judicial approaches to interpretation involve fleshing out the incomplete nature of statute. Statutes are tools for the coordination of social or administrative endeavour, but are fragmentary, requiring elucidation and supplementation. An administrator, faced with this task, is not acting with a free hand. They must understand the aim and purpose of the statute in order to deliver its policy. They must find ways of directing its proper application in new cases.⁸² The dominant judicial approach to

⁷⁸ [2017] UKSC 51, [2017] 3 WLR 409 [100]-[101] (Lord Reed).

⁷⁹ Jerry Mashaw’s work on this is insightful on this point. See above note 7.

⁸⁰ S Shapiro, *Legality* (Belknap Press 2011).

⁸¹ *ibid* 128-9.

⁸² See Cairney (n 27).

interpretation is arguably analogous. The judge applies a dynamic approach which oscillates between the identification, from a range of sources, of statutory policy, and the realisation of that policy in novel circumstances. Classically, the difference is that the administrative approach is characterised by the policy aims and exigencies of a particular moment, whereas the courts will look to determine objectively the legal extent of a provision's scope. I do not dismiss this subjective/objective gap. The key point, however, is that careful consideration of the methods used by courts to determine the legal limits of statute should cause us to question whether that gap is as wide as dominant approaches to interpretation presume. The next chapter considers this question via a survey of Supreme Court cases.

Chapter 9. Testing the Thesis – Interpretation and Policymaking in the UK Supreme Court

9.1 Introduction

The last chapter argued, at a theoretical level, that questions of objective interpretation and creative policymaking are not sharply distinguishable. The relevance to this thesis is the interrelationship between legal doctrine and administrative policy. In particular, it relates to my general hypotheses insofar that applying standards of legal correctness to policymaking can lead to bifurcation (i.e. an unstable mixture of deference and judicialisation). In my method chapter I set out three sub-hypotheses relevant in the context of statutory interpretation. These were that: (i) recent decisions of the Supreme Court will continue to prioritise judicial views as to the meaning of statute in public law cases; (ii) that this will lead to the Court's engagement in a quasi-policy making process; and (iii) that this will risk bifurcation and its associated pathologies. To test these sub-hypotheses I carried out a survey based on rigorous case selection, per the method set out in the introduction. This chapter sets out my analysis on points (i) and (ii).

The first point, that the Court will prioritise judicial views as to the meaning of statute, was tested by carrying out a general survey to determine whether I consider the Court's dominant approach to be: (i) textual; (ii) contextual/purposive; (iii) values-based; or (iv) facilitative. The key question was whether the Court's approach to interpretation was generally 'closed' or 'open'. The first three categories correspond to closed methods of interpretation, from an executive perspective, in treating meaning as a matter for the court. The fourth approach is open in having greater regard for an executive view of the meaning of a statute. The second point, that an approach which treats interpretation as primarily a question of law for judicial determination will lead to a process of quasi-policymaking, was tested via careful reading of relevant cases.

The analysis is set out below, ordered via the four categories of interpretation (i.e. (i) textual; (ii) contextual/purposive; (iii) values-based; or (iv) facilitative). In short, it demonstrates that the Court's output relies primarily on closed models of interpretation. My impression was that closed approaches dominate. Further, there is evidence supporting the thesis that these closed models are akin to processes of administrative policymaking. In that sense, therefore, there is evidence to support the general hypothesis that statutory interpretation in the appellate courts implicates them in a quasi-policy process which they would otherwise expressly eschew. Within the caselaw, however, there is also a subordinate jurisprudence in which the Court is incorporating a need to take account of the contribution the executive can make in statutory interpretation. These open judicial approaches are, however, both marginal and inconsistently applied.

9.2 Text and Plain Meaning – Never Determinative

Text, unsurprisingly, always plays a significant role in deciding cases. The reader is referred to Appendix C which records the interpretative approaches used in each case.¹ Yet, in line with Andrew Burrows' analysis, in the Supreme Court text is only the starting point for analysis.² In the cases surveyed the Court very rarely relies solely on the text of a provision.³ Care is needed in extrapolating from a relatively limited selection of cases. It may be that literal approaches play a greater role in first instance courts, and the claims made in this chapter are subject to that caveat. Nonetheless, plain meaning is not an approach used to resolve the trickier questions of interpretation in the cases I considered. This matters because, while literalism itself is not value neutral, it is a means by which a court can signal its intention to restrain its own creativity.

My survey suggested that textualist approaches are rarely significant. They are relied upon most where the Court is looking to text to cut through the 'noise', or complexity, of approaches relied upon by the parties or the courts below.⁴ In *DB v Chief Constable of the Police Service of Northern Ireland* for example, Lord Kerr uses the clear wording of policing powers to ensure effective notification of marches in Northern Ireland.⁵ The Chief Constable had been particularly seized of the need to balance the competing rights of protesters and persons affected by their actions but, in doing so, had in Lord Kerr's view lost sight of the statutory text. In *Doogan and another v Greater Glasgow and Clyde Health Board* the Court used the plain meaning of the statute to avoid the complex practical consequences of a range of potential readings proposed by the parties.⁶ And in *KO (Nigeria) v Secretary of State for the Home Department* Lord Carnwath leaned on text to cut through an array of complex tribunal decisions relating to deportation decisions.⁷ Even in these cases, the limits of textualism are clear. In *DB* the Court's approach involves consideration of the context and rationale of the relevant statute.⁸ In *Doogan* Baroness Hale attempts to divine what Parliament had in its mind when passing the text in question.⁹ In *KO*, while Lord Carnwath looks to reduce

¹ The only arguable exception to this point is the majority decision in *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787, if we take at face value Lord Wilson's criticism of their judgment.

² A Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (CUP 2018) 2-11.

³ Arguably, in only 2 cases: *Regina (B) v Westminster Magistrates' Court* [2014] UKSC 59 [2015] AC 1195 [17] (Lord Mance); *In the matter of Raymond Brownlee for JR* [2014] UKSC 4 [2014] NI 188 [32]-[33] (Lord Kerr).

⁴ See e.g. *In the matter of Raymond Brownlee for JR* *ibid*; *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622; *Doogan and another v Greater Glasgow and Clyde Health Board* [2014] UKSC 68, [2015] AC 640; *DB v Chief Constable of the Police Service of Northern Ireland* [2017] UKSC 7, [2017] NI 301; *R (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492; *O'Connor v Bar Standards Board* [2017] UKSC 78, [2017] 1 WLR 4833.

⁵ *DB* (n 4) [52]-[55] (Lord Kerr).

⁶ *Doogan* (n 4) [25]-[27] (Baroness Hale).

⁷ *KO* [2018] UKSC 53, [2018] 1 WLR 5273 [16]-[23] (Lord Carnwath).

⁸ *DB* (n 4) [48]-[52] (Lord Kerr).

⁹ *Doogan* (n 4) [38] (Baroness Hale).

complexity by focusing on text, he nonetheless looks to both the history of the underlying policy and the practical considerations of various tribunal decisions.¹⁰

The point here is a short one. My survey suggested that the Supreme Court infrequently places decisive reliance on pure textualism. While text is relevant in every case, it is mainly used to rule out interpretations the Court finds unattractive, rather than identify correct ones.¹¹ For example, in *M v Secretary of State for Justice* (in which the Court considered whether conditions could be imposed on a patient on release under the Mental Health Act 1983 if they constituted a deprivation of liberty) Baroness Hale ruled out a particular reading on the basis that it was at odds with the wording of that Act.¹² But that process of exclusion is not the end of the analysis, since her overall conclusion relies on broader questions of principle,¹³ and practicality.¹⁴ Text is a limiting factor on the scope of judicial discretion, but seldom determines precisely how that discretion should be exercised. For the purposes of the analysis here, the takeaway point is that the least creative mode of interpretation, and arguably least akin to policymaking, is never sufficient to determine the questions reaching the Supreme Court.

9.3 Purpose and Context

Judicial frustration with the limitations of text in resolving cases is seen in *London Borough of Southwark and another v Transport for London*. This case required the Court to interpret an order transferring rights and liabilities for certain highways to the Department for Transport. Lord Briggs argues strongly that statute should be understandable with reference only to itself, while acknowledging that the interpretative task is going to necessitate the use of significant contextual material:

[i]t is hard enough on the law-abiding public that legislation is often unintelligible without the assistance of skilled lawyers. It is even worse if its meaning requires, in addition, the assistance of a legal historian. None the less, this is a case [...] where neither the analysis of the dispute as to statutory meaning, nor the appropriate solution to it, can be undertaken without substantial recourse to the history of English and Welsh highways law and in particular legislation. Even the innocent sounding word ‘highway’ is itself capable of having a range of different meanings, dependent upon the context in which it is used.¹⁵

¹⁰ *KO* (n 7) [12], [16]-[23] (Lord Carnwath).

¹¹ On which see D Greenberg, ‘All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting’ (2005) 7 *European Journal of Law Reform* 31, 41.

¹² [2018] UKSC 60, [2018] 3 WLR 1784 [33]-[36] (Baroness Hale).

¹³ *ibid* [31] (Baroness Hale).

¹⁴ *ibid* [32] (Baroness Hale).

¹⁵ [2018] UKSC 63 [5] (Lord Briggs).

In the event, construing the statute involved legislative history,¹⁶ common law rules,¹⁷ and practical outcomes.¹⁸ My survey suggested that the majority of statutory interpretation cases decided by the Court are determined in this way. The Court considers a range of intra and extra-statutory contextual matters, and derives from these a ‘best fit’ interpretation.¹⁹ As explained above, this approach necessarily implies a measure of judicial discretion, via the selection of and weight afforded to contextual factors. This section address the breadth of the potential judicial discretion via a survey of cases from my dataset, before setting out four recurring tropes which demonstrate the ways this method blurs into a form of quasi-policymaking. The implications of this are significant; through a closed interpretative process predicated on principles of legal correctness, the Court is to some extent implicated in the subjective process of government.

The Court’s predominant approach is to seek the objective purpose of the text enacted by Parliament.²⁰ This includes consideration of a wide range of contextual factors which look backward to seek the purposes for which the original legislation was passed. These include: the text and content of the wider statute;²¹ the scheme of the statute;²² legislation on *pari materia* topics;²³ government consultations;²⁴ background documentation such as departmental reports, Law Commission Reports, and white or green papers;²⁵ legislative history (i.e. the manner in which a government’s proposal was altered during the relevant bill’s passage);²⁶ statements in Hansard;²⁷ explanatory notes;²⁸ relevant guidance;²⁹ and the purpose of international instruments.³⁰

¹⁶ *ibid* [8]-[19] (Lord Briggs).

¹⁷ *ibid* [7] (Lord Briggs).

¹⁸ *ibid* [40] (Lord Briggs).

¹⁹ A good example is *R v Haralambous* [2018] UKSC 1, [2018] AC 236, in which Lord Mance looks to the text [15], statutory context [27], legislative background and history [33], practical implications [33], and relevant case law [15]-[24] when construing provisions in the Police and Criminal Evidence Act 1984.

²⁰ For representative comment to this effect, see e.g. *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622 [6] (Lord Reed, Lord Thomas); *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384 [88]-[90] (Lord Reed).

²¹ E.g. *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 [30] (Lord Mance).

²² E.g. *Trump International Golf Club v Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85 [7]-[13] (Lord Hodge).

²³ E.g. *R (Black) v Secretary of State for Justice* [2017] UKSC 81, [2018] 2 WLR 123 [36] (Baroness Hale); *R (Belhaj) v Director of Public Prosecutions (No 1)* [2018] UKSC 33, [2018] 3 WLR 435 [18] (Lord Sumption).

²⁴ E.g. *McCann v State Hospitals Board for Scotland* [2017] UKSC 31, [2017] 1 WLR 1455 [17]-[20] (Lord Hodge).

²⁵ E.g. *DB (n 4)* [48]-[52] (Lord Kerr); *R (Belhaj) v Director of Public Prosecutions (No 1)* [2018] UKSC 33, [2018] 3 WLR 435 [53] (Lord Lloyd-Jones, Lord Wilson); *Williams v Hackney London Borough Council* [2018] UKSC 37, [2018] 3 WLR 503 [14]-[20] (Baroness Hale).

²⁶ E.g. *R (BSB Ltd) v Central Criminal Court* [2014] UKSC 17, [2014] AC 885 [30] (Lord Toulson).

²⁷ E.g. *Iceland Foods Ltd v Berry (Valuation Officer)* [2018] UKSC 15, [2018] 1 WLR 1277 [16] (Lord Carnwath).

²⁸ E.g. *R (Forge Care Homes Ltd) v Cardiff and Vale University Health Board* [2017] UKSC 56, [2017] PTSR 1140 [24] (Baroness Hale).

²⁹ E.g. *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 [34]-[35], [38] (Lord Carnwath); *Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] PTSR 549 [19] (Baroness Hale).

³⁰ *R (Brown) v Secretary of State for the Home Department* [2015] UKSC 8, [2015] 1 WLR 1060 [22] Lord Toulson.

These sources are supplemented by the Court updating a statute's original purpose, developing its meaning to maintain relevance in new circumstances. The Court routinely turns to caselaw relevant to a statutory provision when interpreting it in new circumstances.³¹ It also takes account of societal change when construing statutes, particularly in the case of older legislation.³² The practical consequences of competing interpretations are also factors which are sometimes weighed in the interpretative process.³³ Some of the sources identified above in terms of past context are relevant here, too. Institutional guidance and international instruments given effect through primary legislation, for example, can assist in the evolving meaning of statute.

This multi-stranded approach, relying on a range of sources to both identify a statute's original policy and give that purpose effect within the context of current needs and values is close to Eskridge's concept of dynamic interpretation.³⁴ It involves a process of practical reasoning aimed at the reification of statutory meaning within a present context. Two interrelated points require emphasis. First, this search for the objective policy of statute is a 'closed' method. It places interpretative authority entirely in judicial hands. The near ubiquitous references to the need to establish Parliament's 'intention' in the jurisprudence emphasise that the Court sees its task as seeking the *true* meaning of statute.³⁵ Superficially, this approach poses no separation of powers issues. Yet, and this is the second point here, the process of determining Parliamentary intention is not just a process of discovering but also one of making policy. The range of contextual sources on which the Court draws, both those going to Parliament's past intention and the meaning of that intention in present conditions, and the potential for the recombination of those sources in manifold ways, facilitate a process of bounded discretion structurally analogous to administrative interpretation. Evidence of the inherently subjective nature of the process appears in the cases I considered in at least four ways: (i) contextual source manipulation; (ii) variability of purpose; (iii) practical consequences; and (iv) differential diagnosis.

9.3.1 *Contextual Source Manipulation*

One of the clearest ways in which the structural congruity between judicial interpretation and the bounded discretion of administration is seen is in those cases where the justices demonstrate differing views on the selection of, and weight afforded to, contextual sources.

In *R (N) v Lewisham London Borough Council*, the Court considered whether housing authorities are required to obtain a court order to obtain possession of interim accommodation supplied to homeless persons. The case turned on whether interim accommodation is 'occupied as a dwelling

³¹ E.g. *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384 [65]-[77] (Lord Reed).

³² E.g. *Haile v Waltham Forest London Borough Council* [2015] UKSC 34, [2015] AC 1471 [80] (Lord Neuberger).

³³ E.g. *R (N) v Lewisham London Borough Council* [2014] UKSC 62, [2015] AC 1259 [35] (Lord Toulson).

³⁴ WN Eskridge, 'Dynamic Statutory Interpretation' (1987) 135 *University of Pennsylvania Law Review* 1479.

³⁵ E.g. *Black* (n 23) [36] (Baroness Hale).

under a licence' under the Protection from Eviction Act 1977 (PEA). The apparently inconsequential nature of the point belied its importance in terms of authorities' ability to manage resources. Writing for the majority, Lord Hodge found for Lewisham. In doing so, he relied on: the meaning of provisions in PEA in predecessor legislation;³⁶ statutory context;³⁷ the potential practical need for authorities to move claimants;³⁸ and, while emphasising that 'policy' considerations are on their own insufficient to determine the case, that an alternative finding would hamper authorities' ability to manage their duties.³⁹ He made extensive use of previous caselaw.⁴⁰ And he places some reliance on the settled practice of authorities, based on a governmental Code of Practice, and endorsed in previous caselaw which had been impliedly 'endorsed' by Parliament (in the sense that it had ignored clear opportunities to override it).⁴¹ But he is careful to say this would be of assistance only if the statute is unclear, which is in his view not the case. Lord Hodge rejects arguments that Article 8 ECHR requires a sympathetic reading of the provision.⁴²

Lord Carnwath concurs with Lord Hodge's judgment. He emphasises the primacy of text in interpretation.⁴³ And he has little time for the concept of 'tacit' legislation, whereby Parliament is taken to endorse something if it fails to take an opportunity to amend it.⁴⁴ His concurrence also deviates from Lord Hodge in his greater willingness to take account of 'settled practice'. Whereas Lord Hodge pays lip-service to this source, for Lord Carnwath an interpretation which has been treated as settled by end users *should* be respected for reasons of stability and business planning.⁴⁵ While that makes little difference in this case, it begins to show the ways in which the weight given to competing interpretative aids meaning.⁴⁶

This point becomes emphatic in Lord Neuberger's dissent. Lord Neuberger is critical of the majority's use of PEA's predecessor statutes and the caselaw built upon them.⁴⁷ He prefers to look to the wording of PEA in its immediate statutory context,⁴⁸ considering caselaw on statutes *in pari materia*.⁴⁹ He adopts a wider meaning of 'dwelling' than the majority on the basis of the

³⁶ R (N) (n 33) [33] (Lord Hodge).

³⁷ *ibid* [33] (Lord Hodge).

³⁸ *ibid* [34] (Lord Hodge).

³⁹ *ibid* [35] (Lord Hodge).

⁴⁰ *ibid* [45] (Lord Hodge).

⁴¹ *ibid* [53] (Lord Hodge).

⁴² *ibid* [74] (Lord Hodge).

⁴³ *ibid* [79] (Lord Carnwath).

⁴⁴ *ibid* [85]-[86] (Lord Carnwath).

⁴⁵ *ibid* [94]-[97] (Lord Carnwath).

⁴⁶ A similar point leads Lord Carnwath to dissent elsewhere. See e.g. *Haile v Waltham Forest London Borough Council* [2015] UKSC 34, [2015] AC 1471

⁴⁷ R (N) (n 33) [107]-[125] (Lord Neuberger).

⁴⁸ *ibid* [126]-[128] (Lord Neuberger).

⁴⁹ *ibid* [129]-[134] (Lord Neuberger).

purpose of PEA, giving greater weight to the vulnerability of persons subject to homelessness legislation.⁵⁰ He expresses strong reservations about the concept of ‘implied’ legislation,⁵¹ and is vehemently opposed to the ‘customary’ meaning favoured by Lord Carnwath.⁵² Baroness Hale’s approach is similar to Lord Neuberger’s in preferring a wide interpretation which gives effect to the statutory purpose of protecting vulnerable individuals.⁵³ Baroness Hale also specifically criticises Lord Hodge’s reliance on PEA’s predecessor legislation, when the statutory context of PEA has since changed.⁵⁴

Lord Neuberger accuses the majority of being swayed by ‘policy’ concerns.⁵⁵ Yet the fundamental point here is that the differing methodological approaches deployed by the majority and minority demonstrate that all concerned are implicated in a process of *quasi*-policymaking. In eschewing the use of ‘tacit’ legislation and customary meaning, the dissenters demonstrate that the choice of contextual resource will affect the outcome of cases. Further, the different weight afforded to particular sources by the minority demonstrates the ways in which dynamic, purposive interpretation leads to differing outcomes. For Lord Neuberger and Baroness Hale, the reduced weight afforded to relevant caselaw, and the increased weight given to the protection of individuals, lead them to a different characterisation of PEA’s purpose. It is a longstanding principle of judicial deference that the weight afforded to competing considerations by a decision maker in questions of policy is, absent irrationality, not one for the courts.⁵⁶ Far from a neutral process of identifying Parliament’s objective intent, interpretation involves questions of relevance and weight in a manner analogous to policymaking.⁵⁷

9.3.2 *Competing Purposes*

Contextual source manipulation is the clearest demonstration of the bounded discretion of interpretation in action. A second, related, point is the number of cases where the justices demonstrate the intractable difficulties of identifying statutory purpose. This may sound uncontroversial, since if the task were easy there would be no need for highly able and experienced practitioners to sit in courts. Yet admissions, express or implied, that questions of purpose are amenable to manipulation further demonstrate that interpretation is far from value free.

⁵⁰ *ibid* [135]-[137] (Lord Neuberger).

⁵¹ *ibid* [142]-[147] (Lord Neuberger).

⁵² *ibid* [148] (Lord Neuberger).

⁵³ *ibid* [158] (Baroness Hale).

⁵⁴ *ibid* [161]-[166] (Baroness Hale).

⁵⁵ *ibid* [153] (Lord Neuberger).

⁵⁶ E.g. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL) 764.

⁵⁷ R (N) is not a lone example. *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27, [2019] 1 All ER 173 demonstrates a similar dynamic.

In *In re Agricultural Sector (Wales) Bill*, for example, Lord Reed and Lord Thomas expressly confirm the difficulties of determining statutory purpose, which they readily admit can be framed in a range of ways which yield different outcomes.⁵⁸ This was vital in the immediate context of whether a Welsh Bill was within competence of the National Assembly, since the statutory purpose went to the question of whether a bill retaining a system of agricultural wages regulation in Wales was an ‘excepted’ matter. Baroness Hale, Lord Reed and Lord Hodge similarly observe in their joint judgment in *Christian Institute v Lord Advocate No 3* that identifying statutory purpose is not ‘an easy matter’.⁵⁹

The sharp end of this point in terms of outcomes is seen in another case concerning the competences of the National Assembly. In *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*, the Court considered whether the Assembly had legislative competence to pass liability for the costs to the NHS of treating victims of asbestos related diseases to the persons legally responsible for causing those diseases. The crux was whether this provision related to the ‘organisation or funding of the National Health Service’. Both the majority and minority look to context in order to determine statutory purpose, but they are swayed by different contexts. Lord Mance, for the majority, seeks the ‘natural meaning’ of the statute in context.⁶⁰ That context included the provisions in the Government of Wales Act 2006 (GOWA) and UK wide legislation dealing with healthcare funding prior to GOWA’s enactment.⁶¹ Lord Thomas, dissenting with Baroness Hale, also seeks to find the statutory purpose via the ‘ordinary meaning in context’.⁶² For him, however, that context is specifically GOWA itself and not any prior healthcare legislation.⁶³ The choice of relevant context, in both judgments, materially affects the outcome. Both contextual options were arguable, and neither judicial choice was particularly controversial. In short, the question was one of opinion and reasonable disagreement rather than principle.

As with the manipulation of contextual sources generally, most (if not all) Acts will permit of a range of potential purposes. Acts of Parliament are the outcome of a process of debate and negotiation and likely to incorporate a range of perspectives.⁶⁴ They are polyvalent rather than univocal. The power to determine purpose cannot, therefore, be entirely disinterested. There is both express and implicit recognition of this in the dataset. This is vital here because it implicates

⁵⁸ [2014] UKSC 43, [2014] 1 WLR 2622 [65] (Lord Reed, Lord Thomas).

⁵⁹ [2016] UKSC 51, 2017 SC (UKSC) 29 [31] (Baroness Hale, Lord Reed, Lord Hodge).

⁶⁰ [2015] UKSC 3, [2015] AC 1016 [19] (Lord Mance).

⁶¹ *ibid* [20] (Lord Mance).

⁶² *ibid* [83] (Lord Thomas).

⁶³ *ibid* [91] (Lord Thomas).

⁶⁴ On which see J Waldron, *Law and Disagreement* (Clarendon 1999) 122-129.

the judiciary in questions of substance which, in the majority of cases in my dataset, it is answering via a closed process.

9.3.3 *Practical Consequences*

The third manifestation of statutory interpretation's congruity to administrative policymaking is in the Court's consideration of practical consequences. A core difference between administrative and judicial policymaking is that the administrator pursues their own goals, whereas the judge seeks to identify and enforce those of Parliament. In terms of separation of powers doctrine, this reflects the idea that it is at odds with judicial neutrality for courts to pursue social objectives, and that they have neither the expertise nor resources to do so.⁶⁵ This is supported, for example, in Baroness Hale's statement in *Doogan v Greater Glasgow and Clyde Health Board* that it is not for the Court to predict the outcomes of wide or narrow readings of provisions relating to abortion and conscientious objection.⁶⁶

Yet there is evidence in the caselaw that this distinction blurs. If the interpretative process itself may be generally characterised as one with close analogies to administrative policymaking, then this aspect of its method again highlights the close practical parallels between judicial and administrative processes. In *R (Eastenders Cash & Carry Plc) v Revenue and Customs Commissioners*, concerning the scope of customs officers' power to detain goods under the Customs and Excise Management Act 1979, for example, Lord Sumption and Lord Reed take into account the good sense of providing powers to temporarily detain goods pending the outcome of an investigation.⁶⁷ In *R (N) v Lewisham London Borough Council*, Lord Hodge gives qualified weight to local authorities' asset management needs when considering whether they have a statutory obligation to give notice and obtain a court order to obtain possession of interim homelessness accommodation.⁶⁸ And in *HM Inspector of Health and Safety v Chevron North Sea Ltd*, Lady Black considers that it is impractical not to allow employment tribunals to take into account material not available to Health and Safety Executive inspectors in health and safety appeals.⁶⁹

The point here is not to argue about the merits of these decisions. Rather, it is to illustrate that one of the factors available to the courts in a process of dynamic interpretation is the practical outcome of competing readings. The desirability of particular outcomes, however, is inextricably

⁶⁵ A Kavanagh, 'The Constitutional Separation of Powers' in D Dyzenhaus and M Thorburn, *Philosophical Foundations of Constitutional Law* (OUP 2019) 222.

⁶⁶ [2014] UKSC 68, [2015] AC 640 [25] (Baroness Hale).

⁶⁷ [2014] UKSC 34, [2015] AC 1101 [45] (Lord Sumption, Lord Reed).

⁶⁸ [2014] UKSC 62, [2015] AC 1259 [35] (Lord Hodge).

⁶⁹ [2018] UKSC 7, [2018] 1 WLR 964 [18]-[23] (Lady Black).

bound up with questions of social or economic aims which are classically the province of administrators.⁷⁰

9.3.4 *Differential Diagnosis*

The fourth and final source of evidence supporting my interpretation-as-policy argument is in the Court's use of differential diagnosis. On this approach, in order to pinpoint the 'correct' interpretation of a statutory provision, the Court posits a range of potential meanings and tests these against relevant contextual sources. For example, in *MS (Uganda) v Secretary of State for the Home Department*, concerning asylum appeal rights, Lord Hughes identifies four potential interpretations of section 83 of the Nationality, Immigration and Asylum Act 2002, which provided appeal rights against certain asylum decisions.⁷¹ Some of these were more 'natural' than others.⁷² Yet Lord Hughes goes on to identify the statute's purpose via comparison of the practical consequences and relative rationality of the competing alternatives.⁷³ Again, while purportedly a question of 'purpose', this differential process is comparable to the bounded rationality of policymaking. The Court selects, from a range of potential options, the most desirable in based on a range of competing considerations and potential outputs.

Of course, in judicial proceedings the bounds on the Court's rationality are of a different nature to those imposed on an administrative policymaker. Thus, in *Romein v Advocate General for Scotland*, Lord Sumption's differential analysis of provisions retrospectively removing limits on citizenship inherited takes into account the need to strike a balance between literal meaning and statutory purpose.⁷⁴ These are concepts drawn from interpretative doctrine. The key point however, is that the structural congruity between differential judicial approaches and administrative policymaking further substantiates the overlaps between purposive approaches to interpretation and the bounded rationality of policymaking.⁷⁵

9.3.5 *Purpose/context: Summary*

The purposive approach is the predominant way in which the Supreme Court solves interpretation problems. The process is a 'dynamic' one involving multifactorial analysis to determine the purpose of a statute and to reconcile that purpose with the needs and norms of the present. Yet this ostensibly objective process possesses structural analogies with policymaking, which is itself a subjective process of reconciling statutory purpose with current governmental objectives. It goes too far to say that the processes are identical, but there are shared

⁷⁰ R Dworkin, *Taking Rights Seriously* (Duckworth 1977) ch 4.

⁷¹ [2016] UKSC 33, [2016] 1 WLR 2615 [10] (Lord Hughes).

⁷² *ibid* [14] (Lord Hughes).

⁷³ *ibid* [15]-[20] (Lord Hughes).

⁷⁴ [2018] UKSC 6, [2018] 2 WLR 672 [10]-[11] (Lord Sumption).

⁷⁵ A further example is *M v Secretary of State for Justice* [2018] UKSC 60, [2018] 3 WLR 1784 [28] (Baroness Hale).

characteristics. Further, in my dataset there is clear evidence that this point extends beyond the level of analogy. I have identified four ways in which Court's approach to purposive interpretation is very closely implicated with questions of discretion and expedience. The institutional implication here is that, notwithstanding constitutional norms about judicial intrusion on policy questions, the Court's approach here is a closed one which treats questions of discretion/policy as questions of law.

9.4 Principles, Legality and Justice

The other main closed approach used by the UK courts in statutory interpretation is one which prioritises a concept of justice, based on protections inherent in the common law for fundamental rights and liberties, and principles of equal treatment. My survey suggested that these ideas have played a role in the cases in my dataset, without being anything like as dominant as purposive approaches. On this approach the Court seeks to use the process of interpretation to give effect to constitutional or democratic values.⁷⁶ These include: individual liberty;⁷⁷ fundamental constitutional concepts, such as the inviolability of proceedings in Parliament,⁷⁸ the scope of the prerogative to alter sources of domestic law,⁷⁹ and the separation of powers;⁸⁰ access to justice;⁸¹ and gender equality.⁸² Plainly, in common with the purposive model, in terms of qualitative analysis this values-based approach is one which sees the Court engaging in a process of bounded creativity, since the values protected are neither universal nor immutable.

Again, the method here is a 'closed' one; values-based interpretations are treated as questions of law and subject to a correctness standard. In one sense, this is in accordance with the normative trajectory of values-focused interpretation. The point is to infer legal restrictions in otherwise unclear statutory provision in order to protect individual liberties and other constitutional fundamentals. Yet, at times, the Court is not only reading legal limits into the scope of administrative discretion based on established norms, but engaging in a dynamic process of weighing social values and goals. This occurs in at least three ways: (i) incorporation of non-deontological rights norms; (ii) competing judicial theories of justice; and (iii) the embedding of values-based interpretation in the purposive/contextual approaches.

⁷⁶ See e.g. *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 [203]-[209] (Lord Neuberger and Lord Mance); *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 [51]-[59] (Lord Neuberger); *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 [75]-[81] (Majority judgment).

⁷⁷ E.g. *M* (n 75) [31] (Baroness Hale).

⁷⁸ *R (Buckinghamshire County Council)* (n 76).

⁷⁹ *R (Miller) v Secretary of State for Exiting the European Union* (n 76).

⁸⁰ *R (Evans) v Attorney General* (n 76) [51]-[59] (Lord Neuberger); *In the matter of an application by JR55 for JR* [2016] UKSC 22 [27] (Lord Sumption); *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531 [26] (Lord Neuberger).

⁸¹ *R (UNISON) v Lord Chancellor* (n 76).

⁸² *R (Coll) v Secretary of State for Justice* (n 76).

9.4.1 *Non-deontological Norms*

First, the process of incorporating rights protections into interpretative method has, additionally, imported other aspects of rights jurisprudence. In particular, there is evidence in that the process of balancing protected rights and policy aims inherent in proportionality review is taking place as an aspect of statutory interpretation. As discussed in Chapters 4 and 5, this balancing process tends to blur distinctions between legal standards and policy-making, implicating judges in the weighing of competing values.⁸³ In *R (UNISON) v Lord Chancellor*, for example, the Court considered whether prohibitively expensive Employment Tribunal fees were *intra vires* the enabling statute. On its face, this appears a straightforward question of Parliamentary intention.⁸⁴ Yet in determining the legality of the Lord Chancellor's fees regime, Lord Reed applied a proportionality-style analysis, asking whether the government's threefold justification for the measure (transferring costs burdens from taxpayers to end users; deterring unmeritorious claims; and encouraging early settlement) was sufficiently compelling given its impacts on access to justice.⁸⁵ In the event, the statistical material before the Court suggested that the policy was a serious impediment for potential claimants.⁸⁶ The first plank of the government's justification demonstrated, in Lord Reed's view, a fundamental misunderstanding of basic economics, and there was limited evidence that the second or third aims were being met.⁸⁷ In a sense, then, the quality of the Lord Chancellor's policymaking processes, and the practical effectiveness of his decisions, played a role in the scope of his statutory discretion. The key point for this chapter is the interrelationship between policymaking and legal interpretation. This is not simply a case of a legal norm limiting the scope of a vague provision. Rather, the correct interpretation of the statutory power turns on the quality of the policy process deployed in its use.

9.4.2 *Competing Theories of Justice*

Secondly, notions of values-based interpretation or principles of legality appear to assume that they are based on a single, agreed concept of justice.⁸⁸ Yet there is evidence in my dataset of competing ideas of justice at play. In *R (B) v Westminster Magistrates' Court*, for example, the Court considered whether there was an implied power in the Extradition Act 2003 to hold a closed material hearing where a Rwandan national subject to extradition sought to admit evidence from a witness who wanted to conceal their identity. For the majority, Lord Mance found that there was no such implied power, taking into account the compelling force of open justice principles,

⁸³ G Webber, *The Negotiable Constitution* (CUP 2010) 113.

⁸⁴ [2017] UKSC 51, [2017] 3 WLR 409 [65] (Lord Reed).

⁸⁵ *ibid* [89] (Lord Reed).

⁸⁶ *ibid* [91]-[98] (Lord Reed).

⁸⁷ *ibid* [100]-[101] (Lord Reed).

⁸⁸ E.g. *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131 (Lord Hoffman).

which required testing in open court of whether evidence was ‘relevant, truthful and persuasive’.⁸⁹ In dissent, Lord Toulson applied an alternative vision of justice, which paid greater regard to the foreseeability of a potentially serious breach of the claimant’s human rights.⁹⁰ Rights norms can conflict. Yet, in an interpretation case, it is notable to see again the scope for judicial discretion in the applicability of a (purportedly) neutral process of realising Parliament’s intent. Forty years ago John Griffith showed the ways in which rights can convert political into legal discourse,⁹¹ and these cases demonstrate how questions of interpretation in this context increasingly depend on fundamentally contestable questions of value.

9.4.3 *Embedding in Purposive/context Approaches*

Finally, while values-based interpretation is a distinct method of interpretation, it is worth noting that the Court often treats values points as one of the range of factors relevant to a purposive/contextual approach. For example, in *McCann v State Hospitals Board for Scotland*, the Court relies on: legislative history, including relevant pre-legislative reports and consultations;⁹² the government’s Code of Practice;⁹³ statutory text and context;⁹⁴ and impacts on patient autonomy.⁹⁵ I have already explained that the purposive approach imports a significant amount of judicial discretion via the selection and weighing of contextual factors. Principles of legality and justice form part of the process of selection and weighing of contextual materials which, as set out above, operates as a quasi-policymaking process.

9.5 Closed Approaches: Summary

Closed, legalistic approaches to interpretation predominate in the Supreme Court. Such approaches to statutory interpretations downplay the extent to which they incorporate significant judicial discretion. The processes by which that discretion is exercised are dynamically analogous to administrative policy-making. Yet they involve the application of a standard of correctness. This raises institutional and constitutional questions that are insufficiently taken into account by current practice. Policy questions are traditionally the province of Parliament and the executive, for reasons of expertise and constitutional propriety which, in other contexts, have led the judiciary to develop standards of deference. I do not suggest that judges should simply defer to administrative interpretations of statute. However, I do suggest that the interplay between law and policy taking place in interpretative questions requires scepticism over the propriety of treating these solely as questions of law. From this perspective, it is noteworthy to see that there

⁸⁹ [2014] UKSC 59, [2015] AC 1195 [29] (Lord Mance).

⁹⁰ *ibid* [86]-[93] (Lord Toulson).

⁹¹ JAG Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1.

⁹² [2017] UKSC 31, [2017] 1 *WLR* 1455 [17]-[20], [24] (Lord Hodge).

⁹³ *ibid* [27] (Lord Hodge).

⁹⁴ *ibid* [35]-[41] (Lord Hodge).

⁹⁵ *ibid* [38] (Lord Hodge).

are a number of areas in which the Court does demonstrate a willingness to accommodate administrative interpretations in the making of legal meaning. The task of the next section is to survey the cases in which this occurs.

9.6 Facilitative Approaches

The fourth broad category used in my classificatory scheme was a ‘facilitative’ model, placing greater weight on executive expertise in statutory construction than closed approaches. Such a model recognises and incorporates views from a range of institutional perspectives (‘interpretative pluralism’), rather than maintaining judicial hegemony. While my survey suggested that this approach is infrequently used, there is nonetheless a subordinate discourse to be excavated from the Court’s jurisprudence which recognises interpretative pluralism in one form or another.

The cases covered here include those where any judge expressed in *dicta* the potential for an open approach, regardless of whether or not such an approach played a role in their reasoning. For this reason, some of the cases referred to have been discussed above. I have also included in discussion here cases that were not centrally statutory interpretation cases, but nonetheless demonstrated potential for an open approach to linguistic interpretation which could be transferred to statutory cases. For purposes of presentation they are grouped here into three classes: (i) judgments incorporating interpretative pluralism; (ii) judgments relating to the expert decision making of tribunals; and (iii) judgments relating to the scope of Article 6 ECHR.

9.6.1 Interpretative Pluralism

The first set of cases share a mode of critical reflectiveness by the Court in that it considers and, to some extent, gives weight to the positive contribution an administrative interpretation can make to either the application or substance of the law.

R (N) v Lewisham London Borough Council, discussed above in relation to contextual source manipulation, is also an informative case study in terms of debates over the Court’s use of existing administrative practice to aid interpretation. The Court’s approach comprised a range of interpretative techniques but the relevant aspect here is the tentative, though not un-qualified, reliance of some of the justices on ‘settled practice’. The issue was whether the Court was willing to rely on a combination of longstanding lower court authority housing officers had relied upon for a substantial period of time. Lord Carnwath, in particular, was willing to countenance the need in some cases for legal correctness to give way to legal certainty for pragmatic reasons.⁹⁶ He holds that *Lewisham* represents the moment for the Court to recognise that:

⁹⁶ *R (N)* (n 33) [94] (Lord Carnwath).

[...] [w]here [a] statute is ambiguous, but it has been the subject of authoritative interpretation in the lower courts, and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts.⁹⁷

For analysis here, it is noteworthy that Lord Carnwath's rationale is bound up with the need to recognise: '[...] pressures facing authorities in this area, and the financial constraints under which they are acting [...]'.⁹⁸ Of course, Lord Carnwath is not privileging an executive interpretation, but a judicial interpretation that has been generally adopted.⁹⁹ The case is about certainty and consistency in terms of the rule of law as much as anything else. But the limited recognition given to practice nonetheless suggests the *potential* for the courts take account of the wider institutional context within which interpretation occurs.

Lord Hodge, for the majority, is also willing to give qualified weight to 'settled practice', albeit he saw no conflict in the case between legal correctness and administrative certainty.¹⁰⁰ Even when it comes to the notion of settled practice itself, his approach is less pragmatic than that of Lord Carnwath. He frames the point in terms of reliance on Parliament's presumed awareness of lower court authority when re-enacting the relevant provisions. His approach is thus better characterised as purposive rather than facilitative. But, nonetheless, he appears open to the concept. It also receives some limited support elsewhere in the Court's jurisprudence.¹⁰¹

The strong reaction of Lord Neuberger, in dissent in *R (N)*, is however more reflective of the Court's general interpretative method. For him, the purpose of the section and the property rights of vulnerable persons are compelling.¹⁰² The idea of 'customary meaning' is an anathema and the Court should concern itself with what the words actually mean.¹⁰³ The 'actual' meaning of the words in a 'hard' case like *N*, however, is subject to genuine disagreement. The words are capable of multiple interpretations. And the relevance and weight of the contextual resources which can assist in identifying Parliament's purpose are disputed. This demonstrates neatly the ways in which a correctness standard can obscure questions of judicial discretion. Lord Neuberger accuses the majority of policymaking,¹⁰⁴ but in his own judgment he reads values into

⁹⁷ *ibid* [95] (Lord Carnwath).

⁹⁸ *ibid* [97] (Lord Carnwath).

⁹⁹ He takes a similar line in *Haile v Waltham Forest London Borough Council* [2015] UKSC 34, [2015] AC 1471

¹⁰⁰ *R (N)* (n 33) [53] (Lord Hodge).

¹⁰¹ See *R (George) v Secretary of State for the Home Department* [2014] UKSC 28, [2014] 1 WLR 1831 [12] (Lord Hughes).

¹⁰² *R (N)* (n 33) [135] (Lord Neuberger).

¹⁰³ *ibid* [148] (Lord Neuberger).

¹⁰⁴ *ibid* [153] (Lord Neuberger).

PEA which go beyond the literal meaning of the statutory words.¹⁰⁵ He takes account, for example, of the practical impacts (or ‘policy’ implications) of different interpretations.¹⁰⁶ His criticism of the majority is thus misguided, suppressing the quasi-policymaking aspects of his own purposive approach.

While *N* may incorporate aspects of a facilitative approach, even Lord Carnwath’s pragmatism does not extend to allowing executive input into interpretation. Some support for an approach making conceptual space for the executive interpreter is however found elsewhere. In *Isle of Wight Council v Platt* the Court considered the meaning of ‘regular’ school attendance for purposes of the criminal offence faced by a parent whose child does not achieve that benchmark.¹⁰⁷ Baroness Hale gives the Court’s sole judgment, finding that ‘regular’ means ‘in accordance with rules drawn up by the schools’. Much of her judgment adopts the classic dynamic method described above, taking into account legislative history and caselaw on the relevant provision,¹⁰⁸ and carrying out a ‘differential diagnosis’.¹⁰⁹ This differential process includes consideration of whether ‘sufficiently frequently’ is the right interpretation, which Baroness Hale dismisses on the basis of nine reasons.¹¹⁰ Essentially for those same nine reasons, she considers that the meaning of ‘regularly’ is a question for schools to decide.¹¹¹ Alongside a range of matters characteristic of a closed process, such as historic legislative changes¹¹² her nine reasons also include qualitative aspects going to the underlying policy of avoiding disruption to a child’s education.¹¹³ Baroness Hale allows schools to determine how that policy is to be recognised; the meaning of ‘regularly’ is impliedly delegated to decision makers. This judgment only goes so far. Much of the method is closed. And the decision relies, in part, in Court’s own determination of the true policy underlying the Education Act. It thus has much in common with the courts’ longstanding approach of allowing decision makers leeway on questions of application.¹¹⁴ Nonetheless, in specifically allowing the meaning of regularly to be fleshed out by individual schools, the judgment displays some openness to interpretative plurality.

Some qualified support for a facilitative approach is also seen in *R (Brown) v Secretary of State for the Home Department*, concerning the meaning of a ‘significant number of people’ when determining the existence of state persecution for asylum purposes. States with a good track record of not

¹⁰⁵ *ibid* [128] (Lord Neuberger).

¹⁰⁶ *ibid* [151] (Lord Neuberger).

¹⁰⁷ [2017] UKSC 28, [2017] 1 WLR 1441.

¹⁰⁸ *ibid* [8]-[28] (Baroness Hale).

¹⁰⁹ *ibid* [29]-[41] (Baroness Hale).

¹¹⁰ *ibid* [32]-[41] (Baroness Hale).

¹¹¹ *ibid* [42] (Baroness Hale).

¹¹² *ibid* [34] (Baroness Hale).

¹¹³ *ibid* [40] (Baroness Hale).

¹¹⁴ *R v Monopolies and Mergers Commission* [1993] 1 WLR 23 (HL).

persecuting people were placing on a fast-track list, meaning that asylum seekers citing persecution from those countries would have their claims more quickly and readily dismissed. The Court holds that the Secretary of State does not have to rule out persecution entirely before putting a state on the fast track list, but had to be sure that persecution is not a 'general' feature of life. Of relevance here was an argument run by the Secretary that she should be allowed a margin of appreciation in undertaking her assessment where there is no way to reasonably quantify the level of persecution. Lord Toulson (supported by the rest of the Court) had no time for such an argument.¹¹⁵ Given the requirements of the Geneva Convention, and more generally the human suffering at stake, there were strong arguments for avoiding giving the Secretary of State a free hand.¹¹⁶ Yet, as Lord Hughes points out in concurrence, the majority's approach to interpretation could effectively eliminate entirely a discretionary area of judgment afforded to the Secretary of State by the legislation. If a state cannot be designated where a 'reasonable section of the community' is persecuted, however small, then the Secretary of State's discretion is reduced to nothing.¹¹⁷ He notes, furthermore, that this forecloses her ability to take into account a range of circumstances.¹¹⁸ Again, there is some support, if only *in obiter* in a concurrence, for a more collaborative approach to interpretation.

Finally, in *R (Cornwall Council) v Secretary of State for Health*, the Court had to unpick a fiendishly complex set of circumstances in determining in which of three council areas a person was 'ordinarily resident' for purposes of the National Assistance Act (NAA). This case receives further consideration in the next chapter. The relevant point, for now, is Lord Wilson's characterisation of the majority approach. Lord Carnwath, for the majority, takes a closed interpretative approach. Notably, he rejects the Secretary of State's reading of the NAA on the basis that, while justifiable as a 'policy choice', it is unjustifiable under the terms of the statute.¹¹⁹ Lord Wilson, however, characterises the majority's approach as a policy decision dressed up as interpretation, which is precisely the same criticism that Lord Carnwath had made of the Secretary of State's approach.¹²⁰ While I would not characterise Lord Wilson's approach as facilitative, his critique of the majority reasoning in *R (Cornwall Council)* evidences a form of implicit openness, because it draws attention to the policymaking processes inherent in a purposive approach.

¹¹⁵ [2015] UKSC 8, [2015] 1 WLR 1060 [23]-[24] (Lord Toulson).

¹¹⁶ *ibid.*

¹¹⁷ *R (Brown) v Secretary of State for the Home Department* [2015] UKSC 8, [2015] 1 WLR 1060 [30] (Lord Hughes).

¹¹⁸ *ibid* [34] (Lord Hughes).

¹¹⁹ [2015] UKSC 46, [2016] AC 137 [49]-[51] (Lord Carnwath).

¹²⁰ *ibid* [73] (Lord Wilson).

9.6.2 *Tribunals*

There is longstanding precedent for the courts to allow expert decision makers leeway in determining the proper application of statute, provided their approach falls within a range of reasonable interpretations.¹²¹ In similar vein, the Supreme Court showed in *R (Jones) v First-tier Tribunal* a willingness to manipulate the difference between questions of law and questions of fact in order to allow tribunals and minor courts some leeway to exercise their expert judgment.¹²² It also took a distinctly pragmatic approach to managing judicial review of tribunals in *R (Cart) v Upper Tribunal*.¹²³ In the cases decided in my reference period the Court has continued to show some deference to the policy making role of tribunals.¹²⁴ A tribunal has to actively exercise its expertise in order to benefit from this, and the Court will intervene where it discovers what it considers a clear error of law.¹²⁵ But the Court nonetheless shows some willingness to deploy doctrine flexibly in the face of institutional expertise.

A caveat is required. Tribunals, as Cane has shown, began life as part of the administrative apparatus of the state.¹²⁶ However, following a similar historical trajectory to the courts, which started out as part of the monarch's mechanics of governing before assuming independence, the tribunals have become increasingly court-like during the 20th century.¹²⁷ They still occupy something of a liminal space between the realms of law and policy.¹²⁸ But changes in their procedure and personnel have made them increasingly judicial in focus. This suggests the Court's rationale for allowing them greater leeway is not solely or even predominantly their expertise, but their position on the judicial 'side' of the constitution. This latent, or subordinate, strand in the jurisprudence wherein the Court is willing to recognise a role for policy-focused interpretation is then arguably an exception that proves the rule. Tribunal policy decisions are respected because this accords with traditional conceptions of the rule of law.

9.6.3 *Article 6 ECHR*

Article 6 provides that a determination of a person's 'civil rights and obligations', requires a fair and public hearing by an independent and impartial tribunal established by law. The scope of 'civil rights and obligations' is an autonomous concept, in the sense that it is for the European

¹²¹ *R v Monopolies and Mergers Commission* (n 114).

¹²² [2013] UKSC 19, [2013] 2 AC 48.

¹²³ [2011] UKSC 28, [2012] 1 AC 663.

¹²⁴ See e.g. *R (Electoral Commission) v City of Westminster Magistrates Court* [2010] UKSC 40, [2011] 1 AC 496; *Pham v* (n 29).

¹²⁵ See *MN (Somalia) v Secretary of State for the Home Department* [2014] UKSC 30, [2014] 1 WLR 2064.

¹²⁶ P Cane, 'Judicial Review in the Age of Tribunals' [2009] Public Law 479, 482. See also Justice Hickinbottom, 'Tribunal Reform: A New Coherent System' [2010] Judicial Review 103.

¹²⁷ See P Cane, *Administrative Tribunals and Adjudication* (Hart 2010) 70; G Richardson and H Genn, 'Tribunals in Transition: Resolution or Adjudication?' [2007] Public Law 116.

¹²⁸ See R Carnwath, 'Tribunal Justice – a New Start' [2009] Public Law 49; R Craig, 'Black Spiders Weaving Webs: The Constitutional Implications of Executive Veto of Tribunal Determinations' (2016) 79 Modern Law Review 166.

Court of Human Rights to determine its meaning.¹²⁹ In that Court's hands, it has been subject to inflationary pressures leading to its expansion beyond its initial confines.

Clearly, this is not centrally a question of statutory interpretation in the sense of the cases considered above. However, the Court's approach to the right to a fair hearing is instructive, because its interpretation of the extent of Article 6 is shaped by the policy focused nature of the question at stake.

In the early cases, the article retained its original scope in ensuring access to a court in private law cases.¹³⁰ It subsequently extended to cover administrative decisions *affecting* private law rights, such as town and country planning.¹³¹ It developed further to cover certain public law rights which are analogous to private law rights, such as contributory social security payments.¹³² Thereafter, some non-contributory benefits have been deemed to fall within Article 6's scope, provided the eligibility criteria are sufficiently clear cut to approximate an enforceable individual right.¹³³

The UK courts have struggled with the Article's scope and, in turn, the degree to which questions over resource allocation can be judicialised. In the leading case of *Runa Begum v Tower Hamlets London Borough Council* (concerning the claimant's refusal of accommodation under homelessness legislation) the House of Lords preferred to avoid grappling head on with the applicability issue by holding that *if* Article 6 were engaged then it would not have been breached.¹³⁴ Yet the difficulties here have continued to exercise the Supreme Court. In *Ali v Birmingham City Council*, Lord Hope carried out a full analysis of the authorities, concluding that Article 6 is not engaged where a benefit is '[...] dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met [...]'.¹³⁵ The claimants took the case to Strasbourg, where the ECtHR was unconvinced that the lack of definite criteria took the 'civil right' in issue outside the previous authorities relating to non-contributory welfare benefits.¹³⁶

The matter resurfaces in the Supreme Court in my reference period. *Poshteh v Kensington and Chelsea Royal London Borough Council* concerned a dispute over the suitability of an offer of housing

¹²⁹ On which see e.g. *Woonbron Volkshuisvestingsgroep v The Netherlands* (2002) 35 EHRR CD 161.

¹³⁰ See *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [78]–[88] (Lord Hoffman).

¹³¹ E.g. *Bryan v United Kingdom* 21 EHRR 342.

¹³² E.g. *Feldbrugge v The Netherlands* 8 EHRR 425.

¹³³ *Salesi v Italy* 26 EHRR 187; *Stec v United Kingdom* 41 EHRR SE 295; *Tsfayo v United Kingdom* 48 EHRR 457.

¹³⁴ [2003] UKHL 5, [2003] 2 AC 430.

¹³⁵ [2010] UKSC 8, [2010] 2 AC 39 [49] (Lord Hope).

¹³⁶ *Ali v United Kingdom* (2015) 63 EHRR 20.

accommodation.¹³⁷ It is clear from the focus of the judgment that the Supreme Court took the case in order to continue a dialogue with the ECtHR in light of *Ali v UK*. Lord Carnwath criticises the ECtHR for failing to consider properly the Supreme Court's '[...] concerns over 'judicialisation' of the welfare services, and the implications for local authority resources'.¹³⁸ He points out that the ECtHR's reasoning relies on *obiter* comments in two UK cases, and has failed to give sufficient regard to the concerns expressed in those judgments as to the potential impacts on resource allocation decisions of expanding Article 6's scope.¹³⁹ Furthermore, he argues that the ECtHR has taken a 'questionable' view of its own previous consideration of the need for discretion in the area.¹⁴⁰ Given that in *Ali v UK* the ECtHR appears to be extending Article 6, and given the implications of judicialising polycentric decision-making, this is not a case where the Supreme Court considered itself bound by a 'clear and consistent' line of ECtHR cases.¹⁴¹ Lord Carnwath's judgment is suffused with the logic and language of deference. The Court considers it necessary to shape doctrine to take account of the complex, multi-factorial policy decisions falling within the discretionary purview of administrators. In particular, it does so because Article 6 potentially requires judicial consideration of the *substance* of a decision, rather than the process by which it is taken.

Why does any of this matter here? The Court seeks to shape doctrine, when construing the scope of Article 6, in light of its potential to lead to substantive review of questions of administrative policy. In particular it does so to avoid the courts being the ultimate arbiter of such questions. Thus, on one hand, the Article 6 jurisprudence is relevant because on a point of interpretation, the Court is willing to give significant weight to the needs of effective administration. On the other, there is an inherent contradiction in its failure to take account of those needs in the course of 'ordinary' statutory interpretation. The Article 6 question is, of course, different in kind from the questions at large in interpretation cases. It involves interpretation of an international instrument, taking account of caselaw of the ECtHR. Further, if the UK courts over-interpret the scope of Article 6, it is potentially harder for Parliament to redress that than would ordinarily be the case. It nonetheless flags up some of the inconsistencies in the application of closed interpretative processes in terms of the Court's general awareness of the policy issues in play.

¹³⁷ [2017] UKSC 36, [2017] 2 WLR 1417.

¹³⁸ *Poshteb v Kensington and Chelsea Royal London Borough Council* [2017] UKSC 36, [2017] 2 WLR 1417 [33] (Lord Carnwath).

¹³⁹ *ibid* [34] (Lord Carnwath).

¹⁴⁰ *ibid* [35] (Lord Carnwath).

¹⁴¹ *ibid* [36]-[37] (Lord Carnwath). The 'clear and consistent' test is set out in *Manchester City Council v Pinnock* [2011] UKSC 6, [2011] 2 AC 104 [48].

9.7 Conclusion

This chapter forms the baseline for the theoretical discussions and case studies in the next. Three points by way of summary are required. First, my survey approach suggested that the predominant means of interpretation deployed by the Court in the period under analysis is closed, leaving interpretation in the hands of the judiciary. While the Court occasionally deploys an open, institutionally collaborative approach, interpretation is ordinarily treated as a question of law and thus decided on a correctness standard. Text is central to that task, but pure textualism is virtually non-existent. The Court relies mainly on purposive and values-based approaches. In particular, it relies on a model which Eskridge has termed ‘dynamic interpretation’, wherein the Court looks to a range of contextual sources to establish Parliament’s objective intention, but seeks to situate these within a web of current needs and beliefs.¹⁴² It also relies on a ‘values’ based mode of interpretation which ensures that the meaning of text takes account of principles of justice.

Second, analysis of the caselaw demonstrates that these prevalent closed approaches operate, in many ways, as a process of quasi-policymaking. Interpretation of necessity involves a measure of creativity and judicial discretion. However, what is perhaps underestimated is the extent to which the exercise of this discretion, in the reconciliation of hard cases, operates structurally in a manner analogous to administrative policymaking. This has important institutional and constitutional implications. Institutional competence and constitutional principle have led questions of policy, in the sense of discretion or expedience, to fall to Parliament and the executive. I have suggested in earlier chapters that this approach erects an unhelpful distinction between law and policy which inhibits effective institutional functioning. Something of the same error is seen here, in that questions *potentially* best considered by institutions other than the courts are being wrapped up in questions of law. This is not to argue that judges must defer to administrative interpretations of statute. But it does mean there is a need to consider whether the current dominant approach leads to the most effective policy outcomes. In the next chapter, I situate these issues in a wider constitutional framework, and seek to propose a modest reformation of interpretative practice.

¹⁴² See Eskridge (n 34). See also S Gagler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37 Monash University Law Review 1.

Chapter 10. Bifurcation, Constitutional Inconsistency, and the Need for Pragmatic Deference

10.1 Introduction

In the preceding chapter, a survey of a selection of Supreme Court cases demonstrated that statutory interpretation in the UK Supreme Court is predominantly a ‘closed’ process (on which see Chapter 3). It leaves limited scope for administrators to play a role in the elaboration of the plans, or policies, laid down by Parliament in statute. Analysis of the substantive caselaw also suggested the Court’s processes of interpretation are, themselves, a process of quasi-policymaking. Clearly, there are important normative reasons for judicial supremacy in the interpretation of statute. It is potentially at odds with both the democratic principle of Parliamentary sovereignty and the rule of law to argue otherwise. Yet given the inherent difficulties in identifying objective intent, and the fact that statutes can never contemplate and address all the matters to which they will apply, interpretation is a process of bounded creativity. For statutory interpretation to be entirely a question of judicial discretion, I will argue, to some extent runs against the grain of administrative law principle in arrogating questions of substance to the courts. There is a subordinate discourse within the Court’s interpretative practice which is more facilitative, in terms of incorporating administrative interpretative expertise. Yet this jurisprudence is neither particularly well developed, nor properly central in models of statutory interpretation.

In this chapter, I situate the results from this interpretative microcosm within the wider constitutional universe. I argue that the trends identified are a symptom of the UK’s gradualist constitutional order, insofar as the evolving models of constitutionalism have not fully adapted consistently and effectively to the needs of the administrative state (on which see Chapter 3). While interpretation must rely on a background theory of constitutional propriety, current approaches to statutory interpretation imply a background theory which demonstrates an inconsistent and incomplete understanding of the developing constitutional order. In particular, applying a standard of legal correctness to questions of policy-making can undermine the proper role of the administration in the constitution. While, clearly, it is not for the executive to determine definitely the meaning of statute, there is room for its views to play a greater role than is currently occurring in practice. Via a series of case studies, I illustrate the problematic dynamics to which these misunderstandings can cause. In line with the analysis in earlier chapters, I argue that the current approach to interpretation risks bifurcated outcomes (i.e. in the intra-doctrinal sense, namely the tendency of review to shuttle between strong and weak forms of review).

Using the subordinate, open model of interpretation described in Chapter 8, supplemented with additional evidence from my case studies, the final part of this chapter sets out a tentative solution. I develop an interpretative approach which emphasises the role of executive discretion (or policymaking) in statutory interpretation. I argue that a ‘dynamic’ model of statutory interpretation could evolve to incorporate a range of context-sensitive methods including, where relevant, the claims of effective administrative policy making.

10.2 Misunderstanding the Constitution: Is Parliamentary Sovereignty Sufficient as a Background Constitutional Theory?

The process by which a court interprets statutory text necessarily requires an underlying constitutional theory.¹ That theory operates not only at the macro-level (i.e. parliamentary sovereignty requires courts to give effect to statutes), but in the micro-level resolution of individual cases. The methods used to solve interpretative dilemmas, the manner in which those methods are deployed, and the extent to which a judge is willing to adhere to or depart from statutory text, all require an understanding of the proper constitutional role of the institutions of the state.² Each interpretative undertaking thus engages with core constitutional concepts; with the meaning and proper extent of the separation of powers and the rule of law. As Bix puts it:

legal interpretation [...] occur[s] against a background of political debates and practical problems. For example, issues of judicial practice within a particular legal system often turn on how much power should be delegated to the judiciary, to what extent the judiciary should co-operate with the legislature, and how clearly the legislature must speak in order for citizens to be bound by the enactments.³

Since the shift in power from monarch to Parliament in the 17th century onwards, the primary interpretative role of the judiciary has increasingly been predicated on a doctrine of legislative sovereignty. The traditional theory runs as follows. Parliament is sovereign in the constitution, and the judicial role is to ensure that its commands have effect by ensuring they are given an accurate interpretation. The scope of executive discretion is, accordingly, bounded by the limitations of that interpretation. Through the objective identification of Parliament’s will, not only do the courts ensure that the will of the people’s representatives prevails, but they also minimise the risks of either judicial activism or its perception.⁴

¹ See A Rosen, ‘Statutory Interpretation and the Many Virtues of Legislation’ (2017) 37 *Oxford Journal of Legal Studies* 134.

² See J Bell and G Engle, *Cross on Statutory Interpretation* (3rd edn, Butterworths 1995) 40–42.

³ B Bix, *Law, Language and Indeterminacy* (Clarendon 1993) 3.

⁴ Bell and Engle (n 2) 21–47; A. Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (CUP 2018) 29–31.

This democratic justification for the judicial role is simple but compelling, and on its face defensible in institutional terms. Judicial independence and objectivity mean that judges are more likely to arrive at a disinterested interpretation of Parliament's will than any other party.⁵ They possess the skills, training and experience to perform that job to a high degree. From a rule of law perspective, the doctrine of precedent ensures that interpretations are stable, allowing persons and organisations to plan in accordance with relatively fixed expectations.⁶ These points exert a strong force in terms of informing judicial practice. However, it is important to recall that this traditional Diceyan approach to constitutional theory and practice has over time come under pressure from competing versions of constitutionalism, centred less on the supremacy of an individual institution and more on a plural conception of constitutional authority.⁷ While parliamentary sovereignty remains the primary source of legal authority in accordance with the extant rule of recognition,⁸ constitutional authority is to an increasing extent shared.⁹

On one hand, the courts have developed their constitutional role. They have shaped the common law and deployed values-based interpretative method to ensure that government operates within, and is constrained by, a framework of liberal democratic principle.¹⁰ They have shaped a richer version of the separation of powers wherein the Court's task is not simply to police the boundaries of Parliamentary intent, but to play a positive role in framing the aims and values of a liberal democracy.¹¹ As set out in the previous chapter, even in a limited selection of recent Supreme Court judgments a significant portion of judgments are driven by fundamental values. There are also prominent hints in the jurisprudence of limits on Parliament's sovereignty. Baroness Hale asserts, for example, in *R (Jackson) v Attorney General* that there are certain things that it may not be possible for Parliament to achieve via legislation. Her example there is removing rights to judicial review.¹² There has been an expansion, in short, of the formally democratic model, based on the mechanical translation of Parliament's will, to a substantively democratic model in which the courts enforces conditions of democratic legitimacy.

⁵ On judicial independence see e.g. G. Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015).

⁶ See J Raz, *The Authority of Law* (OUP 1979).

⁷ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Classics 1982).

⁸ *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 [20]-[23] (Majority judgment).

⁹ For critique see e.g. I Harden and N Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson 1986).

¹⁰ See S Stephenson, 'The Supreme Court's Renewed Interest in Autochthonous Constitutionalism' [2015] Public Law 394, 395; R Masterman and S Wheatle, 'Unpacking Separation of Powers: Judicial Independence, Sovereignty and Conceptual Flexibility in the UK Constitution' [2017] Public Law 469; and JEK Murkens, 'Judicious Review: the Constitutional Practice of the UK Supreme Court' [2018] Cambridge Law Journal 349.

¹¹ See CJS Knight, 'Bipolar Sovereignty Restated' [2009] Cambridge Law Journal 361.

¹² [2005] UKHL 56, [2006] 1 AC 262 [102] (Baroness Hale).

The Diceyan ideal of Parliamentary sovereignty has also come under strain as a result of the increasing prominence of the executive in the constitution. Chapter 2 traced the development of the administrative state and judicial response to this. As noted there, the twentieth century saw a significant increase in the size and functioning of the administrative state. This went hand in hand with an upsurge in the amount of statute produced and in its decreasing specificity. The state operated in more areas of life, and greater latitude was left to administrative decision making.¹³ For some this has been a wholly negative development, undermining democratic accountability.¹⁴ A significant achievement by the courts in the last half century has been the development of legal methods for coping with an increasingly empowered executive.¹⁵ Nonetheless, the overarching constitutional trajectory permitted the executive a greater role in the development and delivery of policy.

The constitutionally normativity of executive discretion is reflected in constitutional theory and practice in a number of ways. First, there is an extent to which statutory interpretation in the Supreme Court's own caselaw affords respect to executive views. Chapter 9 set out the evidence of an 'open' model of interpretation within the cases. These cases recognise, in varying ways, the discretionary aspects of interpretation and concomitant need to afford decision makers a degree of autonomy. This approach to interpretation is not novel to recent Supreme Court cases. There is longstanding authority which recognises the role for executive input into the *application* of statute.¹⁶ While such authority posits a distinction between statutory interpretation and application which I argue is inherently instable, it nonetheless implicitly recognises the interrelatedness of statutory interpretation and discretion. In doing so, it affords greater respect to institutional reasons for privileging executive understandings of statute.¹⁷

Second, there is broader judicial recognition of the need to take account of institutional function in questions of substantive policy. The courts have shown a willingness, in the elaboration of administrative law principles at common law, to defer on such questions.¹⁸ While I have questioned the viability of fixed boundaries between the two, it is nonetheless relevant here that doctrine incorporates latitude for executive decision making. Proportionality review, too,

¹³ See e.g. P Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016) ch 2.

¹⁴ See e.g. G Hewart, *The New Despotism* (Ernest Benn 1929); CK Allen, *Bureaucracy Triumphant* (OUP 1931).

¹⁵ See *R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 (HL) 641.

¹⁶ See *R v Monopolies and Mergers Commission* [1993] 1 WLR 23 (HL).

¹⁷ See R Sainsbury, 'Administrative Justice: Discretion and Procedure in Social Security Decision Making' in K Hawkins (ed), *The Uses of Discretion* (Clarendon 1992) 295.

¹⁸ E.g. *R v Cambridge Health Authority ex parte B* [1995] EWCA Civ 49 (CA); *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [69] (Lord Hoffmann).

incorporates a formal doctrine of deference to mitigate the inherently substantive nature of that form of review.¹⁹

Third, wider constitutional principle recognises, to some extent, the normative and practical reasons to leave significant administrative powers in executive hands (a point which requires more elaboration than I can provide at this juncture). I am not advocating unbridled executive power. The trajectory of constitutional evolution has, rightly, been towards accountability and the reduction of unfettered executive power.²⁰ But those aspect of principle which privilege executive power are worth keeping in mind. As Lord Mustill explained in *Fire Brigades Union*, the executive has its own, largely exclusive domain in terms of administration of the country.²¹ In the case of central government, the UK constitution continues to rely in part on residual prerogative powers, exercisable in the main by the Government (or the Queen on the advice of Government).²² It has not entirely shifted to a system whereby the Government has to point to a power specifically afforded it by Parliament. Statutory bodies, such as local authorities, must point to such power. But even then, the need for broad executive power is recognised by changes such as the ‘general power of competence’.²³ Furthermore, Westminster-constitutionalism relies on a strong executive. The executive has effect command of the legislative work of Parliament. This has been decried by some,²⁴ and reforms has taken place over time to reduce executive dominance.²⁵ But nonetheless the central fact of executive dominance remains true. Finally, and relatedly, the accountability of the executive to Parliament via the network of conventions shaping its existence and ensuring democratic oversight reinforces the centrality of the executive within the constitution. The system is designed, to the extent the term is apt, to facilitate the dominance of the executive branch. That is not to say there is no accountability or that the executive’s powers are unchecked, but the centrality of the executive branch is a constitutional fact.²⁶ These arguments are, of course, more relevant to central government than the wider executive.

There is thus constitutional recognition, embedded in legal principle, of the relative institutional capabilities of the courts and the executive. Nonetheless, as Chapter 9 demonstrated, in an indicative dataset of public law cases in the UK’s apex court mainly took a closed approach to

¹⁹ See Chapters 2 and 4.

²⁰ See e.g. J Jowell, ‘Administrative Law’ in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2005) 373.

²¹ *R v Secretary of State for the Home Department, Ex p Fire Brigades Union and Others* [1995] 2 AC 513 (HL) 567 (Lord Mustill).

²² See T Endicott, *The Stubborn Stain Theory of Executive Power From Magna Carta to Miller* (Policy Exchange 2017) <https://policyexchange.org.uk/wp-content/uploads/2017/09/The-Stubborn-Stain-Theory-of-Executive-Power.pdf> accessed 9 September 2018.

²³ Localism Act 2011, s 1(1)

²⁴ E.g. Lord Hailsham, ‘Elective Dictatorship’, the Richard Dimbleby Lecture (1976). See also *The Dilemma of Democracy: Diagnosis and Prescription* (Collins 1978).

²⁵ For a useful overview see R Masterman and C Murray, *Constitutional and Administrative Law* (Pearson 2018) 306-307.

²⁶ See W Bagehot, *The English Constitution* (OUP 2009) ch 1.

interpretation. There is a subsidiary ‘open model’ which allows the executive a role, bounded yet substantive, in interpretation. But that model is represented in only a minority of cases.

I also showed in the Chapter 9, via analysis of a range of cases, that the process of the statutory interpretation is analogous to a process of policy making. For this reason, the Court’s general interpretative approach (i.e. one of legal correctness) represents, if not a misinterpretation of the modern constitution, then certainly an incomplete elaboration of one of its core principles.

Insofar as the practice of statutory interpretation constitutes a process of policy making, in failing to properly take account of the potential role of the executive in the reification of statutory meaning it neglects wider constitutional principle. Nor is this simply a theoretical issue. In the next section, I will demonstrate how the ‘incomplete’ theorisation of statutory interpretation is impacting upon the effectiveness of its practical application.

10.3 A Familiar Pathology: Bifurcation

In Chapters 4, 5 and 6, I discussed the ways in which the Court’s approach to questions of policy in administrative law has led to a sporadic phenomenon of ‘bifurcation’ (i.e. a tendency for review to shuttle between overly active and overly active approaches). This term was used, in part, to engage with and critique discussions in the literature regarding what I have termed inter-doctrinal bifurcation (i.e. whether substantive review should constitute one or two standards). Inter-doctrinal bifurcation in this sense is not directly relevant in the context of statutory interpretation. However, I have continued to use the term ‘bifurcation’ in my study of statutory interpretation to refer to the potential for review to lapse into strong and weak standards for two reasons. First, for the sake of consistency with earlier chapters. Second, and more importantly, to situate the analysis within my broader argument that the development of UK administrative leads to bipolarity in terms of the intensity of review.

The discussion in this chapter so far has argued that the background theory behind statutory interpretation in the UK courts is out of sync with constitutional realities. Interpretative practice, following the logic of Parliamentary supremacy, applies a standard of correctness; government bodies must act within the boundaries of their statutory authority, as objectively identified by the courts. However, that process of interpretation is akin to a process of policymaking. In this sphere the constitution generally recognises the practical and normative reasons for executive pre-eminence. The judicial role is therefore troubled by some contradiction. In this section, I use two examples to demonstrate generally how the limited space for issues of policy within interpretative doctrine leads to a series of pathologies overlapping with the problems encountered in questions of substantive review (namely: (i) centrally, an unstable combination of weak and strong review; (ii) exacerbation of judicial attitude; and (iii) an inconsistent approach to

questions of policy, in that overly legalistic approaches cut across effective institutional functioning, while on occasion clear flaws in the policymaking process can go untested). In section 10.4 I will discuss in greater detail examples of how these pathologies have emerged within my dataset.

The fundamental issue is that interpretative doctrine implicates the courts in adjudication on policy questions, subsumed beneath a façade of parliamentary intention. That places judges in a potentially invidious position, but also leads to inconsistent decision making insofar as they are having to reconcile an objective, correctness standard of review with a subjective, creative process of interpretation. In particular, it can lead, as in the case of substantive review, to both deference and strong legalism. The inconsistency can be seen in two broad ways: (i) historically contingent judicial attitudes to interpretation; (ii) judicial divergence within discrete cases.

10.3.1 *Historically Contingent Approaches to Interpretation*

Bifurcation emerges through the courts' varying approaches to interpretation in cases involving government. Clearly approaches will differ from judge to judge and case to case. Broad trends can however be identified. In Chapter 2 I explored the functionalist critique of judicial power, including criticism in the early half of the twentieth century from critics like Laski and Jennings, to the effect that strict literalism was suffocating the emergence of effective government.²⁷ Yet for most of the 20th century, up until the 1960s, the courts were willing to allow the executive a wide discretion. Notorious cases such as *Liversidge v Anderson* illustrate the point most clearly.²⁸ But an attitude of deference was generally shared.²⁹ For a time, then, the courts' approach to interpretation was subjecting administration to *too little* scrutiny.

A series of decisions issued by the House of Lords in the 1960s heralded a broader change of approach, leading over time to the development of stronger administrative law doctrine and judicial scrutiny of government decision making.³⁰ Regulation by the judiciary has, by and large, become gradually more intensive, leading to calls in some quarters for a greater judicial reticence.³¹ Arguably, then, interpretative method can now be lead to *too much* scrutiny. The recent case of *R (on the application of Privacy International) v Investigatory Powers Tribunal* is a case in point,

²⁷ H Laski, 'Judicial Review of Social Policy in England: A Study of *Roberts v Hopwood*' (1925–26) 39 *Harvard Law Review* 832; WJ Jennings, 'Courts and Administrative Law – the Experience of English Housing Legislation' (1936) 49 *Harvard Law Review* 426, 430.

²⁸ [1942] AC 204 (HL).

²⁹ For a useful overview see R Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart 2002).

³⁰ Notably: *Ridge v Baldwin* [1964] AC 40 (HL); *Conway v Rimmer* [1968] 2 WLR 1535 (HL); *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997 (HL); *Anisminic Ltd v Foreign Compensation* [1969] 2 AC 147 (HL).

³¹ See e.g. P Sales 'Modern Statutory Interpretation' (2017) 38 *Statute Law Review* 125.

wherein the Court took a creative interpretative approach which privileged judicial oversight of errors of law, regardless of the terms of a statute.³²

While the shift in attitude away from strong deference toward government is to be generally applauded, it is important to recognise the role of attitude here. Interpretation can be more or less formal; more or less creative; or more or less respectful of views of particular actors, depending on judicial discretion. The attitude toward the appropriate intensity of judicial scrutiny which emerged in the late 20th century occurred with limited consideration of the *purpose* of administrative law's role in regulating institutional functioning.³³ In particular, the gradual shift from weak to strong models of interpretation took place without concerted consideration of the potential role of policymaking in the interpretative task. Essentially, a form of bifurcation takes place at a temporal level, without sufficiently careful analysis of the implications of shifting jurisprudence for administrative policymakers. The courts initially adopted a weakly deferential approach before a process of gradual conversion to a more judicially astringent model of review.

Anisminic Ltd v Foreign Compensation Commission and its aftermath illustrates the practical difficulties here of a shift from deference to legalism. In this case, the House of Lords took both a strong, value-based approach to interpretation of an otherwise relatively clear ouster clause, and also took steps leading in due course to the abolition of historic distinctions between errors within and outside jurisdiction. Any legal error identified by the courts would, henceforth, invalidate a decision.³⁴ This abolition of the old jurisdictional distinctions deprived the courts of one possibility for allowing executive decision makers some leeway in the construction and application of statute.

That has subsequently re-emerged in the deference to which the courts on occasion show decision makers in terms of questions of application. In cases where a statutory term permits of a range of reasonable meanings, the courts may elect to police the boundaries of that range, but leave application *within* those boundaries to the decision maker.³⁵ The approach has been endorsed by the Supreme Court in *R (A) v Croydon London Borough Council*.³⁶ Beatson was thus prescient in his suggestion that the abolition of 'jurisdictional' questions would give rise to a need which would be addressed elsewhere.³⁷ As the open cases in my dataset showed, the courts have the means to recognise the interrelationship between interpretation and policymaking.

³² [2019] UKSC 22, [2019] 2 WLR 1219 [105] (Lord Carnwath), [160] (Lord Lloyd-Jones).

³³ Jowell (n 20) 391.

³⁴ *R v Lord President of the Privy Council, Ex p Page* [1993] AC 682 (HL).

³⁵ *R v Monopolies and Mergers Commission* [1993] 1 WLR 23 (HL).

³⁶ [2009] UKSC 8, [2009] 1 WLR 2557.

³⁷ J Beatson, 'The Scope of Judicial Review for Error of Law' (1984) 4 Oxford Journal of Legal Studies 22, 44-45.

Yet the application doctrine is limited. It is optional whether this approach is used by the courts, and may be deployed or suppressed as a matter of judicial discretion. In the cases I considered, its use is rarely seen. Others have noted that it tends to be underused more generally.³⁸ And *Privacy International* confirms that the Court prefers the *Anisminic* approach. Further, the application approach leaves fundamental questions of interpretation as entirely a matter for judicial control. In doing so, it tends to replicate the logic of bifurcation. In *A*, for example, the Supreme Court considered whether a local authority had duties towards children who *appear* to be a child, or to persons actually under 18. Baroness Hale held that questions as to the level of service to be provided to children were a question of application. Thus the interpretation of a ‘child in need’ left scope for administrative discretion. The question of who is a ‘child’, however, is one with right or wrong answers.³⁹ One sees immediately, and in a way reminiscent of the logic seen in the substantive review, the ways in which statutory interpretation can polarise into weak and strong review on the basis of judicial fiat. The Court is allowing the administrator a measure of discretionary judgment, but it is a question of judicial discretion where the line between questions of law and questions of policy is drawn. The overarching point is that the shift from weak to strong interpretation has left questions of the role of administrative functioning which continue to trouble the courts.

10.3.2 *Bifurcation in the Jurisprudence*

The second way in which this bifurcatory pathology (i.e. a tendency to shuttle between strong and weak form review) has emerged is at the level of individual cases. I have argued that interpretation involves policymaking, and that it is accordingly not always appropriate to apply a correctness standard of review. The correctness shoe is likely to pinch the most in those cases where the issues at stake are questions for executive discretion, such as resource allocation. A well-known example is found in two House of Lords decisions dealing with the question of whether local authority resources were relevant to the extent of a statutory duty: *R v East Sussex County Court ex p Tandy*,⁴⁰ and *R v Gloucestershire County Council ex p Barry*.⁴¹ In *Tandy*, the House held that a duty to provide ‘suitable’ education for a pupil, meaning ‘efficient education’ taking into account a pupil’s age, ability, aptitude and any special needs, could not include consideration of resource implications. The duty was to provide statutorily mandated education, so the authority’s job was to assess what education was needed and then find the appropriate resources. In *Barry*, however, the House considered the similar question of whether authority resources were relevant to a duty to ‘make arrangements’ for persons whom it considered ‘necessary’ to provide

³⁸ See P Daly, ‘Deference on Questions of Law’ (2011) 74 *Modern Law Review* 694, 719.

³⁹ [2009] UKSC 8, [2009] 1 WLR 2557 [26]-[32] (Baroness Hale).

⁴⁰ [1998] AC 714 (HL).

⁴¹ [1997] AC 584 (HL).

meals and recreational provision. In this case, the authority's own resources were considered relevant. It is very difficult to reconcile the two judgments. On its face, the duty in *Barry* is couched in slightly softer language, which may appear to confer greater discretion. And it provides more flexibility only where the authority considers it 'necessary' to meet a person's needs. But in both cases the structure of the relevant duty was the same; an authority had to consider the level of provision necessary, and provide it. There is no clear distinction in terms of the relevance of financial considerations.

Comparison of the two cases thus provides evidence of the ways in which a bifurcatory logic emerges at the level of individual cases. Similarly framed provisions, on related topic matters, are given entirely contradictory interpretations; one very deferential, the other very directive. Faced with discretion on a question suffused with policy implications, the objective 'correctness' standard applied by the Courts leads to opposite conclusions. There are, then, *practical* consequences of failing to develop a mode of interpretation which takes account of both the policymaking dynamics involved in the process of identifying intent.⁴²

In both the historical development of statutory interpretation, and at the level of individual cases, the distortions to which a correctness approach to interpretation can give rise are evident. The next step is to consider whether, and how, such distortions have arisen in my selection of Supreme Court cases.

10.4 Case Studies & The Pathologies of Interpretation: Bifurcation in the Supreme Court

I have argued so far that the dominant 'closed' approaches to interpretation do not adequately address two factors. First, the creative role of interpretation in the elucidation of statute; and second, the recognition elsewhere in constitutional norms afforded to administrators in the development of policy. In the preceding section I have started to set out, in broad terms, the practical consequences to which this theoretical problem can give rise. In this section, returning to the cases in my Supreme Court dataset, I use a selection of case studies to illustrate in more detail how those consequences are emerging and the problems they entail in terms of the broader delivery of effective governance. Three implications are seen: (i) undermining administrative interpretation; (ii) bifurcation into deference and legalism; (iii) inconsistent judicial discretion.

⁴² Similar issues arise in recent Supreme Court cases such as *R (McDonald) v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, [2011] PTSR 1266 and *R (KM) v Cambridgeshire County Council* [2012] UKSC 23, [2012] PTSR 1189.

10.4.1 *Undermining Administrative Interpretation.*

The general adoption of a closed approach means that administrative interpretations will be subordinate to those of judges, cutting off potential benefit that administration expertise could play in illuminating statute. The field of housing policy and practice is one involving delicately balanced questions of human needs and broader resource implications. Indeed, the appellate courts have given weight to this point elsewhere. The ongoing dialogue between the Supreme Court and the ECtHR on the role of Article 6 ECHR in homelessness appeals has focused on the risks of judicialisation in a delicate area of policy.⁴³ The Supreme Court has consistently taken the line, in its dialogue with the judges in Strasbourg, that the types of question at play in these cases are pre-eminently for administrators.⁴⁴ Furthermore, since the decision in *Holmes-Moorhouse v Richmond upon Thames LBC* the higher courts have taken a generous approach to interpretation of decision letters written by housing officers.⁴⁵ The courts have recognised, in numerous ways, the complex policy problems in this area. The strength and resilience of closed interpretative approaches nonetheless shines through these cases.⁴⁶ While with one hand the Court fights to protect administrative discretion in this field from ECtHR intrusion, at the level of domestic interpretation it takes the opposite approach.

In *Nzolameso v Westminster City Council*, for example, considering an authority's duties to homeless persons under the Housing Act 1996 (the '1996 Act') the Court imposed stringent requirements on the investigations an authority had to undertake to comply with duties under section 208(1) of the 1996 Act to secure accommodation, as far as practicable, within its district.⁴⁷ In truth the authority in this case had made minimal effort to comply with the section 208 duty. But it is nonetheless instructive to compare the approach of the Supreme Court to the Court of Appeal. The Court of Appeal had been content to find for the Council, on the basis that even if there was limited evidence that it had considered how to comply with its duty in Mrs Nzolameso's case, the courts could nonetheless infer that it done so.⁴⁸ The Secretary of State for Communities and Local Government had intervened in the Supreme Court on the basis that this gave local authorities too little incentive to perform their duties effectively.⁴⁹ The Supreme Court, perhaps

⁴³ On judicialisation see e.g. A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000) and R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

⁴⁴ Most recently *Poshteh v Kensington and Chelsea Royal London Borough Council* [2017] UKSC 36, [2017] 2 WLR 1417 [23] (Lord Carnwath).

⁴⁵ [2009] UKHL 7, [2009] 1 WLR 413. The decision is cited in both *Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] PTSR 549 and *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811.

⁴⁶ For a useful analysis which has informed the discussion here see Ian Loveland, 'Reforming the Homelessness Legislation? Exploring the Constitutional and Administrative Legitimacy of Judicial Law-making' [2018] Public Law 299.

⁴⁷ *Nzolameso* (n 45) [27] (Baroness Hale).

⁴⁸ [2015] PTSR 211 (CA) [21]-[25].

⁴⁹ *Nzolameso* (n 45) [27] (Baroness Hale) [35].

encouraged by this intervention, took a much stricter approach. Baroness Hale sets out a range of matters an authority should be considering in such decisions.⁵⁰ In conclusion she goes so far as to suggest *in obiter* that authorities should have a policy, covering various issues and arrived at via a process she sets out, for procuring in-Borough housing. This is bifurcation in practice. The Court of Appeal was too willing to defer to administrative judgment, but the Supreme Court goes too far in terms of undermining administrative expertise.

In *Hotak v Southwark London Borough Council*, the Court considered the proper comparator for purposes of determining whether a homeless person is ‘vulnerable’ in section 189(1) of the 1996 Act.⁵¹ Lord Neuberger emphasised the primacy of the statutory text.⁵² However, following consideration of previous case law, and a reinterpretation of the leading case *R v Camden LBC ex parte Pereira*,⁵³ he determined that the comparison is to be made with an ordinary person if made homeless (i.e. rather than with an ordinary homeless person).⁵⁴ He has no time at all for the practical wisdom of decision makers, arguing that to do so will undermine statutory intent.⁵⁵ Likewise, he considered that the use of statistical evidence to determine vulnerability would be ‘dangerous’.⁵⁶ So, while the Court elsewhere recognises the difficult questions of resource allocation that permeate this field, practical knowledge is given short shrift.

Finally, in *Haile v Waltham Forest London Borough Council*, the Court considered the meaning of becoming homeless ‘intentionally’ for purposes of section 191(1) of the 1996 Act (again, this would determine the extent of an authority’s duties to an applicant for homelessness assistance).⁵⁷ Administrators in the case had followed, correctly, longstanding authority set down in *Din (Taj) v Wandsworth LBC*.⁵⁸ However, while purporting to *not* overrule *Din*, Lord Reed minutely dissected changes made to the statutory scheme in order to find for the claimant.⁵⁹ In truth, this was a case of effective overruling dressed up as distinguishing.⁶⁰ Lord Carnwath dissents on the basis that the statutory changes had made no substantive shift to the 1996 Act, whereas *Din* has a 20 year pedigree and authorities will have planned their work around it.⁶¹ Lord Reed’s approach meant that a housing officer following an orthodox procedure could not possibly have got the decision right. The case, on one view, is about the duties owed by the courts to longstanding precedent.

⁵⁰ *ibid* [36] (Baroness Hale).

⁵¹ *Hotak* (n 45).

⁵² *ibid* [59] (Lord Neuberger).

⁵³ (1999) 31 HLR 317.

⁵⁴ *Hotak* (n 45) [57] (Lord Neuberger).

⁵⁵ *ibid* [40] (Lord Neuberger).

⁵⁶ *ibid* [42] (Lord Neuberger).

⁵⁷ [2015] UKSC 34, [2015] AC 1471.

⁵⁸ [1983] 1 AC 657; [1981] 3 WLR 918.

⁵⁹ *Haile* (n 57) [59]-[63] (Lord Reed).

⁶⁰ *Haile* (n 57) [79]-[80] (Lord Neuberger).

⁶¹ *ibid* [88]-[89] (Lord Carnwath).

But, again, it shows a deprioritising of practical knowledge that fits into a pattern of broader judicial behaviour.

10.4.2 *Intra-curial Bifurcation*

I have argued that statutory interpretation is a form of policymaking, admitting of reasonable disagreement on questions of expedience. As with the proportionality balancing exercise, the application of a correctness standard to provisions permitting of a range of interpretations can lead to bifurcation into strong legalistic and weak deferential approaches. The practical consequence of this is that the Courts do not focus as effectively they could on the question of whether the administration has made full use of its institutional capabilities.

R (A) v Secretary of State for Health demonstrates the dynamic here.⁶² The case concerned the legality of a decision by the Secretary of State not to require Clinical Commissioning Groups in England to fund abortions for women usually resident in Northern Ireland. In legal terms, the case turned on the meaning of provisions in the National Health Service Act 2006 requiring the Secretary of State to promote a comprehensive health service in England designed to secure improvement (a) in the physical and mental health of the people of England and (b) in the prevention, diagnosis and treatment of illness. The question was whether this duty required him to direct primary care trusts to provide free abortion services to all persons present in their area, temporarily or otherwise. Clearly, the questions involved were sensitive ones involving patient autonomy and resource allocation.

Lord Wilson, writing for the majority, adopts the purposive approach described in the previous chapter. He looks to the statutory text,⁶³ including previous incarnations of the relevant provisions and the history of the statute's development.⁶⁴ He is swayed by two factors. He reads the text as affording the Secretary of State very broad discretion to people who live in England.⁶⁵ Therefore, to place the obligation on the Secretary of State argued for by the claimants would cut across the UK's devolutionary settlement, undermining Northern Ireland's decision not to fund abortions.⁶⁶ He also concludes with a point, expressly disavowed by the Secretary of State, that to hold otherwise would encourage health tourism.⁶⁷ Lord Wilson's judgment, framed in terms of Parliamentary intention, is thus highly deferential in terms of the discretionary space afforded the Secretary of State, no doubt in light of the nature of the decisions facing him. But it is important

⁶² [2017] UKSC 41, [2017] 1 WLR 2492.

⁶³ *ibid* [9]-[10] (Lord Wilson).

⁶⁴ *ibid* [11]-[16] (Lord Wilson).

⁶⁵ *ibid* [18] (Lord Wilson).

⁶⁶ *ibid* [20] (Lord Wilson).

⁶⁷ *ibid* [36] (Lord Wilson).

to note that the methods by which he reaches this decision are the judge-centric closed methods of contextual/purposive interpretation.

Lord Kerr, in dissent, deploys those methods of purposive interpretation to opposite effect. He looks to both text and statutory context, reading the provisions significantly more restrictively than Lord Wilson in determining that it was not open to the Secretary of State to exclude non-resident patients.⁶⁸ While he admits that ‘the people of England’ is an ‘amorphous’ phrase with many potential meanings, he looks to the practical realities of free movement in holding that the Secretary of State’s duties are not limited to residents.⁶⁹ He also diminishes the relevance of Lord Wilson’s devolution point, noting that the decision of the Northern Ireland Assembly not to fund abortions in Northern Ireland is in no way undermined by women’s ability to obtain abortions elsewhere.⁷⁰ In the dynamics of the two judgments the logic of bifurcation emerges: faced with a correctness standard in an area of sensitive policy making, the Court splits into camps of more and less deferential interpretation based on the outcomes at issue. Vitaly, the issue here is not one of subtly different interpretations of an unclear phrase. Rather, Lord Wilson for the majority deals with the lack of clarity in the statutory provisions by inferring that it thus allows the Secretary of State a broad area of discretion. Lord Kerr takes a much more legalistic approach in reading the provision as imposing, in some respects, strict duties. Again, bifurcation sees different, contrasting views on the role of judicial review emerge.

This dynamic is even more pronounced in the contrasting judgments of the majority and dissenters in *R (Evans) v Attorney General*. The case has attracted significant and extensive academic discussion because of the range of constitutional principle involved.⁷¹ A journalist sought details of advice sent by Prince Charles to various government departments under the Freedom of Information Act 2000 (FOIA). Following a decision of the Upper Tribunal requiring their release, the Attorney General exercised his power under section 53 FOIA to override the Upper Tribunal where he had ‘reasonable grounds’ to do so.

Lord Neuberger (with whom Lord Reed and Lord Kerr agreed) takes a ‘values’ approach. First, decisions of the ordinary courts should not be set asunder by any other party. Second, decisions of the executive should be subject to review by the courts. For Lord Neuberger, the Attorney General’s approach to section 53 ‘flouts the first principle and stands the second principle on its head’. Given the requirements of the ‘principle of legality’, extremely clear parliamentary

⁶⁸ *ibid* [54]-[70] (Lord Kerr).

⁶⁹ *ibid* [56] (Lord Kerr).

⁷⁰ *ibid* [77] (Lord Kerr).

⁷¹ See e.g. M Elliott, ‘A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution’s Relational Architecture’ [2015] *Public Law* 539; TRS Allan ‘Law, Democracy, and Constitutionalism: Reflections on *Evans v Attorney General*’ [2016] *Cambridge Law Journal* 38.

authority would be necessary for a member of the executive to overrule a judicial decision.⁷² On Lord Neuberger's account, section 53 was practically limited to cases where either there was a 'material change in circumstances' between a tribunal decision and consideration by the government, or where a tribunal decision were 'demonstrably flawed in law or fact'.⁷³ The effect of this is to close down executive discretion entirely, notwithstanding the apparently permissive text of FOIA itself. In bifurcatory terms, it shows judicial discretion operating in a strong manner to preclude executive decision making.

This outcome neglects the potential role of executive expertise in the illumination of statutory meaning. The interplay in Lord Neuberger's judgment of his reading down of the Attorney General's role, with his simultaneous privileging of the role of tribunals, is important. Tribunals, as set out in the previous chapter, occupy a liminal space at the law/policy boundary, yet they have become increasingly court-like in function and practice. Lord Neuberger's judgment is driven not only by underlying principle about the sanctity of court judgments, but also by the tribunals' specific expertise on the subject matter at hand.⁷⁴ Of course, the case dealt with a decision of the Upper Tribunal (and thus equivalent to the High Court)⁷⁵ but it is implicit that Lord Neuberger's consideration was driven in part by tribunals' skill and experience in the resolution of disputes over the propriety of releasing information.

Insofar as this point forms part of Lord Neuberger's reasoning, it serves to emphasise the extent to which his values-based judgment shuts down the Attorney General's own expert decision-making capacity. The statutory scheme of FOIA privileges the capabilities of the tribunals in decisions which straddle the law/policy boundary. And it is entirely proper not to afford the Attorney General undue leeway in the exercise of section 53, since casual application of the provision of that power could undermine FOIA entirely. FOIA does however envisage a role for matters within the knowledge and expertise of the Attorney General. The Attorney General has a *sui generis* role within government, providing neutral and objective advice like any lawyer, but also operating as a partial member of the executive. It is for this reason, for example, that government departments require the Attorney's permission to introduce retrospective legislation. The Attorney will operate with a lawyer's awareness of the risks of such legislation, but will take account of relevant policy considerations. Section 53 appears to be taking advantage of this, placing the power in the hands of a lawyer, yet affording scope for substantive policy reasons to play a role. Lord Neuberger upsets that delicate balance.

⁷² R (*Evans*) v *Attorney General* [2015] UKSC 21, [2015] AC 1787 [52]–[53] (Lord Neuberger).

⁷³ *ibid* [71] (Lord Neuberger).

⁷⁴ *ibid* [69] (Lord Neuberger).

⁷⁵ Tribunals, Courts and Enforcement Act 2007, s 3(5).

Returning to the question of bifurcation, if Lord Neuberger's approach to interpretation writes executive expertise out of the game entirely, the dissents from Lord Wilson and Lord Hughes allow it unfettered free play. In Lord Wilson's trenchant critique, Lord Neuberger's approach overturned the doctrine of Parliamentary sovereignty, re-writing the clear terms of FOIA.⁷⁶

While, for Lord Wilson, the use of section 53 to override a decision of a tribunal on a point of law was impermissible, Lord Neuberger had failed to appreciate that on questions of policy it is perfectly acceptable for an executive view to prevail.⁷⁷ For Lord Wilson, the Attorney General's view on the reasonableness of issuing a veto could be impugned only if misdirected on the facts or otherwise irrational.⁷⁸ Lord Hughes comes to a similar conclusion; a veto could be quashed only if predicated on a 'material misdirection'.⁷⁹

Three points are important here. First, the differences between the majority and minority judgments illustrate the bifurcation that can arise from the application of a pure correctness standard to disputable questions of interpretation. Second, Lord Wilson's judgment is pertinent to my general theme in highlighting the scope for judicial discretion inherent in the application of that standard. Against Lord Neuberger's values-based re-writing of FOIA, Lord Wilson lauds the objectivity of a 'plain-meaning' approach. In so doing, however, he demonstrates that this approach can be applied tactically to suppress otherwise relevant considerations. There is longstanding authority in *Anisminic Ltd v Foreign Compensation Commission* for careful consideration of statutes excluding the jurisdiction of the courts, which is arguably what section 53 sets out to achieve.⁸⁰ Lord Wilson's judgment, in its apparent simplicity, thus belies a more complex set of considerations. Furthermore, as noted above, Lord Wilson also argues that there is no problem with allowing the Attorney discretion on questions of policy. This sets up a distinction between law and policy which elides the quasi-policymaking processes demonstrated in the various tactics of the majority and minority judgments. Third, it is important to note that in case we see demonstrated the different visions of the judicial role that are inherent in the dynamics of bifurcation. For the dissenters, applying a plain-meaning approach, regulation is effectively primarily to be left to the political constitution. For the majority, the legal constitution imposes strict standards which require an expansive reading of the relevant provision.

The middle ground in the case was occupied by an important judgment from Lord Mance (with whom Baroness Hale agreed). For Lord Mance, a decision of the Attorney General to exercise the veto power in section 53 would be subject to a stricter standard of review than mere

⁷⁶ *ibid* [168] (Lord Wilson).

⁷⁷ *ibid* [171] (Lord Wilson).

⁷⁸ *ibid* [180] (Lord Wilson).

⁷⁹ *ibid* [153] (Lord Hughes).

⁸⁰ [1969] 2 AC 147 (HL).

rationality.⁸¹ He distinguishes between a disagreement as to background fact, and between a view on the merits. For the Attorney General to take a different view to the tribunal on the facts, there would need to be the ‘clearest possible justification’. On the other hand, it would be possible for the Attorney to disagree as to the ‘relative weight to be attributed to competing interests’ provided he had ‘properly explained and solid reasons’.⁸²

My argument in this section has been, primarily, that a correctness approach to interpretation can lead to bifurcation. Under a façade of objectivity, the innately creative nature of interpretation operates to allow judges to give effect to their own views. In ‘hard’ public law cases, this can lead to bifurcation in terms of strong and weak scrutiny of government action. Lord Mance’s judgment shows a potential reconciliation. His approach is significantly closer to Lord Neuberger’s than it is to the dissenters. Indeed, he accepts that his approach might allow the Attorney to disagree with a tribunal on the facts only ‘in the sort of unusual situation in which Lord Neuberger contemplates that a certificate may validly be given.’⁸³ To that extent, his is a ‘closed’ judgment.

Lord Mance’s approach is however rather more nuanced in terms of institutional pragmatics than are the views of either the majority or the dissenters. To that extent, the *Evans* judgment illustrates not just the problems of the approaches critiqued in this chapter, but also the potential development of the more pragmatic ‘open’ method described above (indeed, it may be thought of as hinting at the kind of ‘passivist’ approach advocated in Chapter 7). FOIA’s scheme, unusually, engages two different executive (or quasi-executive, in the tribunal’s case) policymakers. Lord Mance’s judgment, at least in principle, makes space for and requires both to exercise their expert faculties. Clearly, the tribunal is afforded respect; the Attorney may not trump its decision on the facts without very strong justification, or disagree lightly on its weighing of the competing interests. However, provided the Attorney has undertaken the sort of investigation that would allow him to produce properly explained reasons he is also afforded, at least theoretically, a degree of deference. Lord Mance’s view was that the Attorney’s disagreement in the case went to the background facts, not the weighing of the relevant principle. Given the fineness of that distinction, in practice this approach actually appears rather closer to Lord Neuberger’s than its abstract elaboration suggests. But it nonetheless provides the germ of a more institutionally sensitive model.

⁸¹ *ibid* [129] (Lord Mance).

⁸² *ibid* [130] (Lord Mance).

⁸³ *ibid* [130] (Lord Mance).

10.4.3 *Intra-curial Divergence.*

A rather rarer pathology, divergence is really an extreme extension of bifurcation, in which interpretation does not merely bifurcate into strong and weak forms of review, but devolves into unbridled judicial discretion. Such a phenomenon confirms the argument made above regarding the creativity of statute. Such cases show bifurcation's pathologies, in terms of practical outcomes, however, in that they disincentivise effective policymaking on the part of the executive.

The case of *R (Cornwall Council) v Secretary of State for Health* is a case in point.⁸⁴ The decision before the Court was in which of three council areas a person was 'ordinarily resident' for purposes of the National Assistance Act (NAA). Clearly, that is a vague term permitting of a range of interpretations. The case was further complicated by a highly complex factual background, in which the person in question could arguably have been 'resident' in any of three authority areas: Cornwall, Wiltshire, and South Gloucestershire.

Lord Carnwath, for the majority, takes a closed interpretative approach which takes into account a range of contextual matters. He looks to: the statutory context (including the long title);⁸⁵ the legislative background;⁸⁶ consideration of the nature of the NAA test by the Law Commission for potential reform purposes;⁸⁷ and caselaw.⁸⁸ The range of relevant factors testifies to both the difficulty of the decision, but also the potential discretionary scope of this form of 'dynamic' interpretation. Notably, however, Lord Carnwath downplays that aspect of the decision in framing it as a decision with a correct answer. Notwithstanding the complex, policy-type nature of the question, the Court treats the matter as one of law to be considered on a correctness standard.⁸⁹ Consistently with that view, he also rejects the Secretary of State's reading of the NAA on the basis that, while justifiable as a 'policy choice', it is unjustifiable in terms of the wording of the statute.⁹⁰ Seeking to uncover the 'policy' of the Act, Lord Carnwath dismisses strict linguistics and applies his multi-factorial approach in determining that Wiltshire is in fact the correct authority for statutory purposes.⁹¹

Lord Wilson's dissent characterises Lord Carnwath's approach as judicial policy decision masquerading as interpretation.⁹² Ironically, however, Lord Wilson's own approach is

⁸⁴ [2015] UKSC 46, [2016] AC 137. A further example is *R(N) v Lewisham London Borough Council* [2014] UKSC 62, [2015] AC 1259.

⁸⁵ *ibid* [33] (Lord Carnwath).

⁸⁶ *ibid* [34] (Lord Carnwath).

⁸⁷ *ibid* [37] (Lord Carnwath).

⁸⁸ *ibid* [39]-[48] (Lord Carnwath).

⁸⁹ *ibid* [43] (Lord Carnwath).

⁹⁰ *ibid* [49]-[51] (Lord Carnwath).

⁹¹ *ibid* [53] (Lord Carnwath).

⁹² *ibid* [73] (Lord Wilson).

characterised by the same contextual manipulation deployed by the majority. Lord Wilson expressly eschews a ‘policy’ based approach to the question, emphasising that he is ‘not a legislator’.⁹³ He looks to caselaw,⁹⁴ and legislative history,⁹⁵ before applying ‘differential diagnosis’ approach, comparing practical outcomes, to come to a conclusion.⁹⁶ While eschewing the policy approach he believes characterises the majority decision, Lord Wilson nonetheless engages in a mode of purposive analysis which the last chapter demonstrated as profoundly policy-focused in nature.

Why are these outcomes pathological? First, they take bifurcation to an extreme. The question is no longer simply whether the Court will allow the decision maker room for discretion, but which of a range of policy options the Court will select. This point is made emphatic by comparison with the decision of the High Court by Mr Justice Beatson.⁹⁷ Beatson J conducted a careful analysis of the relevant authorities and the Secretary of State’s decision-making processes. As noted above, the issues were highly complex and inevitably drew the courts into a process of policy-making. In the end, Beatson is swayed by the *care* which the Secretary of State had applied in making his decision. While the end decision was ‘artificial’ in terms of the NAA, the Secretary of State’s decision was not an unreasonable one.⁹⁸ The approach of the Supreme Court, on the other hand, does little to incentivise such painstaking deliberation. Beatson J effectively rewards the Secretary of State, in conditions of uncertainty, for his conscientious approach. The Supreme Court trampled over his efforts. Of course, if an error at law is at issue, then the courts have long determined that it is appropriate for them to step into the decision maker’s shoes.⁹⁹ Yet the point here is that when a statute (or plan, using Shapiro’s term) is either very open-textured or unclear, it is not clear that the law is the right place to find an answer. Essentially, as I have shown, resolving such questions is to a high degree a question of policy. Applying a standard of legal correctness in this context is illogical on its face and, to an extent, at odds with aspects of constitutional principle.

10.5 A New England? Developing an Institutionally Sensitive Approach to Interpretation

It is a mantra of the Court that statutory interpretation is a process of identifying Parliament’s intent. I have shown that this is not unproblematic. Interpretation is a process of shadow policymaking and assertions to the contrary are a means, unconscious or otherwise, of concealing

⁹³ *ibid* [65]-[66] (Lord Wilson).

⁹⁴ *ibid* [67]-[69] (Lord Wilson).

⁹⁵ *ibid* [70] (Lord Wilson).

⁹⁶ *ibid* [73] (Lord Wilson).

⁹⁷ [2013] LGR 197 (HL).

⁹⁸ *ibid* [87]-[89] (Beatson J).

⁹⁹ *Privacy International* [38] (Lord Carnwath).

activism.¹⁰⁰ Simplistically characterising interpretation as an objective process, reflecting the foundational principle of parliamentary supremacy, is to fall into error. This represents an incomplete understanding of constitutional theory and reality. It fails to take sufficient account of the institutional aptitudes of the executive elsewhere afforded constitutional recognition. And, in so doing, it can lead to a series of practical pathologies.

Given all this, and the longstanding recognition in philosophy and literary criticism of the political implications of ascribing authorship, there is a demonstrable need to develop constitutional thinking around uncritical reliance on parliamentary intention and supremacy.¹⁰¹ A range of commentators have advocated deference on questions of law.¹⁰² But they have not addressed the need to connect constitutional theory and practice in the manner done here, nor proposed a functionally satisfactory approach. This final section proposes a modest development of current practice, drawing on both the subordinate ‘open’ models of interpretation identified in the previous chapter and comparative perspectives, in order to start this process.

A reason why background constitutional theories of interpretation in the UK have failed to keep pace with constitutional and institutional reality is, in part, the UK’s unsystematic constitutionalism. As described above, the constitutional order has moved from the system of Parliamentary monopoly described by Dicey to a richer model demonstrating multiple nodes of power.¹⁰³ The courts have a recognised role in the development of constitutional concepts. The administration has longstanding recognition in development and delivery of policy. However, the gradualist nature of these changes has hampered considered reflection on the role of the executive policymaker in the interpretation of statute.

Peter Cane’s distinction between co-ordinate and subordinate judiciaries is instructive here.¹⁰⁴ Cane compares the subordinate UK courts, passively giving force to legislative instruction, with the coordinate courts in the US, whose more clearly defined constitutional role gives them a status as policy actors in their own right. This coordination approach, predicated on a clearer separation of powers and roles, has as its corollary a culture wherein the interpretative role in the US is not uniquely one for the judiciary. In the codified US system, a more clearly defined separation of powers coexists with less clarity in terms of interpretative role. A plurality of

¹⁰⁰ See R Posner, ‘Statutory Interpretation – in the Classroom and in the Courtroom’ (1983) 50 *University of Chicago Law Review* 800, 816-17; Sir J Laws, ‘Illegality: The Problem of Jurisdiction’ in M Supperstone and J Goudie (eds) *Judicial Review* (Butterworths 1992) ch 4.

¹⁰¹ E.g. M Foucault, ‘What is an Author?’ in P Rabinow (ed), *The Foucault Reader: An Introduction to Foucault’s Thought* (Penguin 1984) 101. In a legal context see R Posner, *Law, Pragmatism and Democracy* (Harvard University Press 2005).

¹⁰² See e.g. Daly (n 38); R Williams, ‘When is an Error not an Error? Reform of Jurisdictional Review of Error of Law and Fact’ [2007] *Public Law* 793; P Craig, ‘Judicial Review of Questions of Law: A Comparative Perspective’ in S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law* (2nd edn, Edward Elgar 2017) 389.

¹⁰³ See N Bamforth and P Leyland, *Public Law in a Multi-Layered Constitution* (Hart 2003).

¹⁰⁴ Cane (n 13) 218–235.

constitutional authority goes hand in hand with a greater recognition of the potential for functional overlap. There is in that system, accordingly, greater need for institutional self-awareness (i.e. in the sense that the courts will consider carefully whether they are best placed to fix statutory meaning).

That is reflected in the US Supreme Court (USSC) decision in *Chevron USA Inc v Natural Resources Defense Council*.¹⁰⁵ In that case the USSC, recognising that resolving statutory ambiguity entails questions of policy as well as principle, established that the courts would show deference to reasonable agency interpretations of statute. This applied not only where Congress expressly legislated to provide agency discretion, but where there is silence or ambiguity in a statute an agency is charged with administering.¹⁰⁶ Why was this appropriate? First, because the USSC recognised the ‘writerly’, open-textured, nature of administrative statute. Second, because of reasons familiar to UK lawyers for deference to executive views on questions of substantive policy. Agencies ordinarily possess greater expertise in their area of proficiency than the courts. End users will rely on agency interpretations of statute, and to overturn this after what may be a lengthy period will subvert expectations. Further, statutory silence or ambiguity in the field of administrative law implies a legislative intention that an agency given a particular task will flesh out the gaps or resolve those ambiguities.¹⁰⁷ Of course, *Chevron* may be critiqued for going too far, with interpretation becoming arguably entirely a question of policy.¹⁰⁸ But that is really a question of judicial vigilance; the risks of the doctrine do not undermine its core justification.

In the UK, an historically subordinate judiciary has retained a formal interpretative role, reflected in the terminology and practice used by the courts, which paradoxically can more tightly restrict executive policymaking than its US cousin. This disjunction between doctrine and reality does not reflect the ways in which the UK constitution is more coordinate than it once was. The comparison demonstrates the contours of the problem more clearly. First, the notion of a purely passive interpretative role is misguided; the UK courts are acting as partial (or secondary) policymakers. This has become more pressing in light of the broad historical sweep toward open-textured statute, which leaves room for greater administrative discretion, but also greater judicial discretion.¹⁰⁹ Second, in developing its role as quasi-constitutional court, the Court is shifting orbit from (less) subordination to (more) coordination. While Parliament still reigns supreme for

¹⁰⁵ 467 US 837 (1984).

¹⁰⁶ See TW Merrill and KE Hickman, ‘Chevron’s Domain’ (2001) 89 *Georgia Law Journal* 833, 854.

¹⁰⁷ S Breyer, ‘Judicial Review of Questions of Law and Policy’ (1986) 38 *Administrative Law Review* 363, 368-9.

¹⁰⁸ E.g. M Aronson, ‘Should We Have a Variable Error of Law Standard’ in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart 2015) 241.

¹⁰⁹ See PS Atiyah, ‘Common Law and Statute Law’ (1985) 48 *Modern Law Review* 1.

most of the justices,¹¹⁰ the Court has to an extent reconceptualised itself as more akin to a coordinate, constitutional court. It has developed common law ‘constitutional’ rights.¹¹¹ Statute now takes effect within a network of rights and principles.¹¹² It has even hinted at limits on Parliamentary supremacy.¹¹³ It has been willing to overturn socioeconomic policy.¹¹⁴

There has thus been a shift to what might be termed ‘multi-vector constitutionalism’; a greater equality across the institutions of state.¹¹⁵ This has happened, however, without the critical judicial reflection that has taken place in the US in terms of the wider implications for role propriety in a plural constitution. Interpretative practice in the US addresses the risks of one constitutional actor arrogating too much of one function to itself.¹¹⁶ Of course, it would always be possible for Parliament to override an unwanted judicial interpretation, and it has done so. But this answer is insufficient given the constraints on Parliament’s time and scope for relevant issues to be brought to its attention.¹¹⁷ In short, a more practical solution is needed. This should exhort UK commentators to think carefully about the role of the courts in terms of policymaking, and to reconceptualise formal distinctions between law and policy which characterised the UK’s traditional approach to interpretation. In particular, interpretative practice needs to recognise the policymaking expertise of administrators in determining the substance of law.

The relatively limited claim I make from this is that the Court’s general approach is predicated on an understanding which incompletely realises the role of expert, executive interpretation. I do not suggest that the Court needs to adopt any alien, novel practice here. Rather, I am suggesting that the answer is to adopt an interpretative model which take fuller account of extant constitutional principle regarding the respect to be afforded to the executive’s institutional capabilities.¹¹⁸ I have spent some time showing that statutory interpretation itself is a question of judicial discretion. The short point is that it too should take into account (I put it no higher than that) relevant reasons to defer to executive interpretations.

The key is to determine what practical effect to make of the core insight here. In particular, the task is to draw the Court’s latent recognition of the need for institutionally pluralist approaches to

¹¹⁰ See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 [20] (Majority decision).

¹¹¹ E.g. *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455.

¹¹² *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL).

¹¹³ *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [102] (Baroness Hale).

¹¹⁴ E.g. *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45 [2012] 1 AC 621; *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453.

¹¹⁵ With thanks to Colin Murray.

¹¹⁶ On which see e.g. MS Paulsen, ‘The Most Dangerous Branch: Executive Power to Say What the Law Is’ (1994) 83 *Georgetown Law Journal* 217.

¹¹⁷ FJ Port, *Administrative Law* (Green and Co 1929) ch 4.

¹¹⁸ I rely on Adrian Vermeule’s self-confessedly contrarian use of a Dworkian model to justify administrative discretion in *Law’s Abnegation: From Law’s Empire to the Administrative State* (Harvard University Press 2016). Daly actually makes the same point (n 38) 701.

statutory interpretation into the mainstream. The starting point is to confirm what it does not involve. It is not my argument that the executive should have an unfettered ability to determine the extent of its own statutory powers. Nor, concomitantly, do I suggest that it is not the courts' role to rule out interpretations of statute which cannot be reasonably considered as falling within the meaning of the text. It is also vitally important to recognise that it is constitutionally proper, in a modern state, for the courts to use interpretative practice to give effect to underlying democratic principle. In the UK constitution, the lack of a formalised system of checks and balances, along with executive dominance of Parliament, mean that statutory interpretation plays a vital role in protecting rights fundamental to democratic functioning. And even within these red lines, I am not urging submissive deference to executive interpretations. I agree with commentators who have recommended that, in certain circumstances, courts should recognise that institutional factors should encourage deference to interpretations made by inferior bodies.¹¹⁹ The risk inherent in eschewing a strongly legal model is of a shift to unprincipled pragmatism.¹²⁰

Recognising (as the courts have, elsewhere) that Parliament legislates within a representative democracy that confers upon the executive a role of responsible policymaking, I instead recommend an approach to statutory interpretation which pays greater regard to that principle, but in a way that maximises the potential for that policymaking to be undertaken in a deliberative, consultative and transparent manner. My approach is thus *pragmatic* in the sense described in chapter 7; seeking to maximise effective institutional functioning within a democratic state via a process of passivactivism. The point is to take account of the institutional impacts of interpretative methodologies by, firstly, respecting administrative interpretations arrived at via a responsible process of policy making and, secondly, recognising the potential impacts such an approach might have in the wider policymaking community.¹²¹

Two approaches to interpretation provide useful context and help flesh out the proposed approach. First, Eskridge and Frickey have developed a dynamic, pragmatic approach to interpretation which is instructive here.¹²² They start from Hans-Georg Gadamer's insight that interpretation means nothing in the abstract; it is process of practical reasoning.¹²³ The work of interpretation involves selection from a range of possible options, each of which will find supporting argument from a range of sources; democratic command, private interest, proper

¹¹⁹ See the important articles by Daly and Williams (n 102).

¹²⁰ See J Beatson, 'The Scope of Judicial Review for Error of Law' (1984) 4 Oxford Journal of Legal Studies 22.

¹²¹ See A Vermeule, 'The Cycles of Statutory Interpretation' (2001) 68 University of Chicago Law Review 149. For the potential of law to empower non-lawyers by taking a step back see Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press 2016) chapter 6.

¹²² WN Eskridge Jr, and PP Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 42 Stanford Law Review 321.

¹²³ HG Gadamer, *Truth and Method* (William Glen-Doepel tr, Sheed and Ward 1975) 290-2.

policy and so forth.¹²⁴ They deploy C. S. Pierce's notion of a 'cable' rather than a 'chain' approach to argumentation; whereas a chain is only as strong as its weakest link, a cable intertwines a range of constitutive elements to ensure its strength. Eskridge and Frickey build their dynamic interpretative model on this idea; the best 'practical' interpretation is one which 'tests' best against the relevant arguments.

The second approach is Jerry Mashaw's concept, in the context of agency approaches to interpretation in the US, of 'prudential interpretation'.¹²⁵ Judges and administrators, faced with ambiguity, take a different prudential approach; the judge looks for the 'right' answer, the prudential administrator makes the statutory scheme effective. Mashaw therefore recommends an interpretive model that recognises the benefits of an *active, inquiring* administration; agency interpretation is a part of policy development, and doing so legitimately involves the 'prudent exercise of a wide range of administrative capacities.'¹²⁶

As set out in the previous chapter, the Court's approach often approximates something akin to Eskridge's idea of 'dynamic' interpretation, a form of practical reasoning that mediates between sources identifying the intentions of the past and the needs of the present. This dynamic model exhorts us to look to a *plurality* of sources when determining statutory meaning, reaching practical outcomes situated within a network of constitutional principle. My argument here is that one of those sources should be, for the reasons set out above, executive interpretation of statute based on principles of sound policymaking. Clearly, this cannot be at the expense of other relevant constitutional principle. I thus advocate that the courts continue to look to the range of relevant factors (e.g. text, legislative history, constitutional principle) on a case by case basis, affording them relevant weight as relevant.

Setting out how the relevant factors should be weighed would be an impossible task, and foolish in the abstract. As Mashaw explains, there is no way of determining in advance the right balance between courts and administrators.¹²⁷ However, what I can say, building on Mashaw and the model of passivactism set out in Chapter 7, is that a reasonable administrative interpretation of statute should be afforded greater deference where an authority can demonstrate that it: (i) reached that interpretation via a process of active deliberation (to some extent, the approach of Baroness Hale and Lord Mance in *(R) Evans v Attorney General* hints at this kind of approach) ; (ii) made use of expertise; (iii) collaborated with a wide range of relevant stakeholders as part of that

¹²⁴ Eskridge and Frickey (n 122) 349.

¹²⁵ JL Mashaw, 'Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise' (2005) 55 University of Toronto Law Journal 497, 515.

¹²⁶ *ibid* 516-517.

¹²⁷ *ibid* 521.

process; and (iv) undertook its policymaking in a transparent manner which facilitated scrutiny.¹²⁸ Clearly, an administrative interpretation would have to be one not clearly excluded by the underlying legislation. But if it is not so excluded, the Court should be prepared to give weight to an executive interpretation even if it disagrees with it.¹²⁹ Indeed, to defer to such an interpretation may even be the best way of respecting Parliament's intention.¹³⁰

Clearly a range of objections arise here, but all can be countered. For one, it may be argued that this approach constitutes unjustifiable sub-delegation of the legislative role to the executive. The constitutionally objectionable spectre of Henry VIII clauses rears its head.¹³¹ The problem with such executive legislation is the lack of scrutiny. Yet the context is very different here. Unlike a Henry VIII provision, there is no possibility of the executive altering statute. It may be taken in a particular direction, but on my model an executive interpretation would be afforded deference only where it was a reasonable interpretation of the parent statute. It would have to fall within the permissible limits set by Parliament. Conversely, in the modern administrative state, it is simply unrealistic to expect Parliament to consider every single detail of policy. Within the broad parameters it can consider, however, the question remains as to which institution is best placed to refine the detail.

Alternately, my approach may be said to further violate classical conceptions of the separation of powers in allowing the executive to interpret statute, which is *prima facie* a role for the courts.¹³² In response, the UK has never applied a particularly formalised concept of the separation of powers.¹³³ Moreover, there is a separation of powers consideration running in the other direction. Part of that doctrine must be that policymaking is a matter for the executive, for which it is primarily accountable to Parliament. Given, as I have shown, that statutory interpretation is a process of quasi-policymaking, there are actually good separation of powers arguments in favour of deference.¹³⁴ As other commentators have pointed out, there is actually no good substantive reason to prefer the courts' view of the meaning of statute, particularly where this involves consideration of administrative policy questions.¹³⁵

¹²⁸ Sunstein's approach to *Chevron* deference is relevant here. He considers that such deference is to be afforded where an interpretation is adopted via a formal deliberative procedure. See CR Sunstein, 'Chevron Step Zero' (2006) 92 *Vanderbilt Law Review* 187, 193.

¹²⁹ The approach in *Chevron USA Inc v Natural Resources Defense Council*, 467 US 837 (1984) is of obvious relevance here. See further *Skidmore v Swift and Co*, 323 US 134 (1944).

¹³⁰ Daly (n 38) 706.

¹³¹ On which see *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531 [25]-[30] (Lord Neuberger).

¹³² I Hare, 'The Separation of Powers and Judicial Review for Error of Law' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Hart 1998) 113, 131.

¹³³ A Kavanagh, 'The Constitutional Separation of Powers' in D Dyzenhaus and M Thorburn, *Philosophical Foundations of Constitutional Law* (OUP 2019) 222.

¹³⁴ Sunstein (n 128) 197. See also WN Eskridge Jr and LE Baer, 'The Continuum of Deference: Supreme Court Treatment of Agency Interpretations from *Chevron* to *Hamdan*' (2008) 96 *Georgia Law Journal* 1083, 1092.

¹³⁵ Craig (n 102) 394.

A further argument against my proposition is that while the courts may not have any special insight into such policy questions, the benefits of their independence outweigh any possible drawbacks. If a judicial interpretation of a statute is so very objectionable in policy terms, it may be said, then the better approach is for Parliament to amend the statute. First, the approach advocated accommodates the independence point by confirming that it is for the courts to restrict *unreasonable* interpretations of statute. Beyond that, the persuasive force of independence drops significantly. Policy arguments are and should be subjective. In cases where interpretation of statute involves a policy process, the question is whether that should be uniquely a question for inexperienced and unaccountable judges. As to the question of Parliamentary correction, this is simply unrealistic in terms of the size of the administrative state and the time pressures of the Parliamentary timetable.

A more concrete objection is that allowing the possibility of executive-determined interpretations raises the possibility of there being a confusing multiplicity of statutory readings, either because different authorities interpret a statute differently or because an authority's interpretation changes over time. This gives rise to objections in terms of the rule of law. This is certainly a criticism a judge would have to take into account. But it is important to note that the alternative to a multiplicity of interpretations is the problem of ossification.¹³⁶ The rationale for deference to executive interpretation is that it recognises and facilitates the policymaking aspects of determining statutory meaning. To some extent, the entire point is to allow provision to be made for different or changing circumstances. The problem which I am seeking to address is a judicial approach which shuts down that possibility. And, of course, it would be quite possible for a judge applying a dynamic model of interpretation to take account of the impacts of multiple readings. In some circumstances this is genuinely problematic, in others less so.

Finally, a general response to any constitutional objection raised is that these are all capable of being factors a judge can take into account when determining the constitutional legitimacy of any given interpretation. I have assumed that interpretation, in hard cases, involves consideration of a range of factors. I have suggested that a judge should be looking to include active administration as one of those factors, and to give relevant weight to it in the circumstances. If there are any genuinely compelling constitutional objections to affording respect to administrative views of statutory meaning *in the circumstances of a particular case*, then a judge can take those into account as part of the interpretative process. While I argue it is important for administrative views to play a greater role in determining legal meaning, neither they nor any other factor are *prima facie* determinative.

¹³⁶ A Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) 3 Duke Law Journal 511.

10.6 Conclusion

The previous chapter established that, in my dataset, the Supreme Court applies a ‘closed’ standard of legal correctness to most questions of interpretation. This is, in the case of open-textured or unclear statute, to arrogate to judges a role that might properly be considered one in which the administration should play a greater role. This chapter has sought to place that argument in a wider constitutional context, arguing that the current approach taken by the Court does not reflect a shift toward a more pluralist constitutional model. This is not simply a theoretical problem, as my case studies have demonstrated. In particular, by applying a standard of legal correctness to questions of administrative discretion, the Court has on occasion given rise to pathologies of bifurcation discussed in earlier chapters (i.e. the tendency of judicial practice in UK administrative law to become overly active or overly passive). To remedy this problem, inspired by a latent, open model of interpretation occasionally deployed by the Court itself, I set out a tentative solution in the form of a ‘dynamic’ model of statutory interpretation. This model incorporates greater respect of for legitimate claims of effective administrative policy making.

Chapter 11. Conclusion

11.1 The Research: Summary

My overarching thesis, presented at the outset of this thesis, is that judicial approaches in the UK Supreme Court are implicated in a dynamic of ‘bifurcation’. Bifurcation, at its most simple, means judicial scrutiny of administrative decision-making which risks being both overly active or overly passive. This is overriding meaning of the term, but it comprises four interlocking facets. First, bifurcation arises when law and policy are conceptualised in discursively separate fields. Second, its core effect is that judicial scrutiny of executive policy can oscillate between strong review (which risks judicialisation in the sense described in the introduction) and judicial deference (which relies on political accountability which is potentially sub-optimal). Third, bifurcation is functionally sub-optimal, because it can risk both leaving serious flaws in decision making processes untested, or dictating outcomes to decision makers. Finally, bifurcation can exacerbate differences in judicial attitude toward the appropriate extent of executive discretion.

The term ‘bifurcation’ is borrowed from debates in academic literature over whether substantive review in the UK should comprise one or two standards. I have repurposed it here for two reasons. First, because my thesis argues that debates over bifurcation in the literature regarding the appropriate number of standards to be used in substantive review overlook a deeper ‘bifurcation’, regardless of which standard is applied, between relatively strong and relatively weak intensities of review. Second, insofar as the competing voices in those debates tend to factor relative intensity of review into their rationales (i.e. in the sense that those who prefer to move to a single standard of review broadly prefer stronger review) the debate actually perpetuates the bifurcated dynamic I argue hinders UK administrative law.

My overarching researching question was to assess, as per the method set out in Chapter 3, whether there is evidence in a rigorous selection of recent Supreme Court cases to support this hypothesis. The analysis looked at three areas where I considered that the impact of court decisions would have implications for the *substance* of administrative policy or discretion: proportionality review under the Human Rights Act 1998 (‘HRA’), substantive review at common law and statutory interpretation.

Cases involving proportionality review under the HRA were considered in Chapters 4 and 5, and Appendix A. A general survey suggested that, when undertaking the four-stage proportionality analysis (i.e. whether a measure has a legitimate aim, whether there was a rational connection between the measure and the aim, whether the measure interfered with protected rights no more than necessary, and whether an overall balance between aims and impacts had been struck) the Court’s focus is on the latter two aspects of that test, and in particular on the process of

balancing. This, I argued, was suggestive of bifurcation. Analysis of a selection of cases supported that to some degree. A number of recurring patterns in the cases, along with specific case studies, exhibited the pathologies of bifurcation. One of these pathologies, crucially, was that the Court's approach could be functionally suboptimal. There were instances where the Court was deferring to a decision maker despite strong reservations about the quality of its policy processes. There were also instances of judicialisation. On the other hand, there was evidence in the cases that proportionality could be deployed to *stimulate* effective functioning on the part of the executive, without simply deferring or dictating outcomes.

Substantive review at common law was considered in Chapter 6 and Appendix B. My investigation considered whether the relevant administrative law doctrines are applied: (i) in a strongly legalistic manner which precludes administrative decision making ('legalism'); (ii) deferentially; or (iii) in a way which stimulates the active deployment by the executive of its own institutional expertise ('institutionally activating'). As in the case of proportionality review, the outcome of the analysis demonstrated the existence of bifurcation. A bare *Wednesbury* standard is generally applied deferentially. The broader version of the doctrine (focusing on ensuring that an authority has acted e.g. for proper purposes and taking into account relevant considerations) was frequently legalistic. Common law rights discourse is legalistic in tone, but deferential in outcome. However, there was also clear evidence, particularly in the broader *Wednesbury* standard, of an 'institutionally activating' mode of review. As in the case of proportionality under the HRA, this mode was institutionally sensitive, rewarding decision makers who took an energetic approach to policymaking. I noted above that the debates over whether substantive review should constitute one or two standards of review have been, in some ways, unhelpful, but it is nonetheless worth noting that this finding suggests there are good reasons for retaining *Wednesbury*.

Finally, in Chapters 8, 9 and 10 and Appendix C I considered the impacts of the Court's approach to statutory interpretation. The analysis looked at whether the Court's mode of analysis was ordinary 'closed' (i.e. from an administrator's perspective, one which substitutes judicial for administrative understandings of the meaning of statute) or 'open' (i.e. which took a more plural approach to determining statutory meaning, giving weight to the reasonable views of expert decision makers). Overwhelmingly, my survey suggested that the Court's approach was closed. In Chapters 8 and 9 I discussed the implications of this. I argued that interpretation, both in general and with reference to the Supreme Court cases considered in this thesis, is akin to a process of policymaking. In Chapter 10, further analysis of cases in my reference period showed how this can lead to bifurcation (i.e. in the sense deployed in this thesis). It also set out an argument that, while recognising the strong arguments to retain judicial pre-eminence in interpretation, current

practice is in some ways based on an incomplete understanding of the constitution, in failing to consistently give weight to relevant executive views on the meaning of statute.

11.2 Why Does this Matter?

The outcomes of my study have implications in terms on both a doctrinal level, but also at the level of constitutional theory in terms of conceptualising inter-institutional dynamics of state power. At the doctrinal level, the empirical findings in Chapters 4, 5 and 6 have implications for the doctrine of substantive review. Arguments in this field in recent years have frequently turned on the question of inter-doctrinal bifurcation; whether proportionality and *Wednesbury* review should be retained or whether proportionality should become the sole head of review.¹ Related debates address the ‘rainbow’ of review i.e. the best way to adopt a context sensitive approach in determining the appropriate scope and intensity of substantive review.² The empirical findings of this thesis demonstrate that there are fundamental problems with this debate. It has been pointed out by others that one oversight of the inter-doctrinal debates between bifurcationists and unificationists is that it can overlook the need for case by case consideration of what a defendant is alleged to have done wrong, and how that is to be assessed by the reviewing court.³ I take this further, in demonstrating that the debates in fact elide a deeper problem of *intra-doctrinal bifurcation*, which in the Supreme Court’s inconsistent application of strong and weak forms of review leads to institutionally insensitive forms of review whichever doctrine is deployed. That is a deeper point, because it requires more careful consideration of the relationship between courts and policymakers, and the nature and role of administrative law.

The analysis in Chapters 8, 9 and 10 also has consequences for the theory and method of statutory interpretation. In both theory and practice, the Supreme Court’s approach to interpretation of statute in my dataset is firmly predicated on ‘closed’ approaches to the elucidation of legislative intent. Others have advocated for an executive role in determining questions of law. My analysis follows a similar line, but develops this in three ways. First, my empirical analysis draws out the analogous nature of legal methods of interpretation and executive policy making. Second, I demonstrate how strongly legalistic approaches to interpretation can lead to bifurcation. Third, I show that such approaches represent a misreading of the modern constitution. This has obvious ramifications for judicial practice. I have set out in Chapter 10 a modest proposal for ‘rehabilitating’ the legalistic model of interpretation currently applied in the Supreme Court.

¹ See e.g. the essays collected in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart 2015).

² M Taggart, ‘Proportionality, Deference, Wednesbury’ [2008] *New Zealand Law Review* 423.

³ E.g. R Williams, ‘Structuring Substantive Review’ [2017] *Public Law* 99.

The light my empirical findings shine on doctrinal level debates also reaches the level of constitutional practice. At a constitutional level, the support given to the bifurcatory hypothesis within my dataset constitutes an intervention in debates around the interrelationship of the courts, government and Parliament. In particular, it engages with questions regarding the appropriate balance of competences in the regulation of government by the other constitutional actors. In my introduction I referred to debates in the UK between political and common law constitutionalists. The former place greater emphasis on political accountability of the executive to Parliament. The latter rely more on constitutional norms developed by the courts to delimit government power. Accordingly, the former advocate relatively restricted judicial control. The latter prefer a relatively activist judiciary. However, the findings of the empirical analysis undertaken in this thesis suggest that these abstract debates are flawed in perpetuating the bifurcated logic of modern UK administrative law, which I traced from its nineteenth century roots through to the present day in Chapter 2.⁴ Both theories of the appropriate strength of judicial power fall short in failing to account for the inconsistent fluctuation in intensity of review. My study achieves two things in this regard. First, it provides evidence of the limitations of this constitutional debate. Second, in using evidence from the caselaw of a subordinate, institutionally-sensitive model of review, allows the conceptualisation of a more effective administrative law.

11.3 Implications

The question is, then, what a more effective administrative law might look like. Chapter 2 provided a summary of the functionalist philosophy which advocated, in the face of a dominant Diceyan orthodoxy, the role of government in the administrative state. The core insights of the functionalist critique were: (i) that over rigid judicial conceptualism can disempower the functioning of the other constitutional institutions; and (ii) that public law needs to be reconceived as a means to an end, remain pertinent and are relevant to the analysis here.⁵ Functionalism criticised formalist approaches which inhibit state aims in the public interest.⁶ It sought to advocate an institutionally sensitive approach to law which focuses on ensuring that the functions of state are exercised by the most appropriate body.⁷

⁴ See A Young, *Democratic Dialogue and the Constitution* (OUP 2017) ch 3.

⁵ See M Loughlin, *Public Law and Political Theory* (Clarendon 1992); F Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.

⁶ See e.g. H Laski, 'Judicial Review of Social Policy in England: A Study of *Roberts v Hopwood*' (1925–26) 39 *Harvard Law Review* 832.

⁷ See e.g. J Willis, 'Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional' (1935) 1 *University of Toronto Law Journal* 53.

The functionalists tended to prefer political forms of executive accountability.⁸ They could also be critical of the use of judicially enforceable human rights.⁹ As explained in Chapter 2, reliance wholly or mostly on the political constitution has become unrealistic, and human rights norms have proven an important tool in protecting individual autonomy from state intrusion. Further, reliance on the political constitution and advocating judicial deference, can itself result in bifurcation. The functionalist critique is nonetheless vital in identifying a number of risks similar to those comprising the bundle of pathologies inherent in bifurcation. First, the risk of judicial concepts operating in a different register to those of policymakers. Second, the risk of a supplanting of executive by judicial values. Third, the importance of political means of control. Fourth, the failure of administrative law to develop a means of *substantive* review of policy choices. And finally, the constitutional importance of ensuring that institutions are enabled and required to function in a way which realises their institutional ends to the fullest. Even if the functionalists' suggested solutions would not necessarily resolve all of these problems, they are key in helping envisage a more institutionally sensitive administrative law.

In Chapter 7, I sketched out the broad parameters of what such a jurisprudence might look like. Starting from the basis that the role of law in this field is to legitimate the exercise of administrative discretion (i.e. in the sense that if the claimant proves their claim, then an exercise of discretion was legally illegitimate), I developed a concept of law built on foundational precepts of deference. This was not to advocate a submissively deferential approach on the part of the judicial. Rather, while the institutional and constitutional principles of deference provide *prima facie* reasons for a court to give weight to a decision maker's views, I advocated a jurisprudence which sought to maximise the persuasive force of those reasons on a case by case basis. The key is for the judiciary to adopt an *attitude* toward the deployment of doctrine which seeks to *avoid* supplanting judicial for administrative values, but only as the *quid pro quo* for the adoption by administrators of active, deliberative, transparent and participative forms of policy making. I called this a 'passivist' approach, which recognises and seeks to minimise the risks of legal norms precluding or dictating administrative discretion, while using doctrine to ensure that administrative competencies are actively deployed. In short, it seeks to stimulate administrators to function, on their terms, but to their highest potential.¹⁰ Clearly, there will be instances where a decision maker has exceeded the powers afforded them by statute, whether as a straightforward question of interpretation or because a matter obviously material to a decision has not been taken into account. Likewise, there will be instances where the requirements of justice mean that the

⁸ JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1.

⁹ JAG Griffith, 'The Brave New World of Sir John Laws' (2000) 63 *Modern Law Review* 159.

¹⁰ See A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press 2016).

claims of an individual right *will* trump a policy aim. As bifurcation shows, the application of administrative law doctrine does not always admit of clear answers, relying on judicial discretion to determine the relative weights of competing values.¹¹ The potential of a passivist approach is to provide a principled basis for structuring that discretion, one which is sensitive to the respective institutional functions of both courts and administrators. At the outset, I refer to a process of ‘judicialisation’, where the law comes to dictate the substance and process of policymaking.¹² At a time when politics is become more polarised, and the judicial intervention in policy questions increasingly fraught,¹³ the time is ripe for a revival and reconceptualisation of functionalism.¹⁴

¹¹ See *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 [28] (Lord Steyn).

¹² A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000).

¹³ See *R (Miller) v The Prime Minister* [2019] UKSC 41.

¹⁴ See M Loughlin, ‘The Functionalist Style in Public Law’ (2005) 55 *University of Toronto Law Journal* 361.

Appendix A – Human Rights Act 1998 Proportionality Cases

Case name & citation	Summary	Decisional focus in terms of rights/balancing
<p>Kennedy v Charity Commission</p> <p>[2014] UKSC 20, [2015] AC 455</p>	<p>Whether section 32(2) Freedom of Information Act 2000 (FOIA) provides an absolute exemption to requests for information connected to an inquiry; whether Article 10 ECHR applied to such a request.</p>	<p>A majority holds that Article 10 does not apply.</p> <p>Lord Wilson and Lord Carnwath dissent on this point.</p> <p>Lord Wilson: Does not consider how Article 10 would apply in the case, but notes at [189] that a decision made in accordance with a technical scheme such as FOIA will be given considerable respect.</p> <p>Lord Carnwath: Does not consider Article 10 would apply in the case. Again, his interest is in preserving the technical FOIA mechanism [221]-[233].</p> <p>(NA)</p>
<p>A v British Broadcasting Corporation</p> <p>[2014] UKSC 25, [2015] AC 588</p>	<p>Whether a direction under s.11 Contempt of Court Act 1981 prohibiting reporting on a deportee’s case was a breach of Article 10.</p>	<p>Lord Reed (<i>Balancing</i>): The application of Article 10 is dealt with without separating out the elements of the proportionality exercise [69] – [77]. Necessity is mentioned at [76]. The remainder is a question of balancing. The arguments in favour of the direction were overwhelming in terms of protecting ongoing legal proceeding and A’s rights under Article 3 ECHR.</p>

<p>Barnes v The Eastenders Group [2014] UKSC 26, [2015] AC 1</p>	<p>Whether it was a breach of Article 1 Protocol 1 to make an order allowing a receiver to draw his remuneration from assets seized by the CPS from the The Eastenders Group under section 48 of the Proceeds of Crime Act 2002, when a court had ruled that the seizure orders should never have been made.</p> <p>If so, whether it was a breach of Article 1 Protocol 1 to refuse to allow the receiver to claim his remuneration from the CPS.</p>	<p>Lord Toulson (<i>Balancing</i>): [87] Holds that the ‘critical question’ is whether the order was ‘disproportionate, in that it would not achieve a fair balance between the interest of the community and protection of the companies’ right to their own property.’ Given that the Group was not the defendants, it was clearly disproportionate to require it to pay the receiver’s costs [88]-[96].</p> <p>The question is then whether to refuse to allow the receiver to claim his costs from CPS was itself a breach of Article 1 Protocol 1.</p>
<p>R (T) v Chief Constable of Greater Manchester Police R (B) v Secretary of State for the Home Department [2014] UKSC 35, [2015] AC 49</p>	<p>Whether a blanket requirement for disclosure of criminal convictions & cautions in an enhanced criminal record check breached Article 8 ECHR.</p>	<p>Lord Reed (for a unanimous court) (<i>Rational connection</i>): holds that there is no rational connection between minor dishonest as a child and the question of whether a person poses a threat to children as an adult [142].</p> <p>NB. Lord Reed (for a majority) also finds that the scheme is not ‘in accordance with the law’ in the sense that there were not adequate safeguards for the proportionality of individual decisions to be assessed’ [108]-[119].</p>

		Lord Wilson dissents on this point [28]-[38].
R (Nicklinson) v Ministry of Justice R (AM) v Director of Public Prosecutions [2014] UKSC 38, [2015] AC 657	Whether criminalisation of assisting suicide under section 2(1) of the Suicide Act 1961, and in one case the policy of the DPP, breached Article 8 ECHR.	<p>Lord Neuberger (<i>necessity, balancing</i>):</p> <ul style="list-style-type: none"> - Aim and connection are accepted and the key is thus necessity and balance [82]. <p>Lord Mance: (<i>rational connection, necessity, balancing</i>):</p> <ul style="list-style-type: none"> - Aim is primarily for the government but the other three stages require consideration [171]. <p>Lord Wilson (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Concurs with Lord Neuberger, but effectively focuses on balancing factors counteracting the judgments of Baroness Hale and Lord Kerr [198]. <p>Lord Sumption (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Effectively sees the question as balancing incommensurably values, and for that reason this is entirely a matter for the state [217]-[218], [232]. <p>Lord Hughes (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Concurs with Lord Sumption [267]. <p>Lord Clarke (<i>Balancing</i>):</p>

		<ul style="list-style-type: none"> - Concur with Lord Sumption, Lord Reed and Lord Hughes [290]. <p>Lord Reed (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Concur with Lord Sumption, Lord Hughes and Lord Clarke. - See [297] on deference to the political constitution. <p>Baroness Hale (<i>Necessity, balancing</i>):</p> <ul style="list-style-type: none"> - Considers the question as one of necessity and also fair balance [311]-[312], [317]. <p>Lord Kerr (<i>Rational connection, necessity, balancing</i>):</p> <ul style="list-style-type: none"> - The prohibition lacks a rational connection in light of an absence of evidence on the ‘vulnerability’ of patients [351]. - It goes further than necessary, in that less intrusive measures are readily conceivable [355]. - It fails to strike a fair balance between the interests of those who wish to end their lives and society in general [357].
<p>R v Ahmad [2014] UKSC 36, [2015] AC 299</p>	<p>Whether it is disproportionate, for purposes of Article 1, Protocol 1 ECHR, to confiscate property or money obtained as a</p>	<p>Lord Neuberger, Lord Hughes, Lord Toulson (<i>Aim, balancing</i>):</p> <ul style="list-style-type: none"> - This is not the main issue in the case, but they confirm at [72] that to over-confiscate funds would be disproportionate.

	result of committing an offence from a number of persons such that the amount confiscated exceeds the amount actually obtained via criminal endeavour.	
R (on the application of Sandiford) v The Secretary of State for Foreign and Commonwealth Affairs [2014] UKSC 44	Whether a refusal of the Secretary of State for Foreign and Commonwealth Affairs to fund legal assistance to a woman charged with drug smuggling in Bali was a breach of Article 6 ECHR.	Lord Carnwath & Lord Mance: The claimant was outside the UK's jurisdiction for ECHR purposes [19]. <i>(NA – jurisdiction)</i>
R (Barclay) v Lord Chancellor and Secretary of State for Justice (No 2) [2014] UKSC 54, [2015] AC 276	Whether constitutional reform provisions made in the island of Sark were compatible with Article 6 ECHR.	To allow the claimants to challenge in the UK courts subverted the manner of the ECHR's application in Sark. <i>(NA – jurisdiction)</i>
R (Lord Carlile of Berriew) v Secretary of State for the Home Department [2014] UKSC 60, [2015] AC 945	Whether the Home Secretary's refusal to allow an Iranian dissident to speak to a group in the Houses of Parliament was a breach of Article 10 ECHR.	Lord Sumption (<i>Balancing</i>): <ul style="list-style-type: none"> - [32] determines that there are cases where rationality is the only measure; - [34] the courts must test the factual basis for an interference; - [38] identifies that the only ways to impugn the decision are (i) undervaluing rights; (ii) overestimating risks; (iii) failing

		<p>to consider less intrusive alternatives (i.e. (i) and (ii) are <i>balancing</i> points, (iii) is a question of necessity).</p> <ul style="list-style-type: none"> - Commits paragraphs [39]-[46] to the <i>balancing</i> points, and [47] to necessity. <p>Lord Neuberger (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - [68] If a decision is not irrational, the Court decides whether to substitute judgment – this is unlikely in a national security context. - [70]-[73] In this case, on the question of balance, given the foreign relations context there would need to be ‘exceptionally’ heavy considerations weighing against the government before its judgment would set aside. <p>Baroness Hale (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Legitimate aim is largely a matter for the government [99]-[101]. - Rational connection is clear [102]. - Necessity is a circular question and briefly dismissed [103] - Key point is the balancing exercise [104]-[109]. The interests on either side are not particularly strong in the
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		<p>circumstances, but agrees with government that lifting the ban would give rise to political ramifications.</p> <p>Lord Clarke (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Concurs with Lord Neuberger, as once it is accepted that the government’s assessment of risk must be accepted, there are no means for the Court to come to a different view [112]. - Expresses <i>in obiter</i> deep reservations about the government’s evidence base [111]. <p>Lord Kerr (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - The Court is constitutionally required to come to a view on the importance of the right infringed [150]-[162]. - Moves directly to the question of balance. The risks identified by the government cannot be easily assessed, whereas the importance of freedom of speech can. It was inappropriate to give weight to a potential Iranian response that would itself be anti-democratic [169]-[180].
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<p>R (N) v Lewisham London Borough Council R (H) v Newham London Borough Council [2014] UKSC 62, [2015] AC 1259</p>	<p>Whether Article 8 ECHR required that a court order be obtained (as per provisions in the Protection from Eviction Act 1977) before an authority could obtain possession of interim accommodation.</p>	<p>Lord Hodge (<i>Balancing</i>) (NB. there were concurrences and dissents but Lord Neuberger was the only judgment on this point):</p> <ul style="list-style-type: none"> - [62]-[66] Article 8 imports a procedural obligation, and there are sufficient opportunities in the statutory scheme for the proportionality of an eviction to be raised. Makes clear that it will be exceptional [65] for a claimant to prove a breach of Article 8. - As to the application of Article 8 to the claimants' case, the eviction decisions are in accordance with the law and pursue a legitimate aim [67]. - Holds at [68] that the pressing nature of housing requirements means a fair balance is struck – to hold otherwise would potentially privilege persons in interim accommodation whose needs have already been determined, over those who have outstanding claims. - [69]-[74] There are sufficient procedural safeguards in place to ensure a tenant could have the proportionality of their claim assessed.
<p>Sims v Dacorum Borough Council</p>	<p>Whether provision for one person in a joint</p>	<p>Lord Neuberger (<i>Balancing</i>):</p>

<p>[2014] UKSC 63, [2015] AC 1336</p>	<p>tenancy to give notice is a breach of Article 1, Protocol 1 or Article 8 ECHR.</p>	<ul style="list-style-type: none"> - A1P1 goes nowhere because the claimant made the bargain himself [15]-[16]. - Irrationality on the Council's part would be the only legal problem but there are reasons for inclusion of the provision. - Sims' case had been considered in the lower courts and the DDJ had come to a reasonable decision on the Council's reasons for seeking possession [18]-[19]. - Article 8 could have been raised in proceedings. The DDJ had considered the Council's decision-making procedures and determined that its decision was 'proportionate' [21].
<p>Moochan v Lord Advocate</p> <p>[2014] UKSC 67, [2015] AC 901</p>	<p>Whether restrictions on prisoners voting in the Scottish referendum breached Article 3, Protocol 1 or Article 10 ECHR.</p>	<p>Interpretation case rather than one of balancing (NA).</p>
<p>Doogan v Greater Glasgow and Clyde Health Board</p> <p>[2014] UKSC 68, [2015] AC 640</p>	<p>Whether provisions on conscientious objection constituted a breach of Article 9 ECHR.</p>	<p>Pure statutory construction point (NA).</p>

<p>In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill</p> <p>[2015] UKSC 3, [2015] AC 1016</p>	<p>Whether a Welsh Assembly Bill placing liability on persons by whom or on whose behalf payments are made to sufferers of asbestos-related illnesses for the cost to the NHS of treatment breached Article 1, Protocol 1 ECHR.</p>	<p>Lord Mance (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Accepts Counsel’s point that the gov line is not taken for granted at any stage of the prop analysis [46]. - The ensuing discussion shifts to fair balance (i.e. the first three stages of the proportionality exercise are subject to a ‘manifestly unreasonable’ test, whereas the substantive issue is the fourth question) [47]-[53]. - The key is that he does not consider a sufficiently compelling reason has been put forward to justify retrospective legislation [65]-[69]. Paragraph [67] is important in confirming that, notwithstanding that this was a legislative decision, the Court’s role is to ensure that the outcome is ECHR compliant. <p>Lord Thomas (in dissent) (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Agrees with Lord Mance test [105]. - A limited test at the first three stages [108]. - Takes a deferential attitude to the Assembly on balance – its view deserves great weight [114].
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		<ul style="list-style-type: none"> - He nonetheless conducts a balancing exercise, but suffused with the language of deference (e.g. ‘reasonable’ [124]) [115]-[126]).
<p>R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland</p> <p>R (T) v Commissioner of Police of the Metropolis</p> <p>[2015] UKSC 9, [2015] AC 1065</p>	<p>Compatibility with Article 8 ECHR of data by the police relating to persons who have not been convicted of a criminal offence.</p>	<p><i>Catt</i></p> <p>Lord Sumption (<i>Necessity, balancing</i>):</p> <ul style="list-style-type: none"> - A mix of necessity/balance. The impacts on effective policing of disaggregating vast amounts of data means that the limited interference is justifiable. [29]-[36]. <p>Baroness Hale (<i>Necessity, balancing</i>):</p> <ul style="list-style-type: none"> - Concurs with Lord Sumption [52]. <p>Lord Toulson (<i>Necessity</i>):</p> <ul style="list-style-type: none"> - Finds for Catt on the basis that it is unnecessary to retain the information given the ease with which a regular review could be undertaken [65]-[69]. <p><i>T</i></p> <p>Lord Sumption (<i>Necessity, balancing</i>):</p> <ul style="list-style-type: none"> - [42]-[44] The period of data retention was hugely disproportionate to the ends pursued (although, in the event, the data on <i>T</i> was not retained

		<p>for a disproportionate length of time) [42]-[44].</p> <p>Baroness Hale (<i>Necessity, balancing</i>):</p> <ul style="list-style-type: none"> - The good reasons for retaining data in harassment cases (provided there is a review) provide sufficient justification [54]-[55]. <p>Lord Toulson (<i>Necessity, balancing</i>):</p> <ul style="list-style-type: none"> - Like Baroness Hale, Lord Toulson can see the justification for retaining data on hate crimes and is content on the basis that reviews of necessity can be undertaken [76].
<p>Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)</p> <p>[2015] UKSC 15, [2015] AC 1599</p>	<p>Correct approach when a defendant to a claim for possession raises an argument that a landlord has been discriminatory contrary to the Equality Act 2010. Considers whether the balancing exercise is the same as that required in cases to which Article 8 ECHR applies.</p>	<p>Not a case wherein Article 8 is directly applicable, but noteworthy to see Baroness Hale saying that in possession cases it will be very rare for an Article 8 defence to succeed.</p> <p>(<i>NA</i>)</p>
<p>R (SG) v Secretary of State for Work and Pensions</p>	<p>Whether the cap on the total amount of benefits payable per household</p>	<p>Lord Reed (for the majority) (<i>Necessity, balancing</i>):</p>

<p>[2015] UKSC 16, [2015] 1 WLR 1449</p>	<p>breached Article 14 and Article 1, Protocol 1 ECHR.</p>	<ul style="list-style-type: none"> - [14] The question is whether the aim is legitimate and whether the means are proportionate. - The aim is swiftly established as legitimate [63]-[66]. - Necessity (i.e. the claimants argue that the cap could be set by reference to average income including pay/benefits) is dealt with as a question of statutory interpretation [67]-[69]. - The claimants argue that the impacts are marginal, but Lord Reed concludes that this goes nowhere because there will be cost savings and behaviour changing impacts [70]-[77]. He notes that advance notice was given to affected persons to enable them to adjust. - International law arguments [78]-[90]. The United Nations Convention on the Rights of the Children is not at issue where the alleged discrimination is against women [86]-[89]. - The key here is the high policy context of the decision, unless ‘manifestly without reasonable foundation’ it should be respected [92]-[96]. <p>Lord Carnwath (<i>Balancing</i>):</p>
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		<ul style="list-style-type: none"> - The UNHCR is not relevant where the alleged discrimination is against women [129]. - The government has nonetheless ignored the purpose of child-related benefits [133]. <p>Lord Hughes (<i>Necessity, balancing</i>):</p> <ul style="list-style-type: none"> - Concurs with Lord Reed [135]. - Confirms that ECtHR caselaw does not indicate that the UNHCR is relevant to the justification of discrimination [144]. <p>Baroness Hale (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - The key is whether the discrimination is justified [188]-[189]. - The question is whether there is a legitimate aim and whether the policy manifestly lacks a reasonable foundation [208]-[209]. - The UNCRC shapes the analysis – the test is not met because it will deprive children of basic needs [228]. <p>Lord Kerr (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - UNCRC has direct effect [255]-[256]
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<p>Gaughran v Chief Constable of the Police Service of Northern Ireland</p> <p>[2015] UKSC 29, [2016] AC 345</p>	<p>Whether the indefinite retention of biometric data of persons convicted of crimes breached Article 8 ECHR.</p>	<p>Lord Clarke (for a majority) (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Sets out at the 4-stage <i>Bank Mellat</i> test [19]-[20]. - The application of in this case turns on the balancing [33]-[49]. - The interference is at the low end [33]-[35]. - There are significant benefits to the policy, and there are range of approaches across member states [38]-[44]. <p>Lord Kerr (in dissent) (<i>Rational connection, balancing</i>):</p> <ul style="list-style-type: none"> - The key is this case is whether the policy is rationally connected to the aim and interferes no further than necessary [61]. - There is a lack of evidence that the possession of data assists solve crime [62]-[68]. - A less interfering alternative is easily imaginable [83]-[85]. - On balancing, the stigmatising impacts of listing must not be underestimated [96]. - Notably anti-deferential [99]-[101]
<p>In re JR38</p>	<p>Whether publication of a teenage rioter for crime detection</p>	<p>The Court splits on whether Article 8 is engaged at all (Lord Wilson and Lord Kerr consider that it is), but</p>

<p>[2015] UKSC 42, [2016] AC 1131</p>	<p>purposes breached Article 8.</p>	<p>nonetheless the whole bench considers whether an interference would be proportional.</p> <p>Lord Kerr (<i>Necessity & balancing</i>):</p> <ul style="list-style-type: none"> - The aim is legitimate [73]. - Rational connection is also dealt with summarily [74]. - Necessity is not a problem because of the scrupulous approach taken by the police in ensuring other options had been exhausted [75]-[77]. - On fair balance the public benefits of the measure and the success of the policy outweighed the interference [78]-[80]. <p>Lord Toulson (<i>Necessity & balancing</i>):</p> <ul style="list-style-type: none"> - Expressly concur with Lord Kerr's application of the proportionality assessment [103] <p>Lord Clarke (<i>Necessity & balancing</i>):</p> <ul style="list-style-type: none"> - Expressly concur with Lord Kerr's application of the proportionality assessment [115].
<p>Mathieson v Secretary of State for Work and Pensions</p>	<p>Whether cutting off a carer's Disability Living Allowance after a patient's residence in</p>	<p>Lord Wilson (<i>Rational connection</i>):</p> <ul style="list-style-type: none"> - The test is whether there is a legitimate aim and a reasonable relationship between means

<p>[2015] UKSC 47, [2015] 1 WLR 3250</p>	<p>hospital for a prescribed period was a breach of Article 14 and Article 1 Protocol 1.</p>	<p>and aims [24]. In the social security context the threshold is high [26].</p> <ul style="list-style-type: none"> - The evidence demonstrates that parents are providing as much care in hospital as they do at home [30]-[36]. - The Secretary of State had presented no evidence to the contrary [37]. Accordingly, there was no rational connection between the measure and its aim.
<p>Beghal v Director of Public Prosecutions</p> <p>[2015] UKSC 49, [2016] AC 88</p>	<p>Whether search and question without charge or suspicion at an airport constituted a breach of Article 6 or Article 8 ECHR.</p>	<p>Lord Hughes (lead judgment) (<i>Necessity & balancing</i>):</p> <ul style="list-style-type: none"> - Aim and rational connection dealt with summarily [47]. - The key is the linked question of necessity/balance [48]. - Less intrusive measures would achieve nothing like the same utility [49]. - Given the relatively limited interference, and the safeguards in the policy, a fair balance is struck [49]-[51]. <p>Lord Neuberger and Lord Dyson (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - It is not always necessary for the government to produce positive evidence in support of its justification [76].

		<ul style="list-style-type: none"> - In this case, the intrusion is limited and the aims and safeguards outweigh the impacts [78]-[79]. <p>Lord Kerr (<i>Necessity & balancing</i>):</p> <ul style="list-style-type: none"> - Notes that here, as is ‘usually’ the case, the debate is about necessity/balance [121]. - Notes that at [122-3] effectiveness is not the same as proportionate. - The key is balance, the intrusion here is significant, and no justification for suspicion-less interrogation had been put forward [125]-[128].
<p>Coventry and others v Lawrence</p> <p>[2015] UKSC 50, [2015] 1 WLR 3485</p>	<p>Whether provisions relating to legal funding were in breach of Article 6</p>	<p>Lord Neuberger & Lord Dyson (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - The aim of seeking to rely on private sources of funding was legitimate [26]-[27]. - The substantive question was proportionality, between different kinds of litigants, and between the rules and the matters in issue [29]-[84]. <p>Lord Mance (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Concurs with Lord Neuberger and Lord Dyson [99]. <p>Lord Clarke (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Focus is on proportionality [109].

<p>R (Bourgass) v Secretary of State for Justice</p> <p>[2015] UKSC 54, [2016] AC 384</p>	<p>Whether continued segregation of two prisoners breached Article 6.</p>	<p>Art 6 considered but deemed inapplicable (<i>N4</i>).</p>
<p>R (Tigere) v Secretary of State for Business, Innovation and Skills</p> <p>[2015] UKSC 57, [2015] 1 WLR 3820</p>	<p>Whether provisions preventing all persons subject to specified immigration status requirements from obtaining a student loan were in breach of Article 14 and Article 2 Protocol 1.</p>	<p>Baroness Hale (for the majority) (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Amends the ‘manifestly without reasonable justification’ test in an education context [28]. - The aim is legitimate [34]. - Looks very like this is going to be impugned for a lack of rational connection [36]. - But in the final analysis the policy is found unlawful on workability and balance [38]-[42]. <p>Lord Sumption & Lord Reed (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - The test is ‘manifestly without reasonable foundation’ [77]. - It is reasonable to distinguish persons with a connection to the UK [88]. - The simplicity and predictability of a bright line rule must be weighed in the balance [91]. - Deference here required to Parliament [100].

<p>Shahid v Scottish Ministers</p> <p>[2015] UKSC 58, [2016] AC 429</p>	<p>Whether unlawful segregation of a prisoner constituted a breach of Article 8.</p>	<p>Lord Reed (<i>Necessity & balancing</i>):</p> <ul style="list-style-type: none"> - Aim gets short shrift at [40]. - At [74] he conflates the necessity/proportionality tests. - The question turns on increasing weightiness of reasons needed as the length of detention increases [76]-[77]. - Given that the impacts increase over time, and it is necessary to continuously consider less severe treatment [81]-[86].
<p>R (Bibi) v Secretary of State for the Home Department</p> <p>R (Ali) v Secretary of State for the Home Department</p> <p>[2015] UKSC 68, [2015] 1 WLR. 5055</p>	<p>Whether an immigration rule requiring foreign spouses/partners of persons settled in the UK to take an English test breach Article 8 and/or Article 14.</p>	<p>Lord Wilson & Baroness Hale (<i>Aim, balancing</i>):</p> <ul style="list-style-type: none"> - Article 8 does not allow couples to live together in whichever country they like, though any restriction must be for a legitimate aim and proportionate [25]-[29]. - Extensive analysis on aim [30]-[45]. - Rational connection gets short shrift [46]. - Limited consideration of necessity [48]-[49]. - Fair balance turns on the availability of learning facilities in home countries – the main issue here is the Secretary of State’s guidance and the Court seek additional representations [49]-[55].

		<p>Lord Hughes and Hodge (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Lord Hughes decries Baroness Hale and Lord Wilson’s search for evidence justifying the aim [43]-[45]. - The focus is on balance [68]-[74] as the other aspects of the proportionality test are easily met. <p>Lord Neuberger (<i>Aim, balancing</i>):</p> <ul style="list-style-type: none"> - Like Lord Hughes, he considers that Baroness Hale and Lord Wilson’s desire for evidence in support of the aim is misguided and will seek to a search for spurious information [96]-[97]. - All four tests are met, but notes that the balancing point is met largely because deference is needed here [98].
<p>R (Roberts) v Commissioner of Police of the Metropolis</p> <p>[2015] UKSC 79, [2016] 1 WLR 210</p>	<p>Whether the designation of certain wards in which stop and search powers could be used without suspicion was a breach of Article 8.</p>	<p>Challenge succeeds on legality (<i>NA</i>).</p>
<p>Christian Institute v Lord Advocate</p> <p>[2016] UKSC 51, 2017 SC (UKSC) 29</p>	<p>Whether a ‘named person’ scheme in Scotland, which required a named individual to coordinate care for children and facilitate</p>	<p>Baroness Hale, Lord Reed & Lord Hodge (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - The scheme was not ‘in accordance with the law’ (including [83]-[84]) that there are limited opportunities for

	inter-agency data-sharing, was a breach of Article 8 ECHR.	<p>the proportionality of individual decisions to be tested).</p> <ul style="list-style-type: none"> - On the general proportionality point, aim and rational connection are dealt with in very short order [91]-[92]. - As to necessity, the Court asks only whether the restriction on a fundamental right was reasonable [93]. - In the abstract, it is not possible to say that the scheme itself is disproportionate. However, there was potential for the scheme to be operated disproportionately and guidance would be needed on an appropriate balance could be struck [94]-[101].
R (Johnson) v Secretary of State for the Home Department [2016] UKSC 56, [2017] AC 365	Whether deportation of the claimant (who had a Jamaican mother and British father), in circumstances where he would have been a British citizen but for the fact that his parents were not married, was a breach of Article 8 and Article 14.	<p>Baroness Hale (<i>Rational connection</i>):</p> <ul style="list-style-type: none"> - The question is whether there is a legitimate aim and a reasonable relationship of proportionality between ends and means. - There was no justification for treating Johnson differently to someone whose parents had been married [34]
R (MA) v Secretary of State for Work and Pensions	Whether the 'bedroom tax' was in breach of Article 8 and Article 14.	<p>Lord Toulson (for the majority) (<i>Balancing</i>):</p>

<p>R (Rutherford) v Secretary of State for Work and Pensions R (A) v Secretary of State for Work and Pensions</p> <p>[2016] UKSC 58, [2016] 1 WLR 4550</p>		<ul style="list-style-type: none"> - The question is whether the measures were ‘manifestly without a reasonable foundation’ (i.e. essentially a question of justification). - Claimants who could point to analogous cases for whom provision <i>had</i> been made were able to show there was no reasonable foundation [46]-[49]. - Other cases are dismissed in short order [56]-[59]. - While a final claimant A, had a strong case for remaining in her house, the need for additional security (to prevent domestic abuse) was not connected to the need for an additional bedroom. <p>Baroness Hale (in dissent re: A) <i>(Balancing)</i>:</p> <ul style="list-style-type: none"> - The state has an obligation to provide for victims of domestic abuse recognised in international law [74]. - It was thus discriminatory not to make provision for A [76].
<p>Makhlouf v Secretary of State for the Home Department (Northern Ireland)</p>	<p>Whether deportation of a foreign citizen who had resident UK children was in breach</p>	<p>Deals with disaggregation of rights i.e. whether the children’s rights in this situation are considered in their own right (<i>NA</i>).</p>

<p>[2016] UKSC 59, [2017] 3 All ER 1</p>	<p>of the family's rights under Article 8 ECHR.</p>	
<p>Ali v Secretary of State for the Home Department [2016] UKSC 60, [2016] 1 WLR 4799</p>	<p>How tribunals should address the proportionality of deportation decisions engaging Article 8 ECHR in light of revised Immigration Rules which purported to weigh relevant considerations in advance.</p>	<p>Lord Reed (for the majority) (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - The case addresses the tension between context sensitive decision making and certainty [15]. - The Rules are to be afforded respect as the will of the legislature (though not in the same way as an Act). - The tribunal had to make its own assessment of proportionality [40]-[45]. - Yet the policy of the Secretary of State was entitled to be given great weight [46]. <p>Lord Wilson (concurring) (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Also grapples with the relationship between correctness and giving weight to the policy [77]. <p>Lord Thomas (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Recommends a 'balance sheet' approach to balancing [82]-[84]. <p>Lord Kerr (in dissent) (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - There is a need for thorough case by case assessment [115]. - Article 8 ECHR cannot be met via prescriptive rules which

		<p>establish weight in advance [46], [57].</p> <ul style="list-style-type: none"> - N.B. On the four-stage proportionality test, Lord Kerr clear that aim/rational connection must not be left out of the assessment [165].
<p>DB v Chief Constable of Police Service of Northern Ireland [2017] UKSC 7</p>	<p>Whether the Northern Ireland Police had breached Article 8 and Article 11 in not preventing a protest.</p>	<p>Decided on a point of statutory interpretation (<i>NA</i>).</p>
<p>In re Brewster [2017] UKSC 8, [2017] 1 WLR 519</p>	<p>Whether a requirement in a local government pension scheme in Northern Ireland for unmarried cohabitants to satisfy a registration requirement was in breach of Article 1 Protocol 1 and Article 14.</p>	<p>Lord Kerr (<i>Rational connection</i>):</p> <ul style="list-style-type: none"> - The test is whether the policy is ‘manifestly without reasonable foundation’ [55]. - Where an impact on social and economic matters has not been considered then the courts will be more interventionist [64]. - There was no such consideration here, and ex post facto justifications were nebulous [65]. - There is thus no rational connection between the aim and the measure.
<p>R (MM (Lebanon)) v Secretary of State for the Home Department R (Majid) v Secretary of State for the Home Department</p>	<p>Whether minimum income rules applicable to non-EEA partners of spouses/civil partners in the UK breach Article 8 ECHR.</p>	<p>Baroness Hale & Lord Carnwath (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Rules in the abstract will very rarely fail to pass the proportionality assessment, because the question is the

<p>R (Javed) v Secretary of State for the Home Department SS (Congo) v Entry Clearance Officer (Nairobi)</p> <p>[2017] UKSC 10, [2017] 1 WLR 771</p>		<p>balance in individual cases [56]-[57].</p> <ul style="list-style-type: none"> - Outlines the need to defer on policy questions (though NB. hints at an approach where deference relies on sound administration) [75]. - Aim/rational connection dealt with swiftly [83]-[84]. - At a global level, the proportionality assessment is then effectively one of rationality [98] (though NB. suggestions here of an approach founded in administrative effectiveness).
<p>R (Agyarko) v Secretary of State for the Home Department R (Ikuga) v Secretary of State for the Home Department</p> <p>[2017] UKSC 11, [2017] 1 WLR 823</p>	<p>Whether decisions to refuse right to reside to foreign partners of UK citizens on the basis that, in accordance with the Immigration Rules, there were not ‘insurmountable obstacles’ to family life taking place overseas and there were no other exceptional circumstances, were a breach of Article 8 ECHR.</p>	<p>Lord Reed (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - The ultimate question in Article 8 cases is the fair balance [41]. - Question is whether the rules have shut down the balancing exercise. - The Secretary of State is entitled to fix weight to particular factors [46]. - While the ‘insurmountable obstacles’ test is stringent it is broadly in line with the ECtHR jurisprudence (i.e. it doesn’t refer to literally insurmountable obstacles only) and to be applied in accordance with it [42]-[48].

		<ul style="list-style-type: none"> - The ‘exceptional circumstances’ test is also in line with a proportionality approach [54]-[60].
<p>SXH v The Crown Prosecution Service</p> <p>[2017] UKSC 30, [2017] 1 WLR 1401</p>	<p>Whether a decision to prosecute an asylum seeker for fraudulent use of an identification case when, as it turned out, they had a statutory defence to this was a breach of Article 8 ECHR.</p>	<p>An application question (<i>NA</i>).</p>
<p>McCann v State Hospitals Board for Scotland</p> <p>[2017] UKSC 31, [2017] 1 WLR 1455</p>	<p>Whether a comprehensive smoking ban at a secure hospital constituted a breach of Article 8 ECHR.</p>	<p>Lord Hodge (<i>Aim, rational connection, necessity, balancing</i>):</p> <ul style="list-style-type: none"> - I.e. analysis on all grounds was brief. - The question of aim and rational connected are easily met [59]. - Necessity/balance also addressed in short order [60]. A ban on smoking indoors was clearly proportionate, and in light of the practical difficulties of partial enforcement the comprehensive ban was similarly justifiable.
<p>Poshteh v Kensington and Chelsea Royal London Borough Council</p>	<p>Whether it was reasonable for the claimant to reject an offer of accommodation made under local</p>	<p>Deals with scope of Article 6 – holds that the question here is one of resource allocation and Strasbourg has erred in attempting to apply Article 6 to discretionary decisions (<i>NA</i>).</p>

[2017] UKSC 36, [2017] 2 WLR 1417	authority duties to homeless persons.	
R (Coll) v Secretary of State for Justice (Howard League for Penal Reform intervening) [2017] UKSC 40, [2017] 1 WLR 2093	Whether the limited number of single sex approved premises for female prisoners released on licence was a breach of Article 8 and Article 14 ECHR.	<p>Baroness Hale (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - The crucial question is whether the limited provision is a proportionate means of achieving a legitimate aim [39]. - Cost saving is a legitimate aim, but the Secretary of State fails in terms of whether the impacts are justified because no thinking has been done about the issue [40]-[41].
R (A) v Secretary of State for Health [2017] UKSC 41, [2017] 1 WLR 2492	Whether a decision to refuse abortions in England for women ordinarily resident in Northern Ireland was a breach of Article 8 and Article 14.	<p>Lord Wilson (for the majority) (<i>Balancing</i>) (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Aim/connection/necessity are dealt with in a sentence; the whole question is balance [32]. - Lord Wilson rules out the application of the ‘manifestly without reasonable foundation’ test at the fourth stage. - Nonetheless, the claimants come nowhere near impugning the policy. The Secretary of State’s aim is to protect the devolution settlement in the UK. The claimants have put forward only the text of certain international conventions [33]-[35]. <p>Lord Kerr (<i>Aim</i>):</p>

		<ul style="list-style-type: none"> - Primarily Lord Kerr’s judgment turns on a different interpretation of the underlying legislation, which removes scope for the Secretary of State not to provide for the claimants. In light of this he also finds for the claimants on the basis that the Secretary of State did not have a legitimate aim [87].
<p>Kiarie v Secretary of State for the Home Department R (Byndloss) v Secretary of State for the Home Department [2017] UKSC 42, [2017] 1 WLR 2380</p>	<p>Whether deporting someone to whom the law allows an appeal in circumstances which will prejudice his participation in that appeal breach Article 8 ECHR.</p>	<p>Lord Wilson (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Aim, rational connection and necessity addressed in passing [78]. - The key is balance, and the Secretary of State had failed to establish sufficient justification [78 – referring back to earlier discussion]. <p>Lord Carnwath (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Concurs on the restricted basis that the Secretary of State did not have sufficient evidence to know that the procedural aspects of Article 8 would be met.
<p>Lord Advocate (representing the Taiwanese Judicial Authorities) v Dean</p>	<p>Whether an extradition order was a breach of Article 8 ECHR.</p>	<p>Article 8 claim summarily dismissed (NA).</p>

[2017] UKSC 44, [2017] 1 WLR 2721		
Benkharbouche v Embassy of the Republic of Sudan Janah v Libya [2017] UKSC 62, [2017] 3 WLR 957	Whether state immunity to employment claims brought by employees in state embassies was a breach of Article 6 ECHR.	Since, as a matter of customary international law the embassies are not entitled to state immunity, it is a breach of Article 6 to bare their claims (<i>NA</i>).
R (C) v Secretary of State for Work and Pensions [2017] UKSC 72, [2017] 1 WLR 4127	Whether a data retention/access policy regarding transgender benefits claimants was a breach of Article 8 ECHR.	Baroness Hale (<i>Balancing</i>): <ul style="list-style-type: none"> - Aim is not disputed [34]. - The rational connection is obvious [35]. - The core issue is the balance between preventing fraud and ensuring that transgender claimants have their identity protected [35]-[37]. - Baroness Hale notes at [36] is that one of the key points in favour of a finding for the government is that it is not for the Court to administer the benefits system.
R (HC) v Secretary of State for Work and Pensions [2017] UKSC 73, [2017] 3 WLR 1486	Whether withdrawing various benefits from <i>Zambrano</i> carers was a breach of Article 8/Article 1 Protocol 1 and Article 14 ECHR.	Lord Carnwath (<i>Balancing</i>): <ul style="list-style-type: none"> - The test is whether the policy is ‘manifestly without reasonable foundation’ and this is dismissed summarily [32]. - [37] Notes the limited nature of bare <i>Wednesbury</i> review.
R (Mott) v Environment Agency	Whether licence restrictions on a salmon	Lord Carnwath (<i>Balancing</i>):

<p>[2018] UKSC 10, [2018] 1 WLR 1022</p>	<p>fisherman were a breach of Article 1 Protocol ECHR.</p>	<ul style="list-style-type: none"> - The restrictions were an instance of control of property rather than expropriation [32]. - The case turned on whether impacts on the claimant were excessive [32]-[37]. - Noteworthy that Lord Carnwath suggests ways in which the decision-making process could have been better [36]
<p>In re Maguire [2018] UKSC 17, [2018] 1 WLR 1412</p>	<p>Whether Bar Council rules prevented free choice of counsel – not an Art 6 issue because it didn't impede justice.</p>	<p>Not a justification case – the question was what justice required, not whether the Bar Council's decision required justification (<i>NA</i>).</p>
<p>In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) [2018] UKSC 27, [2019] 1 All ER 173</p>	<p>Whether the prohibition in Northern Ireland on abortion in cases of (i) cases of serious foetal malfunction (ii) rape and (iii) incest was a breach of Article 8 ECHR.</p>	<p>On Article 8:</p> <ul style="list-style-type: none"> - Lord Mance, Lord Kerr, and Baroness Hale hold the law is disproportionate in all three cases. - Lord Reed, Lord Lloyd-Jones hold is it not disproportionate. - Lady Black agrees with the majority on (i) but the minority on (ii) and (iii). <p>Baroness Hale, Lord Mance & Lord Kerr (<i>Balancing x 3</i>):</p> <ul style="list-style-type: none"> - Accepted that there is a legitimate aim [21], [105], [278]. - And a rational connection [113], [291].

		<ul style="list-style-type: none"> - Balance is key: the central issue is whether the interference ‘strikes a fair balance between the rights of the pregnant woman and the interests of the foetus’ [21, 117 and 287]. <p>Lord Reed (for the dissenters) (<i>NA</i>):</p> <ul style="list-style-type: none"> - The claim does not allow the court to examine the facts of individual cases [361]. - Defining categories of pregnancy in which abortions should be permitted involves highly sensitive and contentious questions of moral judgment [362]. <p>Lady Black (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Concurs with Lord Mance on the right approach [368], though some of the circumstance specific consideration differs.
<p>JP Whitter (Water Well Engineers) Ltd v Revenue and Customs Commissioners</p> <p>[2018] UKSC 31, [2018] 1 WLR 3117</p>	<p>Whether the exercise of powers to provide (or remove) certificates of exemption from a tax deduction scheme required consideration of individual impacts for purposes of Article 1 Protocol 1.</p>	<p>Lord Carnwath (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Treated as a question of statutory interpretation. Once it is accepted that the underpinning statute does not require individual consideration, there is no route to use Article 1 Protocol 1 to read this in [23].

<p>R (Steinfeld) v Secretary of State for International Development</p> <p>[2018] UKSC 32, [2018] 3 WLR 415</p>	<p>Whether refusing to extend civil partnerships to heterosexual couples constituted a breach of Article 8 and Article 14 ECHR.</p>	<p>Lord Kerr (<i>Aim, balancing</i>):</p> <ul style="list-style-type: none"> - To be legitimate, an aim must be intrinsically linked to the discrimination. Tolerance of discrimination where the government is deciding how to address it is insufficient [42]. - There is in any event a failure to strike a fair balance, since there may be impacts on heterosexual couples for no substantive reason [52].
<p>Williams v Hackney London Borough Council</p> <p>[2018] UKSC 37, [2018] 3 WLR 503</p>	<p>Whether putting children into temporary accommodation without informing their parents of their right to object (after 72) hours and to remove the children was a breach of Article 8 ECHR.</p>	<p>The proportionality of the Article 8 interference was not discussed in the lower courts nor mooted before the Court so discussion was brief (<i>NA</i>).</p>
<p>An NHS Trust and others v Y (by his litigation friend, the Official Solicitor)</p> <p>[2018] UKSC 46, [2019] 3 WLR 751</p>	<p>Whether Article 6 and Article 8 ECHR require a court order in every treatment withdrawal case.</p>	<p>This is not required by the ECHR [103]-[114]. There is no absolute need to go to court, and it is better for families <i>not</i> to have to deal with court proceedings (<i>NA</i>).</p>
<p>R (on the application of AR) v Chief Constable</p>	<p>Whether disclosure of a rape acquittal via an enhanced CRC was a</p>	<p>Lord Carnwath (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Centrally a case about the approach appellate courts

<p>of Greater Manchester Police [2018] UKSC 47, [2018] 1 WLR 4079</p>	<p>breach of Article 8 ECHR.</p>	<p>should take to assessing lower courts' proportionality decisions [68].</p> <ul style="list-style-type: none"> - The hearing judge went no further (as he was entitled) than to accept the Chief Constable's view that the allegations 'might' be true. It was a question for him whether the information was of 'sufficient weight' in the Article 8 balance [69]-[70].
<p>In re McLaughlin [2018] UKSC 48, [2018] 1 WLR 4250</p>	<p>Whether paying widowed parents' allowance only to persons who had been married to their deceased spouse constituted a breach of Article 8, Article 1 Protocol 1, and Article 14 ECHR.</p>	<p>Baroness Hale (for the majority) <i>(Rational connection, balancing):</i></p> <ul style="list-style-type: none"> - The issue is whether there is a legitimate aim and a reasonable relationship of proportionality [32]. - The 'manifestly without reasonable foundation' test applies because this is a social security context [34]. - The stated aim of protecting marriage is legitimate [36]. - Comes very close to holding that the measure lacks a rational connection, but in the end determines that the measure is one of a small package available to married couples [37]. - The nub is the questioning of justification/balancing – the claimant is in an analogous position to a married person,

		<p>since the issue is the need to care for children [38]-[39].</p> <ul style="list-style-type: none"> - [40] International obligations reinforce the point. <p>Lord Hodge (in dissent) (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Interprets the purpose as being about the widow(er) [59]-[60]. - Technically the rest of the test is irrelevant [80]. - However, aim/connection are dealt with in short order [82]. - The key question is then whether the measure is disproportionate (applying the ‘manifestly without reasonable foundation’ test, he finds it is not) [83]-[87].
<p>KO (Nigeria) v Secretary of State for the Home Department</p> <p>[2018] UKSC 53, [2018] 1 WLR 5273</p>	<p>Whether provisions directing the courts’ balancing of Art 8 issues in deportation/removal decisions involving children’s interests (in particular, whether it would be ‘reasonable to expect’ a child to leave the UK, or ‘unduly harsh’ for a parent to be removed while the child remains) required consideration of the impacts only on children, or whether a</p>	<p>An interpretation case (see discussion of the government’s attempts to clarify the role of Article 8 ECHR at [12]), though notable for Lord Carnwath’s eschewal of balancing save where this is inevitable [16]-[18] (<i>NA</i>).</p>

	balancing exercise is to be undertaken (i.e. including the behaviour of the parents).	
Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, [2018] 1 WLR 5536	Consideration of the statutory meaning of 'precarious' in the context of the requirement that limited weight be given to matters under Article 8 ECHR established when immigration status was precarious.	Another interpretation case which impacts the nature of the balancing exercise undertaken by the courts. The Court endorses a 'bright line' rule i.e. relationships created when a person has any leave short of indefinite is 'precarious' [44]. Nonetheless, discretion remains under the statute to assess cases in the round [50] (NA).
R (on the application of Stott) v Secretary of State for Justice [2018] UKSC 59, [2018] 3 WLR 1831	Whether prisoners serving an 'Extended Determinate Sentence' (i.e. no right to parole until 2/3 of the sentence has expired) constituted illegitimate discriminate under Articles 5 and 14 ECHR.	Lady Black (for the majority) (<i>Rational connection, balancing</i>): <ul style="list-style-type: none"> - The majority hold that EDS prisoners are not in an analogous situation to comparator prisoners, so the legitimacy question was strictly moot but considered nonetheless. - The aim point is swiftly dismissed [152]. - As to whether there was a justification the majority hold that relative to prisoners serving indeterminate terms, the fixed end date compensated

		<p>for the delay in the possibility of parole [153-156].</p> <p>Lord Carnwath (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - A brief concurrence but he does address proportionality. This is a question of justification, but an irrationality standard is to be applied [180]-[181]. <p>Lord Hodge (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Same position as Lord Carnwath [196]-[203]. <p>Baroness Hale (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Aim is the easy question [216]. - Question is justification – she cannot see how it is logical for a more dangerous prisoner to be eligible for parole at an earlier date [217]-[221]. <p>Lord Mance (<i>Balancing</i>):</p> <ul style="list-style-type: none"> - Justification [238]. - Assessment is similar to Baroness Hale’s [240]-[248]
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Appendix B – Common Law Substantive Review Cases

Case name & citation	Summary	Mode of Review
<p>In the matter of Raymond Brownlee for JR</p> <p>[2014] UKSC 4, [2014] NI 188</p>	<p>Whether legal aid rules which did not make provision for additional costs where a legal team changes was lawful.</p>	<p>Lord Kerr (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - This was a material consideration [32]-[33] that should have been taken into account when drafting the rules (though note that this finding stemmed from a concession made as part of consultation on new rules).
<p>IA (Iran) v Secretary of State for the Home Department</p> <p>[2014] UKSC 6, [2014] 1 WLR 384</p>	<p>Consideration of the weight to be given to United Nations High Commission for Refugees (UNHCR) findings in immigration decisions.</p>	<p>Lord Kerr (<i>Governance Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - The expertise of the UNHCR is such that it should be afforded prima facie weight: ‘All of these factors require of the national decision-maker close attention to the UNHCR decision and considerable pause before arriving at a different conclusion.’ [48]-[49] - However, the Tribunal had carried out a careful analysis of the material leading it to reject the UNHCR determination [52]-[53].
<p>Kennedy v Charity Commission</p> <p>[2014] UKSC 20, [2015] AC 455</p>	<p>Whether the exemption in section 32 Freedom of Information Act 2000 for material related to inquiries continued to</p>	<p>Lord Mance (<i>Common law rights – legalistic</i>):</p> <ul style="list-style-type: none"> - The Commission has general discretion to release material publicly. Given the principle of openness at stake such decisions

	apply after the inquiry has finishes.	<p>would be subject to a high standard of review [49].</p> <ul style="list-style-type: none"> - The standard of review will, however, be variable and context dependent [55]. <p>Lord Toulson (<i>Common law rights – legalistic</i>):</p> <ul style="list-style-type: none"> - The courts must determine, on an claim against a decision to refuse disclosure, whether the open justice principle requires disclosure [109]-[132].
MN (Somalia) v Secretary of State for the Home Department [2014] UKSC 30, [2014] 1 WLR 2064	The extent to which tribunals can rely on ‘sprakab’ linguistic analysis reports (i.e. which purport to identify where an author originates).	<p>Lord Carnwath (<i>Governance Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - Tribunals have to exercise their expertise to benefit from judicial deference – see [22]-[32] on tribunals general and [46] on their approach to reports.
R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] UKSC 44, [2014] 1 WLR 2697	Legality of blanket FCO policy not to fund legal cases overseas.	<p>Lord Carnwath & Lord Mance (<i>Governance Wednesbury – deference</i>) (<i>Common law rights – legalistic</i>):</p> <ul style="list-style-type: none"> - Fettering principles are irrelevant where the source of power is the Royal Prerogative [62]. Certain principles e.g. legitimate expectation could still apply in respect of the policy’s operation. - Irrationality is a high bar, albeit it that it may bite (following <i>Kennedy</i>) to a greater extent in a case where death is imminent

		<p>[66]. NB. This is not relevant here because the FCO has considered the individual case – the Court finds nothing <i>irrational</i> in its decision to maintain its normal position [71].</p> <ul style="list-style-type: none"> - <i>In obiter</i> urge a reconsideration of the position in light of Bali’s attitude to the case. <p>Lord Sumption (<i>Governance Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - Legally the Secretary of State is under no obligation to take action, but in common with Lords Carnwath and Mance he considers <i>in obiter</i> that having embarked on a review of the policy the FCO should consider the case in light of changed circumstances.
<p>R (Moseley) v Haringey London Borough Council</p> <p>[2014] UKSC 56, [2014] 1 WLR 3947</p>	<p>Lawfulness of consultation on a council tax reduction scheme.</p>	<p>Lord Wilson (<i>Governance Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - Fairness may require a range of options to be explored [28]. - The consultation here presented as the only possible option one of a number [31]. - The duty of fairness was thus breached. <p>Lord Reed (<i>Governance Wednesbury – legalistic</i>):</p>

		<ul style="list-style-type: none"> - Diverts attention from the common law and onto the overall purpose of the statute, which was to engage the view of particular consultees [39].
<p>R (Kaiyam) v Secretary of State for Justice</p> <p>R (Haney) v Secretary of State for Justice</p> <p>R (Massey) v Secretary of State for Justice</p> <p>R (Robinson) v Governor of HM Prison Whatton</p> <p>[2014] UKSC 66, [2015] AC 1344</p>	<p>Provision of facilities enabling rehabilitation and, ultimately, release for prisoners under an ‘Imprisonment for Public Protection’ sentence.</p>	<p>Lord Mance (<i>Bare Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - The case turns primarily on the application of Articles 5 and 14 ECHR. - NB. In confirming that the case turns on an individual rights issue, the Court considers whether the standard applied here is the same as the threshold of ‘egregious’ behaviour required to fail at common law [41]. <p>NB. There were other judgments but none dealt with common law.</p>
<p>Sustainable Shetland v Scottish Ministers</p> <p>[2015] UKSC 4, 2015 SC (UKSC) 51</p>	<p>Whether the Scottish Ministers had taken account of considerations required under the Wild Birds Directive when determining an application for significant wind farms development.</p>	<p>Lord Carnwath (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - Decided on a material considerations basis, as opposed to the ‘hard look’ required by the Lord Ordinary. - Nonetheless, the Court goes further than the Inner House in requiring Ministers to have regard to considerations impacting upon their ability to comply with the requirements of the Directive [33].

<p>R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills</p> <p>[2015] UKSC 6, [2015] PTSR 322</p>	<p>Whether it was rational for the Secretary of State, when distributing EU funds across UK countries and regions, to apply a uniform approach rather than take into account unique situations.</p>	<p>NB. The Court accepted that the EU principle of equal treatment was equivalent to an irrationality standard [26], [162].</p> <p>Lord Sumption (<i>Bare Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - The policy context necessitated a light touch judicial approach [22]-[24]. - To fall foul of the legal standard, the decision would to reach a high discrimination threshold [34]. - It was ‘impossible’ for the Court to find the decision outside the broad range of lawful decisions [42]. <p>Lord Neuberger (<i>Bare Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - There is a need for the Court to moderate itself in budgeting issues [61]-[62]. - This is very much a ‘policy’ decision [78]. <p>Lord Clarke (<i>Bare Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - Agrees with Lord Sumption on the basis that this is a ‘policy call’ [112]. <p>Lord Mance (<i>Governance Wednesbury – legalistic</i>):</p>
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		<ul style="list-style-type: none"> - Finds that the Secretary of State's approach of applying a uniform reduction across the piece undermines the implicit goals of the underlying Regulation [157]. <p>Lord Carnwath (<i>Governance Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - Whatever head of review is relevant the problem was ineffective policy making [187].
R (Trail Riders Fellowship) v Dorset County Council [2015] UKSC 18, [2015] 1 WLR 1406	Whether maps submitted to the Council for purposes of marking rights of way complied with statutory requirements as to scale.	Lord Clarke (<i>NA</i>): (<i>in obiter</i>) 'The authority is under a public law obligation to prepare and maintain the DMS in proper form, which duty must itself imply that it should be at least professionally prepared to a quality and detail equivalent to the OS map. Given the availability of the OS map, it would be irrational for the authority not to use it.' [28]
Pham v Secretary of State for the Home Department [2015] UKSC 19, [2015] 1 WLR 1591	Whether it was lawful for the Secretary of State to make an order depriving the claimant of his British citizenship because to do so would make him stateless.	<p>NB. Court holds that the claimant is not stateless. However, it also considered <i>in obiter</i> the potential for proportionality review in common law in such a case.</p> <p>Lord Carnwath (<i>Common law rights – legalistic</i>):</p> <ul style="list-style-type: none"> - Endorses a variable standard – [60]. <p>Lord Mance (<i>Common law rights – legalistic</i>):</p>

		<ul style="list-style-type: none"> - Proportionality could in principle be applicable where citizenship was at stake. - Endorses variable review [94]. <i>Wednesbury</i>/proportionality are not inherently different in terms of intensity [96]. But in cases engaging fundamental rights a stricter standard is appropriate [98]. <p>Lord Reed (<i>Common law rights – legalistic</i>):</p> <ul style="list-style-type: none"> - Proportionality is part of <i>Wednesbury</i> [114]. - The two standards are not the same [115]. - However, they may yield the same outcome in light of the potential for variable intensity review [116]- [119]. The effect is to distinguish challenges to administrative action from rights cases. <p>Lord Sumption (<i>Common law rights – legalistic</i>):</p> <ul style="list-style-type: none"> - Collapses the distinction between rationality/proportionality review, considering that it was unsatisfactory to apply proportionality to EU but not British citizenship [105]-[106] on varying intensity as we move up the rights pole.
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		<ul style="list-style-type: none"> - NB. He argues that proportionality is not necessarily more intense, requiring consideration of institutional factors [107].
<p>R (Evans) v Attorney General</p> <p>[2015] UKSC 21, [2015] AC 1787</p>	<p>Whether the Attorney General exceeded his discretionary power to override a decision of the Upper Tribunal under the Freedom of Information Act 2000.</p>	<p>Lord Neuberger (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - The power of the courts to review decisions of the executive, and the potential for the executive to set aside court decisions, are principles that may be undermined only by the clearest statutory wording [52]. <p>Lord Mance (<i>Governance Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - Overriding a tribunal decision would require the clearest possible justification [71]-[79]. - N.B. The decision to take a different line to the IAT would need to be ‘a higher hurdle than mere rationality’ [129]. <p>Lord Wilson/Lord Hughes (<i>Governance Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - Treats the question as settled by a literal approach to statutory interpretation.
<p>Nzolameso v Westminster City Council</p>	<p>Whether the Council had abused its discretion under homelessness</p>	<p>Baroness Hale (<i>Governance Wednesbury – legalistic</i>):</p>

<p>[2015] UKSC 22, [2015] PTSR 549</p>	<p>legislation in allocating housing to the claimant a significant distance from her current home.</p>	<ul style="list-style-type: none"> - The Court of Appeal had treated the case as a question of bare rationality, and the claimant had lost. - The Court deals with this as a matter of implied statutory intention in finding that the duty to house homeless persons ‘in borough’ where this is ‘reasonably practicable’ requires placing them as close to where they had lived as possible [19]. - This is backed up by reference to duties held by authorities to children [27].
<p>Mathieson v Secretary of State for Work and Pensions</p> <p>[2015] UKSC 47, [2015] 1 WLR 3250</p>	<p>Legality of provisions cutting Disability Living Allowance for carers where the disabled person had been resident in hospital for a specified period.</p>	<p>Wednesbury cited in argument but the Court eschews rationality review (<i>NA</i>).</p>
<p>R (Champion) v North Norfolk District Council</p> <p>[2015] UKSC 52, [2015] 1 WLR 3710</p>	<p>Whether environmental assessments in respect of a planning decision had been properly carried out.</p>	<p>Rationality cited in earlier cases but no longer at issue by the time the case reaches the Supreme Court (<i>NA</i>).</p> <p>Lord Carnwath:</p> <ul style="list-style-type: none"> - See [42] for brief <i>obiter</i> discussion of whether the Council’s officers had considered relevant material.
<p>Mandalia v Secretary of State for the Home Department</p>	<p>Whether, in relation to requirements in the Immigration Rules to</p>	<p>Lord Wilson (<i>Governance Wednesbury – legalistic</i>):</p>

<p>[2015] UKSC 59, [2015] 1 WLR 4546</p>	<p>hold funds for a specified period for purposes of visa extensions, caseworker had to seek further evidence in with existing policy.</p>	<ul style="list-style-type: none"> - Individuals have an expectation that their cases will be decided in line with extant policy, and interpretation of such policy a matter of law [28]-[31] - The interpretation adopted, however, eschews pedantry and requires administrators to investigate uncertainty by seeking further evidence [36].
<p>R (Bibi) v Secretary of State for the Home Department</p> <p>R (Ali) v Secretary of State for the Home Department</p> <p>[2015] UKSC 68, [2015] 1 WLR 5055</p>	<p>Challenge to the legality of language requirements for non-EEA spouses of British citizens.</p>	<p>Centrally an Article 8 ECHR case. The common law claim adds nothing (see Baroness Hale and Lord Wilson at [57]) (NA).</p>
<p>R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs</p> <p>[2015] UKSC 69, [2016] AC 1355</p>	<p>Challenge to the refusal of the Secretary of State to direct an inquiry under the Inquiries Act 2005, into the killing of 23 unarmed civilians by Scots Guards in the former Federation of Malaya in 1948.</p>	<p>Lord Neuberger (for the majority) (<i>Bare Wednesbury – deference</i>) (<i>Common law rights – legalistic</i>):</p> <ul style="list-style-type: none"> - Bare irrationality fails in short order – the decision was not unreasonable [129]. - But addresses <i>in obiter</i> the potential for proportionality review at common law. He notes that proportionality is more likely to get to the merits of a decision [133], albeit the courts must be aware that they are not primary decision makers.

		<ul style="list-style-type: none"> - He then argues that proportionality and rationality are not as different as they appear – the issue is context. Here, for the same reasons as the rationality challenge was dismissed, a proportionality challenge would not succeed [136]. <p>Baroness Hale (<i>Governance Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - Since there is no fundamental right in question, she considers the claim purely on a <i>Wednesbury</i> basis [307]. - The failure to consider all the benefits of an inquiry made the decision rational [313]. <p>Lord Kerr (<i>Common law rights – legalistic</i>):</p> <ul style="list-style-type: none"> - <i>In obiter</i> considers that the difference between <i>Wednesbury</i> and proportionality is overestimated [271]. - Notes that proportionality in non-rights cases would require modification [281]- [283]. This more loosely structured test is not met. - Without an identifiable right, he effectively applies a reasonableness standard [283].
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<p>Trump International Golf Club v Scottish Ministers</p> <p>[2015] UKSC 74, [2016] 1 WLR 85</p>	<p>Challenge to wind farm development on basis of an irrational planning condition.</p>	<p>Lord Hodge (<i>Bare Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - The condition is not uncertain and irrational – the approach here is light touch [30].
<p>Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority</p> <p>[2015] UKSC 75, [2016] 2 All ER 631</p>	<p>Whether it was irrational for the CMA to conclude that the acquisition by the claimants of a ferry operation’s assets was a merger for purposes of the Enterprise Act 2002.</p>	<p>Lord Sumption (<i>Bare Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - The Court of Appeal’s finding that the decision was irrational was overly formalistic [41]-[43]. - The CMA is entitled to deference on the basis of its expertise, which here had been deployed with significant ‘depth’.
<p>R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs</p> <p>[2016] UKSC 3, [2016] AC 1457</p>	<p>Challenge to UK decision to stop blocking an asset freeze imposed by the United Nations Security Council.</p>	<p>Lord Carnwath (<i>Common law rights – deference</i>):</p> <ul style="list-style-type: none"> - Agrees that, following <i>Pham</i>, the standard to be implied incorporates a proportionality assessment [54]-[55]. - However, proportionality will often have the same outcome as a rationality assessment, especially where national interests are at stake [57]. - The appellant would not succeed even if a proportionality test were applied [59].

<p>R (Nouazli) v Secretary of State for the Home Department</p> <p>[2016] UKSC 16, [2016] 1 WLR 1565</p>	<p>Challenge to a decision to deport an Algerian on public interest grounds following his release from prison.</p>	<p><i>Wednebury</i> Cited but dropped early in proceedings. (NA)</p>
<p>R (O) v Secretary of State for the Home Department</p> <p>[2016] UKSC 19, [2016] 1 WLR 1717</p>	<p>Challenge to a decision to detain the claimant pending deportation on the basis that the Secretary of State had failed to comply with her own policy regarding the use of psychological reports.</p>	<p>Lord Wilson (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - Confirms that the meaning of policy is for the courts [28]. - The policy mandated practical enquiry – including into available methods of managing outside detention [30]-[31]. - There is a question as to whether application of the policy should be determined on a rationality or a correctness basis [36]. - However, the Court treats the issue as one of procedure i.e. the Secretary of State should have conducted further investigations [37].
<p>R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)</p> <p>[2016] UKSC 35, [2017] AC 300</p>	<p>Whether a previous House of Lords decision should be reopened (and if so, a different decision handed down) on the basis of undisclosed material.</p>	<p>Lord Mance (for the majority) (<i>Bare Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - Intensive review, but concludes the new material was either effectively considered (both by the court and the Secretary of State) or relevant only to a later period [16]-[65].

		<p>Lord Kerr and Baroness Hale (in dissent) (<i>Bare Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - The evidence could possibly have been decisive [155].
<p>R (Ismail) v Secretary of State for the Home Department</p> <p>[2016] UKSC 37, [2016] 1 WLR 2814</p>	<p>The claimant was convicted in absentia in Egypt for deaths resulting from a ferry accident. The question for the Court was the extent of the Secretary of States discretion when serving a foreign judgment under section 1 of the Crime (International Cooperation) Act 2003.</p>	<p>Bare irrationality is run at High Court level but has been filtered out by the time of the Supreme Court decision. (NA)</p>
<p>R (Lee-Hirons) v Secretary of State for Justice</p> <p>[2016] UKSC 46, [2017] AC 52</p>	<p>Failure to provide reasons to a mental patient who had been conditionally released for their recall under the Mental Health Act 1983.</p>	<p>Lord Wilson (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - Where the Secretary of State has promulgated a policy then it should be adhered to [17]. - It was conceded that aspects of the policy had not been adhered to [17]-[21]. - Nonetheless, the Court finds for the Secretary of State in respect of contested aspects of his application of his policy (i.e. the limited reasons provided to the claimant on his recall) [24]-[25].

<p>R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners</p> <p>[2016] UKSC 54, [2016] 1 WLR 4164</p>	<p>Whether disclosure of a taxpayer's confidential information to members of the press was a breach of HMRC's powers.</p>	<p>Lord Toulson (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - The case was considered on rationality grounds in the lower courts. - It was implicit in the governing statute that the powers relating to release of information were not subject to only a bare rationality test [22]. - Information could be released only be done where this is reasonably necessary to HMRC's core functions [24].
<p>Makhlouf v Secretary of State for the Home Department (Northern Ireland)</p> <p>[2016] UKSC 59, [2017] 3 ER 1</p>	<p>Appeal against deportation of a foreign criminal with children in the UK.</p>	<p>Rationality grounds considered in the lower courts are no longer live in what is now an Article 8 ECHR claim [28]. (NA)</p>
<p>R (MM (Lebanon)) v Secretary of State for the Home Department</p> <p>R (Majid) v Secretary of State for the Home Department</p> <p>R (Javed) v Secretary of State for the Home Department</p>	<p>Legality of provisions in the Immigration Rules regarding minimum income requirements for non-EEA family members.</p>	<p>Lord Reed & Baroness Hale:</p> <ul style="list-style-type: none"> - (On alternative funding sources) While the restrictions in the Immigration Rules on taking into account alternative sources of funding are harsh, it was not irrational for the Secretary of State to prioritise ease of use and simplicity over case by case assessment [98]. <p>(<i>Bare Wednesbury – deference</i>)</p>

<p>SS (Congo) v Entry Clearance Officer (Nairobi)</p> <p>[2017] UKSC 10, [2017] 1 WLR 771</p>		<ul style="list-style-type: none"> - (On taking into account statutory duties regarding children) While the Rules assert that these were taken into account, in substance the Court considers that these have not been given direct effect [90]-[92]. <p><i>(Governance Wednesbury – legalistic)</i></p>
<p>R (Agyarko) v Secretary of State for the Home Department</p> <p>R (Ikuga) v Secretary of State for the Home Department</p> <p>[2017] UKSC 11, [2017] 1 WLR 823</p>	<p>Legality of rules relating to applications for leave to remain from immigrants who formed relationships with British citizens during periods of unlawful residence.</p>	<p>Irrationality considered in the Court of Appeal and not live in the Supreme Court. <i>(NA)</i></p>
<p>McCann v State Hospitals Board for Scotland</p> <p>[2017] UKSC 31, [2017] 1 WLR 1455</p>	<p>Legality of a blanket smoking ban, and a policy requiring search and confiscation of patients/visitors' tobacco, at a secure facility.</p>	<p>Lord Hodge <i>(Governance Wednesbury – legalistic)</i>:</p> <ul style="list-style-type: none"> - Policies affecting autonomy are subject to restrictions in the governing legislation [38-39]. - A relevant principle is an obligation to impose the minimum restriction on the freedom of the patient that is necessary in the circumstances [39]. - There was no consideration of this principle by the Board [40]-[41].

<p>Poshteh v Kensington and Chelsea Royal London Borough Council</p> <p>[2017] UKSC 36, [2017] 2 WLR 1417</p>	<p>Whether the Council was correct in determining that it was not ‘reasonable’ for the claimant to reject an offer of accommodation to an Iranian national.</p>	<p>Lord Carnwath (<i>Governance Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - Light touch review of the decision maker’s approach, taking into account the time pressures facing housing officers [39]-[40]. - Noteworthy that the Court rejects the use of proportionality review here in light of its constitutional implications [42].
<p>Hopkins Homes Ltd v Secretary of State for Communities and Local Government</p> <p>Cheshire East Borough Council v Secretary of State for Communities and Local Government</p> <p>[2017] UKSC 37, [2017] 1 WLR 1865</p>	<p>Meaning and application of planning policy regarding the presumption in favour of sustainable development.</p>	<p>Lord Carnwath (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - Reiterates that the approach to the meaning of policy is not one of reasonableness but one of correctness [22]. Application and weight are for the decision maker [26].
<p>R (A) v Secretary of State for Health</p> <p>[2017] UKSC 41, [2017] 1 WLR 2492</p>	<p>Review of the Secretary of State’s refusal to fund abortions for women from Northern Ireland who are not ordinarily resident in the UK.</p>	<p>Lord Wilson (<i>Bare Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - The Secretary of State has broad discretionary authority and it is not irrational to make provision in accordance with the devolved administration of the UK [18]-[20]. <p>Lord Kerr (<i>Governance Wednesbury – legalistic</i>):</p>

		<ul style="list-style-type: none"> - Having construed the scope of the statutory power in a more restrictive manner (such that it applies to persons in England, rather than those ordinarily resident in England), he holds that the Secretary of State has effectively fettered his discretion [67].
<p>Kiarie v Secretary of State for the Home Department</p> <p>R (Byndloss) v Secretary of State for the Home Department</p> <p>[2017] UKSC 42, [2017] 1 WLR 2380</p>	<p>Legality of requiring appellants in immigration cases to appeal from their home state.</p>	<p>References <i>Wednesbury</i>, but this is an Article 8 ECHR case. Lord Wilson holds that to apply <i>Wednesbury</i>, even in its ‘anxious scrutiny’ mode, is inappropriate [42]-[43], [47]. (NA)</p>
<p>R (UNISON) v Lord Chancellor</p> <p>[2017] UKSC 51, [2017] 3 WLR 409</p>	<p>Challenge to Employment Tribunal fees on the basis that they interfere with rights at common law to access to justice.</p>	<p>Lord Reed (<i>Common law rights – institutionally activating</i>):</p> <ul style="list-style-type: none"> - The fees are unlawful if there is a real risk that they prevent access to justice [86]-[89]. - The practical effect of the fees is to prevent people bringing a claim without having severe impacts on their acceptable standard of living, or of making it irrational to bring a claim [90]-[98].
<p>In re Loughlin</p>	<p>Challenge to prosecutor’s decision not to refer a</p>	<p>Lord Kerr (<i>Governance Wednesbury – institutionally activating</i>):</p>

<p>[2017] UKSC 63, [2017] 1 WLR 3963</p>	<p>case back for sentencing in light of an informant's failure to comply with the terms of their agreement.</p>	<ul style="list-style-type: none"> - Unwilling to interfere with the authority's discretion [31]-[32]. - This is a material considerations case and the question is left to the decision maker, given that there are wide range of potentially relevant issues and she had covered the ground carefully [17]-[19], [31]-[33].
<p>Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority</p> <p>[2017] UKSC 66, [2017] PTSR 1413</p>	<p>Challenge to supplementary planning guidance and associated planning conditions on the basis that they give rise to irrelevant considerations being taken into account in planning decisions.</p>	<p>Lord Hodge (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - Considers the question of materiality with reference to earlier case law [47]-[48]. - Analyses the contribution scheme and determines that the condition is unlawful on the basis that there is an insufficiently clear link between the development and the required condition [61]-[63].
<p>Brown v Parole Board for Scotland and others</p> <p>[2017] UKSC 69, [2018] AC 1</p>	<p>Challenge on the basis that prisoners had not been given reasonable opportunities to rehabilitate.</p>	<p>A case turning on Article 5 ECHR, though Lord Reed mentions the proximity between <i>Wednesbury</i> and proportionality [40]. (NA)</p>
<p>R (HC) v Secretary of State for Work and Pensions</p> <p>[2017] UKSC 73, [2017] 3 WLR 1486</p>	<p>Whether withdrawing various benefits from Zambrano carers was a breach of Article 8/Article 1 Protocol 1 and Article 14 ECHR.</p>	<p>The case mainly turns on EU law but there is extensive <i>in obiter</i> comment which recommended substantive inclusion in the dataset.</p>

		<p>Lord Carnwath (<i>Bare Wednesbury – deference</i>):</p> <ul style="list-style-type: none"> - [37] Notes the limited nature of bare Wednesbury review. - However, in doing so, he gives an <i>in obiter</i> warning to authorities in terms of how they are to take account of their obligations in terms of children’s welfare. <p>Baroness Hale (<i>Governance Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - This point is developed in Baroness Hale’s judgment. She gives guidance on what will be relevant to active consideration [43]-[46].
R (CPRE Kent) v Dover District Council [2017] UKSC 79, [2018] 1 WLR 108	Whether there was a duty to give reasons for a planning decision where a planning committee had gone against the recommendation of the planning officer.	<p>Lord Carnwath (<i>Bare Wednesbury – legalistic</i>) (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - Reasons must not give rise to doubt as to whether a decision is based on rational grounds [35]. - The decision is not about the decision’s rationality <i>per se</i>, but to the need to disclose the reasoning for surprising decisions. - Here there was real doubt as to whether the decision had been reached on a rational basis [69].
R (Mott) v Environment Agency	Whether restrictive conditions imposed on a salmon fisherman were lawful.	The High Court found the decision irrational, but this was overturned by the Court of Appeal. Irrationality was no

<p>[2018] UKSC 10, [2018] 1 WLR 1022</p>		<p>longer a live issue when the case went to the Supreme Court. (NA)</p>
<p>R (Gallaher Group Ltd and others) v Competition and Markets Authority</p> <p>[2018] UKSC 25, [2018] 2 WLR 1583</p>	<p>CMA provides assurance to a party (TMR) entering a cooperation agreement that if other businesses in the same position as it successfully appeal a fine then it would benefit. Following successful appeals, the CMA pays back TMR. The claimants, who were in the same position as TMW but not provided an assurance, challenged the CMA's refusal to pay them back too on the basis of unequal treatment.</p>	<p>Lord Carnwath (<i>Governance Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - Equality is not a branch of irrationality [24], even if it finds expression in cases [26]. - OFT owed a duty of fairness – but that means nothing in itself and is not a legal principle [30]-[31]. - It was not irrational to treat TMR and Gallaher differently given that an assurance had been given to one and not the other [44]. <p>Lord Sumption (<i>Governance Wednesbury – institutionally activating</i>):</p> <ul style="list-style-type: none"> - Proliferation of heads of review is unhelpful – if a decision is based on relevant considerations and not unreasonable then that is sufficient [50]. - In this case the CMA considered the options and took a pragmatic decision – nothing more could be asked of them [56]. <p>Lord Briggs is more substantively deferential [61]-[63]. (<i>Bare Wednesbury – deference</i>)</p>
<p>JP Whitter (Water Well Engineers) Ltd v</p>	<p>Whether powers to provide a certificate of</p>	<p>Lord Carnwath (<i>Governance Wednesbury – legalistic</i>):</p>

<p>Revenue and Customs Commissioners</p> <p>[2018] UKSC 31, [2018] 1 WLR 3117</p>	<p>exemption from a tax deduction scheme were unfettered, and allowed consideration of impacts on individual companies.</p>	<ul style="list-style-type: none"> - HMRC's discretion is fixed by the statutory scheme's implicit purposes [21]-[22].
<p>Nottingham City Council v Parr</p> <p>[2018] UKSC 51, [2018] 1 WLR 4985</p>	<p>Whether the Housing Act 2004 allowed for conditions restricting use of Houses of Multiple Occupation to a class of person, and whether conditions imposed by the tribunals were irrational/unenforceable.</p>	<p>Lord Lloyd-Jones (<i>Bare Wednesbury – legalistic</i>) (<i>Governance Wednesbury – legalistic</i>):</p> <ul style="list-style-type: none"> - It is reasonable to impose conditions relating to the status of the occupants – this reflects the <i>purpose</i> of the statute and allows a more flexible, less standard driven model [18]-[27]. - Further, in context, a specific condition relating to student housing is rational [35]. However, given that the student requirement is rational, a 10-month limit is not since it is unnecessary.

Appendix C - Statutory Interpretation and Policy Cases

Case name & citation	Summary	Mode of Interpretation
<p>R (Buckinghamshire County Council) v Secretary of State for Transport [2014] UKSC 3, [2014] 1 WLR 324</p>	<p>Whether the hybrid bill procedure considering development consent for HS2 was compatible with Strategic Environmental Assessment and Environment Impact Assessment rules.</p>	<p>Lord Carnwath (<i>Closed</i>):</p> <ul style="list-style-type: none"> - EU caselaw [21]-[28]. - Purpose with reference to the travaux préparatoires [34]-[35]. - Text [35]-[36]. - Practical outcome [43]-[49]. <p>Lord Sumption (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Language/purpose/EU caselaw/European Commission guidance [120]-[128]. <p>Baroness Hale (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text, caselaw, purpose, and practicality in terms of Parliamentary progress [155]. <p>Lord Neuberger & Lord Mance (<i>Closed</i>):</p> <ul style="list-style-type: none"> - On the limits of teleological interpretation [171]. - Critique of the CJEU interpretation of the underlying directive (textual, in this sense) [175]-[189]. - Constitutional values [203]-[209].
<p>In the matter of Raymond Brownlee for JR</p>	<p>Challenge to legal aid rules which had not envisaged the need for</p>	<p>Lord Kerr (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Plain meaning (taking into account the need for practical

<p>[2014] UKSC 4, [2014] NI 188</p>	<p>additional costs where a legal team changes.</p>	<p>flexibility on costs issues) [32]-[33].</p>
<p>R (BSB Ltd) v Central Criminal Court [2014] UKSC 17, [2014] AC 885</p>	<p>Whether an application for a search warrant for protected (journalistic) material had to be <i>inter partes</i> as a result of section 9 and Sch 1 of the Police and Criminal Evidence Act 1984.</p> <p>-</p>	<p>Lord Toulson (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Plain meaning; - Purpose and legislative history [30]. - Fundamental rights/values (i.e. disclosure of journalistic material) [29].
<p>Kennedy v Charity Commission [2014] UKSC 20, [2015] AC 455</p>	<p>Whether the exemption in section 32 of the Freedom of Information Act 2000 for material related to the conduct of an inquiry continued after an inquiry's conclusion.</p>	<p>Lord Mance (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text/grammar [28]. - Broader scheme of section 32 scheme [29]. - Statutory context i.e. purposes and scheme of FOIA [30]. - Broader statutory context [31]. - Influenced by the common law obligation to make information publicly available (i.e. values) [43]-[56]. - Requirements of Article 10 ECHR [38]-[94] <p>Lord Toulson takes a very similar line to Lord Mance (<i>Closed</i>).</p> <p>Lord Wilson (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Reads the requirements of the ECtHR cases differently, and accordingly treats the influence

		<p>of Article 10 differently to the majority [189].</p> <ul style="list-style-type: none"> - Influenced by the lack of clarity to any potential common law obligation to make information available (i.e. values) [198]. - Reading of the text of the statute is same as majority, though he would adopt an alternative interpretation on the basis of his views on Article 10 ECHR [200]. <p>Lord Carnwath(<i>Closed</i>):</p> <ul style="list-style-type: none"> - Agrees with Lord Wilson on the effect of the ECtHR jurisprudence [218]-[219]. - Agrees with Lord Mance generally on the meaning of section 32 [221]. - Looks to general purpose of FOIA [230]. - Takes account, in agreeing with Lord Wilson, of practical/policy considerations i.e. bringing access to information decisions with the purview of the specialist bodies administering FOIA [232].
R (George) v Secretary of State for the Home Department	Whether, if a deportation which would cancel indefinite leave to remain is	<p>Lord Hughes (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Looks to <i>in pari materia</i>, though this is of limited use here [15].

<p>[2014] UKSC 28, [2014] 1 WLR 1831</p>	<p>revoked, this revives the original leave to remain.</p>	<ul style="list-style-type: none"> - Legislative background, including assumptions made by Parliament [12], [16]-[18]. - Practical effects [19]. - Not decisive, but reference at [21] to whether a particular point was in the minds of the legislators. - Natural meaning [29]. - Parliament’s treatment of the section in subsequent legislation [30]. - Scheme of the relevant Act [31].
<p>MN (Somalia) v Secretary of State for the Home Department [2014] UKSC 30, [2014] 1 WLR 2064</p>	<p>The extent to which tribunals can rely on ‘sprakab’ linguistic analysis reports (i.e. which purport to identify where an author originates).</p>	<p>Not an interpretation case – but one that makes clear that tribunals have to exercise their expertise to benefit from judicial deference.</p> <p>See Lord Carnwath at [22]-[32] on tribunals generally and [46] on the need for them to take a critical approach to the use reports.</p>
<p>R (Eastenders Cash & Carry Plc and others) v Revenue and Customs Commissioners [2014] UKSC 34, [2015] AC 1101</p>	<p>Extent of customs officers’ powers to detain goods under s.139 Customs and Excise Management Act 1979, in particular whether there was an implied power to detain goods that <i>may</i> be liable to forfeiture.</p>	<p>Lord Sumption & Lord Reed (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Statutory context [13]-[21]. - In light of the provision’s wording and the wider statutory context, no such implied power appears to exist (i.e. because where the drafter was providing for this, they did so expressly) [23]. - However, this gives rise to problems in terms of

		<p>practicality, EU and HRA, and other statutory provisions [24].</p> <ul style="list-style-type: none"> - Accordingly, they turn to legislative history and statutory purpose. In light of judicial approaches to earlier related legislation and the context in which Parliament was legislating, they discover that there was an implied power to detain for investigation [45].
<p>The Manchester Ship Canal Company Ltd v United Utilities Water Plc</p> <p>[2014] UKSC 40, [2014] 1 WLR 2576</p>	<p>Whether, under the Water Industry Act 1991, a sewerage undertaker has a statutory right to discharge surface water and treated effluent into private watercourses.</p>	<p>Lord Sumption (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Principles of statutory construction (i.e. necessary implication) 2. - The practical consequences if the right did not exist [18]. - The provision in question, read against the general principles of the 1991 Act, meant that such a right was implicit [19]-[20]. <p>Lord Toulson (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Looks to the text and purposes of the 1991 Act [29]-[35]. - This is fortified by (though he does not rely on) the previous legislative position. <p>Lord Neuberger (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Relies more on interpreting the 1991 with reference to provisions in earlier legislation [39].

<p>In re Agricultural Sector (Wales) Bill</p> <p>[2014] UKSC 43, [2014] 1 WLR 2622</p>	<p>Whether the Agricultural Sector (Wales) Bill 2013, retaining a regime of agricultural wages regulation in Wales, was within competence of the National Assembly for Wales.</p>	<p>Lord Reed & Lord Thomas (<i>Closed</i>):</p> <ul style="list-style-type: none"> - The principles from the Wales Act (s.108 and Sch 7). - The constitutional significance is unimportant, though the constitutional purpose is (i.e. values) [6]. - Expressly rules out the use of (i) parliamentary exchanges; (ii) ministerial correspondence; (iii) the history of devolution in Wales [35]-[43]. - A textual approach is applied. ‘Agriculture’ has a wide semantic range [49]. - Reinforced with questions of broader purpose [53]-[54] and legislative history [50]-[52]. - NB. Note that there are different ways of framing a bill’s purpose [65] (in this case, that is settled via s.108).
<p>Healthcare at Home Ltd v Common Services Agency for the Scottish Health Service</p> <p>[2014] UKSC 49, [2014] PTSR 1081</p>	<p>Meaning of ‘reasonably well-informed and normally diligent tenderer’ in EU procurement law.</p>	<p>Lord Reed (<i>NA</i>): Effectively settled by CJEU.</p>
<p>R (B) v Westminster Magistrates' Court</p>	<p>Whether there is an implied power to allow the court to hold a closed material process</p>	<p>Lord Mance (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text. Clear that there is no right on the face of the statute [17].

<p>[2014] UKSC 59, [2015] AC 1195</p>	<p>where a Rwandan national subject to extradition wishes to put forward evidence from someone who does not want their identity revealed.</p>	<p>Lord Toulson (in dissent) (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Takes a values-based approach. The requirements of justice supplement the statutory scheme [86]-[93].
<p>R (N) v Lewisham London Borough Council</p> <p>[2014] UKSC 62, [2015] AC 1259</p>	<p>Whether an authority must give notice and obtain a court order to obtain possession of <i>interim</i> accommodation.</p>	<p>Lord Hodge (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Statutory history (i.e. the Rent Acts) [26]. - Text i.e. ‘Dwelling’ is not a term of art [23]. - Purpose (‘statutory policy’ taking into account the context of the application [28]-30)). - Broader statutory context [33]. - Practical implications [34]-[35]. - Previous caselaw re: ‘dwellings’ [45]. - Inferences from other statutes considered but rejected [50]. - Considers settled practice, including in circumstance where Parliament has legislated in the knowledge of caselaw [53]. - Policy and individual justice (i.e. values) considered but have limited weight. <p>Lord Carnwath (<i>Open</i>):</p> <ul style="list-style-type: none"> - Clear on the primacy of text [79].

		<ul style="list-style-type: none"> - Dismisses ‘tacit’ legislation [86]. - Support use of this as background material relevant to intent. - ‘Settled practice’ [94]-[97]. <p>Lord Neuberger (in dissent) (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Criticises the use of previous statute and related caselaw. [107]-[125]. - Text and statutory context [126]-[128]. - Caselaw on statute <i>in pari materia</i> [129]-[134]. - Values i.e. vulnerability of the persons involved [135]-[137]; - Purpose of the section [138]; - Strong reservations on the ‘implied legislation’ [142]-[147]. - Strongly opposed to the customary meaning approach [148]. - Criticises the majority for use of policy considerations [153]. <p>Baroness Hale (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text [159]. - Critiques the way in which Lord Hodge uses context. - Looks to <i>in pari materia</i>/statutory context [163]. - [166] Dismisses the arguments over impacts – this is irrelevant;
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		<ul style="list-style-type: none"> - [167] And caselaw likewise has no place. - [168] Nor does customary meaning.
<p>Doogan v Greater Glasgow and Clyde Health Board</p> <p>[2014] UKSC 68, [2015] AC 640</p>	<p>Scope of provisions in the Abortion Act 1967 regarding conscientious objection for medical practitioners and the provision of abortions.</p>	<p>Hale (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Not for this court to predict the outcomes of narrow/wide readings or to reconcile the competing moral arguments [25]-[27]. - Dealt with mainly via a straight reading of the provision [34]-[35]. - Previous caselaw [36]. - Baroness Hale’s view of what Parliament had in its collective mind at the time of passing the legislation – i.e. purpose [38].
<p>In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill</p> <p>[2015] UKSC 3, [2015] AC 1016</p>	<p>Whether the National Assembly for Wales has power to make persons liable to compensate victims of asbestos related diseases liable for the cost of NHS treatment to such victims.</p>	<p>Lord Mance (for the majority) (<i>Closed</i>):</p> <ul style="list-style-type: none"> - ‘Natural meaning’ [19]. - Statutory position prior to passing of Government of Wales Act 2006 [20]. - Determines that imposing liability on 3rd parties is insufficiently closely connected to be ‘for NHS organisation’ and thus outwith competence [27]. <p>Lord Thomas (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Looks to ‘ordinary meaning in context’ [83].

		<ul style="list-style-type: none"> - Deals with statutory history [85]-[95] (unlike Mance, he is interested <i>only</i> in the Government of Wales Act [91] and <i>not</i> other Acts).
<p>R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills</p> <p>[2015] UKSC 6, [2015] PTSR 322</p>	<p>Whether it was lawful to apply a non-differentiated reduction to EU funding for economically depressed areas.</p>	<p>The majority deal with this as a question of rationality.</p> <p>Lord Mance (in dissent) (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Purpose based on text [116]-[118]. - Wider legislative context of the relevant directives [119]-[138].
<p>R (Brown) v Secretary of State for the Home Department</p> <p>[2015] UKSC 8, [2015] 1 WLR 1060</p>	<p>Asylum and meaning of ‘significant number of people’ – Court holds that the SoS does not need to rule out persecution before putting a country on the fast-track list – rather it has to be sure persecution is not a general feature of life.</p>	<p>Lord Toulson (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Natural meaning [21], - Purpose of the UN Refugee Convention [22]. - Rejects the SoS’s argument that she should be afforded a margin of appreciation when there is no way of determining a reasonable figure on her proposed approach. - Confirmation, in discussion of construing provisions with reference to subsequent amendment, that Parliament’s purpose is the aim of interpretation [24]. - [27] On limits of <i>Pepper v Hart</i>. <p>Lord Hughes (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Concurr, but notes: [30] a practical point in that the majority finding could reduce

		<p>the Secretary of State's discretion to nothing; at that this undermines decision making [34]; and that a clear purpose of the provision is to streamline claims [35].</p>
<p>R (Trail Riders Fellowship) v Dorset County Council</p> <p>[2015] UKSC 18, [2015] 1 WLR 1406</p>	<p>Whether maps submitted to the Council for purposes of marking rights of way complied with statutory requirements as to scale.</p>	<p>Lord Clarke (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Natural meaning [19]-[20]. - I.e. the statute could have, but did not, require maps to be drawn with a particular level of detail [22]-[25]. - Opinion of the Ordnance Survey [32]. <p>Lord Toulson (<i>Closed</i>): Concurs with Lord Clarke.</p> <p>Lord Carnwath (<i>Closed</i>): Concurs with Lord Clarke.</p> <p>Lord Neuberger (in dissent) (<i>Closed</i>):</p> <ul style="list-style-type: none"> - 'Natural' meaning (though he accepts that either reading could be accepted as a 'matter of pure language'). His decision is bound up with practical application [86]-[87]. <p>Lord Sumption (in dissent) (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Purpose [107].
<p>Pham v Secretary of State for the Home Department</p>	<p>Whether removing the claimant's British</p>	<p>NB. Not a case in which a statutory question was controversial so of limited assistance here – turns on</p>

<p>[2015] UKSC 19, [2015] 1 WLR 1591</p>	<p>citizenship rendered him stateless.</p>	<p>interpretation of Convention on the Status of Stateless Persons.</p> <p>Lord Carnwath (<i>NA</i>):</p> <ul style="list-style-type: none"> - Legislative text. - UN guidance [34]-[35], [38] (i.e. statelessness involves more than legal status). <p>Lord Mance (<i>NA</i>):</p> <ul style="list-style-type: none"> - [64] Meaning of the statute has to relate to meaning under the convention. - Contemplates that custom here can alter the law [65] though in the circumstances he doesn't see any need to go beyond the text.
<p>R(Evans) v Attorney General</p> <p>[2015] UKSC 21, [2015] AC 1787</p>	<p>The scope of the Attorney General's discretion to veto release of information which has been ordered by the Upper Tribunal.</p>	<p>Lord Neuberger (<i>Closed</i>):</p> <ul style="list-style-type: none"> - HMG publications on use of veto [20]. - Rule of law/legality (i.e. values) - to override a judicial decision would require the clearest possible authority [51]-[59], [69]. - Previous authority [60]-[65]. - Practical implications [71]-[85]. <p>Lord Mance (<i>Closed</i>):</p> <ul style="list-style-type: none"> - [124] Language (i.e. recognising the implications of Lord Neuberger's judgment in terms of the text).

		<ul style="list-style-type: none"> - Caselaw [e.g. 126]. - Values. <p>Lord Hughes (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text [154]-[155]. - Caselaw on related provisions (which he does not consider to be of much assistance [157]-[160]). <p>Lord Wilson (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text [168]. - Legislative history [170]. - Noteworthy that he considers this to be a case not about law, but about public interest and expertise [171]. - Procedural context (i.e. HMG could not have appealed the tribunal [178]). - Statutory context i.e. alternative protections [172] - Case law [179]. - Practical implications of Lord Neuberger’s judgment.
<p>Nzolameso v Westminster City Council</p> <p>[2015] UKSC 22, [2015] PTSR 549</p>	<p>Effects of ‘reasonably practicable’ requirement in s.208 Housing Act 1996.</p>	<p>Baroness Hale (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text. - Statutory guidance [19]. - External duties re: children also relevant [22]-[30]. - N.B. Each decision is a question of evaluation [25];

		<ul style="list-style-type: none"> - <i>Obiter</i> comments on the need to formulate a policy [39]-[40].
<p>Hotak v Southwark London Borough Council</p> <p>[2015] UKSC 30, [2016] AC 811</p>	<p>Is assessing ‘vulnerability’ for purposes of homelessness assistance:</p> <p>(i) a question of comparability, and if so with whom; and (ii) can support from family be taken into account?</p>	<p>Lord Neuberger (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Notes the evaluative nature of the question [34]. - As to (i) corrects Arden LJ to the effect that vulnerable and resource availability interrelate – not least because Parliament has struck the balance i.e. text [36], [56]. - Disdain for the wisdom of policymakers as opposed to statutory text. Statistics are irrelevant [40]-[43]. - Works out the comparator using previous case law [48]-[58]. - Practical consequences (i.e. on the availability of family resources) [62]. <p>Baroness Hale (<i>Closed</i>): dissents in part, agreeing on vulnerability, but requires more certainty in the familial support. Does not change the interpretive approach.</p>
<p>Haile v Waltham Forest London Borough Council</p> <p>[2015] UKSC 34, [2015] AC 1471</p>	<p>Meaning of ‘intentionally homeless’ for purposes of homelessness duties.</p> <p>Court holds this is a question of (i) whether C did something</p>	<p>Lord Reed (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Legislative history [4]-[8]. - Caselaw [9]-[17], [26] – [58]. - [14] Secretary of State guidance. - Text of the provision and statutory context [18]-[25].

	<p>deliberately meaning he ceased occupation; (ii) whether current homelessness was caused by that.</p>	<p>(N.B. notes at [22] that the purpose/policy is obvious).</p> <p>Lord Neuberger (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Looks to the purpose of the Housing Act 1996 [78]. - Holds that the rereading and distinguishing of <i>Din</i> is more consistent with the policy of the 1996 Act [80]. <p>Lord Carnwath dissents (<i>Open</i>):</p> <ul style="list-style-type: none"> - Impacts on settled practice of overturning previous authority (technically, the Court distinguishes <i>Din</i>, but that is not the practical reality) [88]-[89].
<p>R (Cornwall Council) v Secretary of State for Health</p> <p>[2015] UKSC 46, [2016] AC 137</p>	<p>Which of three council areas a person was ‘ordinarily resident’ for purposes of National Assistance Act at his 18th birthday.</p>	<p>Lord Carnwath (majority) (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Statutory context (including the long title) [33]. - Legislative background [34]. - Afterlife of the test [37]. - Caselaw [39]-[48]. - Rejects the SoS’s practical approach – while justifiable as a policy choice the ‘wording of the statute’ is more important [49]-[51]. - Dismisses linguistic approach in favour of one favouring the ‘policy’ of the Act and practical consequences [53].

		<p>Lord Wilson (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Notes the experience of the public counsel in question [63]. - Eschews a policy approach ('I am not a legislator') [65]-[66]. - Caselaw [67]-[69]. - Legislative history [70]. - [72]-[73] Critiques the majority's approach as policy-creation. - Goes through of process of elimination to determine which outcome makes the most sense [73].
<p>R (Champion) v North Norfolk District Council</p> <p>[2015] UKSC 52, [2015] 1 WLR 3710</p>	<p>Whether it was possible to take into account mitigation measure in the course of environment assessment screening processes (i.e. in determining whether a full assessment would be necessary).</p>	<p>Lord Carnwath (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text. - Caselaw of the CJEU [37]-[42].
<p>R(Bourgass) v Secretary of State for Justice</p> <p>[2015] UKSC 54, [2016] AC 384</p>	<p>Whether a prison governor had delegated authority from the Secretary of State to authorise the continued segregation of two prisoners.</p>	<p>Lord Reed (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Constitutional principle/values i.e. Carltona [48]-[53]. - Text and context of the statute and prison rules [55]-[64]. - Caselaw [65]-[77]. - Purpose [78] et seq (esp [88]-[90]).

<p>Mandalia v Secretary of State for the Home Department</p> <p>[2015] UKSC 59, [2015] 1 WLR 4546</p>	<p>Whether, in respect of a requirements to hold funds for a prescribed period for purposes of visa extensions, the Secretary of State had unlawfully failed to follow her own policy on seeking further evidence before determining an application.</p>	<p>Not a statutory interpretation case.</p> <p>Lord Wilson (<i>NA</i>):</p> <ul style="list-style-type: none"> - Interpretation of policy a matter of law [28]. - Rejects the notion that the Secretary of State can adopt her own interpretation unless it is reasonable [31].
<p>Trump International Golf Club v Scottish Ministers</p> <p>[2015] UKSC 74, [2016] 1 WLR 85</p>	<p>Challenge to a wind farm development consent on basis of an alleged failure to comply with requirements of the Electricity Act and unlawful planning conditions.</p>	<p>Lord Hodge (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Language. - Structure of the Electricity Act [7]-[13]. - Legislative policy/purpose and history [14]-[21]. - N.B. Interpretation of the condition itself is permissive [30].
<p>R (Nouazli) v Secretary of State for the Home Department</p> <p>[2016] UKSC 16, [2016] 1 WLR 1565</p>	<p>Transposition of regulations – deportation of 3rd country nationals with EU family.</p>	<p>Lord Neuberger (<i>NA</i>): [80]-[84] SoS has wide discretion re: achieving the aims of directives.</p> <p>N.B. Limited in terms of being an interpretation case</p>
<p>R (O) v Secretary of State for the Home Department</p>	<p>Whether the Secretary of State had correctly applied her policy on the use of psychological</p>	<p>An interpretation of policy case.</p> <p>Lord Wilson (<i>NA</i>):</p>

<p>[2016] UKSC 19, [2016] 1 WLR 1717</p>	<p>reports for persons detained pending deportation.</p>	<ul style="list-style-type: none"> - At confirms that the <i>meaning</i> of policy is for the courts, though application is for the Secretary of State [28]. - This policy mandates practical enquiry [31]. - The question of application is whether it is rational [36].
<p>In the matter of an application by JR55 for JR</p> <p>[2016] UKSC 22, [2016] 4 All ER 779</p>	<p>Challenge to a decision of the Northern Ireland Commissioner for Complaints (an ombudsman) to require a GP to pay compensation decision and to lay a ‘special report’ before the Northern Ireland Parliament.</p>	<p>Lord Sumption (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Role of ombudsmen, including a comparison of the NICC with the Parliamentary equivalent [19]-[20]. - Text/structure of legislation [21]-[26].
<p>MS (Uganda) v Secretary of State for the Home Department</p> <p>[2016] UKSC 33, [2016] 1 WLR 2615</p>	<p>Rights of appeal under the Nationality, Immigration and Asylum Act 2002.</p>	<p>Lord Hughes (<i>Closed</i>):</p> <ul style="list-style-type: none"> - A range of interpretations are available [14]. - These are compared on the basis of practical consequences and common sense/rationality [15]-[20]. - The key issue is purpose [20] – once this is understood, then the correct interpretation can be selected from the possible options [22]-[24].

<p>Goluchowski v District Court in Elblag, Poland Sas v Circuit Court in Zielona Gora, Poland</p> <p>[2016] UKSC 36, [2016] 1 WLR 2665</p>	<p>Formalities for complying with a European Arrest Warrant.</p>	<p>Lord Mance (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Language of Act and the underlying Framework directive [5]-[9]. - The Purpose of the underlying Directive [23]. - Practice and outcomes [24]-[26]. - Determinations of the CJEU [40].
<p>R (Ismail) v Secretary of State for the Home Department</p> <p>[2016] UKSC 37, [2016] 1 WLR 2814</p>	<p>Extent/nature of SoS discretion when serving a foreign judgment on an Egyptian national under the Crime (International Co-operation) Act 2003.</p>	<p>Lord Kerr (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text/interpretative practice. Text suggests that the statute is merely administrative (in the sense that it does not require the Secretary of State to exercise discretion), though must weigh against this that as a power there may be cases where it <i>shouldn't</i> be exercised [25]-[26]. - Looks to Secretary of State guidance [27]. - Mentions but gives no weight to Parliamentary material [31]. - Article 6 is then considered, but the discussion here turns on the <i>practical</i> effects of service [32]-[54] – for Lord Kerr this is all about the practical effect of the service.

<p>R (Public Law Project) v Lord Chancellor</p> <p>[2016] UKSC 39, [2016] AC 1531</p>	<p>Legality of using Henry VIIIth powers in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to introduce a residence test for civil legal aid.</p>	<p>Lord Neuberger (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Statutory presumptions [26]. - Values. - Wording of the section. - Statutory context [29]-[36]. - Overall purpose of the Act, taking into account legislative history [37].
<p>Christian Institute v Lord Advocate No 3</p> <p>[2016] UKSC 51, 2017 SC (UKSC) 29</p>	<p>Whether a ‘named person’ scheme in Scotland, which required a named individual to coordinate care for children and facilitate inter-agency data-sharing, was outwith the powers of the Scottish Parliament.</p>	<p>Baroness Hale, Lord Reed & Lord Hodge (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Statute and legislative background on purpose 2-[4]. - The principles of devolution (i.e. purpose/effect) [27]-[31]. - N.B. Note that the purpose of a measure may not be easy to establish [31]. - The purpose of the Data Protection Act and its EU sources [34]-[44]. - The effect of the named person scheme in terms of the DPA [45]-[62].
<p>R (Ingenious Media Holdings) v Revenue and Customs Commissioners</p> <p>[2016] UKSC 54, [2016] 1 WLR 4164</p>	<p>Whether disclosure of a taxpayer’s confidential information to members of the press was outwith HMRC’s discretionary powers.</p>	<p>Toulson (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text. - Constitutional principle/values - HMRC’s wide reading is rejected because of its vagueness and implications for privacy [19]-[22].

<p>Mirza v Secretary of State for the Home Department</p> <p>[2016] UKSC 63, [2017] 1 WLR 85</p>	<p>Whether defective applications to vary a period of leave were subject to the protections of section 3C of the Immigration Act 1971.</p>	<p>Lord Carnwath (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Legislative history [20]-[29]. - Note [30] wherein Lord Carnwath berates the Secretary of State’s vague and shifting policy, suggesting an element of pragmatism in interpretation. - Natural meaning [33]. - Cross-checked against the legislative history [34].
<p>R (Miller) v Secretary of State for Exiting the European Union</p> <p>[2017] UKSC 5, [2017] 2 WLR 583</p>	<p>Whether the Secretary of State required statutory authority to withdraw the UK from the EU using the procedure set out in Article 50 TFEU.</p>	<p>Lord Neuberger et al (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text/context e.g. [60]. - Caselaw. - Constitutional principle/values [75]-[81] and associated interpretative inferences [87]-[88]. - Subsequent legislation and events [111]. - N.B. Text/constitutional principle govern the devolution issues too – [129]-[131], [133]-[135], [136]-[151]. <p>Lord Reed (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text and context [179]-[192]. - Caselaw e.g. [194]. - Inferences based on subsequent legislation [198]-[214]. - [215]-[237] Caselaw & constitutional principle/values.

		<p>Lord Carnwath (<i>Closed</i>): Takes a pragmatic/practical line i.e. the Article 50 notice is the start of a process and primary legislation will be needed at some point [259].</p> <p>Lord Hughes (<i>Closed</i>): A footnote – but noteworthy he confirms that either reading is possible [281].</p>
<p>DB v CC Police Service of Northern Ireland</p> <p>[2017] UKSC 7, [2017] NI 301</p>	<p>Whether the Police Service of Northern Ireland had exercised their powers to regulate parades under the Public Processions (Northern Ireland) Act 1998 in accordance with the competing rights claims at stake.</p>	<p>Lord Kerr (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Shifts the focus from discretion and human rights norms to interpretation [3]. - [48]-[52] North Report – i.e. legislative history, though NB the issue is that the police say a problem arises from <i>not</i> having implemented the Report’s findings. - Reading [52]-[55] of the (relatively) clear text based on prior development and purpose. - Practical effect [64]-[65].
<p>R (MM) (Lebanon) v Secretary of State for the Home Department</p> <p>[2017] UKSC 10, [2017] 1 WLR 771</p>	<p>Legality of minimum income requirements in Immigration Rules for non-EEA family members.</p>	<p>Not straightforwardly an interpretation case. But noteworthy for emphasising a strong role for tribunals in policy development. (<i>NA</i>)</p>

<p>R (Agyarko) v Secretary of State for the Home Department</p> <p>R (Ikuga) v Secretary of State for the Home Department</p> <p>[2017] UKSC 11, [2017] 1 WLR 823</p>	<p>Whether decisions to refuse right to reside to foreign partners of UK citizens on the basis that, in accordance with the Immigration Rules, there were not ‘insurmountable obstacles’ to family life taking place overseas and there were no other exceptional circumstances, were a breach of Article 8 ECHR.</p>	<p>Again not a statutory interpretation case, but one in which the Court is clear that the interpretation of policy is a question of law. In this case it undertakes a generous reading of the Secretary of State’s strict policy on the basis that it can be reconciled with the ECtHR jurisprudence. <i>(NA)</i></p>
<p>Financial Conduct Authority v Macris</p> <p>[2017] UKSC 19, [2017] 1 WLR 1095</p>	<p>Whether the FCA had complied with provisions in the Financial Services and Markets Act 2000 protecting the identity of individuals where a ‘regulatory settlement’ is achieved prior to punitive action being taken.</p>	<p>Lord Sumption <i>(Closed)</i>:</p> <ul style="list-style-type: none"> - Text of the relevant section [12]-[13]. - Wider context of the Act [14]. - Purpose [14]-[16]. <p>Lord Neuberger <i>(Closed)</i>:</p> <ul style="list-style-type: none"> - Comparison of practical consequences [23]. - Text [25]. - Designs a reading based on the differential outcomes of narrower/wider readings [26]-[28]. <p>Lord Wilson (in dissent) <i>(Closed)</i>:</p> <ul style="list-style-type: none"> - Values (i.e. identity protection) on the basis that the majority fails to strike a balance between

		<p>individual reputation and regulatory efficiency [44].</p> <ul style="list-style-type: none"> - The key is the nature of the readership and the practical impacts of the majority decision [59]-[60].
<p>Isle of Wight Council v Platt</p> <p>[2017] UKSC 28, [2017] 1 WLR 1441</p>	<p>Meaning of ‘regularly’ attending school for purposes of the offence under section 444(1) of the Education Act 1996.</p>	<p>Baroness Hale (<i>Open</i>):</p> <ul style="list-style-type: none"> - Extensive consideration of the history of the legislation [8]-[22]. - Relevant caselaw [23]-[28]. - Assesses the alternative readings – taking into account its purpose/intention, cross-referenced with other sections of the Act and practical/policy consequences [29]-[41].
<p>McCann v State Hospitals Board for Scotland</p> <p>[2017] UKSC 31, [2017] 1 WLR 1455</p>	<p>Whether a comprehensive smoking ban, and searches of patients/visitors was outwith the powers of the underpinning statute.</p>	<p>Lord Hodge (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Legislative history, including various committee reports and executive consultation [17]-[20], [24]. - The statutory Code of Practice [27]. - Text and statutory context in search of purpose [35]-[38]. - Subordinate legislation made under the relevant Act. - Impacts in terms of patient autonomy (i.e. values) [38]-[39].
<p>Poshteh v Kensington and Chelsea Royal</p>	<p>Whether a refusal of accommodation under the homelessness duties</p>	<p>Not a statutory interpretation case but recorded here because of the Court’s approach to Article 6 ECHR. To avoid</p>

<p>London Borough Council</p> <p>[2017] UKSC 36, [2017] 2 WLR 1417</p>	<p>in the Housing Act 1996 was ‘reasonable’.</p>	<p>judicialisation of administrative questions the Court specifically refuses to follow ECtHR caselaw on the scope of Article 6 [36]-[37].</p> <p>It is also noted for the benevolent interpretation, following longstanding authority, of the authority’s decision letter [7], [39]. (NA)</p>
<p>Hopkins Homes v Secretary of State for Communities and Local Government</p> <p>[2017] UKSC 37, [2017] 1 WLR 1865</p>	<p>The interpretation of provision in the National Planning Policy Framework relating to housing delivery and planning permission.</p>	<p>Another case that does not turn on a point of statutory interpretation but is nonetheless recorded here because again it shows the Court taking a legalistic approach to the meaning of policy. (NA)</p> <ul style="list-style-type: none"> - The court discusses worries over over-legalisation of policy [22]-[26]. But then [26] confirms that interpretation (as opposed to application) is for the court. - Takes a natural meaning approach to the policy, aided by the underlying statutory framework [57]-[61].
<p>R (Coll) v Secretary of State for Justice</p> <p>[2017] UKSC 40, [2017] 1 WLR 2093</p>	<p>Challenge to the limited number of single-sex approved premises for female prisoners released on licence.</p>	<p>Baroness Hale (<i>Closed</i>):</p> <ul style="list-style-type: none"> - There are different available understandings of direct discrimination – court adopts a values-influenced approach that brings the case within scope

		<p>notwithstanding that not <i>all</i> women were affected.</p> <ul style="list-style-type: none"> - Shaped by existing caselaw [30]-[31] – see <i>R v Birmingham City Council, Ex p Equal Opportunities Commission</i> [1989] AC 1155. - Only real interpretation point is the question of ‘separate but equal’ where a textual approach is adopted [35].
<p>R (A) v Secretary of State for Health</p> <p>[2017] UKSC 41, [2017] 1 WLR 2492</p>	<p>Legality of the Secretary of State’s refusal to require Clinical Commissioning Groups to fund abortions for women normally resident in Northern Ireland.</p>	<p>Lord Wilson (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text of the provisions [9]-[10]. - Previous versions of the statute and the course of legislative development [11]-[16]. - His interpretation is shaped by the constitutional (i.e. devolution) context [20]. - He also takes into account the practical issues of health tourism [36]. <p>Lord Reed (<i>Closed</i>): Concurrs with Lord Wilson.</p> <p>Lord Kerr (<i>Closed</i>):</p> <ul style="list-style-type: none"> - More influenced by outcomes/values [51]-[53]. - Text/context (including cross-headings) [54]-[70]. - Practical reality [56]. - Rejects strongly Lord Wilson’s devolution approach [74]-[77]

		<p>i.e. because the people of Northern Ireland haven't expressed a view on health tourism.</p> <p>Hale (<i>Closed</i>): concurs with Lord Kerr but more centrally focuses on [93] values (autonomy).</p>
<p>Kiarie and Byndloss v Secretary of State for the Home Department</p> <p>[2017] UKSC 42, [2017] 1 WLR 2380</p>	<p>Whether deporting someone to whom the law allows an appeal in circumstances which will prejudice his participation in that appeal breach Article 8 ECHR.</p>	<p>Not specifically an interpretation case but recorded here for two reasons (<i>NA</i>):</p> <ul style="list-style-type: none"> - Lord Carnwath's judgment regarding deference to tribunals on question of law. - See [31]-[32] on the use of Parliamentary statements to determine purpose (i.e. in the context of a proportionality analysis).
<p>R (UNISON) v Lord Chancellor</p> <p>[2017] UKSC 51, [2017] 3 WLR 409</p>	<p>Challenge to Employment Tribunal fees on the basis that they interfere with rights at common law to access to justice.</p>	<p>Lord Reed (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Interpretation turns on text & constitutional principle (i.e. values) [65]. - At [80] a process akin to proportionality applies i.e. interference will be tolerated only insofar as it is proportionate [89]. - And then [91]-[98] – the problem for the Secretary of State is the statistical material – if the changes had not brought

		<p>a real risk of preventing access to justice, then they would not be <i>ultra vires</i>. The scope of the power relates, practically, to the quality of the policy making [100]-[101].</p>
<p>R (Forge Care Homes Ltd) v Cardiff and Vale University Health Board [2017] UKSC 56 [2017] PTSR 1140</p>	<p>Whether NHS or LAs are liable for nursing costs in a social care rather than healthcare context.</p>	<p>Baroness Hale:</p> <ul style="list-style-type: none"> - Pre-history forming the background to the enactment of the relevant provision i.e. a ‘mischief’ approach [19], [26]. - Legislative history, including Law Commission reports and the government’s response [21]-[23]. - The explanatory notes accompanying the bill [24]. - Parliamentary debates - <i>Pepper v Hart</i> rejected [25]. - Relevant caselaw. - Practical consequences [28]. - Notes that the NHS is usually able to decide such matters for itself – but here ‘interpretation must come before application’ [33]. - Text/purpose taking into account the intention as manifested in background documents [35]-[43].
<p>Elsick Development Co Ltd v Aberdeen City and Shire Strategic</p>	<p>Challenge to supplementary planning guidance and associated</p>	<p>Lord Hodge (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text.

<p>Development Planning Authority</p> <p>[2017] UKSC 66, [2017] PTSR 1413</p>	<p>planning conditions on the basis that they give rise to irrelevant considerations being taken into account in planning decisions.</p>	<ul style="list-style-type: none"> - For statutory meaning the Court relies primarily on existing authority e.g. [28]. - See [53] for discussion of the relationship between law and policy (i.e. materiality/weight).
<p>Michalak v General Medical Council</p> <p>[2017] UKSC 71, [2017] 1 WLR 4193</p>	<p>Whether the appropriate route to challenge disciplinary action by the GMC was judicial review or via the employment tribunal.</p>	<p>Lord Kerr (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text [13]. - Practicality and statutory presumptions i.e. if Parliament has made provision for an appeal then the assumption is that this is the appropriate route [16]-[18], [32]-[33]. - The nature of the different procedures (i.e. appeal and review) and appropriateness in this case [20]-[22].
<p>R (HC) v Secretary of State for Work and Pensions</p> <p>[2017] UKSC 73, [2017] 3 WLR 1486</p>	<p>Whether withdrawing various benefits from Zambrano carers was a breach of Article 8/Article 1 Protocol 1 and Article 14 ECHR. Court considers <i>in obiter</i> the extent of section 17 of the Children Act 1989 duties on local authorities.</p>	<p>Not an interpretation case as such, but the Court's <i>obiter</i> statements on the meaning of the duty are noted here. (NA)</p> <p>The majority ([33] onwards) consider the previous caselaw on this section, and emphasise its importance.</p> <p>Lord Carnwath effectively requires national guidance to maximise cross-authority operation [37].</p> <p>Baroness Hale concurs, coming close to seeing section 17 an implementation section (i.e. of EU law). She then gives</p>

		guidance [46] et seq on <i>how</i> the statutory duty should be exercised.
O'Connor v Bar Standards Board [2017] UKSC 78, [2017] 1 WLR 4833	Time limits for bringing a discrimination claim under the Human Rights Act 1998.	Lord Lloyd-Jones (<i>Closed</i>): - Purposive approach i.e. a narrow reading would defeat the aims of the relevant section [23]. - Text [29].
R (Black) v Secretary of State for Justice [2017] UKSC 81, [2018] 2 WLR 123	Whether a smoking ban in on public land in the Health Act 2006 applied to Crown land.	Baroness Hale (<i>Closed</i>): - Background to increased activity to prevent smoking [5]-[8]. - Legislative background, including government commentary re: crown application pre-Royal assent [9]-[14], [38]-[41].; - Consider a mid-bill consultation which did not appear to contemplate non-application to crown premises [20]. - Presumption and relevant caselaw, including academic criticism of the jurisprudence [22]-[37]. - Refers specifically to the search for intention [36], explaining that this is achieved via the text and purpose/context. - Absence of provision, following the normal

		presumption, is the key [41]-[44].
R (Haralambous) v Crown Court at St Albans [2018] UKSC 1, [2018] AC 236	Procedures: (1) whereby justices may issue search warrants under PACE; (2) under which the Crown Court may under section 59 of the Criminal Justice and Police Act 2001 order retention by the police of unlawfully seized material on the grounds that, if returned, the material would be immediately susceptible to lawful seizure; and (3) by which persons affected may challenge such decisions by judicial review. In all cases the issue is whether the courts may preclude consideration of material that may not be released to the claimant.	Lord Mance: (NB. all on the central point of whether it was possible for the warrant to be issued without disclosure to the affected party) (<i>Closed</i>): <ul style="list-style-type: none"> - Text/context [15]. - Relevant principles in the caselaw [15]-[24], [34]-[36]. - Protections in other legislation [25]. - Text/intention. - Practicality [27], [33]. - Values. - Comparison with <i>Rossminster</i> - i.e. the broad words there authorised invasion [28]. - Legislative background - again <i>Rossminster</i> formed part of the background to the passing of PACE [33]. <p>As to the possibly of closed material procedures – the court finds this possible in the Crown Court, following (i) interplay of statutory material [41]; and [ii] <i>Ahmed</i>.</p> <p>Same principle on judicial review of a lower court which can hold a closed material procedure i.e. <i>Ahmed</i>.</p>

<p>R (B (Algeria)) v Special Immigration Appeals Commission</p> <p>[2018] UKSC 5, [2018] AC 418</p>	<p>Whether, once detention of a deportee is unlawful (because detention could not take place under <i>Hardial Singh</i> principles), it was nonetheless possible to impose bail conditions.</p>	<p>Lord Lloyd-Jones (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Legality is key - the Secretary of State's purposive/practical approach has no footing [27]-[29]-[45]. - Text - finds no Parliamentary approval for the Secretary of State's approach. - Caselaw on similar but not identical provisions [41].
<p>Romein v Advocate General for Scotland</p> <p>[2018] UKSC 6, [2018] 2 WLR 672</p>	<p>Interpretation of provisions retrospectively removing limits on citizenship inherited through the maternal line.</p>	<p>Lord Sumption (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Legislative history [4]-[8]. - Text and purpose generates three possible interpretations. - [10] Romein's approach is ruled out because, while solving the problem, it is inconsistent with text, conceptual dissatisfactory and practically problematic. - Advocate General's version is ruled out [11] because it is inappropriate given the context – it is <i>overly</i> literal and defeats the <i>purpose</i>. - Reaches a compromise based on purpose without leading to contradiction. - Deals with possible discrimination issues [14]-[15]. -
<p>HM Inspector of Health and Safety v Chevron North Sea Ltd</p>	<p>Whether the Health and Safety at Work Act 1974 allowed an employment</p>	<p>Lady Black (<i>Closed</i>):</p>

<p>[2018] UKSC 7, [2018] 1 WLR 964</p>	<p>tribunal to take into account, in an appeal against a health and safety notice, information not available to the HSE inspector.</p>	<ul style="list-style-type: none"> - Text is unclear, so goes to statutory scheme [17]. - Practical implications are very relevant in balancing [18]-[23] the tribunal's role and the impacts on an employer.
<p>SM (Algeria) v Entry Clearance Officer [2018] UKSC 9, [2018] 1 WLR 1035</p>	<p>Meaning of 'direct' relative for Immigration (European Economic Area) Regulations 2006, on the context of a child adopted by French nationals outside of the EU.</p>	<p>Baroness Hale (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text is of limited assistance [23]. - European Commission communication [24]. - Case-law plus wider EU law principles [25]-[26]. - Purpose of the underlying directive [27]. - Concerns re: practical abuse [28].
<p>Iceland Foods Ltd v Berry (Valuation Officer) [2018] UKSC 15, [2018] 1 WLR 1277</p>	<p>Whether air services are manufacturing operations or trade processes for rating purposes.</p>	<p>Lord Carnwath (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Legislative history [11]-[19]. - Caselaw e.g. [14], [39]. - Considers Hansard, but eschews <i>Pepper v Hart</i> because the meaning is clear [16]. - Recommendations of an expert committee (Wood Committee) whose conclusions informed the drafting of relevant regulations [20]-[34]. - Text e.g. [39].

<p>In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)</p> <p>[2018] UKSC 27, [2019] 1 All ER 173</p>	<p>Standing of the Northern Ireland Human Rights Commission to bring a challenge to the abortion ban in Northern Ireland insofar as this relates to cases of rape, incest, serious and fatal foetal abnormality.</p>	<p>N.B. I have recorded here only the substantive judgments dealing with statutory interpretation.</p> <p>Baroness Hale (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text [12] - Legislative change/history [15] - Common sense & purpose [18] <p>Lord Mance (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text/context [59]. - Practical implications, though eschews a pragmatic approach [60]-[61]. - Comparison with related statute [64]. - Legislative history [66]. - Caselaw. <p>Lord Kerr (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Focus is much more in function [172]. - Legislative history [177]. - Explanatory notes accompany the Bill [182]. - Text e.g. [184]. - Caselaw under the Human Rights Act 1998 [186]-[190]. - Practical implications [197]. - On purposive approaches and avoiding literalism [203]. - Constitutional principles/values underpinning the statute [210].
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<p>JP Whitter (Water Well Engineers) Ltd v Revenue and Customs Commissioners</p> <p>[2018] UKSC 31, [2018] 1 WLR 3117</p>	<p>Whether powers to provide certificate of exemption from a tax deduction scheme required consideration of individual impacts.</p>	<p>Lord Carnwath (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text. - Structure. - Previous cases; all [5] <i>et seq.</i> - The key is whether the statutory provision gave HMRC significant leeway. Holds that the discretion is fixed by the statutory scheme's purposes – it is a prescriptive scheme on its face and that is the end of it [21]-[22].
<p>R (Belhaj) v Director of Public Prosecutions (No 1)</p> <p>[2018] UKSC 33 [2018] 3 WLR 435</p>	<p>Whether the justice and security Act 2013 allows a closed material procedure in a judicial review dealing with a criminal matter.</p>	<p>Lord Sumption (for the majority) (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Natural meaning [15]-[16]. - Looks to the general functions of the High Court in respect of criminal judicial review claims as background (i.e. values) [17]. - Caselaw [17]. - Approach taken in other statutes and caselaw [18]. - General rules of construction [19]. - Statutory context and legislative history [22]-[24]. <p>Lord Lloyd-Jones (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Dismisses the use of the principle of legality and turns to text/context (applying <i>Al Rawi</i>) [41]-[43].

		<ul style="list-style-type: none"> - Rules of construction (i.e. to the extent that the <i>Barras</i> principle assists, it demonstrates that the word has two meanings) [52]. - Legislative history, including a white paper [53]. - Explanatory notes [54].
<p>Nottingham City Council v Parr</p> <p>[2018] UKSC 51, [2018] 1 WLR 4985</p>	<p>Whether the Housing Act 2004 allowed for conditions restricting use of Housing of Multiple Occupation to a class of person, and if so whether conditions imposed by the tribunals were irrational.</p>	<p>Lord Lloyd-Jones (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Natural meaning [18]. - Purpose and object of the legislation [19]. - Statutory context [20]. - Previous versions of the legislation [21]. - The Secretary of State’s guidance on current legislation [22]. - Backdrop against which the statute was enacted i.e. reversing caselaw [24]. - Takes into account the competing concerns of the Secretary of State and the ‘expert’ tribunal in terms of the practical impacts of the potential interpretations [24]-[26]. - Reads the words against the grain to satisfy judicial view of the underlying meaning [27].

<p>KO (Nigeria) v Secretary of State for the Home Department</p> <p>[2018] UKSC 53, [2018] 1 WLR 5273</p>	<p>Provisions in Nationality, Immigration and Asylum Act 2002 seek to direct the courts' balancing of Article 8 ECHR issues, requiring consideration when making deportation/removal decisions whether it would be (depending on the circumstances) 'reasonable to expect; a child to leave the UK, or 'unduly harsh' for a parent to be removed while the child remains. The question, when considering impacts on children, is whether <i>only</i> the child's situation is considered (as KO asserts) or whether a balancing exercise is to be undertaken (i.e. including the behaviour of the parents).</p>	<p>Lord Carnwath (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Political backdrop in terms of government's attempts to clarify the role of Article 8 ECHR [12]. - Purpose i.e. reducing judicial discretion [15]. - But takes into account the principle of legality on children's rights (i.e. values) [15]. - Text, interlaced with the complex caselaw e.g. [16]-[23] (including consideration of the text's incorporation from rules [17], and guidance [18]).
<p>Rhuppiah v Secretary of State for the Home Department</p> <p>[2018] UKSC 58, [2018] 1 WLR 5536</p>	<p>Meaning of 'precarious' in section 117B(5) of the Nationality, Immigration and Asylum Act 2002 i.e. in the context of the</p>	<p>Lord Wilson (<i>Closed</i>):</p> <ul style="list-style-type: none"> - [27]-[36] Case law, in particular that of the ECtHR. - [37] The source of the principles underpinning the legislation i.e. the ECtHR.

	<p>requirement that limited weight be given to private life matters established when immigration status was precarious.</p>	<ul style="list-style-type: none"> - [38]-[42], [44] UK caselaw. - [42] Text/ordinary meaning. - [43] Respect for tribunal interpretation. - [48] Practical effect i.e. ease of use.
<p>M v Secretary of State for Justice [2018] UKSC 60, [2018] 3 WLR 1784</p>	<p>Whether conditions on release following a hospital restriction order under the Mental Health Act 1983 could be imposed if they themselves constituted a deprivation of liberty within scope of Art 5 ECHR.</p>	<p>Baroness Hale (for the majority) <i>(Closed)</i>:</p> <ul style="list-style-type: none"> - Legislative development in light of ECtHR rulings [8]-[12]. - Text and context [18]-[19]. - [21]-[24] Caselaw. - Practical reasoning comparing a range of potential readings [28]. - Pragmatic arguments re: gradual release[29]. - But prefers arguments based on legality (i.e. values) [31] and alternative practical arguments [32] in the sense that the patient may consent simply to get out. - Overarching scheme of the Act [33]-[36]. <p>Lord Hughes (in dissent) <i>(Closed)</i>:</p> <ul style="list-style-type: none"> - Looks to practical purpose of seeking incremental improvement [41]. - The illogicality that Art 5 may result in greater restriction of liberty (i.e. values) [42].

		<ul style="list-style-type: none"> - Deploys the legality principle and purpose differently so as to maximise institutional choice [43]-[48]. - Text as a limit on the potentially ideal reading.
<p>London Borough of Southwark v Transport for London</p> <p>[2018] UKSC 63, [2019] 3 WLR 2059</p>	<p>Construction of order transferring rights and liabilities for certain highways from the local transport authority to the DfT. In particular, whether this transferred the highway plus airspace/subsoil, or only matters relevant to the highway itself.</p>	<p>Lord Briggs (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Natural meaning, noting the limits of this when multiple meanings are possible [4]-[6]. - Common law rules on transfers of land [7]. - Specific principles ('the Baird principle') on which legislative predecessors to the Highways Act were based, taking into account legislative history to ensure the purpose was to incorporate these [8]-[13]. - Subsequent legislative history e.g. related statutes and the various reports leading to these [13]-[19]. - Strongly purpose based, using the legislative history [34]. - Practical unattractiveness of alternatives [40].
<p>The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and</p>	<p>The powers of the Scottish Parliament to to make provision regarding EU matters after the UK has left the EU, including:</p>	<p>Judgment of the whole Court (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Text, including syntax/grammar e.g. [72], [93], [100]-[124].

<p>the Advocate General for Scotland</p> <p>[2018] UKSC 64, [2019] 2 WLR 1</p>	<ul style="list-style-type: none"> - Whether the Bill as a whole is outwith competence; - Whether provision requiring consent of the Scottish Ministers to secondary legislation is outwith competence; - Whether that same provision relates to the reserved matter of ‘Parliament’; - Whether the Bill can delete references to spent EU law in the Scotland Act (i.e. which prohibits amendment of itself by Scotland); - Whether a range of provisions which will be relevant only if the UK leaves 	<ul style="list-style-type: none"> - International legal principle [29]-[33]. - Underlying logic/purpose of devolution and associated constitutional principles/values [29]-[33], [41], [83]. - Caselaw [51]-[52] (i.e. in developing a test for when a provision is ‘modified’). - Statutory context (when determining purpose) [60], [94].
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	<p>the EU are within competence;</p> <ul style="list-style-type: none"> - Whether the Bill is at odds with the scheme of the EU Withdrawal Act. 	
<p>Welsh Ministers v PJ [2018] UKSC 66, [2019] 2 WLR 82</p>	<p>Essentially the same as <i>M v Ministry of Justice</i> above – in this case the Welsh Ministers argued that the Mental Health Act did imply a power to deprive of liberty for Art 5 ECHR purposes.</p>	<p>Baroness Hale (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Principle of legality (i.e. values), including comment on the strictness of the necessary implication test [25]-[26]. - Purpose i.e. no reason to conclude that Parliament would have allowed for this even if it had thought about it (i.e. because reintegration into the community is not necessarily what Parliament had in mind) [26]. - Legislative material, including pre-introduction evidence [26]. - Related provisions in the statute [27]-[28]. - Practical implications [33]. - NB. A case where the Court imposes restrictions on a tribunal [35].
<p>UKI (Kingsway) Limited v Westminster City Council</p>	<p>Service of notice of registration for non-domestic rates.</p>	<p>Lord Carnwath (<i>Closed</i>):</p> <ul style="list-style-type: none"> - Wording (limited use here). - Practical application [36]-[37]. - Caselaw [39].

<p>[2018] UKSC 67, [2019] 1 WLR 104</p>		<ul style="list-style-type: none">- Presumptions (Parliament's presumed knowledge of previous caselaw) and the principle of legality (i.e. values) [45].
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