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Legislative Supremacy and Legislative Intent: A Reply to Professor Craig

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Abstract—My analysis of the constitutional foundations of judicial review has been criticized by Paul Craig; but his objections confuse the 'constructive' account of legislative intent I defend with the 'literal' conception (reflecting the views of individual legislators) I expressly repudiate. He thinks we must choose between legislative intent, literally conceived, and common law principle. This mistake exemplifies the peculiar character of Craig's 'common law model' of judicial review, in which the requirements of the rule of law, on one hand, and the relevant statute, on the other, exist in separate mental worlds. That model is conceptually confused, rejecting the doctrine of ultra vires that (unqualified) legislative supremacy entails, and ultimately grounded in a wholly implausible view of the relationship between common law and statute. It subordinates both statutory text and purpose to common law doctrine, treated as largely self-contained and impervious to context. It ignores the interdependence of legislative and judicial power, impeding a genuine integration of statutory command and common law principle.

1. *Introduction*

In a series of articles written over a period of several years, Professor Paul Craig has sought to negotiate a treacherous path between legal and jurisprudential ravines that threaten to engulf him. His most recent defence of the curious stance of the 'common law camp' in the theory of judicial review leaves him clinging ever more perilously to the edge of a crumbling precipice.[1] For he must try to maintain what are actually incompatible footholds in each of two distinct, but connected, forms of terrain at one and the same time.

First, he wishes to reconcile his claims for the common law 'foundations' of judicial review with unqualified parliamentary sovereignty. Enraptured by the developing common law of judicial review, and the 'judicial creativity' that sustains it, he has mounted a fierce campaign against the ultra vires doctrine, its necessary connections with parliamentary sovereignty notwithstanding.[2] Second, he

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[1] Paul Craig 'The Common Law, Shared Power and Judicial Review' (2004) 24 *OJLS* 237, responding to my earlier critique: see Allan 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 *OJLS* 563.

[2] See e.g. Paul Craig and Nicholas Bamforth 'Constitutional Analysis, Constitutional Principle and Judicial Review' [2001] *PL* 763.

wants to defend the pivotal role of common law doctrine in deciding the outcome of particular cases, even in the context of statutory powers, but without marginalizing the statute in a manner at odds with his acceptance of legislative supremacy. It is the common law, he insists, rather than any legislative will, that draws the boundaries of an agency's powers; yet the powers are conferred and necessarily shaped by a statutory text (which cannot mean merely whatever a judge might like it to mean). The two contradictions are plainly related: the first is largely an analytical representation of the second, in which the implications of Craig's theoretical confusion become apparent in his eccentric account of legal analysis.

At the heart of Craig's account of public law, I shall argue, lies an implausible conception of the relationship between the common law and statute. His affirmation of parliamentary absolutism rests on the notion that common law principle must give way, in the last analysis, to a contrary legislative command; but the legislature can alter the common law's prescriptions (he supposes) only by express provision (or necessary implication, narrowly understood). His 'common law model' of judicial review and his conception of 'priority rules' for protecting rights both depend on that account. The truth of the matter is actually more subtle and more complex. When we perceive the interdependent nature of legislative and judicial authority, we can see that common law principle gives way to statute so far as, but no further than, the reason of the case demands. The legislative *context* in which a statutory power is exercised may radically affect the relevant requirements of common law; but fundamental constitutional commitments, embodied in the common law, will always *inform* that context, to some degree, thereby (in the final analysis) taming legislative power.

2. *The Conceptual Connection between Legislative Supremacy and Ultra Vires*

The conceptual logic that Craig seeks to defy can be summarized as follows. If Parliament's sovereignty is absolute the courts cannot impose constraints on administrative action, developed at common law, except insofar as they serve and support the legislative will. Constraints that inhibit an agency's performance of its statutory functions, perhaps for the protection of individuals' rights or countervailing interests, must at least be *consistent* with the legislative scheme: a court's intervention that undermined or contradicted the statutory scheme, or underlying general purposes, would flout the legislative sovereignty that Craig accepts. It follows that the relevant precepts of administrative legality—the pertinent requirements of the 'rule of law'—constitute principles of statutory construction. They give way in the face of inconsistency with the statutory scheme: their application may be excluded expressly or merely by implication, ousted by

the demands of the statutory scheme, interpreted with true respect for its makers' intentions or purposes.[3]

An agency's decision may be quashed legitimately, therefore, only when it contravenes the statutory delegation of power, correctly interpreted (unless parliamentary sovereignty is curtailed). The agency's 'jurisdiction' is defined by the conditions attached by Parliament, expressly or impliedly, to the powers conferred; such conditions must be treated as inherent limitations on its authority. Unqualified sovereignty, in short, entails the doctrine of ultra vires. A watch committee, accordingly, had no power to dismiss the chief constable until it had first given him the opportunity to answer the case against him; and its decision, in breach of natural justice, was therefore void.[4] It is true, of course, that the relevant jurisdictional conditions cannot be determined—the limits of Parliament's delegation of power cannot be settled—without recourse to notions of good governance reflected in common law doctrine; but that in no way alters the necessary conceptual connection between sovereignty and ultra vires. The ultimate dependence of judicial review on legislative authorization is logically inescapable.

Why has Professor Craig continued to deny the obvious, even when his critics have so forcefully and frequently pointed it out to him?[5] The answer seems to lie in his repugnance towards the 'legislative intent' that administrative lawyers usually invoke in their application of the ultra vires doctrine. If the conditions of an agency's jurisdiction, and the validity of its action, may depend as much on the courts' own standards of legality as on any specific instructions in the relevant statute, is not the appeal to legislative intent somewhat artificial? Why should we allow judges to invoke a largely fictitious intent to justify decisions that reflect, in reality, their own judgments about governmental propriety, informed by common law doctrine?

My own contributions to the debate have sought to explain that the deficiencies of legislative intent are something of a red herring.[6] There has been insufficient analysis of the nature of the 'intent' allegedly in issue. Too much firepower has been expended on the execution of a straw man. For no one, surely, has ever truly supposed that the court's intervention must be justified by reference to any person's actual wishes or expectations, as regards a specific example of administrative error, whether we have in mind the parliamentary draftsman, the bill's government sponsor, or perhaps some representative member of the legislative majority. The pertinent 'legislative intent' is really a metaphor, a largely *constructive*, but necessary, companion of the doctrine of legislative supremacy, just as

[3] See generally John Bell and Sir George Engle, *Cross on Statutory Interpretation* (London: Butterworths, 3rd edn, 1995) 165–67.

[4] *Ridge* v *Baldwin* [1964] AC 40.

[5] See e.g. Christopher Forsyth 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' [1996] *CLJ* 122; Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001); Forsyth and Elliott 'The Legitimacy of Judicial Review' [2003] *PL* 286.

[6] See Allan 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?' [2002] *CLJ* 87, at 106–108; 'Constitutional Dialogue', above n 1.

ultra vires is the formal, though necessary, conceptual counterpart to the notion of absolute or unqualified sovereignty.[7]

The constraints we impose on the exercise of statutory power are, primarily, those that we can properly claim parliamentary sanction for, as reflecting taken-for-granted notions of administrative propriety, consistent with the general legislative scheme. All instructions or delegations of authority, whether written or spoken, assume unstated qualifications and conditions, and legislative ones—if they are to be interpreted reasonably—cannot be treated any differently. If the court cannot persuade us that its control of administrative action, in any specific instance, is consistent with Parliament's delegation of power to the statutory agency—having proper regard to the point or purpose of such delegation—it is challenging the legislative sovereignty that neither side in this debate over ultra vires has been (overtly) willing to question.

Craig's response to my argument is the same response he gave to Mark Elliott's insistence on the conceptual necessity of ultra vires: 'There is no necessity to manufacture legislative intent to fill the gap between legislative silence and the imposition of judicial controls'.[8] There may be no 'specific' intent—no 'actual, discoverable intent as to any of the particularities of judicial review'[9]—and we need not suppose any 'general' or implied intent: there may be no parliamentary view about questions the courts must resolve themselves. Craig concluded that Elliott's analytical claim was false. But that claim was perfectly correct. The 'general' intent is merely a more abstract version of constructive intent, operating at the level of general doctrine: it affirms (or asserts) the consistency of the various forms of judicial control with legislative supremacy, acknowledging that a sovereign Parliament could, in principle, restrict or exclude judicial review. Nor is Parliament ever truly silent: the *validity* of the (necessary) claim to consistency, in any particular case, will depend on *detailed analysis of the statutory scheme*. Consistency with the statutory scheme, and the text that embodies it, is a matter of degree, calling for legal and constitutional judgment.[10]

[7] Some readers might prefer to dispense with the notion of legislative intent altogether. But quite apart from its central place in the courts' jurisprudence, which we have to make sense of, we need to retain a strong connection with the legislative will or purpose (for which intent is a readily understandable metaphor). Without some recourse to intent (even if only by analogy with a single speaker's intent) effective communication between Parliament and courts becomes impossible: see Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press: Sydney, 1994), especially 157–61. See also Andrei Marmor, *Interpretation and Legal Theory* (Oxford: Clarendon Press, 1992), ch 2.

[8] Craig and Bamforth, 'Constitutional Analysis', above n 2, at 769.

[9] Ibid at 770.

[10] Craig's claim that a determination of the scope of statutory power, expressed in terms of legislative authorization or prohibition, is merely 'tautological' is therefore false. Such a determination can be contested by challenging the statutory interpretation on which it necessarily relies. Nor can Sir John Laws' invocation of the 'undistributed middle' (strictly, excluded middle) between legislative prohibition and permission, on which Craig also relies, assist his case: see Sir John Laws, 'Illegality: The Problem of Jurisdiction' in M. Supperstone and J. Goudie (eds), *Judicial Review* (London: Butterworths, 1997) 4.17–4.18. If a statute is necessarily *relevant* to the nature and scope of the powers it confers, it must override inconsistent common law: the excluded middle is inapplicable to judicial review of a statutory power. The true question concerns the legitimacy of the specific interpretation (as Laws' deprecation of reference to Hansard in the event of a threat to constitutional rights shows).

The 'common law' critique of ultra vires has denied analytic truths that any serious critique must acknowledge and confront; it has thereby condemned itself to incoherence, on the one hand, and triviality, on the other.[11] The defenders of the ultra vires doctrine have not denied the important role of the common law in developing general principles of administrative legality; they have only emphasized—and rightly emphasized—the importance of judicial obedience to legislative intent, suitably characterized, as a concomitant of the legislative supremacy on which they insist. Parliamentary sovereignty imposes obligations of respect for such general objectives, and such qualifications and exceptions to those objectives, as make most sense of the text formally enacted; and any genuine, non-trivial, challenge to either ultra vires or legislative intent, thus understood, must repudiate the unqualified nature of legislative supremacy. The true foundations of judicial review must be shown to derive from the common law constitution, within which, and ultimately subject to which, Parliament exercises its legislative powers.

Herein lies the real debate over ultra vires and the foundations of judicial review. Legislative authority—or so I have argued—must be asserted consistently with those precepts of administrative legality that the courts have recognized as constitutive of the rule of law, or legitimate governance. A genuine 'common law model' makes respect for minimum standards of rationality and fairness, as determined by judges in the light of the statutory purpose and administrative context, a binding condition of any legitimate (and lawful) exercise of public power. It must acknowledge the equal and interdependent sovereignties of courts and Parliament.[12]

The statutory ouster clause offers the clearest illustration of the dilemma confronted by a critic of ultra vires.[13] A provision that purports to insulate an administrative decision from all legal challenge presents an obvious threat to the rule of law. Taken literally, it must either be accepted and accorded an interpretation consistent with the legislative will, expressly declared, or rejected as unconstitutional. The interpretative methodology of ultra vires comes as close as we can get to having the best of both worlds: we can say that a privative clause is only truly intended to exclude judicial review of a decision made *within* the agency's jurisdiction (giving 'jurisdiction' a conveniently elastic definition, allowing judicial correction of a wide variety of errors).[14] The constructive interpretation we invoke here, however, relies very heavily on the assumption that Parliament was not seeking—or should not be understood as seeking—to undermine the rule of law.

There is plainly an advantage, then, in terms of intellectual honesty and clarity, in acknowledging the limitation of sovereignty that this form of robust constructivism entails. We can logically repudiate ultra vires, in other words, only by

[11] Its triviality is convincingly portrayed by Christopher Forsyth in 'Heat and Light: A Plea for Reconciliation', in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) 396–97.

[12] See Allan, above, n 6.

[13] For full discussion, see Elliott, *The Constitutional Foundations of Judicial Review* at 145–57.

[14] See *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147.

insisting that Parliament's sovereignty must be asserted within the boundaries provided by the rule of law. This truth was, indeed, implicitly conceded by Craig's own disparagement of 'the strained idea that Parliament did not intend such clauses to protect nullities'.[15] It is also a truth implicit in his reiterated claims that Parliament may still exclude the courts' jurisdiction, in any circumstances, by sufficiently luminous instructions. But of course these are ultimately inconsistent positions. If we are truly determined to purge our constitutional theory of 'strained ideas' and pious fictions, we must embrace the vision of interdependent sovereignties that my own work has sought to explain and defend.[16]

3. *Legislative Supremacy and Constructive Intent*

The 'constructive' notion of legislative intention, which Craig's latest contribution to the debate derides, is only the consequence of rejecting 'literal' (or 'speaker's meaning')[17] intent, on the one hand, while acknowledging the importance of the legislative context of judicial review, on the other. A constructive intent is attributed to the legislature on the basis of the text enacted, interpreted so far as possible in the light of our settled principles of fairness or procedural legality, embodied or summarized in common law doctrine. Although in one sense only a metaphor—for legislative purpose or underlying assumption—it is neither empty nor expendable. We cannot acknowledge Parliament's legislative authority if we do not respect its enactments; and the literal *text*, though in need of interpretation, places genuine constraints on what we can take to be permitted or prohibited, as regards the conduct of a statutory agency. A constructive interpretation makes no claims to reflect the actual wishes or expectations of anyone, as regards the statute's application to any particular case; but insofar as it respects the statute's text, purpose (or apparent purpose), and overall regulatory scheme, it embodies the pertinent legislative 'intention', properly—coherently—understood.[18]

Craig proclaims the obvious when he announces that 'the values that inform or underpin constructive legislative intent' are 'synonymous with the rule of law', and that the courts, rather than the legislature, will determine the meaning of the rule of law. Such truisms could only be thought to undermine the notion of constructive intent by someone who thought that the legislative text itself made no contribution to judicial review of the exercise of the powers it confers. But the statute is not silent when the court determines the limits of an agency's

[15] Craig, 'Ultra Vires and the Foundations of Judicial Review' in Forsyth (ed), *Judicial Review and the Constitution*, 55.

[16] See generally Allan, *Constitutional Justice* (Oxford: Oxford University Press, 2001), especially ch 7.

[17] Cf. Ronald Dworkin, *Law's Empire* (London, 1986), ch 9.

[18] Cf. Bell and Engle, above, ch 2; Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press: Oxford, 1978) 203–13.

powers: it provides the principal features of the administrative context in which rule of law values (or principles of legality) must be construed and applied. And the extent to which such values may properly curtail the scope of a decision-maker's discretion, or impose procedural constraints, will depend on analysis of the powers conferred in the light of their general purpose and intended effect. In so far as Craig agrees that the common law grounds of review must be adapted to the statutory context, in recognition of the demands of the legislative purpose, he embraces—necessarily grants—the critical role of the legislative intent (under whatever *name* he cares to give it).

As regards 'war-time legislation', for example, Lord Reid drew what he considered

> a reasonable and almost an inevitable inference from the circumstances in which Defence Regulations were made and from their subject-matter that, at least in many cases, the intention [of Parliament] must have been to exclude the principles of natural justice.[19]

A constructive intent must therefore reflect the legislative purpose and context in a manner that the rule of law, viewed in the abstract, will not. It is 'well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will... readily imply so much and no more to be introduced by way of additional [i.e. non-specified] procedural safeguards as will ensure the attainment of fairness'.[20] No further constraints—beyond what might reasonably be attributed to the legislative intention—could be imposed without threatening legislative supremacy: 'it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation'.[21]

Since we must seek the 'intention of the statute', rather than that of any identifiable author, the text's 'semantic autonomy' will strongly affect its meaning.[22] The language used, when read in context, will determine the permissible range of meanings available. We must construct the 'real' statute,[23] then, by asking what those who drafted and approved its text could reasonably have meant by their use or endorsement of that language, in the circumstances known to us. The relevant context will naturally include those well established constitutional principles it is reasonable to suppose enjoy widespread consent: a constructive interpretation will certainly reflect their influence; but it will nonetheless remain a reading of the pertinent text. My image of dialogue between judge and

[19] *Ridge* v *Baldwin* [1964] AC 40, at 73.
[20] *Lloyd* v *McMahon* [1987] AC 625 at 702–703 (Lord Bridge).
[21] *Wiseman* v *Borneman* [1971] AC 297 at 308 (Lord Reid).
[22] For the purposive nature of interpretation, which seeks the 'intention of the statute', see Lon L. Fuller, *The Morality of Law* (revd ed) (Yale University Press: New Haven and London, 1969) 82–91. For the notion of 'semantic autonomy', see Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press: Oxford, 1991) 55–57.
[23] Cf. Dworkin, *Law's Empire*, 17.

'representative legislator' was intended to capture that critical interdependence between text and (suitably extended) context.[24]

In his new article, Craig accuses me of 'formalism with a vengeance' because I argue, he supposes, that if the court applies a common law principle to a specific instance of the exercise of statutory power, there is then a 'legislative intent on the issue, literally conceived'. Of course, I argue no such thing; nor could my argument reasonably be understood in that way: I have expressly rejected 'legislative intent, literally conceived' in favour of the constructive version. The 'reductionism' that Craig accuses me of here is surely wishful thinking on his part: it is he who wrongly reduces the idea of legislative intent, correctly conceived, to the 'literal' conception we both reject.

Professor Craig's difficulties with the notion of constructive intent, which he seems to think is some novel (if dubious) contribution to jurisprudence, are all the more surprising in view of his own rehearsal of Ronald Dworkin's case against legislative intent, literally conceived. How could that case (which I accept) conceivably assist his own argument against constructive intention? Dworkin himself distinguishes between 'conversational' and 'constructive' interpretation; and a constructive interpretation of statute will reflect the requirement of 'integrity' that the law should embody a coherent set of principles about justice and fairness, so far as this is possible. Hercules (Dworkin's ideal judge) must construct an interpretation of the Endangered Species Act in the light of the policy of protecting vulnerable species, as well as any other relevant principles or policies relevant to the context: he 'must ask himself which combination of which principles and policies... provides the best case for what the plain words of the statute plainly require'.[25] Hercules' conclusion that the TVA dam should be completed, despite the likely destruction of the snail darter's only habitat, though a consequence of his jurisprudential method, is firmly based on his constructive reading of the statute. His conclusions proceed from an interpretation that can be justified by appeal to all the principles and policies relevant to the issue arising, insofar as these are consistent with (not excluded by) the text to be construed.[26]

I have argued, in the essays Craig criticizes, that the very abstract common law grounds of review must be applied to a specific administrative context before they can assume any tangible, concrete meaning, directly relevant to the circumstances arising. It follows, in my view, that the legitimacy of judicial review, in any particular instance, must depend as much on considerations of legislative

[24] See Allan, 'Constitutional Dialogue', above, 565–67. The 'representative legislator' is one whose intentions or purposes, duly sensitive to the constraints of constitutional principle, are accurately reflected in the statutory text. He can be identified for practical purposes with the draftsman, regarded as Parliament's servant, obedient to its general aims and purposes within the bounds of constitutional propriety. See further Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority', *Cambridge Law Journal* (forthcoming).

[25] *Law's Empire*, 338.

[26] A constructive interpretation must ascribe the pertinent semantic intentions: it 'means trying to make the best sense we can of an historical event—someone, or a social group with particular responsibilities, speaking or writing in a particular way on a particular occasion' (see Dworkin 'Fidelity and Integrity: The Arduous Virtue of Fidelity', 65 *Fordham L Rev* 1249 (1997) at 1252).

purpose, in the case of a statutory power, as on the pertinent rule of law values. According to Craig's new essay, the 'error' in my argument is 'to reason from the premise that judicial review will, perforce, have to be applied in a particular context by the courts, to the conclusion that there must therefore be some species of legislative intent as to the particular issue being adjudicated by the courts'.[27] But this is, once again, his own error: he attributes to me here the 'literal' conception of intent we both reject.

When we have in mind, instead, the properly constructive version, it is simply false to argue that 'the fact that the courts might properly take account of the "context" being social welfare rather than licensing, tax rather than planning, tells one nothing as to whether there is any cognisable legislative intent as to how the principles of judicial review should play out in that "context" '.[28] Either the context is critical or it is not. If it is, as Craig generally seems to concede, the statutory text must be interpreted accordingly; and the relevant common law principles must not be applied in a manner that contradicts that text, correctly interpreted (unless parliamentary sovereignty is itself under challenge). The objection that, in the standard case, 'the legislature has given no thought to' some issue of administrative legality entirely misconceives the issue. We are not making any claims about what anyone thought: we are interested only in whether the court's intervention is duly consistent with the legislative context and purpose that inform our grasp of the enactment's meaning.

Throughout Craig's work on this topic there is a quite remarkable tension between his reiterated affirmations of loyalty to the legislative will, on the one hand, and his downgrading of the statute's role in judicial review, on the other. For, though we are assured that 'the courts will, on the common law model, have due regard to the particular piece of legislation... before them', so that its 'overall aims and purpose' will be taken into account, we are also told that the 'legislature will rarely provide any indications as to the content and limits of what constitutes judicial review'.[29] But if the statute's aims, as revealed by its text, are to play their proper role in the court's decision, how can Parliament have failed to 'provide any indications' about what sort of judicial intervention is appropriate, and in what circumstances? Are the statute's text, and the purposes or policies that inform and explain its instructions, not of central importance to the court's appraisal of executive action, taken under that statute in (purported) pursuance of such purposes and policies? And does not the court's intervention, properly respectful of those policies and purposes, thereby enforce the legislative will, as it applies in the relevant circumstances?

At the root of Craig's repugnance for legislative intent—even in its appropriately constructive guise—is a startling failure to acknowledge the critical role of the

[27] Craig, 'The Common Law, Shared Power and Judicial Review', above, at 245.
[28] Ibid.
[29] Ibid., at 238. Cf. Craig and Bamforth, 'Constitutional Analysis', above, 767.

statutory text; and it is this failure that ultimately cripples the 'common law model' as Craig conceives it. If the text is of little or no importance, in the standard case of judicial review, there is no underlying 'intention' or purpose that need interfere with the court's application of common law doctrine, which is held to be the true determinant of the nature of judicial control. Craig's admissions of the relevance of context are apparently made on the assumption that it is (somehow) independent of the statutory text, unless the nature and scope of judicial review are explicitly addressed. The common law can therefore be adapted to the context, where appropriate, without the purity of the body of 'doctrine' being sullied through contamination by exposure to the legislative will. How else could we explain Craig's insistence on the statute's silence as regards the proper scope and character of judicial control?

A close inspection of Craig's analysis does indeed reveal that he treats the common law grounds of review as somehow free-floating, capable in most cases of dictating the court's decision in isolation from the statutory text. Although legislation 'may specifically address issues of judicial review, such as the giving of reasons, the incidence of consultation rights and the like', he declares, most 'commonly it will not do so'. It seems to follow that the statute normally plays no role in the court's determination of the appropriate standards of procedural legality. It appears that on the 'common law model', as Craig defends it, the legislative text is simply disregarded unless it gives explicit instructions about the scope or content of judicial review.[30] The terms of Parliament's delegation of powers to the public agency, as regards its intended functions, or the specific criteria that should determine the exercise of its discretion, or any appellate safeguards, apparently have no implications for the procedural constraints that the court may impose. But since the statutory text is plainly a principal source of the context in which such questions of procedural legality arise, Craig's approach honours the legislative context largely by ignoring it.

The 'common law model' of judicial review, as Craig presents it, is founded on dogmatic divisions between text, context, and doctrine which, when applied to any particular instance of judicial intervention, prove to be completely untenable. The interpretative methodology of ultra vires is repudiated at the cost of rendering the whole subject radically incoherent. It is simply impossible to maintain the artificial distinctions on which Craig's position depends: text and context are interdependent, and 'doctrine', however firmly grounded its normative underpinnings may be, cannot operate independently of either. The analytical beauty of ultra vires, despite its wholly formal and (admittedly) conclusionary character, consists precisely in its power to symbolize the interdependent nature of legislative will and judicial reason, as they operate in harness in any particular case. If its repudiation entails the severance of doctrine from its statutory context—

[30] Cf. Craig and Bamforth, 'Constitutional Analysis', above, at 777: 'If the omnipotent Parliament chooses to say something *explicit* about judicial review this will be accepted and applied by the courts' (emphasis mine).

which includes first and foremost the text itself—it is entitled to robust defence on grounds both of practicality and democratic legitimacy, quite apart from its analytical utility.[31]

4. *Common Law Doctrine and its Statutory Context*

It follows from Craig's conception of judicial review that there is no essential difference between cases concerned with statutory power and those where the relevant powers are non-statutory: 'The courts will decide on the appropriate procedural and substantive principles of judicial review which should apply to statutory and non-statutory bodies alike.... A finding of legislative intent is not necessary for the creation *or general application* of these principles'.[32] These principles alone determine the style and limits of judicial intervention, except where a statute, in the case of a statutory power, contains explicit instructions to a contrary effect. But that view is either quite untenable, if taken seriously, or else a species of common law formalism to rival the (alleged) formalism of the ultra vires doctrine; and it mirrors the notion that, since ultra vires is plainly irrelevant to judicial review of the exercise of non-statutory power (such as the prerogative), it can be discarded altogether.[33] These are closely related errors: the statutory and non-statutory contexts are crucially different, whether we are concerned with legal reasoning or conceptual analysis. The repudiation of ultra vires, if not simply empty and trivial, entails a wholly implausible detachment of judicial review from its statutory context, in the case of a statutory power.

Contrary to Craig's contentions, common law doctrine is rendered determinate only in the face of allegations of specific injustice or impropriety on the part of a specified public agency in particular circumstances. At an abstract level, it consists only of general principles of legality, loosely connecting fundamental notions of good governance and the dignity of individuals with their practical implications for administrative propriety. The 'rule of law', in this context, requires a public official to use his powers only for their proper statutory purpose, taking all relevant considerations into account and disregarding matters irrelevant to his statutory function. But whether or not the minister can refuse to set up an inquiry under the Agricultural Marketing Act, for the reasons he has given and in the circumstances arising, depends, inevitably, on our interpretation of the statute.[34] The abstract precepts of the rule of law are powerless to generate substantive

[31] I have not argued, as Craig now asserts, that his model is open to charges of judicial supremacism on the ground that the relevant principles have not received legislative approval. My argument is that democracy requires the *application* of such principles to respect the statutory text and context. Craig's model is either undemocratic (ignoring the statutory context) or empty (the context is critical, as in the ultra vires model). See Allan, 'Constitutional Dialogue', especially 566, 568–69. I do not, of course, suggest that Craig's legal analysis exhibits, in practice, the errors that undermine his theoretical model; he is much too good a lawyer for that.

[32] Craig and Bamforth, 'Constitutional Analysis', above, at 767 (emphasis mine).

[33] See Craig, 'Ultra Vires and the Foundations of Judicial Review', above, 53–54.

[34] See *Padfield* v *Minister of Agriculture, Fisheries and Food* [1968] AC 997.

conclusions on their own: they have purchase only in the context of an authoritative reading of the Act, reflecting the 'intent' of its makers.

In his new essay, Craig denies that the 'improper purposes' ground of review is merely formal: it 'expresses the fundamental substantive idea that power that has been accorded for a particular purpose should not be used for a different purpose'. But my point, of course, is that that fundamental idea bears fruit only in the context of a specific grant of power to an identifiable agency for particular purposes. And, once again, Craig's response is highly ambiguous. Insofar as he accepts that 'the application of this particular head of review'—but not others?—'will require close attention to context', he concedes my point against the free-standing nature of 'doctrine'. And insofar as he suggests, by stressing the 'elliptical or indeterminate' nature of the text, in certain cases, that the court's decision is a *substitute* for legislative purpose, he dismisses (or downgrades) the context he purports to make central to the court's analysis. His recital of Jeremy Waldron's point, that people only appeal to legislators' intentions when there is a disagreement in court about what purpose should be attributed to a statute, suggests that he favours the latter position. In any case, of course, Waldron has in mind here the 'literal' sense of intention that we are both agreed is incoherent.[35]

The principal strategy adopted, to refute my contention that the context of application is critical to the concrete meaning of the heads of review, is to emphasize the 'more detailed principles within the heads of review', developed mainly by the courts: 'The normative arguments that serve to justify these more detailed principles have force independently of the particular context in which they are applied'.[36] Now, it is certainly true that the various standards of administrative propriety apply across a broad range of governmental powers and functions; but their general applicability is precisely a function of their abstract formulation: the more detailed their prescriptions, the narrower their sphere of application. The mere fact, then, that a general principle is applicable to a wide range of administrative action does not show that its concrete content, in any particular instance, can be identified in abstraction from the immediate context. So even if, as Craig rightly maintains, context cannot be quite 'everything', we can still insist that, for practical purposes, it must be central to our legal analysis: the relevant principles can obtain their concrete form only in application to a specific administrative scheme, adapted to the demands (in the standard case) of the statutory framework establishing and regulating that scheme. The judicial role is essentially to reconcile the statutory regime with general principle insofar as the specific character, and legitimate ends, of that regime allow.

[35] See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) 143, discussing the status of 'the particular thoughts and hopes of individual legislators'. While Waldron is anxious to distinguish the canonical text from legislators' intentions, he would presumably acknowledge the possibility of deducing general purposes from the *shared* intentions that the language itself most plausibly reveals or suggests.

[36] Craig, 'The Common Law, Shared Power and Judicial Review', above, at 245.

Let us look at this more point more closely, since it is central to the catalogue of errors that mar Craig's 'common law model' of judicial review. It will be the courts, we are told, 'that will fashion the detailed principles concerning particular process rights such as notice, the nature of the hearing, the rules of evidence . . . , representation, the giving of reasons, and the impact of an appeal on an original failure of natural justice'. Those detailed principles, however, will depend for their practical operation—what they require in particular cases—on the specific context in which they apply. It would be preposterous, and plainly contrary to the case-law, to suggest that we could determine their content in abstraction from the particular statutory regime in issue: 'what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates'.[37]

The transformation of natural justice, reflecting procedures appropriate for courts, into a broader conception of procedural fairness, applicable to administrative decision-making, has rendered its concrete content a function of context and circumstance. Unless we are to treat the statutory text and purposes as irrelevant to that context, it makes little sense to think of the common law as operating independently. The analogy between judicial and quasi-judicial or administrative proceedings weakens as matters of policy dilute or displace questions of law: the determination of rights is replaced by the exercise of administrative discretion; and the appropriate standards of procedure will reflect the nature of the inquiry or hearing in point. Powers created for reasons of public interest cannot be exercised in accordance with judicial procedures designed for the accurate determination of legal rights.

Does Craig really think his citation of *Alconbury* assists his case for the independence of judicial doctrine?[38] When a planning question can be decided solely on policy grounds by the minister who is himself the policy-maker, the landowner's legal rights have surrendered to administrative expediency: the normal protection, inherent in the impartial application of established general principles or policy guidelines, is absent. If, nonetheless, the safeguard of judicial review enables such procedures to meet the requirements of independence and impartiality imposed by Article 6 of the European Convention on Human Rights, such requirements are in this context largely formal and empty. Such procedures involve the 'determination' of 'civil rights and obligations' chiefly in the sense of providing for their extinguishment.[39] Far from illustrating the independence of doctrine, as the free-standing basis of judicial review, *Alconbury* demonstrates

[37] *Lloyd* v *McMahon* [1987] AC 625 at 702 (Lord Bridge). For pertinent analysis, see Forsyth and Elliott, 'The Legitimacy of Judicial Review', above, 300–301.

[38] See *R. (Alconbury Developments Ltd)* v *Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2001] 2 All ER 929.

[39] Cf. Tuckey LJ in the QBD at [2001] 2 All ER 958–59.

the opposite: it is hard to imagine a starker instance of the triumph of administrative context over legal principle, abstractly conceived.

A similar mistake is made when Craig observes that the various principles relating to the recognition of legitimate expectations are based on arguments that 'have force independently of the particular context in which they are... applied'. His observation misses the point. Even if general principles will apply whenever their underlying values are pertinent, which is plainly true, their weight or force will depend on the details of the particular case. Although, therefore, these principles (or arguments) may 'encapsulate criteria' that can be stated abstractly—relevant to a range of different circumstances—their practical implications will vary according to the pertinent facts of the case (or generic case) in hand. And if that is so, it is simply false to claim, as Craig also asserts, that there 'will normally be nothing in the particular piece of legislation, or its history that speaks to the particular issue of judicial review... before the court'. Quite the contrary is clearly true. The legislation, both text and context, will be absolutely critical: it is the statutory context that supplies the material on which the doctrinal 'criteria' can bite.

In the leading case, *ex parte Begbie*, Laws LJ explained that the 'facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review'.[40] Attempts to fit the cases within rigid categories, governed by different rules, were (he plainly intimates) largely unsuccessful: 'The more the decision challenged lies in what may... be called the macro-political field, the less intrusive will be the court's supervision'.[41] Everything will depend on whether 'wide-ranging issues of general policy' are involved, and whether the court can 'envisage clearly and with sufficient certainty what the full consequences will be of any order it makes'; and these are, of course, matters of degree, wholly dependent on all the circumstances. It is also important to note, in view of Craig's desire to downgrade the role of the statute in such cases, that both text and context were central to the court's decision in favour of the Secretary of State. Recognition of an expectation, in the circumstances arising, would be contrary to the statutory 'intention'. The minister's duty to act in an even-handed manner between all those affected would, if the applicant's case were accepted, effectively deprive him of the discretion (for exceptional cases) that the statute, on its most plausible construction, conferred.

The close dependence on context of such abstract notions as fairness or relevance may seem almost too obvious to labour; but it is important to see that this confusion at the heart of Craig's conception of judicial review has even deeper roots. For his 'common law model' rests on a notion of the free-standing nature of the whole corpus of administrative law, viewed as a self-consistent fabric of

[40] *R* v *Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1130.
[41] Ibid., at 1131.

doctrine. In the face of this independent doctrinal edifice, the statute is (according to Craig) characteristically silent:

> There will normally be nothing in the legislative text, or the legislative history, which sheds any light on matters such as the test for jurisdictional error, the criteria for substantive review, the intensity with which such review should be applied, what should occur in the event of invalidity, or the one hundred and one other such matters that arise before the courts.[42]

Now, this assertion could only be made by an author whose concern for doctrinal elegance has blinded him to its dangerously misleading allure in the face of practical instances, with all their power to challenge the distinctions and categories we may like to invent for the purposes of didactic exposition. The idea that there are genuine 'tests' for identifying jurisdictional errors, or defining the proper boundaries of review of discretion, or deciding on the availability or otherwise of collateral challenge (or a hundred other such matters), which can operate independently of context—making close inspection and assessment of all the relevant features of the particular case unnecessary—is, I believe, fundamentally mistaken.[43]

The notion, for example, that 'error of law' can serve as a test of the limits of jurisdiction, though certainly popular with judges and textbook writers, is rendered incoherent by the need to distinguish between 'law', 'fact', and 'policy'; for these distinctions cannot be made in abstraction from the particular context in point. If, in accordance with currently fashionable doctrine, all errors of law are now to be considered jurisdictional, we can preserve a degree of autonomy for administrative agencies (as well as a limited scope for ouster clauses to bite) only by manipulating the distinctions between law, fact, and policy, to set the limits of judicial intervention according to the demands of the statutory context.[44] Doubtful or 'erroneous' decisions, made within the agency's legitimate province, must be ascribed the quality of 'fact' or 'policy', even if they involve the application (and hence interpretation) of a statutory provision: we would otherwise destroy the distinction between review and appeal.[45]

The 'doctrine' of nullity is open to similar objections. As a matter of correct analysis, an ultra vires act is void, obtaining no authority from the statutory delegation of power.[46] But whether or not the victim of such an act can challenge it

[42] Craig, 'The Common Law, Shared Power and Judicial Review', above, at 239.

[43] It is a fine irony that the independent common law origin of the relevant 'tests' was proclaimed in order to demonstrate the formalism of the ultra vires doctrine, with which any of the various tests could of course be reconciled: see Craig, 'Ultra Vires and the Foundations of Judicial Review', above, 49–50.

[44] It is noteworthy that in the leading case, affirming the 'error of law' test for jurisdiction, the actual context prompted the court to make an 'exception' to it: see *R* v *Lord President of the Privy Council, ex p Page* [1993] 2 AC 682.

[45] For full discussion, see Allan, 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' [2003] *PL* 429

[46] See *Boddington* v *British Transport Police* [1999] 2 AC 143. See also Forsyth, 'The "Metaphysic of Nullity"—Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord* (Oxford: Clarendon Press, 1998).

collaterally, in the course of ordinary private law or criminal proceedings, will depend on the statutory framework that controls the agency's nature and functions. As Lord Hoffmann acknowledged, in *Wicks*, there is no general doctrine applicable to 'every statutory power, whatever the terms and policy of the statute'.[47] For the purpose of a prosecution for failure to comply with planning restrictions, an 'enforcement notice' (under the Town and Country Planning Act) was interpreted to mean a formally valid notice which, whatever its latent defects, has not been set aside on appeal or by judicial review. The common law will naturally favour the view that, other things being equal, people should be able to defend themselves against ultra vires executive acts in any legal proceedings; but whether or not other things *are* equal is a question that depends on the circumstances: the 'terms and policy' of the statute will therefore be central to the answer.

Craig has often sought to bolster the case for his 'common law model' by drawing an analogy with private law, where the various principles of civil liability, developed by judges, may operate quite independently of legislation. A pertinent statute may therefore be thought to modify what is otherwise a free-standing body of doctrine:

> The courts develop the principles of civil liability which they believe best capture the underlying aims of contract, tort and restitution.... The courts will decide whether such principles should be applied to bodies which derive their powers from statute'.[48]

But the analogy depends on the assumption that judicial review is underpinned by an independent body of doctrine, sufficiently detached from the varied contexts in which it takes determinate shape to furnish genuine answers to the questions of legality arising; and I have argued that such an assumption is false. There is no true analogy at all between principles of civil liability, grounded in a moral theory of corrective or commutative justice, and principles of governmental propriety that assume a concrete form only in a specific administrative context.[49] That, of course, is the explanation for what Craig finds puzzling—that legislative intent is treated as central to questions about the legitimacy of judicial review, in the case of statutory powers, whereas in private law our concerns about legitimacy are focused on the normative content of the rules applied.[50]

[47] *R* v *Wicks* [1998] AC 92 at 117.

[48] Craig, 'Competing Models of Judicial Review', in Forsyth (ed), *Judicial Review and the Constitution*, 379.

[49] There are fundamental problems involved in applying conceptions of 'doctrine' that reflect private law assumptions to the sphere of public law, where the requirement to facilitate (or at least not to obstruct) governmental purposes radically changes the nature of the 'law' being enforced: see generally Hayek, *Law, Legislation and Liberty* (London: Routledge & Kegan Paul, 1982). See also N.E. Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester: Manchester University Press, 1984). For the concept of commutative justice, see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 177–88.

[50] See Craig, 'Ultra Vires and the Foundations of Judicial Review', above, 68–69.

5. *Parliamentary Sovereignty and Constitutional Rights*

In Craig's analysis, the integrity of constitutional rights is secured by the operation of 'priority rules': the right can be abridged only by express statutory provision, or *perhaps* by necessary implication.[51] I have argued that the notion of priority rules, though a convenient *formal* device (like ultra vires!) to signal the ultimate supremacy of the legislative will—if indeed one accepts such supremacy—nonetheless masks the true interdependence of legislative and judicial authority.[52] No common law right takes automatic priority over statute in any circumstances: it is always a matter of seeking a solution that protects the right, so far as possible, while respecting the point and democratic force of the statutory command. Since there is a huge spectrum between, on the one hand, substantial invasions of the core of a fundamental right, and on the other, limited encroachments on more doubtful extensions of a less important right, the legality of an administrative decision will in practice depend on sensitive judgments of context and degree: considerations of weight and proportionality will always be critical.

Craig rejects my charge of formalism: 'The courts have stopped where they have stopped because of a considered judgment that these are the appropriate constraints on sovereignty'.[53] But my charge was directed against his theoretical analysis, not against judicial practice, which for the most part is appropriately respectful of both recognized public needs and established constitutional rights. Although I doubted the value of Lord Hoffmann's summary generalizations in *Simms*, on which Craig relies, I did not challenge the decision itself. I used it to illustrate the true complexity of the issues that typically arise.[54] My discussion sought to show that the idea of Parliament having the 'last word' in such cases makes little sense. Since the 'last' word is as much dependent on interpretation as the 'first' word, the whole notion of priority rules is far too crude to capture the subtle interplay of policy and principle.

Now Craig invokes the courts' Human Rights Act jurisprudence to assist his case. He thinks we can distinguish, independently of context, between bolder and more cautious interpretative approaches. The 'predominant' view favours the cautious approach, whereby legislation will not be 'read down' (under section 3) where that would involve a 'significant revision' of the statutory scheme. Even if we grant that it would be wrong for judges to cross 'the boundary between legislation and interpretation', however, that boundary must first be ascertained; and it is surely doubtful how far it exists in abstraction from the issues of principle

[51] Craig equivocates here, and for good reason. If rights can be curbed by necessary implication, he has granted the relevance of context, in which case the priority rule is nothing more than a presumption, vulnerable to contrary indications. Questions of weight are not excluded. See Craig 'Constitutional and Non-Constitutional Review' (2001) 54 *CLP* 147, at 166–67.

[52] Allan, 'Constitutional Dialogue', above, at 578–82.

[53] Craig, 'The Common Law, Shared Power and Judicial Review', above, at 251.

[54] *R* v *Secretary of State for the Home Department, ex p Simms* [1999] 3 All ER 400; see Allan, 'Constitutional Dialogue', above, at 578–82.

and policy that the court must confront when deciding what a provision, on its best construction, really means. A particular reading can be cogently rejected as making an unauthorized or impermissible 'revision' of the statute only when we have first inspected the reasons that commend alternative constructions, and weighed them in the balance. So there is nothing here to support Craig's formalist approach at all. In this context, as elsewhere, attempts to defend a specific doctrinal approach, viewed in abstraction from the legislative intention that ordinary methods of purposive and contextual interpretation reveal, have generally proved futile.[55]

The language of a provision will always limit the range of 'possible' meanings. In some cases the statute cannot be read compatibly with European Convention rights (on anyone's view) because its basic scheme is irremediably defective; in other cases compatibility may (on balance) entail too great an inroad on the statute's purpose or intended effect. But the graver the threat to a truly fundamental right (where typically the Convention right will match its common law equivalent) the greater is the justification for adopting a compatible reading, even when in another context the court might interpret the language differently. The fact that the Youth Justice and Criminal Evidence Act 1999, section 41, appeared on its face narrowly to circumscribe the judge's power, in a criminal trial for a sexual offence, to admit evidence of previous sexual relations between complainant and defendant was of great importance: it counted strongly against recognition of a broadly-conceived discretion.[56] There is plainly force in Lord Hope's observation that the structure of the Act appeared to disallow an implication in favour of admitting such evidence whenever necessary to ensure a fair trial under Article 6; but that consideration is not necessarily conclusive. Since evidence truly relevant to the defence (as such evidence of previous relations sometimes will be) ought on any reasonable view to be admitted, a suitably elastic interpretation can, in all the circumstances, properly be accepted.[57]

The right answer in such a case can be found only by placing the proper requirements of textual integrity and respect for the statutory purpose or intent in the wider constitutional context. Since that context is all-important we cannot isolate a general interpretative approach appropriate for all rights and all provisions. The court recognized that the present Act must be interpreted so as to suppress the 'mischief' that had provoked its enactment: evidence of the complainant's previous sexual experience should not be admitted when its relevance to questions of consent or credibility was weak. But the power to admit such evidence when cogent had nonetheless to be preserved. Consistently with the

[55] For a devastating critique of such doctrinal efforts, see Geoffrey Marshall 'The lynchpin of parliamentary intention: lost, stolen, or strained?' [2003] *PL* 236.

[56] See *R* v *A (Sexual Offence: Complainant's Sexual History)* [2001] UKHL 25; [2002] 1 AC 45.

[57] Ibid, paras. [44]–[45] (Lord Steyn). The necessary similarity in the complainant's conduct on each occasion could be regarded (in a suitable case) as inexplicable as mere 'coincidence' on the basis that it demonstrated her affection for the defendant: see [163] (Lord Hutton).

image of dialogue between judge and legislator I have sought to defend, Lord Steyn explained that it was 'realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material'.[58] Such an assumption embodies the fundamental constitutional postulate that the rule of law (in its essential core) must be maintained.[59] But perhaps Craig will want to retort that, since Parliament must always have the 'last word', according to the uniform interpretative stance he favours, a fair trial should have been denied?

My answer to Craig's complaint that my own position is not clear should now be apparent, even if it was really obscure before. I reject the crude distinction between interpretative constraint and 'invalidation' of statute that he seems to take for granted.[60] In my own theory, an interpretative constraint should be just sufficient, and no more, to preserve the essentials of the rule of law against statutory violation in particular instances. A robust constructivism (such as that in *A*) can accomplish everything that striking down can achieve, without loss of the statutory scheme or unnecessary affront to the legislature. It is also important to acknowledge the highly elastic nature, in practice, of the distinction between application and non-application of statutory provisions which, on a literal (or acontextual) reading, might do grave constitutional damage; and we may recall Craig's own admission that, in the context of European Community law, a robustly constructive approach preserves mainly 'the formal veneer of legal sovereignty'.[61]

Of course, such reliance on an appropriately constructed legislative intent, invoking Parliament's assumed desire to preserve the rule of law, is not self-justifying. (And so Craig's charges of formalism here are mistaken.) It must be justified like any other legal conclusion—by normative argument that gives due weight to all relevant considerations, including, indeed especially, those that most concerned the legislative majority. The legislative intent, in the sense of the purpose or policy that motivates the enactment, insofar as expressed or implied in the canonical text, is always of central importance. The proper limits of adjudication, therefore, must be sought by examining the consequences (for the community as well as the individual directly concerned) of rival interpretations; and

[58] Ibid at [45].

[59] See especially Allan, 'Constitutional Dialogue', above, at 572–73 (discussing the *Venables* and *Pierson* cases [1997] 3 WLR 23, 492).

[60] Note that Craig doubts the legitimacy of constitutional review, in defence of individual rights, while failing to see that the imposition of interpretative constraints is equally in need of justification. So the problems of legitimacy he thinks I face are (if they are genuine problems) equally problems for him. See Craig 'Constitutional Foundations, the Rule of Law and Supremacy' [2003] *PL* 92 at 107–111, and Allan, 'Constitutional Dialogue', at 583, n 73. For a defence of the judicial power to reject (or revise) an illegitimate statute, based squarely on the court's own duty to act legitimately, see Luc B. Tremblay 'General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law' (2003) 23 *OJLS* 525.

[61] Craig, 'Constitutional and Non-Constitutional Review', above, 163. See further Allan, *Constitutional Justice*, 225–31.

theories of interpretation based on rigid conceptual boundaries between the roles of judges and legislators must be repudiated. The correct reconciliation between legislative purpose and common law constraint is always a complex, and often controversial, question of moral and legal judgment.

My own position, then, takes the fundamental status of the common law constitution seriously. Now, Craig has himself frankly acknowledged that the courts' interpretative methods and doctrines operate to constrain legislative as well as executive power, and that these 'come close to constitutional review itself'.[62] So the critical question must be: could Parliament really forbid such methods and doctrines if it chose to assert its supposedly unqualified sovereignty? Is the legitimacy of the 'common law model' of judicial review itself dependent on continued legislative consent ('intent')? Which is primary: the legislative will or the rule of law, as the common law currently embodies it? These are the questions Craig has to answer. If the common law truly provides the foundations of judicial review, there is only one answer available. The courts must co-operate with the legislative purpose as fully and sincerely as their respect for basic requirements of human dignity and just governance permits; but the interpretative standards and presumptions employed by common law courts are intrinsic features of the unwritten constitution, immune to legislative change inimical to the rule of law, as presently understood. Sovereignty is (and always has been) curtailed.[63]

6. *Conclusion*

The various errors we have discerned in Craig's account of public law are closely related, reflecting at root an artificial and wholly implausible conception of statutory meaning and legislative authority. In his hands, a statute is at once the 'last word' on whatever matter it addresses, and yet largely silent in the face of the myriad complexities that its effective implementation confronts. So we have, on the one hand, the command of a sovereign legislator, wielding unbounded authority, and on the other, a regime of common law principle that operates for the most part quite independently. The nature and legitimacy of judicial review derive from an autonomous body of doctrine which, subject only to explicit contrary enactment, insulates our basic ideals of legality from the hugely variable contexts and conditions in which they must be applied and interpreted. Theories of jurisdiction and nullity, free-standing principles of natural justice, notions of the appropriate 'intensity' of substantive review, distinctions between different

[62] Ibid at 175.

[63] This conclusion is implicit in Sir John Laws's rejection of ultra vires, which is conjoined with an insistence that legislative supremacy is conferred by the common law: 'The common law is the higher premise.' See Laws, 'Illegality: The Problem of Jurisdiction', in Supperstone and Goudie (eds), *Judicial Review* , above, 4.12–4.13. Laws also equivocates, however, purporting (inconsistently) to acknowledge absolute sovereignty. See Allan, 'The Constitutional Foundations of Judicial Review', above, at 102–106.

conceptual categories of legitimate expectation, or between competing 'techniques' of interpretation—these are the real determinants of judicial intervention, according to Craig, rather than the legislative context in which such analytical generalizations normally take concrete form.[64]

It is true that Craig often *states* that the legislative context must be properly taken into account; but his theory violates his own injunction. If he *were* to take it correctly into account, he would have to abandon his current argument for the common law foundations of judicial review, and join me, instead, in questioning the conventional account of parliamentary sovereignty. For the legislative context, which embraces the policies and purposes behind the text, will affect the substance of common law rights, as they apply in practice, and give concrete form to what are otherwise only abstract standards of governmental propriety. The analytical mistake over ultra vires, moreover, neatly mirrors the more fundamental errors over substance. Either Parliament enjoys unqualified power to control or curtail judicial review, in which case common law constraints on the activities of statutory agencies must always be consistent with legislative intent, appropriately ascertained; or else Parliament exercises its sovereignty within the limits of the common law constitution, based on evolving ideas about the fundamental requirements of the rule of law. There is no third position for Craig to occupy.

Finally, it is alleged that my complaints about the futility of the debate over ultra vires, as it has been hitherto conducted, have failed to acknowledge the importance of understanding the relationship between courts and legislature, quite apart from any relevant differences in judicial doctrine. But that charge is simply false. I complained about a debate in which there appeared to be nothing of any substance between the two 'camps' at all, whether one looked at the locus of ultimate constitutional authority, or the 'judicial creativity' at work in developing doctrine, or the content of such doctrine itself.[65] Insofar as Craig's position truly differs from its rivals, beyond mere semantics, it is confused and quite implausible. Of course, the defenders of ultra vires can hardly be blamed for leaping to the defence of a doctrine that unqualified sovereignty logically entails; for they adhere to parliamentary absolutism. If, however, the principal 'common law' challenge to ultra vires has been seriously misconceived, the value of the debate between opposing camps must surely be open to question.[66]

[64] Craig adds such common law doctrines as those defining which public bodies are subject to review, or specifying the requirements of locus standi, ripeness, mootness, and justiciability. Few readers familiar with the relevant case-law will, I imagine, share his confidence in the autonomous character of the relevant 'doctrines', or even their consistent application or internal coherence. See Allan, *Constitutional Justice*, ch 6.

[65] See Allan, 'Constitutional Dialogue', above, at 564.

[66] See also David Dyzenhaus 'Formalism's Hollow Victory' [2002] *NZLR* 525.