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Legislative Intent and Legislative Supremacy: A Reply to Professor Allan

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Abstract—Ten years on and the debate about the foundations of judicial review continues. Two themes have remained constant throughout. The species of legislative intent have multiplied to include specific, general and constructive intent, and who knows what further 'adjectival variants' remain to be discovered. Those opposed to the common law model advance dire warnings of the dangers of ignoring their preferred adjectival version. In Allan's case my previous analytical criticism of constructive legislative intent, henceforth CLI, has provoked more extreme claims and more intemperate language about the alleged consequences of adherence to the common law model. These are, as will be seen, wrong. They serve moreover to mask the problems with CLI. Allan claims repeatedly that I confuse literal and constructive legal intent in his reasoning. This is quite mistaken: I take issue with the very meaning and application of CLI.

1. *The Meaning of Constructive Legislative Intent (CLI)*

Allan's thesis on the rule of law is based on central precepts which are untenable.[1] The same is true for his conception of constructive legislative intent. He has once again built a theory on a central proposition that is unsustainable.

The reader might expect a clear exposition of CLI, given its centrality to Allan's analysis. There is however no fit between expectation and reality. The concept is said repeatedly to be merely a 'metaphor', although a metaphor for what is never made apparent. The reader has to search hard to divine the meaning(s) ascribed to CLI. The fundamental problems with the meaning and use of the concept are neither recognized nor addressed. There are only two possible meanings of CLI that would enable it to perform the task assigned to it by Allan. Hints of both can be gleaned from his work.

The first possible interpretation is that the values which inform the rule of law are ones which we all agree on and hence we can without problem ascribe such constructive intent to the legislature.[2] This claim is untenable. There are 1,076 entries to the 'rule of law' in the list of periodicals. This is the tip of the iceberg: the figure can

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[1] P. Craig 'Constitutional Foundations, the Rule of Law and Supremacy' [2003] *PL* 92, 96–102.

[2] T.R.S. Allan 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 *OJLS* 563; T.R.S. Allan, 'Legislative Supremacy and Legislative Intent; A Reply to Professor Craig', at 566, 568-9.

be multiplied twenty-fold if one includes literature on individual aspects of doctrine, or particular constitutional rights. The literature on equality fills a library by itself. The rule of law is clearly a contestable concept.[3] Why else would Allan have written a monograph plus articles on it, disagreeing with many others en route, if the values that form part of the rule of law were agreed to by all? Disagreement as to the meaning of the rule of law is a reflection of disagreement about values that pervades democratic polities.[4] Those who espouse different theories of justice, liberal, neo-liberal, public choice, republican, communitarian, socialist etc, either incorporate different values under the label the rule of law, *and/or* interpret those values in a different manner.[5] Those who espouse the same theory may differ as to its implications for judicial review. Invocation of the phrase 'constructive legislative intent' does nothing whatsoever to resolve these differences. It performs no function other than expressing the conclusion about the choice thus made.

Now it might be felt this is too theoretical, though it isn't, and that if we focus on judicial doctrine we can conclude that there is a settled meaning to the values that inform the rule of law and constructive legislative intent. This is equally untenable. Reflect on the judicial experience of this century. There are four broad periods in the history of doctrine. The period up to the 1930s continued the same relatively liberal traditions of review that characterized earlier jurisprudence. This was followed by the 'low period' from the 1920s-1960s. We then had the expansion of review in the 1960s-1980s, as exemplified by *Ridge, Anisminic, Conway*, and *Padfield*. The fourth period ran from the 1980s till the present, with the further expansion of review in relation to rights. It was the courts that made the operative choice as to the meaning of the rule of law, and its embodiment in legal doctrine, rather than the legislature. Invocation of 'CLI' does nothing whatsoever to resolve these differences as to the reach of review. The fact that we live in a democracy may well mean that we can posit that Parliament intends some sense of fairness in its dealings with its citizens, but there has always been a vibrant judicial and academic debate about the content, scope and intensity of judicial review within a democracy. The concept of CLI performs no function other than expressing the conclusion about the choice thus made.

Now it might be thought that if we focus on current judicial doctrine then we can conclude that there is a settled meaning to the rule of law and the values that inform constructive legislative intent. This argument fares no better. It is in any event not open to Allan, who has repeatedly criticized public law for being

[3] J. Waldron 'Is the Rule of Law an Essentially Contested Concept (In Florida)' (2002) 21 *Law and Philosophy* 137.
[4] J. Waldron, *Law and Disagreement* (Oxford University Press, 1999).
[5] The contestable nature of public law values has been developed in different ways in the work of, *inter alia*, Robson and Laski in a previous generation, and more recently by, for example, Craig, Harlow, Loughlin, Rawlings, Tomkins and Walker. There is of course a rich vein of such thought in the USA, exemplified by the work of Ackerman, Aman, Cass, Macey, Mashaw, Michelman, Posner, Stewart and Sunstein.

formalist and for ignoring constitutional values.[6] It is testimony to the contradictions inherent in Allan's work that he can maintain that we all agree on fundamental values, such that we can posit a CLI to abide by them, while simultaneously deriding public law for ignoring the very values that he claims we self-evidently agree on. There is more generally vibrant debate within the judiciary about matters such as the scope of substantive review, the proper limits of deference, the interpretation of particular Convention rights, the reach of the interpretative obligation under section 3 of the HRA, and the extent to which breach of legislation dealing with socio-economic matters should sound in damages. This is matched by an equally vibrant academic debate about central issues. The magical invocation of 'CLI' does nothing whatsoever to solve such differences.

The second possible interpretation of CLI is that the legislature will be taken constructively to intend whatever is presently contained in judicial doctrine. Thus Allan states that CLI does not reflect the intentions or expectations of anyone.[7] He argues that the legislature will be taken to intend constructively the principles embodied in common law doctrine,[8] and that when the courts apply doctrine in accord with overall legislative purpose or apparent purpose then they are complying with the 'pertinent' legislative intent.[9] Consider the problems with this interpretation of CLI.

In terms of the debate about the foundations of judicial review, this meaning of CLI reduces Allan's argument to vacuity. CLI would be wheeled out to justify the present embodiment of judicial doctrine, whatsoever it might be, as determined by the courts on the basis of common law principle. This is déjà vu all over again. The reality is that Allan's CLI is no different in this respect, although less clear, than the idea of general legislative intent advanced in earlier literature, and subject to the self-same problems.

In terms of our general precepts of statutory interpretation the thesis is simply reductionist. Courts will of course always interpret statutes to attain their overall purpose. No one has ever suggested the contrary.

In jurisprudential terms, the very use of the word 'intent' within the phrase CLI is problematic, since it assumes that there can be an intent that does not reflect the intentions of anyone. Inanimate things do not have intentions. Nor is this simply a point of jurisprudential nicety, given that Allan's thesis is based on the existence of a constructive legislative intent. The reality is that Allan's thesis is not a thesis about legislative *intent* at all, whatever adjectival formula is used.[10] Nor could Allan meet this critique by arguing in terms of counterfactual legislative

[6] See, e.g., T.R.S. Allan 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?' [2002] *CLJ* 87; T.R.S. Allan 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' [2003] *PL* 429.

[7] Allan, above n 2, 'Reply', at 568, 571.

[8] Ibid at 567, 568.

[9] Ibid at 568, and see 567, 569–82.

[10] Ibid at 566, n 7.

intent. The difficulties with this concept are well known,[11] and suffice to render it wholly implausible. It would require, for example, one to ask, in relation to a case such as *Coughlan*,[12] whether the legislature in 1948 would, if it had thought about the matter, have intended that there should be a concept of substantive legitimate expectations as developed by the courts 50 years later, and the legislature of 1948 would have to make this determination in the light of the numerous subsequent amendments of the primary legislation and with an awareness of the many related developments in judicial review that had occurred in the interim.

2. *The Application of Constructive Legislative Intent*

The preceding difficulties suffice to render the CLI thesis unsustainable. The difficulties with its application are equally serious. We should recall that on Allan's view CLI does not reflect the intentions of anyone. It simply means that when the courts apply the common law principles of review in accord with the statutes overall purpose or alleged purpose then they are locating the 'pertinent legislative intent';[13] provided that the judicial intervention is consistent with the legislative purpose there is CLI.[14]

The difficulties concerning the meaning of CLI plague its application. The very fact that there is disagreement about the values included within the rule of law *and* their interpretation will translate into differences of view as to what should be the principles of review, and how they should be interpreted, and hence whether the judicial decision in the instant case really is consistent with the overall statutory purpose. We can therefore take the same statute, plug in different versions of the rule of law/constitutional values, and come out with different answers as to whether the principles of review have been applied consistently with legislative purpose. Thus utilitarian and non-utilitarian readings of process rights will lead to different conclusions as to what it means to say that procedural review has been applied consistently with legislative purpose. So too more generally will differences of view as between advocates of public choice and republicanism. And if this is felt to be too theoretical, the same applies to different views about, for example, the degree of deference that should be accorded to legislative and executive choices under the HRA, differences of view about the appropriate test for substantive review, and divergent assumptions about the relationship between statute, judicial review and damages actions.

CLI as used in relation to the application of review is problematic independently of the preceding difficulty. Consider the difficulties of applying this when, as is common, the judicial doctrine post-dates by some margin the original statute, as

[11] R. Dworkin, *Law's Empire* (Fontana, 1986) at 325–27, 348–50.
[12] *R* v *East Devon Area Health Authority, ex p Coughlan* [2001] QB 213.
[13] Allan, above n 2, 'Reply', at 568, 571.
[14] Ibid at 570–1.

in *Coughlan* and many other cases. It will also commonly be the case that the statute is simply indeterminate on the relevant matter, such as the test for substantive review, with the conclusion that we could claim CLI for either any version thereof chosen by the courts or none.

CLI also has far reaching implications that are never addressed by Allan. There is no need for us to bother with troublesome issues as to whether the legislature ever addressed the matter in text or history, because we can readily locate CLI. There is scant need for concern about judicial legitimacy, because provided the courts apply review in line with the statute's overall purpose, and how could they really do otherwise, there is CLI. There is no need for us to be concerned about anyone's intentions, because an inanimate object, the statute, can have an intent framed as CLI. There is no need for us to be troubled by standard problems of statutory interpretation because they can readily be resolved through CLI, provided we adhere to the trite mantra that the courts respect the overall legislative purpose when doing so. We need no longer be concerned with jurisprudential issues concerning the nature and limits of adjudication in relation to statute, since provided the courts seek to effectuate the overall legislative purpose, we can claim there is CLI. We can on this view dispense with a whole library of literature concerning legal theory.

3. *Constructive Legislative Intent and Theories of Adjudication*

The last point is important and worth dwelling on further. The reality is that CLI is being used as an inadequate mask for something far more complex, which is a theory of adjudication. Allan recognizes in passing that the language of CLI might not actually be appropriate, but continues to use it nonetheless.[15] It is not fortuitous that Allan, while generally employing the language of CLI, shifts nonetheless without thinking to the language of constructive interpretation, and draws on Dworkin. It is clear however that Allan's use of CLI comports with neither of the main strands of jurisprudential thought.

In terms of non-positivist accounts, Dworkin has made it patently clear that he does not believe in original intent as a theory of constitutional interpretation, nor does he subscribe to the speaker's meaning theory of statutory interpretation. He argues that both should be determined through law as integrity. Propositions of law are true if they follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice. I accept this view.[16] It is precisely what I meant when saying that on the common law model the courts would seek to give the best reading to the statute in relation to the particular principle of review being adjudicated, determined in the light of constitutional values

[15] Ibid at 566, n 7.
[16] Craig, above n 1; P. Craig 'The Common Law, Shared Power and Judicial Review' (2004) 24 *OJLS* 237.

that are largely decided on by the courts through the adoption of a particular version of the rule of law. However the idea that a theory of adjudication in which the courts exercise creative powers to determine the correct theory of justice, which will be contestable, and decide on its application to a particular case, in the light of the collected body of prior case law, bears any semblance to legislative intent as used in the debate about the foundations of judicial review is quite untenable. It is equally misleading to pretend that Dworkin's theory is captured by Allan's repeated mantra that there is CLI when judicial intervention is consistent with legislative text and purpose. Dworkin's theory is of course far richer than this. So Allan has a choice. He might respond by saying that his depiction of CLI is different from Dworkin's theory, in which case he must develop a convincing theory of adjudication of his own. He might claim that he has been misunderstood and that he really meant to capture the totality of Dworkin's theory of adjudication, notwithstanding the fact his present formulation of CLI does not do so. This choice would however fundamentally undermine his thesis in other respects. Dworkin's theory is not premised on the idea that we all agree on a single set of values, or theory of justice; nor does he take the same view of the rule of law as Allan; and nor does Dworkin believe, as Allan does, that there is some fundamental difference between public law and private law, since Dworkin applies the same theory of adjudication to both. It would also undermine Allan's use of CLI throughout. He could no longer trot out the simple formula, viz that CLI exists provided that the courts apply review in accord with legislative purpose. He would have to reason that there should be a legal obligation to, for example, consult, even though the statute was silent, because it was demanded by principles of justice, fairness etc that provided the best constructive interpretation of the community's legal practice judged in the light of the previous case law. Allan's acceptance of Dworkin would also undermine the basis of his challenge to the common law model as I have explicated it, since this is precisely the theory of adjudication that I adopt.

Allan's thesis is equally unconvincing on positivist accounts. It is perfectly possible to subscribe to the common law model while also being a positivist. Most legal theorists are in fact positivists and they would not subscribe to some simplistic account of the relationship between courts and statute of the kind articulated by Allan. The positivist would inquire whether the existing sources provide an answer to the issue of review that is before the court. She may well conclude that this is not the case and that the courts have then a strong discretion to decide on the application of those principles to the instant case.

The idea of CLI as articulated by Allan is therefore no more plausible than the other adjectival variants of legislative intent developed in the literature. The arguments advanced by Allan against the common law model can now be considered. Four such arguments can be discerned.

4. *Argument 1: Legislative Intent, Ultra Vires and Supremacy*

Allan repeats arguments concerning the alleged necessity of legislative intent to legitimate judicial review in a regime based on Parliamentary sovereignty.[17] The previous version of this argument was wrong, but it was at least analytically clear, a virtue lacking in Allan's account. Such sovereignty is said to mean that the courts cannot impose common law constraints, except so far as they 'serve and support the legislative will';[18] that this means that the courts can only intervene on grounds expressly or impliedly determined by Parliament; that this entails adherence to the ultra vires doctrine, which then demands some idea of general or constructive legislative intent.[19] The flaws in this reasoning have been analysed in detail before. Allan's use of the argument serves to make the flaws more evident.

The *argument is premised on erroneous assumptions as to the meaning and implications of sovereignty*. The fact that a legislature is all-powerful means that it can in theory legislate on any subject, and that it can have the last word. This tells one nothing about the extent to which it intends to specify the operative conditions, of the kind covered by judicial review, where it has decided to legislate. Nor does it mean that Parliament must have a view on such issues. Parliament will normally have no discoverable intent as to the particularities of judicial review. Legislative supremacy is, in Laws' words, the trump, not all four suits.[20] The common law model is based on the assumption that it is perfectly proper in a constitutional democracy for the courts to develop and impose constraints on public power as well as private power. It follows that unless the all-powerful Parliament has authorized action inconsistent with the judicially created controls then such controls should be operative and the relevant action should be prohibited. There is no need to find any positive legislative intent to justify the imposition of the controls that constitute judicial review. There is no necessity to manufacture legislative intent to fill the gap between legislative silence and the imposition of judicial controls.

These difficulties cannot be resolved through general or constructive legislative intent. Many issues in judicial review are ones where there is no specific legislative intent, *and* they are not readily resolvable by invocation of general or constructive legislative intent. Cases will often deal with issues such as whether review should be based on the collateral fact doctrine or error of law, proportionality or *Wednesbury* unreasonableness, unfettered freedom for the administration to change policy or substantive legitimate expectations. A general or constructive legislative intent, to the effect that the administration should behave fairly or rationally

[17] Allan, above n 2, 'Reply' at 564–8.
[18] Ibid at 564.
[19] Ibid at (3).
[20] Sir John Laws, 'Illegality: The Problem of Jurisdiction', M. Supperstone and J. Goudie (eds), *Judicial Review* (Butterworths, 2nd edn, 1997), ch 4.

cannot of itself resolve such matters because the argument, for example, as between proportionality and the *Wednesbury* principle, is itself about what specific test of rationality should be imposed on the administration.

Allan's attempt to avoid these conclusions and justify the need for CLI reveals moreover its vacuity. Such intent is said to connote the idea that there is parliamentary sanction for notions of administrative propriety developed by the courts pursuant to the rule of law.[21] This is a repeat of the argument analysed earlier: that Parliament will be taken to intend whatever the courts deem to be the correct limits of judicial review pursuant to the rule of law. The difficulties with this argument were considered above. Nor are they resolved by Allan's repeated nostrum that CLI is met when the courts apply the rules on review while seeking to effectuate the statutory purpose. This means that we could only criticize the courts for exceeding their power and acting contrary to CLI if they were to say in a particular instance that a judicially created limit on statutory power was not required by the rule of law, but should be imposed nonetheless, or that it should be imposed even though it was inconsistent with the statutory scheme. Both scenarios are of course wholly implausible.

5. *Argument 2: Common Law Doctrine and Statutory Context*

Allan maintains that advocates of the common law model ignore the statute, show repugnance for legislative intent, regard the grounds of review as free-floating independent of the text, and all manner of such evils. There is no foundation whatsoever for these wild claims, (which if true would apply equally to the idea of general legislative intent.)

The courts will, on the common law model, have due regard to the particular piece of legislation that is before them. We do not say that the text is unimportant; we do not ignore it; we do not regard legislative intent as repugnant; and we do not disaggregate doctrine and text. We have never said such things, quite the contrary, nor do they follow in any way from the theory. The courts will of course take account of the overall aims and purpose of the legislation when deciding on the application of the principles of judicial review. This is true both in relation to how the principles of judicial review play out in a particular area, and as to whether those principles should more generally be applied in a functionally differentiated manner, given the specificities of that area. This simply means that the courts will strive to give the best reading to the statute all things considered, in the light of the principles of judicial review that they, for the most part, have developed. It does not mean that the legislative text or history on the issue of judicial review before the court will determine such matters, such that the outcome is the result of legislative intent.

[21] Allan, above n 1, 'Reply' at 566.

Take natural justice as an example. It is the courts that have continually refined the rules on bias; it is the courts that decided which bodies should be subject to natural justice; it is the courts that decided which types of decision-making should be subject to these precepts; it is the courts that made and unmade the administrative-judicial dichotomy and that based on rights and privileges; it is the courts that decided that the content of natural justice depends on a balance taking account of the nature of the interest infringed, the likely value of additional procedural safeguards and the cost that this will entail, and a plethora of other issues that constitute procedural justice.

Allan's constant refrain is that these rules must be applied in the context of a particular statutory regime and that the content of natural justice will vary. This is self-evidently true. It does not mean that the legislation will determine, for example, the relative importance of the interest infringed, the likely value of additional procedural safeguards or the financial and other implications of providing them. It does not mean that the legislature has considered such matters. The courts will provide answers exercising their own creative judgment striving to give the best reading to the statute all things considered.

6. *Argument 3: Common Law Doctrine, Context and the Normative Force of Legal Propositions*

There is a related error in Allan's argument. He argues with vehemence that it is mistaken to think about the common law ever embodying principles that could be regarded as having normative force independently of the particular context in which they are applied.

This could simply mean that all legal rules must be applied, and that we cannot therefore determine whether, for example, someone had the *mens rea* for murder without considering the state of mind of the accused, or that we could not determine whether there had been a breach of a duty of care without considering the facts of what the defendant did. This is however a trite proposition with which no one would disagree.

The claim advanced by Allan is more far reaching. It is that we cannot regard a legal proposition as having normative force independently of its context. Thus Allan maintains that the rich set of principles developed by the courts within particular heads of review cannot be regarded as having normative force independently of the context in which they are applied. This is an extraordinary claim. Is it seriously to be argued that the principles, for example, as to what should count as an actionable representation, have no normative force independent of a particular context; that the principled determination that departing from an established policy in a particular instance violates equality has no normative force independently of the context in which it occurs; that the determination that a minister accorded power by Parliament can properly decide on

policy matters has no normative force separate from the particular planning matter at hand; that the set of principles articulated by the courts for deciding on equality claims under the HRA have no normative force in and of themselves, given the range of choices open to the courts in articulating what these principles are, and the implications that this has for the resolution of any particular case; or that the judicial determination that, as a matter of principle, they should substitute judgment for errors of law has no normative force independently of the particular subject matter area? These principles must perforce be applied in a particular context within which the courts will decide whether, for example, the principles relating to an equality claim have been breached. This is self-evidently so. To reason from this proposition to the conclusion that the principles themselves lack normative force independently of context is simply a non-sequitur. The principle that, for example, courts will substitute judgment for errors of law is based on normative assumptions about the relationship between courts and administrative bodies. This is so notwithstanding the judicial ability to characterize the matter as one of fact if they choose to do so. That very determination is itself reflective of a judicial conclusion that the normative assumptions applicable to the relationship between courts and administrators concerning legal errors are inapplicable to the case at hand, and that a different set of normative assumptions concerning the relationship between the two when factual matters are in issue should apply instead.

There is moreover no difference between public law and private law in this respect, notwithstanding Allan's protestations to the contrary.[22] The judicial founders of public law, Coke, Holt Mansfield and the like, were also central to the development of private law doctrine. They reasoned on the premise that it was part of the judicial role to fashion principles to control public and private power alike, and drew no distinction as to their role in the two instances. Nor can any such differentiation be based on the mistaken premise that ideals of corrective justice in private law are somehow less contentious or more or less detached from context than the principles developed in public law. This simply reflects a surprising lack of awareness of the vibrant debates within private law as to the meaning of corrective justice, its application in particular areas, the relationship between corrective and distributive justice and the like.

7. *Argument 4: Judicial Review and Supremacy*

Allan has considered the relationship between judicial review and supremacy on numerous occasions. His analysis has been unclear and confused for reasons that I discussed previously. Suffice it to say that I find his most recent offering on the subject beset by the same problems. Given the exigencies of space let me simply address two related issues.

[22] Ibid at 578.

First, I do not, as Allan maintains, think that there is some 'crude distinction' between interpretative constraints and invalidation.[23] To the contrary, I have consistently argued that there is a spectrum of constraints that the judiciary can impose on the exercise of statutory power, with invalidation being at one end. All such constraints must of course be justified in normative terms, and the difficulties with actual invalidation are, as is recognized by all, greater than in respect to other forms of constraint.

Second, Allan appears to argue that if judicial review is based on the common law, then this must mean that the doctrines used by the common law are 'immune to legislative change inimical to the rule of law, as presently understood'.[24] This is, as stated, clearly a *non-sequitur*. There is nothing inconsistent in arguing that the common law is the foundation of, for example, a duty to give reasons, and that Parliament might nonetheless have the last word in deciding whether to accept that reasons should be provided in a particular instance, even where this runs contrary to common law doctrine. The courts are not the exclusive repositories of wisdom about justice and the rule of law. There may, as Waldron reminds us,[25] be legitimate scope for disagreement about these issues within a democratic polity. The fact that Parliament might enact an unequivocal provision that runs counter to pre-existing judicial doctrine concerning the intensity of review, or the consequences of invalidity in a particular area, might simply reflect legitimate disagreement as to what the rule of law requires, not some 'crude' triumph of sovereignty over judicial principle.

8. *Conclusion*

Allan's argument is replete with florid metaphor and extreme claims. The former is exemplified by silly talk of the common law model negotiating 'jurisprudential ravines' and 'crumbling precipices', this being especially paradoxical given the jurisprudential flaws in Allan's own analysis. The latter is exemplified by the claim that the common law model is 'repugnant' to legislative intent, which is wholly without foundation. The objections to the common law model are in reality misconceived and the meaning accorded to constructive legislative intent untenable.

Allan's arguments reveal moreover the incoherence that besets his work. We are told that the rule of law is the principal constitutional value,[26] yet the courts can do nothing without constructive legislative intent since this will entail judicial supremacism.[27] We are told that there are constitutional values that we all agree on,[28] yet we are told also that public law is beset by formalism and ignores

[23] Ibid at 581.
[24] Allan, above n 2, 'Reply' at 582.
[25] Waldron, above n 4.
[26] T.R.S. Allan, *Constitutional Justice* (Oxford University Press, 2001), chs 1, 2, 7.
[27] Allan, above n 2, 'Constitutional Dialogue', at 573–78.
[28] Allan, above n 2, 'Constitutional Dialogue'; 'Reply' at 565, 568–9.

these very values.[29] We are told that we agree on the meaning of the rule of law,[30] yet Allan finds the need to write a lengthy monograph explicating its meaning and taking issue with all around.[31] We are told that the common law, through the rule of law, provides the values that inform judicial review,[32] but we are told also that the common law merely furnishes empty vessels that are devoid of content.[33] We are told that there must be constructive legislative intent to respect Parliament's will,[34] yet we are told also that it is the courts' view on the meaning of these values that must prevail.[35] We are told that context is everything,[36] yet the courts are criticized for being unaware of broader issues of constitutional value and principle.[37] We are told that the common law values provide the core of the unwritten constitution,[38] yet we are told that such values have no independent normative force.[39] We are told that the Ultra Vires debate which is about the respective contributions of courts and legislature to judicial review is futile,[40] yet Allan engages in this very debate with sound and fury.[41]

It might be well for Allan to concentrate on the coherence of his own thought, and the concepts he employs, before talking of jurisprudential ravines and crumbling precipices.

[29] Allan, above n 6, 'Constitutional Foundations' and 'Doctrine and Theory'.
[30] Allan, above n 2, 'Constitutional Dialogue'; 'Reply'.
[31] Allan, above n 26.
[32] Allan, above n 26.
[33] Allan, 'Allan, above n 6, 'Constitutional Foundations'.
[34] Allan, above n 2, 'Constitutional Dialogue', at 573–78.
[35] Allan, above n 2, 'Reply', at 580–2.
[36] Allan, above n 2, 'Constitutional Dialogue'.
[37] Allan, above n 6.
[38] Allan, above n 26.
[39] Allan, above n 2, 'Constitutional Dialogue'; 'Reply'.
[40] Allan, above n 6, 'Constitutional Foundations'.
[41] Allan, above n 2.