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THE CONSTITUTIONAL BASIS OF JUDICIAL REVIEW IN SCOTLAND

STEPHEN THOMSON

Thesis presented for the degree of Doctor of Philosophy

The University of Edinburgh

2013
This thesis is dedicated to my late grandfather, Ian Thomson,

a model of perseverance

whose energy and courage were outstanding.
DECLARATION

I hereby declare that the following thesis has been composed solely by me, that the work
consstituted therein is my own, and that said work has not been submitted for any other
degree or professional qualification.

Stephen Thomson
September, 2013
Ma On Shan, Hong Kong
ABSTRACT

The thesis examines the constitutional position of the Court of Session's supervisory jurisdiction.

It begins by emphasising the methodological and substantive importance of the historicality and traditionality of law. It then provides a detailed historical account of the emergence of the Court's supervisory jurisdiction, from its inheritance of supervisory functions from emanations of the King's Council to the present-day law of judicial review. Throughout, emphasis is placed on the Court's strong sense of self-orientation in the wider legal and constitutional order, and the extent to which it defined its own supervisory jurisdiction. The court was a powerful constitutional actor and played a strong role in the increasing centralisation and systematisation of the legal order, expanding its supervisory purview through a powerful triumvirate of remedies (advocation, suspension and reduction) and a comprehensive approach to the supervision of a wide range of bodies.

The thesis then frames tensions between Parliament and the Court in the context of judicial review of ouster clauses, chosen as a point of heightened inter-institutional tension. This is demonstrated to be an area in which divergent visions of the constitution are evident – Parliament regarding itself as entitled to oust the jurisdiction of the Court to judicially review, and the Court regarding itself as entitled to examine and pronounce on the extent of ouster, including its limitation or exclusion. In attempting to conciliate these divergent constitutional worldviews, the thesis rejects a “last word” approach which prevails in the English judicial review literature. It considers (and rejects), as alternatives, dialogue theories and functional departmentalism.

The thesis then advances constitutional narratology as its preferred analytical framework for the accommodation of those inter-institutional tensions, and conciliation of their divergent worldviews. The Court's performance of a constitutional-narratological function facilitates the integration, conciliation and synthesis of legal norms with an existing law and legal
system; weaves and coagulates multifarious legal norms into a unified and univocal body of norms; and executes a chronicling, expository and explanatory storytelling function which sets a legally-authoritative narrative to the law. In doing so, the Court performs a distinctive and indispensable constitutional function incapable of fulfilment by Parliament. It is argued that traditionality and functional necessity provide the legal-systemic legitimation for the Court's performance of the constitutional-narratological function. Finally, the thesis considers the institutional specificity of the function, concluding that it is the function, rather than the institution, that is indispensable. However, neither the advent of the Upper Tribunal nor the U.K. Supreme Court suggest at this stage that the Court's performance of that function is waning.
ACKNOWLEDGEMENTS

I have been fortunate to work under such distinguished supervisors as Professor Chris Himsworth and Professor Neil Walker. They subjected my work to rigorous practical and theoretical evaluation, and have made a significant contribution to my academic development. I am very grateful to each of them for the time they have taken to supervise my research.

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Finally, I would like to record my gratitude to my family for supporting my ambitions.
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CHAPTER 1

INTRODUCTION

1.1 General introduction

The supervisory jurisdiction of the Court of Session is the principal jurisdiction through which judicial review is transacted in Scotland. The majority of petitions for judicial review concern statutory enactments, with aggrieved persons seeking review of the acts or decisions of bodies purporting to act or decide under a statutory power. The Court routinely deals with such petitions without challenging or calling into question parliamentary authority, and this evidences a general deference from the Court to Parliament.  

Whilst that may hold true for the majority of petitions for judicial review, an important minority show glimpses of constitutional tensions between Parliament and the Court. Occasionally, those tensions become quite apparent.

An area of judicial review in which tensions are heightened is in the context of statutory ouster clauses. These represent attempts by Parliament to exclude or limit the jurisdiction of the Court (or courts) to judicially review. The Court, for its part, imposes its own interpretation on ouster clauses, and sometimes limits or denies their effect. Judicial review, in the specific context of ouster clauses, thus offers a window into deeper constitutional tensions, framing potentially divergent visions of the constitution, or constitutional worldviews, put forward by each institution. Whilst Parliament regards itself as constitutionally entitled to limit or exclude the jurisdiction of the Court to judicially review by enacting ouster clauses, the Court regards itself as constitutionally entitled to adjudicate on the legal effect, and thus the valid scope, of ouster clauses. This holds true both in those

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1 The discussion is primarily centred around the U.K. Parliament, as opposed to the Scottish Parliament. This is because the Scottish Parliament owes its existence to a single Act of the U.K. Parliament – the Scotland Act 1998 – and, as such, can be relatively easily abolished (if not without political controversy). By contrast, the U.K. Parliament, as a “sovereign” legislature, has a deeper constitutional claim, and also a more ambiguous one, being unable to point to an incontrovertible foundational constitutional moment.
cases in which the Court limits or denies the purported effect of ouster clauses, and in those in which the Court upholds their effect. In this lies a fundamental constitutional tension between Parliament and the Court.

This prompts a search for a framework which accommodates or conciliates those inter-institutional tensions. The natural starting point for ascertaining constitutional authority is a central constitutional text, such as a code, and this is, of course, absent in the U.K. constitutional order. One must therefore adopt some other methodology in ascertaining constitutional authority in such a system, and an approach which is often adopted in purported resolution of inter-institutional tensions is a last word analysis; that is to say, one which seeks to determine whether Parliament or the Court has or should have the “last word” on matters of constitutional or institutional competence. This approach prevails in the English judicial review literature.

It is not, however, the only approach to inter-institutional tensions. It is, indeed, one which is rejected by this thesis. Alternative approaches include dialogue theories, functional departmentalism, and – essentially another take on the latter – bipolar sovereignty. These are argued, however, to be insufficient in their own right.

The thesis instead proposes an analytical framework in which the Court is regarded as performing a constitutional-narratological function. This is argued to be a distinctive constitutional function which can only be performed by judicial institutions, and which differentiates the nature of constitutional functions executed by Parliament and the Court. As such, their respective functions should not be viewed as in terminal competition – even in the context of the inter-institutional tensions raised by judicial review of ouster clauses – but as distinctive, indispensable contributions to a greater constitutional whole. This reserves functionally differentiated claims to exclusive constitutional competence on the part of both legislative and judicial institutions: the legislative claim being to the performance of a legislative-programmatic function, and the judicial claim being to the performance of a constitutional-narratological function. Whilst this thesis neither celebrates nor condemning the Court's enjoyment of that function, it demonstrates that the Scottish legal and constitutional tradition sanctions its performance. In particular, it is supported by the historical pedigree of both the Court and its supervisory jurisdiction, as well as its satisfaction of the legal-systemic criteria for the self-attribution of constitutional authority which the Court must
assert in performance of that function.

1.2 Structure of thesis

The thesis progresses in four broad stages.

Chapter 2 examines the historical pedigree of the supervisory jurisdiction. As will become apparent in the course of this introduction, this is of more than mere “historical importance”, because it lays the foundations for the functional distinctiveness of the Court's supervisory jurisdiction in the wider legal and constitutional order, including the extent to which it has shaped and predefined the constitutional system of the present day.

The chapter begins by showing that equitable superintendence was (and by some interpretations still is) the normative wellspring of the supervisory jurisdiction.

It then considers the manner in which the Court inherited a basic supervisory function from its predecessor institutions in 1532, before examining the growth and development of that function in the centuries that followed. The Court assumed the role of supreme civil court in an increasingly centralised and systematised judicial order, expanding and strengthening the scope and legal-systemic functionality of its supervisory jurisdiction. The common law² development of such remedies as advocation, suspension and reduction played an important role in securing for the Court a general, comprehensive supervisory jurisdiction, and gave sufficient flexibility and generality of scope as to bring such diverse entities as ecclesiastical courts, arbiters, and public and administrative bodies within the supervisory purview of the Court. The broad calibration of the supervisory jurisdiction around a general doctrine of jurisdiction added to the generality of the legal-systemic function performed by the Court, and this evolution of both the Court and its supervisory jurisdiction established a constitutional foundation for that functionality, distinguishable from that enjoyed by Parliament.

Chapter 3 considers the potentially competing constitutional visions advanced by Parliament and the Court in the context of judicial review of ouster clauses. It sets out a number of examples in which Parliament has attempted to oust the jurisdiction of the courts, and the varying judicial responses to those attempts. It is argued that one of the claims advanced by

² That is to say, non-statutory.
the Court, often implicitly, is that of jurisdictional indefeasibility – the idea that there are certain legal and constitutional functions which are the exclusive preserve of the courts, such as the assessment of compliance with jurisdiction. This is, as shown, not always a straightforward or uncontroversial assessment. More fundamentally, the Court lays exclusive claim to the very possibility of determining the legality of ouster clauses. It does not seek or regard it as necessary to rely on some other, external constitutional authority to determine their legality. This stands in stark contrast with Parliament's confident assertion of jurisdictional ouster, and serves as a precursor to the demand for a conciliation between such apparently conflicting visions of the constitution.

Chapter 4 progresses to a consideration of some of the models by which that conciliation may be attempted. It begins by examining a last word analysis, and argues that this is a flawed approach to the problem, primarily because it works from the presumption that Parliament and the courts are exercising the same “word” – that they are competing for the same core of constitutional competence – and in so doing fails to recognise the distinctive constitutional functions performed by those institutions.

Having rejected a last word analysis, the chapter considers two alternative models. The first is that of dialogue theories, which do not in principle rule out the possibility of distinctive and indispensable constitutional functions being performed by different institutions of state. It is argued, however, that dialogue theories do not offer a satisfactory model of analysis.

The second alternative to be considered is “functional departmentalism”, which appears to move towards a greater recognition of functional distinctiveness played out by legislative and judicial institutions. However, this model is shown to be of little assistance in the particular constitutional conditions of the United Kingdom. A related analysis, developed in the context of U.K. constitutional debate, is “bipolar sovereignty”, although this has not been developed into a sufficiently detailed or elaborated framework to be considered as a model in its own right.

Chapters 5 and 6 set out the preferred analytical model of the thesis, with a constitutional-narratological function which is argued to pertain to the Court. It is proposed that courts perform a unique and indispensable function in integrating, explaining and contextualising statutes within the framework of an existing legal order. Whilst this narratological function
is not exclusive to cases concerning statutes, it is perhaps in those cases that apparent institutional tensions (particularly in the context of ouster clauses) are most visible. This recognition of a distinguishable and indispensable function which is argued to attach to the courts is shown to be a complete rejection of a last word analysis, and in this regard emphasis is placed on the fundamental requirement of institutional harmony and a core of constitutional stability in a functioning legal order.

Judicial narratology (which is distinguished from legislative narrative) is acknowledged to exist across all areas of law, but to have deeper constitutional implications in the area of constitutional law. To illustrate this point, narrative is broken down into narratives and meta-narratives. Whilst both involve far-reaching implications for constitutional authority, narratives are more visible, whilst meta-narratives are often tacit or unarticulated – a subtext underlying a particular constitutional worldview. In performing a constitutional-narratological function, the Court is implicated in a self-attribution of constitutional authority and deep processes of self-norming; that is to say, courts self-ordaining their constitutional authority.

This phenomenon raises questions about the legitimacy of the Court's extensive self-normativity, and the chapter considers what legal-systemic legitimation exists for the self-normativity of the constitutional-narratological function. Two factors – traditionality and functional necessity – are put forward as systemic legitimators in that regard. This is not to applaud the self-normativity of courts, but to neutrally and agnostically identify those factors that exist within the legal system for the internal systemic legitimation of that manner of judicial behaviour.

The thesis closes by considering whether the constitutional-narratological function is institution-specific; in other words, whether the Court of Session has an indefeasible claim on this deep constitutional functional as an institution. This is considered in the context of both the Upper Tribunal and the U.K. Supreme Court. It is concluded that the Court of Session does not command such an indefeasible claim, but that the indefeasibility attaches to the underlying function performed by the Court. As such, it falls to any judicial institution to vindicate that claim, such as a court which replaces the Court of Session. This puts into context judicial claims to jurisdictional indefeasibility, by showing that they should most properly be made as functional, rather than institutional, claims. As such, the conclusion
becomes one about courts generally, rather than the Court of Session as a single institution.

1.3 **Scope and methodology of thesis**

The scope of this thesis is limited to judicial review and constitutional law in Scotland. Whilst some of the discussion may be of interest or relevance to other jurisdictions, the theoretical framework which is adopted is a response to the particular legal and constitutional situation of Scotland. That comprises, of course, the particularities of the quite autonomous and distinctive body of Scots law and the Scottish legal system, as well as the broader legal and constitutional order of the U.K. as it applies to and in Scotland.

In accordance with a particular historiographical approach which is introduced in the following section, the thesis takes a broad and long-term view of the legal and constitutional system. It purposely avoids dwelling on, or over-stating the importance of, individual statutes – even those which are commonly regarded as pivotal in the sphere of constitutional law, such as the European Communities Act 1972, the Human Rights Act 1998 and the Scotland Act 1998. At no point is the suggestion made that statutes of this kind are unimportant. Instead, it is argued that the historical and traditional nature of law, and the uncodified nature of the U.K. constitution – in which constitutional authority is so contestable – require that individual statutes are viewed as part of a much wider picture, and a much deeper system. These statutory frameworks are more transitory than the deeper layers of law which authorise and define their generation, interpretation and scope of operation. For this reason, they are not regarded as “game changers”. The latest statute is indeed the *latest* statute, and joins an existing legal system; the institutions, body of law, legal culture, constitutional culture and hermeneutic tradition of which, are all well-established. These deeper elements of the system are the principal focus of this research and, if anything, the thesis emphasises the importance of the past as a response to what is regarded as a general tendency to hang on the latest word of the legislature – or, for that matter, the courts.

Similarly, the thesis is not primarily concerned with the “surface level” of law in its own right, such as the technical rules of judicial review, particular sections of statutes, or the latest judicial utterances in individual cases; and nor does it take these at face value. Instead, the focus is on deeper questions about which institutions are authorised to enunciate those rules and paradigms, the sources and dynamics of that authority, and the implications of
inter-institutional relations for delineating that authority. In particular, the research is motivated by an interest in the manner and extent to which the Court of Session participates in the sourcing and delineation of constitutional authority in the context of judicial review.

The thesis broadly adopts a doctrinal and theoretical approach to the subject matter, one which seeks to make observations about the legal and constitutional system, and to provide a theoretical framework which more adequately accommodates and explains that system than existing accounts. In particular, it does not seek to be normative, in that it does not advance a manifesto of how things ought to be.

The thesis does not engage with the currently fashionable debate between legal and political constitutionalism. There are several reasons for this, which can only be briefly stated. First, the debate implies a sustainable dichotomy between law and politics; in principle precluding the conception of law as a sub-category of politics, and therefore constructing a competition between a whole (politics) and a part thereof (law). It seems unconvincing that this dichotomy can be cleanly made. The political and social world seems more nuanced than this dichotomy suggests, with “law” itself being essentially political, in the sense that it is concerned with assertions of power, the dynamics of the state, and the organisation of a social order.

Indeed, the very idea of constitutionalism as government according to some definitive or framing law, seems to imply the separation of the act of government from the substance of a constitution. This seems especially problematic in the U.K. constitutional order, because the substantive element of the constitution is emphasised in the absence of a central, organising constitutional text. The constitution is a more practice-oriented enterprise; neither framed by, nor sourced from, a central text, but by the long-standing institutional practices and more elusive constraints of the system. The act of government seems, itself, to be a sub-category of the constitution – that is to say, the stuff of which the legal, political and constitutional order is constituted. In this context, “constitutionalism” seems to hold the truism that the act of government is not a free-standing exercise, but is constrained by external factors.

As such, although the legal and political constitutionalism debate is cast as a binary framework, it represents just one approach to the subject\(^3\) which, in accordance with the

\(^3\) See Michel Rosenfeld and András Sajó (eds.), *Oxford Handbook of Comparative Constitutional*
above observations, seems to adopt particularly narrow conceptions of “law”, “politics” and “constitutions”. It is for these broad reasons that the thesis does not seek to engage with that particular debate.

Finally, it may be helpful to define at the outset some of the terms used in the thesis. Unless context dictates otherwise, references to “Parliament” are to the U.K. Parliament; the “Scottish Parliament” to the post-devolution Scottish Parliament; the “old Scottish Parliament” to the pre-Union Scottish Parliament; the “Court” to the Court of Session (or the College of Justice); and the “Supreme Court” to the U.K. Supreme Court.

1.4 Historicality and traditionality of law

Two related qualities of law – its historicality and its traditionality – are particularly important for the methodological approach adopted in this thesis. These allude to the diachronic nature of law; the extent to which it must refer to the past in order to be certified as law in the present. Law is profoundly shaped, defined and made legally-authoritative by the existing legal order, citing, invoking and mobilising existing institutions, systems, processes, standards, normative criteria, concepts, methodologies, and other materials and resources. Together, these may be regarded as aspects of an overarching legal tradition.

The extent to which the existing legal tradition defines and constrains law is significant for this thesis, because it seeks to challenge certain preconceptions about constitutional law and the manner in which the subject is approached.

First, it challenges preconceptions about the reference points for ascertaining and measuring constitutional authority; and, in particular, it challenges parliamentary supremacy or

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4 The College of Justice has been used as an alternative name for the Court of Session, however it is technically a wider institution.

5 As opposed to the Court of Session, which was often referred to (and sometimes still is) in Scotland as the “Supreme Court”.

6 This assumes the continuation of an existing legal and constitutional order. Any decisive break in that order – such as a revolution – might interrupt the extent to which present law gains its authority by reference to the past.
parliamentary authority as the principal reference point in that regard. The absence of a central constitutional text (such as a code) indeed sensitises questions about the reference points for ascertaining and measuring constitutional authority. The United Kingdom was formally established by the Treaty of Union in 1707, but so many of the pre-existing rules, institutions and traditions of law were retained, and regional autonomy (in particular, a semi-autonomous Scottish legal system) maintained, that the present-day constitutional order is substantially a bringing together of the pre-Union legal systems with which there was a very significant degree of continuity.

Importantly, there was no incontestable foundational constitutional moment for either the legislature or the courts, and each labours under a system in which their respective constitutional competences have emerged and been determined with a strong-sense of ongoing, institutional self-definition. It is in the context of this more elusive and ambiguous constitution that legislative and judicial institutions must act.

This cautions, in particular, against too ready an acceptance of the doctrine of parliamentary supremacy as a foundation of the U.K. constitution or the Scottish aspect thereof – in the first place, it was not provided for in the Treaty of Union; secondly, it can only be deduced

7 That is to say, between England and Scotland in the form of the United Kingdom of Great Britain. The Union of Great Britain with Ireland in 1801 formally established the United Kingdom of Great Britain and Ireland. There was no formal “treaty” between Great Britain and Ireland, that union instead being effected by the Union with Ireland Act 1800 (an Act of the Parliament of Great Britain) and the Act of Union (Ireland) 1800 (an Act of the Parliament of Ireland).


9 The Scottish Parliament and the U.K. Supreme Court find their respective foundations, of course, in the Scotland Act 1998 and the Constitutional Reform Act 2005. The U.K. Parliament and the Court of Session, however, can scarcely be traced to comparable foundational moments. The foundation of the Court of Session, and the extent to which its predecessor institutions were important for its own authority and jurisdiction, are discussed below at 19-31.

10 It must be acknowledged, of course, that a doctrine of parliamentary supremacy became a major feature of constitutional theory in the United Kingdom – albeit with an arguably fading dominance in recent years.

11 The Treaty of Union merely provided in Art. III “[t]hat the United Kingdom of Great Britain be
from evidence of institutional practice, and the evidence (in Scotland) does not point overwhelmingly in its favour;\textsuperscript{12} and thirdly, to the extent that it did come to feature as a characteristic of the constitutional system through institutional practice, the system can equally “evolve away” from that position. The stance taken in this thesis is that there does not appear in Scotland to be a particularly compelling reason why a supreme Parliament should be adopted as the starting point of constitutional analysis, and that there is very good reason to use the Court of Session as a starting point for such analysis – certainly with regard to judicial review. This emerges through an historical analysis of Scottish legal and constitutional tradition, which is explored in depth in Chapter 2.

A second preconception which this thesis seeks to challenge is what is sometimes an overemphasis on the latest word of parliaments and courts which, far from being self-standing or self-interpreting, are deeply conditioned by the existing legal order. The thesis does not seek to downplay the importance of statutes as a major source of law, nor, in the context of constitutional law, does it seek to suggest that statutes such as the European Communities Act 1972, the Human Rights Act 1998 and the Scotland Act 1998 have not had significant implications for the constitutional landscape of the United Kingdom. However, there is a danger, in over-playing the paramountcy and momentousness of those statutes, that one loses sight of the existing, deeply-rooted legal and constitutional tradition into which they enter, and which profoundly situates and conditions their meaning, operation and authority. This thesis seeks to emphasise both the importance of that legal and constitutional tradition, and its substance in the Scottish context.

With these methodological objectives in mind, let us consider what, more precisely, is meant by the historicality and traditionality of law. Whilst legislative enactments and judicial decisions are both affected by these factors, statutes are particularly interesting because they represent a diachronic tension within the law, pulling between the law’s past and the law’s future. Neil MacCormick hinted at this idea:

\begin{quote}
represented by one and the same Parliament, to be stiled, The Parliament of Great Britain”. The Acts of Union 1800 which effected the Union with Ireland in 1801 likewise provided in Art. III “that the said United Kingdom be represented in one and the same Parliament, to be stiled The Parliament of the United Kingdom of Great Britain and Ireland”. No provision was made in either the Treaty of Union 1707 or the Acts of Union 1800 for the supremacy of Parliament. This will become apparent in Chapter 2. The judicial view that parliamentary supremacy was more closely associated with English than with Scottish constitutional doctrine was famously expressed in \textit{MacCormick v Lord Advocate} at 411, per Lord President Cooper.
\end{quote}
“A statute represents a new input into an already ongoing legal system. So to make sense of the newly-enacted law one has to read it in the light of the existing legal system to see what it has changed and how the new rules enacted can best make sense in the light of the continuing-but-altered legal system”.13

The diachronic nature of law emerges in two senses. First, new legal norms are generated and recognised as law according to antecedent criteria for valid law-making. They are understood and executed in accordance with an existing legal tradition. Thus the European Communities Act 1972, the Human Rights Act 1998 and the Scotland Act 1998, for example, were enacted by an existing institution (Parliament) according to existing processes and criteria, incorporating an existing conceptual, linguistic and normative framework of law. They were interpreted according to existing rules, concepts and methodologies, applied or enforced using existing institutions (courts, government departments, etc.), systems and frameworks, and joined an existing body of law and legal tradition. In this way, they were – and are – constrained by the law's past; to adopt the terminology of Neil Walker, “derivative” and “parasitic on [an] already-established location within a system of law”.14 As recognised by Martin Krygier:

“even radical legislation enters a continuing tradition which probably affected the way in which it was drafted and certainly will affect the ways in which it is read and applied... [T]he interpreter is confronted by far more than a text to interpret; he must interpret it in terms of the tradition to which both he and it belong”.15

The second sense in which the diachronic nature of law emerges is through another temporal dimension in which statute operates: its orientation towards the achievement of a stated future goal. Thus the above Acts respectively posited a framework of European Community (later European Union) law having domestic effect in the U.K., the European Convention on Human Rights having domestic effect in the U.K., and the creation of a Scottish Parliament and associated administration. These were future objectives which those Acts respectively sought to effect.

In order to do so, however, they had to actuate the machinery and normative frameworks of the existing legal order for the realisation of those posited goals. Indeed, as Kaarlo Tuori suggested, “[w]ithout the conceptual, normative and methodological means provided by [the law’s past], the legislator could not issue its statutes”.\footnote{Kaarlo Tuori, \textit{Ratio and Voluntas: The Tension Between Reason and Will in Law} (Ashgate, Farnham, 2011) at 44.} That includes not only the existing machinery of the legal system – its institutions, processes and other normative frameworks – but a much deeper sense of legal and political pre-understanding: the way law-making is perceived, the basic elements that are used to distinguish law from non-law, ideas of the instrumentalism of legislation, essential theories of language and interpretation, and so on.

In other words, the significance of the past in law ranges from the very practical level of the procedural systems used for legislative and judicial decision-making, to the more metaphysical realm of legal-hermeneutic understanding and basic philosophical approaches to law, authority and social order.

All of this serves as an historical counterweight in the evolution of a legal tradition, as law pulls between the antecedent legal tradition by which it is realised and constrained, and its orientation towards the achievement of posited future goals.

As Tuori recognised, the law’s dependence on the past creates problems for the idea of a legislator’s omnipotence. That is to say, if a legislature is the supreme fount of law in a legal order, how do we account for its necessary reliance on all of those factors in an existing law and legal tradition on which the legislature depends for the normative authority of its statutes, and those on which it must rely in future for the realisation of its aspiration towards a posited goal? If a legislature is not free-standing, but necessarily constrained by the wider constitutional system of which it is but a constituent part, cannot it also be said that its statutes are necessarily constrained by that same system? And does this not create an immediate logical problem for the very idea of parliamentary supremacy, regardless of whether there is or is not purported evidence of it?

The extent to which law is conditioned, shaped and defined by the existing legal tradition gives rise to its traditionality. Krygier made a conceptual distinction between what Walker called “traditionality” and “traditionalism”.\footnote{Walker, \textit{Out of place and out of time} at 21. It also represents a distinction made by Tuori between “philosophical-hermeneutical tradition” and “sociological-historical tradition”.} Traditionality comprises a “methodological
scheme for the employment of the past because the past is vital, indeed indispensable, to the systemic quality of law”.18 Its constituent elements have been described as follows:

“First is pastness: the contents of every tradition have or are believed by its participants to have, originated some considerable time in the past. Second is authoritative presence: though derived from a real or believed-to-be real past, a traditional practice, doctrine or belief has not, as it were, stayed there. Its traditionality consists in its present authority and significance for the lives, thoughts or activities of participants in the tradition. Third, a tradition is not merely the past made present. It must have been, or be thought to have been, passed down over intervening generations, deliberately or otherwise: not merely unearthed from a past discontinuous with the present.”

Krygier's reference to continuity is important because it again emphasises the diachronic nature of law, always drawing on the contents of an existing legal tradition for its systemic legitimacy. It fulfils the existing criteria for recognition as law, as yesterday's “stuff of legal doctrine – statutes, judgments, interpretations, rules, principles, conventions [and] customs cleave law from non-law; and lend law its legal authority.

Traditionalism is, by contrast, a “celebration of or loyalty to the legal past just because it is the accomplished past”.21 Whereas traditionality is a necessary aspect of law in a legal system, traditionalism is an attitude of preference for the way things were; giving rise to ideas such as “ancient wisdom”,22 “golden eras”, classicism and conservatism.

Although there may be traces of traditionalism in our legal culture and tradition – such as a celebration of the institutional writers, prolific judges and perhaps even a nationalistic inclination in upholding the “Scottishness” of Scots law for its own sake – it is the traditionality of law which is emphasised in this chapter. This applies both to legislative and judicial decision-making; Krygier arguing that judging is “an archetypally traditional and tradition-referring practice... a specific and characteristic mode of making and justifying practical decisions... by reference to authorized institutional tradition”.23 In law, he argued, “past maintenance is institutionalized”,24 because the existing legal tradition is captured in,
and conveyed through, the institutions of the legal system.

The claim made is not that tradition is unchangeable, but that it is heavily and fundamentally conditional of the present. Krygier argued that the past is present only to the extent that it is treated as significant in the present; Walker echoing the same idea by reference to a “selective specification of that past as an authoritative present”.

The effect of traditionality may be argued to reflect two temporal currents in the law; namely a faster pace of change in the surface-level rules of law, and a slower pace of change in the deeper layers of law. This distinction between two levels or layers of law will be elaborated upon in Chapter 5, however its essence is captured in the following extract from Tuori:

“The rapid pace of change is a quality of the law's surface, consisting of explicit, discursively formulated normative material; here, the activity of the legislator maintains continuous movement. The briskness of change is tempered by the deeper layers of the law; they change too, but according to a slower rhythm. The legislator's omnipotence does not extend to the legal culture, which changes only gradually, as a joint effect of legal practices... Nonetheless, legal change extends to legislation's legal-cultural underpinnings and even to what can be termed the law's deep culture: its fundamental normative principles and the categories that enable legal thinking, argumentation and regulation in the first place... But the pace of deep cultural changes is slow; the pace of deep culture measures the law's longue durée.”

The detailed historical analysis in Chapter 2 should therefore be read with a heightened awareness of the extent to which historical developments in the jurisdiction and jurisprudence of the Court of Session have been formative in the legal and constitutional tradition of Scotland. Furthermore, whilst the argument is not made in this thesis that the Court, as a specific institution, is immune from statutory abolition; it is nonetheless argued to form a strong historical counterweight in the ongoing unfolding of that tradition. The Court's participation in the architecture of the Scottish constitutional order is – particularly in

25 Krygier said that “lawyers and all who use law inhabit and manipulate traditions whose general intellectual structures, underlying conventions, canons of authority, and standards, change glacially and in ways that individuals rarely have power to affect radically” – ibid. at 248. Emphasis added. Krygier in fact argued that the very traditionality of law ensures that it must change, and that it is impossible for traditions to survive unchanged – see ibid. at 251-254.
26 Ibid. at 248.
27 Walker, Out of place and out of time at 20-21.
28 Tuori, Ratio and Voluntas at 40. The term “longue durée” (French for “long term”) was used by the French Annales School of historians, representing a long-term historiographical approach which emphasises the importance of deep, slowly evolving structures.
the absence of a central constitutional text – one of the principal reference points for ascertaining and defining constitutional authority in Scotland. Newly generated legal norms – including statutes of constitutional significance – should therefore be viewed as the latest (legislative) expression of a continuing tradition; not because of a conscious traditionalism in legal methodology, but because of the necessary historicality and traditionality of law. They must be viewed as a product of the existing legal tradition and culture,\textsuperscript{29} which they join and with which they must be conciliated. To overstate the positivity of statutes or the extent to which they are regarded as relegating the Court (or courts) to a subsidiary tier, is to fail to adequately acknowledge the deep layers of law and legal tradition in which the Court has played a formative (legal-systemic and constitutional) role. It is also to adopt an historiographical approach which is at risk of losing sight of the slower-moving, deeper layers of law in the turbulence of the surface layer, of forgetting the importance of the \textit{longue durée} of law, adopting, instead, one which focuses on the “\textit{brève durée}”.

\textsuperscript{29} \textit{Ibid.} at 46-47.
2.1 Introduction

The supervisory jurisdiction of the Court of Session is one of its defining features when considering its location in the wider legal and constitutional order. It is a cumulative jurisdiction, comprising a multitude of statutory and common law elements. These originate from as early as the Court's inheritance of supervisory functions from its predecessor institutions in the 16th century, right up to the present day. The history of the supervisory jurisdiction is long and complex.

As suggested in the previous chapter, an historical analysis of the supervisory jurisdiction is of more than historical significance, for it is the means by which one must search for the legal and constitutional essence of the jurisdiction. As recent case law acknowledges, the longevous common law heritage of the supervisory jurisdiction continues to be relevant and contentious, particularly at a time when the judicial branch is potentially re-asserting its constitutional identity, and renegotiating its normative and institutional relationship with Parliament.

This chapter recognises the continuing relevance of the historical dimension of the supervisory jurisdiction, and argues that it has more contemporary importance than is commonly acknowledged. The argument serves both to illuminate the historical background to the jurisdiction – particularly in its earlier period, which is often glossed over or misunderstood – and to apply the historiographical methodology introduced in the previous

30 See, for example, West v Secretary of State for Scotland, 1992 S.C. 385 at 393-401, per Lord President Hope; Hepburn v Royal Alexandra Hospital NHS Trust [2010] C.S.I.H. 71 at paras. 14-18, per Lord President Hamilton; and Eba v Advocate-General for Scotland [2010] C.S.I.H. 78 at paras. 34-41, per Lord President Hamilton.

31 See, for example, the “rule of law” meta-narrative emerging in such cases as AXA General Insurance v Lord Advocate [2011] U.K.S.C. 46, at section 7.3.2(b) below.

32 Consider, in this regard, Lord President Hope's analysis of the extent to which the abolition of the
chapter to bring out the deeper legal and constitutional tradition which underpins the supervisory jurisdiction, and which the jurisdiction itself reflects.

Section 2.2 sets out the doctrinal background to the supervisory jurisdiction, which is shown to have developed in close relationship with the development of the Court of Session as an institution. It describes the doctrinal intimacy between the original conceptions of equitable and supervisory functions, and suggests that, with the development of two formally defined and procedurally distinct jurisdictions – the nobile officium and the supervisory jurisdiction – there has failed to be an accompanying, complete disentanglement of those jurisdictions at the conceptual or doctrinal level. Equitable superintendence is shown to be the normative wellspring of the supervisory jurisdiction, and this continues to inform some of the reasoning employed in the Court's exercise of its supervisory jurisdiction.

Section 2.3 comprises three main parts. The first examines the Court's original place in the judicial hierarchy, as the statutorily-established institution inheriting most of its substantive and institutional jurisdiction from the sessions of the King's Council by which it was preceded. Its rising prominence in the judicial hierarchy – fuelled by such factors as a professionalising judiciary, a broad range of remedies at its disposal, its absorption of other courts and jurisdictions, and its exertion of jurisdiction over inferior courts and judicatories – had significant implications for the rising prominence and increasing scope of its supervisory jurisdiction.

The second part of section 2.3 examines the Court's evolving supervisory function in greater detail, by focusing on the supervisory processes and remedies which were instrumental in securing a broad and general supervisory jurisdiction for the Court. The process of falsing the doom is shown to have been a relatively basic, but ancient and indigenous, framework for the supervision by superior of inferior courts. It is evidence of a process which we might now call judicial review in existence in Scotland from possibly as early as the 13th century, but certainly from the 14th century. The idea of supervisory jurisdiction can thus be shown to have existed in Scotland long before it took shape as a formal jurisdiction. As this section will demonstrate, the supervisory purview of the Court was significantly strengthened and consolidated with the powerful triumvirate of supervisory remedies in the form of

Scottish Privy Council was important for the supervisory jurisdiction of the Court (West v Secretary of State for Scotland at 393-394), which has since been regarded as incorrect – see Eba v Advocate-General for Scotland (Inner House) at 83-84, per Lord President Hamilton. See fn. 818.
advocation, suspension and reduction. The development of the law of judicial review in Scotland therefore goes back to at least the 13th or 14th century, and this must be folded into a comprehensive investigation of the legal and constitutional tradition underlying the supervisory jurisdiction.

Most of the discussion will, to this point, concern the Court's relationship with other courts and bodies in the temporal judicature; these, indeed, are the entities with whom the Court principally developed a supervisory relationship in the period prior to approximately the 18th century. Thereafter, the scope of the supervisory jurisdiction expanded so as to include within its purview persons and bodies commanding jurisdiction outside the temporal judicature. This forms the subject matter of section 2.4. The supervision of three such classes of bodies are briefly examined in turn: (i) ecclesiastical courts and tribunals, (ii) arbiters and (iii) public and administrative bodies. It is demonstrated that this was made possible by the generality of the judicial review framework and indeed the generality of remedies (advocation, suspension and reduction) deployed by the Court in the exercise of its supervisory jurisdiction. It is argued that this doctrinal generality, assisted by the deployment of general remedies, has been key to the (organic) expansion in scope of application for the supervisory jurisdiction so as to comprehensively embrace a wide variety of entities with jurisdiction (and not necessarily intentionally – it seems only to have been from around the second half of the 18th century that the Court came to explicitly reason in terms of a body's excess of jurisdiction, and from there to develop a supervisory doctrine in that regard). This contrasts with the position in English law, in which the framework for judicial review adhered rather more to a formal distinction between public law and private law. The adherence in Scots judicial review to a more general supervisory jurisdiction – illuminated by, and conveyed through, its historical pedigree – goes, itself, some way towards locating the function of the Court's supervisory jurisdiction in the wider legal and constitutional order. The chapter closes by emphasising the constitutional importance of the historical pedigree of the Court's supervisory jurisdiction.

By final word of introduction, it should be pointed out that as this “historical chapter” aims to bring out specific features of the legal and constitutional tradition underlying the supervisory jurisdiction, it proceeds only in a loosely chronological fashion. Particular

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33 “Temporal”, as opposed to “spiritual” or “ecclesiastical”; and “judicature” as opposed to the non-judicial sphere.

34 See fn. 485.
elements of the evolving institutional, doctrinal and jurisprudential aspects of the supervisory jurisdiction are discussed and, in order to ensure thematic coherence, there is inevitably a degree of overlapping of timelines.

2.2 Equitable superintendence as the normative wellspring of the supervisory jurisdiction

The growth and evolution of the Court of Session and its supervisory jurisdiction has been one of intimate relation between institution and function (both constitutional function and legal-systemic function). It is, in fact, historically anachronistic to speak of a distinct supervisory jurisdiction, or a jurisdiction which went by that name, in earlier times. Instead, the Court has come to fashion and frame this jurisdiction through its evolving jurisprudence, as it developed its own emerging sense of identity and function in the legal and constitutional order.

The normative wellspring of the supervisory jurisdiction was a more general sense of equitable superintendence; namely, the idea of a central court acting as a judicial overseer, casting a general supervisory gaze across the legal order to ensure compliance with due process, legality and the rule of law, and the upholding of standards of justice and fairness in adjudication and other proceedings.

As will be explained, the establishment of the College of Justice in 1532 provided an institutional break for the central judicial function in the Scottish constitutional order, whilst retaining a degree of formal and substantive continuity with its institutional predecessor, namely those meetings of the King's Council known as “sessions”. By formally divorcing the judicial from the legislative and administrative at the institutional level, the Court was established as a new locus of central (civil) judicial authority in Scotland; with which came a fresh opportunity to advance an agenda for improving the administration of justice.

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35 See A.M. Godfrey, Civil Justice in Renaissance Scotland: The Origins of a Central Court (Brill, Leiden and Boston, 2009) at 211.
36 See 28-29 infra.
37 The College of Justice Act 1532 referred to a “college”, and not to the “Court of Session”.
38 Although the Court shared, to a (greatly) diminishing extent, the central judicial function with the Scottish Parliament and the King's Council (later to be known as the Privy Council); the Court was nonetheless the new locus of judicial authority in Scotland (though it also exercised some administrative functions).
The Court would have to orientate itself in an emerging constitutional order within which it was a new, central judicial institution. Its situation at the apex of the civil judicature afforded an opportunity to build on the gaining impetus developed in the sessions to supervise inferior courts and judicatories, and this is seen in the numerous instances in which the Court regulated such matters as the settlement of disputes between inferior courts with competing jurisdictions, the transference of cases between courts, and the coordination of remedies and parallel actions in different courts. This area of judicial activity was the precursor to the formally distinct “supervisory jurisdiction” of the present day, with the Court ruling on the legality of proceedings, rather than their merits, and either annulling or redirecting them.

However, the Court's supervisory activity also extended to a more substantive delivery of justice, in areas of judicial activity which would now be classed as pertaining to the Court's *nobile officium* – its “high equitable jurisdiction”. This is nowadays understood as a fairly narrow procedural device by which the Court may supply “equitable” norms in the absence of applicable legal norms, or disapply existing legal norms in situations of particular injustice.

Each of these areas of judicial activity – both the formally defined “supervisory jurisdiction” and the “*nobile officium*” – have grown out of a more general sense of equitable superintendence by the supreme civil court. Indeed, the term “*nobile officium*” or “*officium nobile*” has (unhelpfully) been used historically to refer to this more general latitude of the Court to exercise an indeterminate, self-norming jurisdiction to administer justice according to self-conceived ideas of justice, fairness and equity. The breadth of this enterprise was a feature both of the Court's location at the apex of the judicial hierarchy, and its concomitant generality of jurisdiction.

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39 See Godfrey, *Civil Justice* at 353.
40 See, for example, confirmation that the Court may have advocated a cause wherein there were “double rights” – *A v B*, 1675 Mor. 7412. On these points, see section 2.3.2 below.
41 See Godfrey, *Civil Justice* at 211.
42 See, for example, *Watt v Strathclyde Regional Council*, 1992 S.L.T. 324 at 331, per Lord Clyde.
43 Godfrey said that for the King's Council to be exercising such generality of jurisdiction was, in the second half of the 15th century, a relatively recent development – Godfrey, *Civil Justice* at 207.
This unrefined, rudimentary power of the Court, inherited from the various manifestations of the King's Council, and which has sometimes been vaguely called its “equitable jurisdiction”, was imprecisely expressed and haphazardly developed. It is essentially encapsulated in the ideological foundation set out by Lord Kames, who wrote that “it is the province, one should imagine, of the sovereign, and supreme court, to redress wrongs of every kind, where a peculiar remedy is not provided”, and that there was growing in the Court a jurisdiction which “will probably in time produce a general maxim, that it is the province of [the Court], to redress all wrongs for which no other remedy is provided”. That sentiment was discernible even in the Court's early jurisprudence; the following is taken from a case from 1534:

“[g]if the Lordis of Counsal were not Jugeis competent to the reductioun of all decreitis gevin befor thame, thair sould follow ane greit inconvenient and absurditie, viz. That albeit that any persoun were enormlie hurt be decreit of the saidis Lordis, thair wer na remeid nor reformatioun to be had thairof; because thair is na competent Judge within this realme, havand sufficient facultie of our Soverane Lord, he quhais powar and jurisdiction the said pretended decreit may be reducit, bot the saidis Lordis alanelie: and swa ane wrangous decreit and sentence sould remaine unretreitit, in greit prejudice and enorme hurt of the partie agains quohim it was gevin...”

The evolution of a more distinct supervisory jurisdiction within that wider area of judicial activity corresponded with the development of the law and legal system in a general sense; indeed of a body of law and a legal system – with an emphasis on, respectively, the unified quality of a body of law, and the systematic quality of a legal system. The law was made increasingly coherent, taxonimised and “scientificised” through a number of media including judicial development of legal doctrines, regularisation of procedural law, and dialogue and dissemination through institutional writings and legal training and education. Systematisation in law was coupled with systematisation in the judicial sphere, with a shift away from the administration of justice in a very rudimentary sense (typically by institutions which melded executive and judicial functions and which would not fit comfortably into a

44 See, for example, J.W. Brodie-Innes, Comparative Principles of the Laws of England and Scotland: Courts and Procedure (W. Green, Edinburgh, 1903) at 278.
45 Henry Home (Lord Kames), Historical Law Tracts (4th edition) (Bell & Bradfute, Edinburgh, 1817) at 228-229.
46 Innes v Dumbar, 1534 Mor. 7320.
47 For evidence of this in Scotland, including the work of the early institutional writers, see John W. Cairns, ‘Historical Introduction’ in Kenneth Reid and Reinhard Zimmermann, A History of Private Law in Scotland (Vol. 1) (Oxford University Press, New York, 2000) at 130-139.
separation of powers model of the state) towards a more refined and increasingly centralised system of judicial administration. This is reflected in a systematised hierarchy of courts, distinct jurisdictions, and a more mechanical application of defined legal rules, with the incorporation of basic principles like due process, the certainty and predictability of law, self-consistency and internal cohesion.

This general movement from rudimentary justice to a refined legal system may be considered through the various stages of development in the maturation of a legal order: from earlier periods in which a king, clan chief or other ruler might personally hear the plea of a subject and dispense justice in the most crude and ad hoc of senses; through a form of regularisation and collectivisation of judicial decision-making, but still with basic remedies, as where royal courts would entertain simple complaints by bill or by oral submission in a suit of “wrang and unlaw”, and where writs were purchased out of chancery to instigate lawful process before the sheriff, justiciar or burgh court; and so on to the present-day law on judicial review practised by the Court of Session, with an established body of technical law comprising detailed rules, internal cohesion and regularised procedures.

Notwithstanding these developments, it does not seem that the supervisory jurisdiction and the nobile officium, as presently understood, have ever been entirely disentangled at the doctrinal level; despite the fact that they are now procedurally distinct, and doctrinally distinguishable. There persists in the modern-day jurisprudence reference to the Court's

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48 See Godfrey, Civil Justice at 19 and 32; and Julian Goodare, State and Society in Early Modern Scotland (Oxford University Press, New York, 1999) at 17. The archetypal example across mediaeval Europe was the curia regis or king's council. Even of later periods has a similar remark been made – see, for example, David Edward, 'Administrative Law in Scotland: The Public Law / Private Law Distinction Revisited' in Deirdre Curtin and David O'Keeffe (eds.), Constitutional Adjudication in European Community and National Law (Butterworths, Dublin, 1992) at 291, who commented, with regard to the performance by justices of the peace and sheriffs of administrative and executive functions, that “those who created the Scottish system of local government paid scant regard to Montesquieu”.

49 Consider, in this regard, the reported manner of King David I's (Dabíd mac Maíl Choluim) personal involvement in dispensing justice – on which see, for example, Philip J. Hamilton-Grierson, The Appellate Jurisdiction of the Scottish Parliament' (1918) 15 Scottish Historical Review 205 at 206.

50 See Godfrey, Civil Justice at 14 et seq.

51 See ibid. at 20.

52 Ibid.

53 Petitions to the nobile officium are governed by Chapter 14, and petitions for judicial review by Chapter 58, of the Rules of the Court of Session.

general fund of equitable powers, with a number of judgments suggesting a continued
doctrinal association between the supervisory jurisdiction and that original equitable
jurisdiction. For example, Lord Pitman said in the Lands Valuation Appeal Court that if the
Court permitted particular entries to remain in a valuation roll, “we shall give rise to a wrong
without a remedy, suspension not being competent”. Lord Dunpark stated in Brown v
Hamilton District Council that “[e]very wrong must have a remedy” and that it is the “sole
prerogative of the Court of Session in the exercise of its supereminent jurisdiction by
providing a remedy where no other exists”. Lord Clyde, in Watt v Strathclyde Regional
Council, described the supervisory jurisdiction as “part of the officium nobile of the supreme
court”. Lord President Hope stated that to treat Rule of Court 260B as applicable only to
some cases amenable to the supervisory jurisdiction, but not to others, “would risk leaving
those other cases without a remedy, because no other procedure is available”. He also
referred to what he regarded as questions which were not appropriate for judicial review
“because other means of appeal or review are available”, explaining that the:

“basis for excluding such cases lies in the principle, which is of general application
to what Stair, IViii.1 described as the officium nobile, or extraordinary jurisdiction,
of the Court of Session, that it is available only where the ordinary procedure would
provide no remedy”.

57 Watt v Strathclyde Regional Council at 331, per Lord Clyde. He also emphasised the equitable
aspect of judicial review in Lord Clyde, The Nature of the Supervisory Jurisdiction and the
Public/Private Distinction in Scots Administrative Law in Wilson Finnie, C.M.G. Himsworth and
Neil Walker (eds.), Edinburgh Essays in Public Law (Edinburgh University Press, Edinburgh,
1991) at 281-293. See also Forbes v Underwood (1886) 13 R. 465 at 468, per Lord President
Inglis; Brown v Hamilton District Council at 28, per Lord Dunpark; Hanlon v Traffic
Commissioner, 1988 S.L.T. 802 at 806, per Lord Prosser; King v East Ayrshire Council, 1998 S.C.
182 at 194, per Lord President Rodger; Eba v Advocate-General for Scotland (Inner House) at
paras. 34-35, per Lord President Hamilton; and by counsel at paras. 26-27. It is notable that one
will not find, among these cases, a consistent treatment of the topic.
58 On which, see fn.189. As noted above, petitions for judicial review are now governed by Chapter
58 of the Rules of Court.
59 West v Secretary of State for Scotland at 404, per Lord President Hope. For examples of other
cases in which the court was influenced by a concern that no wrong should go without a remedy,
or a consideration of this factor, see Murchie v Fairbairn (1863) 1 M. 800 at 803, per Lord
President McNeill; Lanarkshire Steel Company Limited v Caledonian Railway Company (1903) 6
F. 47 at 60, per Lord McLaren; Alexander Hogg & Co. v Corporation of Greenock, 1907 S.C. 103
at 111, per Lord Pearson; D. & J. Nicol v Dundee Harbour Trustees, 1914 S.C. 374 at 388, per
Lord Salvesen; Halliday v Pattison, 1987 S.C. 259 at 264, per Lord Kirkwood; Clyde Solway
Consortium v Scottish Ministers, 2001 S.C. 553 at 580, per Lord Cameron of Lochbroom; and
Tehrani v Secretary of State for the Home Department, 2007 S.C. (H.L.) 1 at 19, per Lord Hope of
Craighead.
60 Watt v Strathclyde Regional Council at 329, per Lord President Hope.
It may be doubted whether that section of Stair's *Institutions* is referring to what we now understand as judicial review, or the process embodied in the present-day supervisory jurisdiction; but instead a reference to what we would now understand (or what was historically understood) as the *nobile officium*. Indeed, none of the examples given by Stair of the exercise of that jurisdiction concern the Court's supervision of inferior courts or other bodies. Elsewhere, too, have judges come close to regarding, or actually regarded, the Court's supervisory jurisdiction and its broader equitable jurisdiction as one and the same thing, or not meaningfully distinguishable.

As such, the supervisory jurisdiction is a descendent of a wider notion of equitable superintendence, now expressed in the Court's oversight of persons and bodies exercising jurisdiction (the formally defined supervisory jurisdiction) and the provision of equitable relief to persons in respect of whom there is either no directly applicable legal norm in a given case, or a pre-existing legal norm the application of which would have resulted in particular injustice (the formally defined *nobile officium*). Those jurisdictions continue to be associated by a shared doctrinal and jurisprudential heritage, in the Court's wider, original equitable jurisdiction.

### 2.3 The emergence of the supervisory jurisdiction

As already suggested, the development of the supervisory jurisdiction is one closely associated with the development of the Court as an institution, and so the first part of this section considers the institutional developments relevant to the evolution of the supervisory jurisdiction. The second part of the section considers the specific processes and remedies through which that jurisdiction manifested.

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62 Perhaps most notable in this regard is the oft-cited dictum of Lord President Inglis in *Forbes v Underwood*, in which he described the Court's supervisory jurisdiction as an exercise of “its supereminent jurisdiction. It is not of very much consequence to determine whether it is in the exercise of its high equitable jurisdiction, or in the performance of what is sometimes called its *nobile officium*” – *Forbes v Underwood* at 468, per Lord President Inglis. Lord McCluskey's use of “supervisory jurisdiction” and “*nobile officium*” as interchangeable terms, albeit in a slight reference, seems careless – see *The Royal Bank of Scotland plc v Clydebank District Council*, 1992 S.L.T. 356 at 365. See further *Kyle and Carrick District Council v A. R. Kerr & Sons*, 1992 S.L.T. 629 at 632, per Lord Penrose. They have, however, been distinguished, or argued to be distinguishable – see, for example, the judgment of Lord Murray in *Tehrani v Argyll and Clyde Health Board (No. 2)*, 1989 S.C. 342 at 374.
Two sources in particular are frequently cited in this section, and it is right to acknowledge the outstanding contribution that each has made to the study of this area of legal history. John Cairns' *Historical Introduction* in Kenneth Reid and Reinhard Zimmermann's *A History of Private Law in Scotland* gives a much more substantial overview of the history of the Scottish legal order than its unassuming title suggests, and is cited with frequency in the first main part of this section. Mark Godfrey's *Civil Justice in Renaissance Scotland: The Origins of a Central Court* is an excellent account of the rise of the Court of Session and its relationship with the wider legal order, and is cited frequently throughout the whole of the present section. Each has provided much in the way of original commentary and reference material, and each is an historically authoritative work in its own right.

### 2.3.1 The Court's place and emerging identity in the judicial hierarchy

The story of the development of the Court's supervisory jurisdiction spans around five hundred years of legal and political evolution. Throughout, institution and jurisdiction developed in close relationship, and some of the principal factors affecting the rise of the Court to the apex of the civil judicial hierarchy – from where it would be most naturally placed to command a general supervisory jurisdiction – are explored in this sub-section. These include the professionalisation of the Scottish judiciary, the breadth of the range of remedies at the Court's disposal, its absorption of other courts and jurisdictions, and its exertion of jurisdiction over inferior courts and judicatories. As these factors would make their own contribution to the emergence of the Court as the supreme civil court in a unified and systematised judicial hierarchy, so would they contribute to the development of the Court's supervisory jurisdiction.

The nature of the Court's own institution in 1532 was such, however, that it is predated by the supervisory jurisdiction. It is in fact prior to 1532 that one must look for the origins of what is seemingly the same supervisory jurisdiction that is in use in the Court today.

#### a. The Court of Session as a new institutional receptacle for the supervisory jurisdiction

The legal, political and constitutional environment prior to the Court's institution in 1532 is a substantial field of investigation in its own right. By way of background to the foundation

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63 Cairns, *Historical Introduction* (op. cit. fn. 47).
64 Godfrey, *Civil Justice*.
65 Literature on this area includes Cairns, *Historical Introduction* (op. cit. 47); Godfrey, *Civil Justice*; Robert Kerr Hannay, *The College of Justice: Essays on the Institution and Development of the Court of Session* (William Hodge, Edinburgh and Glasgow, 1933); and Hector L. MacQueen,
of the Court, and in the interests of completeness, acknowledgement is briefly made of the Court's predecessor institutions which commanded what may be described as supervisory functions.

Godfrey has added much clarity to the story of the emergence of the Court. He summarises the institutions commanding what ended up as the Court's substantive jurisdiction as existing in three essential forms: auditorial sessions, conciliar sessions and the College of Justice. He does, however, use other headings to describe the predecessors to the College: the Auditory Session (1426-1468), the Judicial Council (1468-1488), the Conciliar Session (1488-1504), and Council and Session (1504-1526).

The present chapter adopts a slight difference in terminology from that used by Godfrey. His use of the term “the Session” has connotations of unity and singularity, which may undermine the very point he made that the evolution was in fact one of sessions – not of a single body – and an evolution of a function or a (changing) receptacle for transacting judicial business rather than that of a particular institution. He made this point when he said that:

“The auditory-type Session of the 1420s was a very different type of body from the conciliar one of the 1490s, and both differed from the Session of the mid-1530s and later. Although all are linked by certain threads of continuity in their evolution, there was no trajectory or path of development which saw the original tribunal of 1426 reshaped and modified as a matter of consistent policy aiming towards the goal of a permanent central civil court... The apparent continuity in nomenclature should therefore not disguise the highly contingent nature of the developments.”

The present chapter opts for the term “sessions” in order to emphasise the fact that there was not a single institutional receptacle for the exercise of supervisory functions prior to the establishment of the Court, but groupings less permanent and, taking a long-term view, less organised.

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66 Godfrey, Civil Justice at 40.

67 See ibid. at 43-93. The chapter discussing this subject stops at 1526, although Godfrey went on, in the next chapter, to show the significance of the period from 1526-1532 in the build-up to the institution of the Court. Presumably, however, the sessions of that period belong to his defined “conciliar sessions” category. Less likely, they could be considered a fourth category in their own right, but were clearly not auditorial sessions.

68 Ibid. at 40.
Parliament was, prior to 1426, the principal institution in which central judicial business was transacted. It was both a legislature and a court, and the distinction of legislative from judicial functions was anachronistic in this early period. Parliament had a number of judicial committees, which Cairns reports to have been appointed to hear appeals from at least 1341. It was also the highest forum in which the ancient procedure of “falsing the doom” operated.

The auditorial sessions were first instituted by an Act of 1426 and “must have represented an attempt to satisfy a demand for central justice which Parliament and Council did not feel capable of meeting or willing to accommodate”. The composition of those sessions reflected that of the auditorial committees of Parliament, but the jurisdiction which they exercised was that of the King's Council. This they did in a more accessible and regularised form than the itinerant Council itself and, because their determinations were final, there was no mechanism for further appeal. These sessions were in existence from 1426 to around 1468-1472, when they seem to have fallen into desuetude.

The terminology of “sessions” gave way over the next twenty years or so, with the King's Council assuming (or resuming) a central judicial function. What followed was an apparent fusion of the judicial business of the Lords of Council on the one hand, and the parliamentary Auditors of Causes and Complaints on the other, and meetings of this amalgamated expression of “judicial” jurisdiction were again referred to as “sessions” from

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69 Its description as an “institution” should not distract from its nature for many years as an itinerant assembly which (taking a long-term view) gathered sporadically. See, for example, ibid. at 16-17; and R.K. Hannay, ‘On 'Parliament' and 'General Council'” (1921) 18 Scottish Historical Review 157 at 163-164. The Records of the Parliament of Scotland resource noted parliaments sitting at 34 different locations, as far apart as Aberdeen, Auldearn (near Nairn), Ayr, Glasgow and Berwick-upon-Tweed.


72 Cairns, Historical Introduction (op. cit. 47) at 38.

73 See Hamilton-Grierson, Appellate Jurisdiction of the Scottish Parliament at 216-219; Hannay, On Parliament and General Council at 158; and section 2.3.2(a)(i) infra.

74 References to the “auditorial sessions” are in adoption of Godfrey's terminology.

75 Off heryng of complanttis (APS ii, 11, c.19) (“Lords of Session Act 1426”).

76 Godfrey, Civil Justice at 43. Prior to 1426, Parliament was the principal institution in which central judicial business was transacted.

77 See ibid. at 43-61.

78 Ibid. at 61-66.
the mid-1480s. Godfrey criticises Trevor Chalmers' view that what would become the Court of Session was “in all but name... in existence from the earlier part of James IV's reign”\(^{79}\) (James took the throne in 1488). He was likewise critical of Robert Kerr Hannay's view that, by 1504, the Court of Session “had definitely taken shape” – Hannay generally downplayed the significance of 1532 in that regard,\(^{80}\) a view which Godfrey described as controversial.\(^{81}\) Instead, he endorsed Chalmers' claim that “the Session in 1513 was poised awkwardly between being a function of the curia regis and becoming a professional judicature”.\(^{82}\) Godfrey regarded the period to 1504 as one in which haphazard measures sought to make expedient Council's transaction of judicial business.\(^{83}\) Although the sittings known as “sessions”, and other meetings of Council, came to have “distinctive if overlapping functions”,\(^{84}\) this sessional aspect of the Council seems to have developed an institutional character of its own in the period around the end of the 15th into the beginning of the 16th century.\(^{85}\) An example may be taken, in that regard, of a determination of Council in March 1525 to provide for a session in June 1525, which came to be one of the longest sessions for several years.\(^{86}\) There were also innovations in differentiating the personnel of Council and “Session”, particularly from 1527.\(^{87}\)

It appears to have been from 1527 that a particular institutional identity emerged for the sessions,\(^{88}\) and although it would take until 1541 for the requisite formalities to be put in place,\(^{89}\) 1532 appears to be the key date for the institutional break for the Court of Session itself,\(^{90}\) with the passing of the College of Justice Act 1532. The relevant point here, for


\(^{80}\) See generally Hannay, *College of Justice*.

\(^{81}\) Godfrey, *Civil Justice* at 69. Godfrey gives a detailed overview (and critique) of Hannay's position at 94-105.

\(^{82}\) See ibid. at 76; and Chalmers, *The king's council* at 311.

\(^{83}\) Godfrey, *Civil Justice* at 67-79. See also MacQueen, *Pleadable Brieves* at 274.

\(^{84}\) Godfrey, *Civil Justice* at 90.

\(^{85}\) See Hannay, *College of Justice*, at 22, in the context of Godfrey, *Civil Justice* at 75-76 and 90.

\(^{86}\) See Godfrey, *Civil Justice* at 91.

\(^{87}\) See ibid. at 90-92 and 109-113.

\(^{88}\) See ibid. at 107-118.

\(^{89}\) A particularly useful summary was given in ibid. at 128.

\(^{90}\) Hannay had argued otherwise, and his approach in that regard was supported by a number of writers including Gordon Donaldson, A.A.M. Duncan and Hector MacQueen (see Godfrey, *Civil Justice* at 95). However, W.C. Dickinson (Hannay's successor as Fraser Professor of Scottish History and Palaeography at the University of Edinburgh), W.D.H. Sellar (see Godfrey, *Civil Justice* at 101), and Godfrey (see Godfrey, *Civil Justice* at 123-142) have regarded 1532 as the key date. See, however, John W. Cairns, *Revisiting the Foundation of the College of Justice* in Hector L. MacQueen (ed.), *Miscellany Five* (Stair Society, Edinburgh, 2006) at 27-50.
present purposes, is that although the pre-1532 sessions were exercises of the jurisdiction of the King's Council (and in that regard it is helpful to speak of “sessions” and not of “the Session”, which may give the impression of a distinct institution of that name), and although there was a degree of continuity pre- and post-institution of the College of Justice, the events of 1532 in particular would provide the institutional break necessary for any supervisory functions of the sessions to be carried out by a distinct, characteristically judicial institution. Prior to 1532, any supervisory functions exercised in the sessions were exercises of conciliar jurisdiction – the supervisory jurisdiction of the King's Council. Even although the judges of the newly instituted Court continued to act with the authority of the King's Council (as “Lords of Council and Session” – witness the origins of that term), the supervisory jurisdiction was, in institutional terms, that of the College of Justice. This serves both to highlight the institutional significance of 1532, and also the degree of jurisdictional continuity pre- and post-1532, underlining the fact that what did not happen in 1532 was the wholesale invention of a new institution; but rather, as Godfrey put it, the “reconstitution of the Session”.91

Indeed, it is clear that supervisory functions were being carried out by pre-1532 sessions of the King's Council, and Godfrey comfortably referred to the “supervisory jurisdiction” of both Council and Session.92 Exercises of this jurisdiction included instances of suspension,93 the regulation of procedure in inferior courts in response to complaints about fairness or due process,94 and the resolution of disputes over competing jurisdiction among inferior courts.95 The falsing of dooms,96 or instances of the reduction of decrees of “inferior” courts or judicatories,97 could likewise be characterised as supervisory in nature.

The relevance of this early historical background should not be understated. In the first place, it adds context to the unadorned identification of 1532 as the key date for the Court's foundation and, in particular, its being an institutional receptacle for the inheritance of pre-

91 Godfrey, Civil Justice at 144.
92 See ibid. at 211-218. This “supervisory jurisdiction”, and the instances thereof given by Godfrey, were referred to in Eba v Advocate-General for Scotland (Inner House) at para. 34, per Lord President Hamilton.
93 See Godfrey, Civil Justice at 213 and 218-223. Suspension is discussed at section 2.3.2(a)(iv) below.
94 Ibid. at 211-212.
95 Ibid. at 212-214. For a later example, see Russell v Trustees for repairing the roads leading to Glasgow, 1764 Mor. 7353.
96 Discussed below at section 2.3.2(a)(i).
97 Reduction is discussed below at section 2.3.2(a)(v).
existing supervisory functions. The origins of the supervisory jurisdiction are shown not to lie in a particular, readily identifiable case, or even in the institution of the Court, but to be older, more open-ended and more elusive.

Secondly, the early historical background questions the soundness of descriptions of the Court's supervisory jurisdiction as either "statutory" or "common law" in nature. As noted at the beginning of this chapter, the supervisory jurisdiction is a cumulative jurisdiction comprising a great variety of statutory and common law aspects. The Court was created as a distinct institution by statute – the College of Justice Act 1532 (which is still in force today) – but which clearly imported elements of jurisdiction from the Court's predecessors: the Act provides that the College will "sitt and decyde apoun all actiouns ciuile" and that its "processes, sentencis and decretis sall have the samin strenthe, force and effecte as the decretis of the lordis of sessioune had in all tymes bigane". This effected a (formal and substantive) continuation of conciliar jurisdiction into the newly established institution. Since that time, numerous statutes have conferred further elements of (supervisory) jurisdiction upon the Court, and so too has there been, throughout the centuries, continual development of its common law rules and principles.

Furthermore, there is no clear dividing line between instances of "statutory" jurisdiction and instances of "common law" jurisdiction. Even statutorily-conferred powers, duties and instances of jurisdiction take on common law aspects as they are interpreted, analogised, applied and developed by courts. At what point does an instance of "statutory" jurisdiction become "common law"? How, indeed, would one categorise judicial attributions of "intention" to Parliament in the application of statutory norms? Rather than seeking to describe the supervisory jurisdiction as either "statutory" or "common law" in nature, it appears more accurate to recognise that the Court's supervisory jurisdiction is a complex accumulation of many aspects of jurisdiction, some of which derive from statute, and others of which do not.

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98 See, for example, counsel for the reclaimer's argument in Hepburn that the Court's jurisdiction was statutory, and counsel for the respondents' opposing argument – Hepburn v Royal Alexandra Hospital NHS Trust at paras. 5, and 9-10, respectively.
99 College of Justice Act 1532. Godfrey doubted the significance of this latter phrase beyond a mere recognition of the authority of decrees which he claimed to be "wholly distinct" from the concept of jurisdiction – see Godfrey, Civil Justice at 154. However, as jurisdiction between courts is to a large extent conveyed through decree, as one court formally and climactically exerts its authority over another, decree seems to be an expression of jurisdiction, and therefore to be intimately connected with it.
This sub-section may therefore be concluded by observing that the Court was established in 1532 as a distinct institution by a statute which had only general and vague provisions for its substantive jurisdiction. This allowed the substantive jurisdiction of the King's Council, including the supervisory jurisdiction exercised by sessions thereof, to continue to be exercised by the Court in common law (non-statutory) form as an inheritor institution which was, for the first time, an institutionally distinct and characteristically judicial body with a centralised function in the Scottish legal and constitutional order. The manner of the Court's own development would strengthen its inherited supervisory jurisdiction, asserting a fresh identity for both itself and its supervisory jurisdiction, and confirm their ascending authority in the Scottish legal and constitutional order.

b. Factors propelling the Court to the apex of the civil judicial hierarchy

It is claimed in this chapter that there was an intrinsic relationship between the Court's emerging location in the civil judicial hierarchy and its concomitant development of a general and comprehensive supervisory jurisdiction. Even although the Court was in 1532 ordained by statute as the principal institution for the transaction of central judicial business, there was not yet a unified hierarchy of courts in the civil judicature, and the text of the statute alone would not have been enough to confirm the Court as supreme civil court in practice.

Indeed, the Court would have to exert the supremacy of its jurisdiction to ensure its universality across the civil sphere in an emerging judicial (and jurisdictional) hierarchy. Such an hierarchy would indeed emerge, and the Court would come to reside at its apex. A number of factors combined to propel the Court to that position. The principal factors investigated in this section – and which are important for an appreciation of the legal and constitutional tradition of which the supervisory jurisdiction is a part – are a professionalising judiciary, the breadth of the range of remedies at the Court's disposal, its absorption of other courts and jurisdictions, and its exertion of jurisdiction over inferior courts and judicatories. Other relevant factors, which are not investigated here, included the Court's geographical location in Edinburgh, and its stature in Scottish legal, political and social life.100

100 See Cairns, Historical Introduction (op. cit. fn. 47) at 60 and 82-83; and Godfrey, Civil Justice at 257, 355, 359 and 402.
(i) Professionalising judiciary

The institution of the Court was preceded by a period of experimentation with civil justice, which is generally recognised to have begun in earnest in 1426 with the Act which established the auditorial sessions.\(^{101}\) These comprised the King's Chancellor and “certain discreet persons of the Three Estates” appointed by royal command.\(^{102}\) Lord President Cooper surmised the falling into desuetude of such sessions as largely caused by:

> “the persistent policy of confiding the judicial function to an unpaid, part-time, lay magistracy masquerading as judges and engaging casually in the discharge of judicial duties in intervals snatched from their major preoccupations as territorial magnates, or statesmen, or ecclesiastical dignitaries”.\(^{103}\)

Indeed, there does not appear to have been an appreciable sense of judicial independence in such early periods: membership of the bench of the auditorial sessions was dependent on membership of Parliament, and membership of the King's Council was dependent on being in favour with the monarch.\(^{104}\)

The establishment of the Court, however, has been said to have “marked the introduction in Scotland of a permanent bench of professional judges”.\(^{105}\) The Act establishing the Court in 1532 aspired, “becaus our souerane is maist desyrous to haue ane permanent ordoure of Justice of the vniversale wele of all his lieges”, to institute “ane college of cunning and wise men... for the doing and administracioune of Justice in all ciuile actiouns”, who would be “swoorne to minister Justice equaly to all persouns in sic causis as sall happin tocum before thaim”.\(^{106}\)

The professionalism of the new judiciary would be measured according to various criteria. It would have to be a full-time and dedicated profession, legally-educated and legally-trained, independent and free from corruption and external interference.

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\(^{101}\) Lords of Session Act 1426.
\(^{102}\) Stair Memorial Encyclopaedia at para. 896, referencing the Lords of Session Act 1426.
\(^{103}\) Ibid., referencing Lord Cooper, Selected Papers 1922-1954 (Oliver and Boyd, Edinburgh, 1957) – 'The Dark Age of Scottish Legal History 1350-1650’ 219 at 227.
\(^{104}\) Ibid. at para. 904.
\(^{105}\) Ibid.
\(^{106}\) [Untitled Act] (APS ii, 335, c.2) (“College of Justice Act 1532”).
So, too, would professionalisation be required among the practitioner body. Hannay suggested that this was occurring at the bar as early as the middle of the 15th century,\(^{107}\) and Cairns argued to have been developed at the bench and bar by 1590.\(^{108}\) A number of distinct groups of practitioners emerged. The introduction of general procurators from 1532, against the background of the traditions of ecclesiastical legal practice and the *ius commune*, has been said to have played a particular role in the development of a recognisable legal profession in Scotland.\(^{109}\) They organised in the Faculty of Procurators in Glasgow from the middle of the 17th century.\(^{110}\) The Faculty of Advocates claims to have been in existence from the establishment of the College of Justice, but stated that its origins predate that institution.\(^{111}\) Cairns noted that in 1610 the Senators of the College of Justice consulted the advocates on ways to solve problems in the operation of the Court,\(^{112}\) and the advocates had the organisation, preparation and corporate self-awareness\(^{113}\) to boycott the Senators and, on occasion, even the Crown.\(^{114}\) Cairns described these as “defining moments” for the Faculty of Advocates.\(^{115}\) Writers or Clerks to the Signet had their own sphere of practice and themselves organised in a Society.\(^{116}\) This kind of professionalisation was assisted by the increasing emphasis on academic education in the law,\(^{117}\) the increasing circulation of legal texts among practitioners,\(^{118}\) and the increasing preference for law to be recorded in writing.\(^{119}\)

\(^{107}\) Hannay, *College of Justice* at 135-136.


\(^{109}\) Cairns, *Historical Introduction (op. cit. fn. 47)* at 70-71, and see also 88-89.


\(^{111}\) Website of the Faculty of Advocates (The Profession of Advocate).

\(^{112}\) Cairns, *Historical Introduction (op. cit. fn. 47)* at 87.

\(^{113}\) See *ibid.* at 125-128 and 130.

\(^{114}\) In 1670, for example, the Faculty of Advocates voted to refuse to observe new rules on fees which had been approved by Charles II, after which the advocates withdrew from the Court for two months. More famously, Charles II proclaimed in 1674 by royal pronouncement that protestations for remeid of law from the Court to Parliament were not permitted, to which there was significant opposition among advocates. Some were disbarred, whilst others withdrew in protest, and this stand-off lasted until 1676 – see *ibid.* at 125-126.

\(^{115}\) *Ibid.* at 126.


\(^{117}\) See *ibid.* at 87, 89-91 and 94.

\(^{118}\) See *ibid.* at 97 and 99.

\(^{119}\) See *ibid.* at 95, 101 and 132-137.
Legal education and training had an important part to play in the professionalisation of the judiciary. In apparent response to an unsatisfactory standard of competence in the law prevailing on the bench, measures for improvement were put in place ranging from the teaching of Latin in schools (for the stated purpose of improving judicial standards through the preparation of men for the study and practice of law), to the erection of formal legal education in the Scottish universities, requirements set down by the Court (or the Faculty of Advocates) for admission to practise before it, and the stipulation of qualifications necessary to become a Senator of the College of Justice, including forms of trial for fitness. Provision was even made in the Treaty of Union for the qualifications necessary of candidates for the office of Senator.

Improvements in court practice and process contributed to the improvement of standards of justice, as through such legislation as that debarring indictors and officers of court from assizes (juries); the imposition of a requirement for assizers (jurors) to declare in open court gifts received from any party; and on biased assizes more generally. The adoption of Romano-canonical procedure in the Court introduced a degree of procedural quality and regularity. Professionalisation was advanced by a more expeditious division of labour between, initially, the “outtir tolbuyth” and the Court itself from 1555, then between an Outer and Inner House from the 1560s, a structure formally enacted in statute in 1810. Other measures included the organisation of court rolls, the regulation of orderliness in court proceedings and the development of written pleadings.

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120 See ibid. at 62-63.
121 Ibid. at 62.
122 See, for example, ibid. at 129-130.
123 Ibid. at 87 and 126-127.
124 See ibid. at 86 and 124.
125 Treaty of Union 1707, Art. XIX.
126 Cairns, Historical Introduction (op. cit. X) at 60, referencing “That na officer, nor he that indyctis ony man, pass on his assise” (APS ii, 9, c.6) (“Jurymen Act 1426”).
128 Ibid., referencing [Untitled Act] (APS ii, 111, c.4) (“Criminal Juries Act 1475”).
129 See ibid. at 63-64.
130 Court of Session Act 1810. See also ibid. at 120-121.
131 Cairns, Historical Introduction (op. cit. fn. 47) at 85, citing as an example AS, I, 62-63 (2nd January 1650); see also ibid. at 120 citing the Articles for Regulating of the Judicatories (1670) and the Act concerning the regulation of the judicatories (APS viii, 80, c.40) (“Courts Act 1672”).
132 Ibid. at 85-86, citing AS, I, 53 (24th June 1643).
133 Ibid. at 121-122.
Attempts to promote judicial independence included an Act of 1458 setting out the terms for loss of office in respect of negligent judges (either temporarily or permanently, depending on the basis for their holding judicial office);\textsuperscript{134} an Act of 1504 attempting to deal with biased judges;\textsuperscript{135} an Act of Sederunt from 1594 prohibiting a Lord of Council and Session from sitting in a case where a litigant was his father, brother or son; and another from the same year prohibiting the Lords, officials or practitioners of the Court from purchasing property which was the subject of litigation before it.\textsuperscript{136} Judicial independence was also a concern of James V (on the throne from 1513-1542), who promised not to privately intervene in the performance of the judicial functions of the Lords of Council and Session but as justice required.\textsuperscript{137} Likewise, the Claim of Right declared it unlawful to send letters to courts instructing judges whether or how to proceed in deciding cases. It also declared it unlawful to change “the nature of the judges gifts \textit{ad vitam aut culpam} into commissions \textit{durante beneplacito}”, thus providing for security of tenure.\textsuperscript{138}

These factors would combine to professionalise the judiciary and the practitioner body appearing before it. Elevating the status, reputation and authority of the Court and its litigation, this would have contributed to an environment in which the Court, and its stated commitment to justice, could be taken seriously; and therefore, too, its supervisory jurisdiction.

(ii) Breadth of its range of remedies

The breadth of the range of remedies at the disposal of the Court buttressed its supervisory function. Individual remedies are explored in greater detail below,\textsuperscript{139} but it may be noted that advocation, suspension and reduction, in particular, combined to provide a flexible, general and comprehensive menu of supervisory remedies. Advocation allowed the Court to lift actions out of inferior courts, either to be remitted back to the inferior court with instructions on how to proceed, transferred to another court for disposal, or disposed of in the Court

\textsuperscript{134} Ibid. at 60, referencing [Untitled Act] (\textit{APS} ii, 50, c.23) (“Officers of Law Act 1458”).
\textsuperscript{135} Ibid., referencing [Untitled Act] (\textit{APS} ii, 250, c.11) (“Sheriff Court Expenses Act 1504”).
\textsuperscript{136} Ibid. at 85, citing Anent the declyning of the senatouris off the college of justice qha ar father, brother or sone to the pairties (\textit{APS} iv, 67, c.22) (“Declinature Act 1594”) and Anent the bying of landis and possessionis dependand in pley be jugeis or memberis of courtis (\textit{APS} iv, 68, c.26) (“Land Purchase Act 1594”).
\textsuperscript{137} See the \textit{Stair Memorial Encyclopaedia} at para. 906.
\textsuperscript{138} The declaration of the estates containing the Claim of Right and the offer of the croune to the king and queen of England (\textit{APS} ix, 38, c.28) (“Claim of Right 1689”).
\textsuperscript{139} See section 2.3.2(a) \textit{infra}. 
itself.\(^{140}\) Suspension and reduction allowed for almost any kind of act, omission, decision or document to be judicially annulled.\(^{141}\)

The Court alone was in possession of such a broad and comprehensive range of remedies. Their generality was important for demonstrating and effecting the generality, comprehensiveness and universality of its jurisdiction, and thereby, its superiority over other courts in the civil judicature. Having carved out such practical and effective means of exerting that authority and superiority,\(^{142}\) the Court affirmed its place at the apex of the civil judicial hierarchy. The significance of the generality of these remedies for the scope of the supervisory jurisdiction, and its concomitant place in the wider legal order, will become further apparent as this chapter progresses.

(iii) Absorption of other courts and jurisdictions

In earlier periods, it may be an overstatement to speak of a Scottish “legal system”. Instead, there was essentially a collection of jurisdictions loosely hanging together under the ultimate normative authority of the monarch. Numerous courts and officials commanded jurisdiction over comparatively local or specialised areas, including sheriffs, magistrates, justiciars' courts, burgh courts, regality courts, barony courts, stewartry courts, bailiary courts, admiralty courts and commissary courts. These sometimes had competing or overlapping jurisdictions,\(^{143}\) and there was no general judicial oversight of jurisdiction comparable to that implied in the systemic quality of a legal system with a unified judicial hierarchy.

As the legal order developed and matured, it would unify, centralise and de-compartmentalise, gaining a more obviously systemic quality. The Court played a significant role in that process, with numerous local and inferior jurisdictions being brought within the umbrella of a central civil judicature, and thus under the hierarchical authority of the Court. One of the more visible aspects of centralisation in the Scottish legal system was the Court's absorption or assumption of other courts and jurisdictions. This was often effected by a combination of both the Court's own initiative in its approach to deciding cases,

\(^{140}\) Advocation is discussed at section 2.3.2(a)(iii) infra.
\(^{141}\) Suspension is discussed at section 2.3.2(a)(iv), and reduction at section 2.3.2(a)(v), infra.
\(^{142}\) The Court also confirmed its own privative jurisdiction in, for example, reductions of right (\(A v B\), 1618 Mor. 7407), extraordinary removings (\(Jerriswood v Livingston\), 1632 Mor. 7408; \(Bethun of Blebo v His Tenants\), 1681 Mor. 7409) and actions for proving the tenor (\(Lord Balnagoun v M'Kenzie\), 1663 Mor. 7408).
\(^{143}\) Stair Memorial Encyclopaedia at para. 1022.
and statutory confirmation of the Court's superiority or assumption of jurisdiction which had previously been vested in another court. The extent to which the Court gained jurisdiction in these areas had profound consequences for the scope and strength of both its substantive and supervisory jurisdiction.

A series of statutes enacted between 1707 and 1856 transferred the jurisdictions of a number of important judicatories – two of which were central courts in their own right – to that of the Court of Session. This would serve both to enlarge and further generalise the Court's jurisdiction. These statutes will be considered in chronological order of the main point of statutory transfer, with the aim of giving an illustrative overview of the manner in which the Court's jurisdiction expanded by reference to other courts and jurisdictions.

Following the Reformation, jurisdiction over certain business relating to churches, parishes, manses, ministers' stipends and teinds\(^{144}\) was vested by Acts dating from 1617 to 1693 in a series of *ad hoc* commissions, the second of which was styled as the Commission for Plantation of Kirks and Valuation of Teinds,\(^{145}\) and a name which may be used in the plural to describe the Commissions collectively. The jurisdictions of the Commissions were transferred *en bloc* by an Act of 1706 to the Lords of Council and Session.\(^{146}\) Although the Lords, in exercise of this jurisdiction, came to be known as the “Teind Court” – a name which is still used today – this was never a separate court in its own right.\(^{147}\) As Lord Kinnear said, “the Court of Teinds is nothing but the Court of Session under another name”\(^{148}\); indeed the Lords were ordained by the Act to exercise their jurisdiction over teind business “during the time of session”, even although the jurisdiction was vested in the Lords rather than the Court as such. This transfer of jurisdiction over the relevant business relating to churches, parishes, manses, ministers' stipends and teinds, nonetheless represented an enlargement of the Court's substantive jurisdiction.

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\(^{144}\) Teinds (tithes) were extinguished by the Abolition of Feudal Tenure etc (Scotland) Act 2000, s.7.


\(^{146}\) Act anent plantation of kirks and valuation of teinds (*APS* xi, 433, c.10) ("Plantation of Kirks and Valuation of Teinds Act 1707").

\(^{147}\) *Presbytery of Stirling v Heritors of Larbert and Dunipace* (1900) 2 F. 562. See also the *Stair Memorial Encyclopaedia* at para. 816, where it is stated that, strictly speaking, the term “Teind Court” is a misnomer; and see also para. 921.

\(^{148}\) *Presbytery of Stirling v Heritors of Larbert and Dunipace* at 568, per Lord Kinnear.
The Court of Session Act 1830 introduced a number of major judicial and jurisdictional reforms. Perhaps most notably, “a battle over maritime jurisdiction which ebbed and flowed over two centuries” reached its climax in this Act. Jurisdiction over prize, maritime and admiralty affairs (both civil and criminal), including an appellate jurisdiction over inferior admiralty courts, was exercised by the High Court of Admiralty. Otherwise known as the Curia Admirallatus Scotiae, this court predated the Court of Session and was regarded as one of three central courts in the civil judicature in the 16th century.

The battle over maritime jurisdiction arose with the institution of the Court of Session, which both declined to recognise the High Court of Admiralty as exercising an independent jurisdiction, and held itself to be a competent judge in admiralty causes. In a prominent case of the latter, and in a quite visible competition of jurisdictions, the Court did not accept the claim to jurisdiction asserted by Lord Bothwell, the then Lord High Admiral of Scotland, who had compeared before it. However, the Court invited Lord Bothwell to sit and vote with the Court in that particular case.

This case is symbolic of the manner in which the competition would develop and finally be resolved. The Admiralty Court Act 1681, although enlarging the powers of the Lord High Admiral, signalled a formal erosion on the stature of the High Court of Admiralty, by subjecting its decrees to review by the Court of Session (albeit by suspension and reduction

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149 Stair Memorial Encyclopaedia at para. 916.
150 Prize jurisdiction is that over enemy property seized or captured at sea.
152 The other central civil courts at the time were the Court of Session and the Court of Exchequer. For an overview of the High Court of Admiralty, see the Stair Memorial Encyclopaedia at paras. 909 and 916; and see also Wade, Acta Curiae Admirallatus Scotiae. Wade stated that the law administered by the High Court of Admiralty was “the customary law of the sea... a sort of general law of the sea based on the jus gentium and customs of seafaring men”. These were formally expressed in various codes, the most authoritative of which was said to have been the Rôles d'Oléron. Other sources included the Lex Rhodia (used in the Mediterranean), the Gotland or Wisby Sea Law (used in the Baltic), certain French Codes, and decisions of the English Admiralty Court – see ibid. at xix-xx, and see also Edda Frankot, 'Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea' in Juan Pan-Montojo and Frederik Pedersen (eds.), Communities in European History: Representations, Jurisdictions, Conflicts (Pisa University Press, Pisa, 2007) at 157.
153 There also appears to have been conflict between the High Court of Admiralty and the Court of Justiciary – see Wade, Acta Curiae Admirallatus Scotiae at xvi-xvii.
154 Stair Memorial Encyclopaedia at para. 916, citing Flemings v Lord Bothwell, 1543 Mor. 7322.
155 Erskine, Institute, I.III.33.
only, and not by advocation\textsuperscript{156} unless in questions of competency\textsuperscript{157}), and also maintaining
the Court of Session’s privative jurisdiction in the civil judicature over competency, including the competence (\textit{vires}) of the High Court of Admiralty.\textsuperscript{158} The High Court then
lost its prize jurisdiction in 1825 to the High Court of Admiralty in England.\textsuperscript{159} Finally, the
Court of Session Act 1830 transferred admiralty jurisdiction to the Court of Session.\textsuperscript{160} This
was the death knell for the High Court of Admiralty, and the victory of the Court of Session
over maritime jurisdiction.

This represented another expansion of the substantive jurisdiction of the Court of Session,
with an important jurisdiction being wrestled from another (older) court and finally won over
with the assistance of statute. But it was not only its substantive jurisdiction that was
enlarged, for the Act subjected inferior admiralty jurisdiction to sole review in the Court of
Session (in civil matters) and the High Court of Justiciary (in criminal matters).\textsuperscript{161} Inferior
courts of admiralty now came under the superintending gaze of the Court of Session,
enlarging its supervisory jurisdiction. Furthermore, the Act rendered the High Court of
Admiralty defunct, so that there now remained only two central courts in the civil judicature
– the Court of Session and the Court of Exchequer – in which the former was an increasingly
dominant member.

The Court of Session Act 1830 also transferred the jurisdiction of the Jury Court to the Court
of Session.\textsuperscript{162} The Jury Trials (Scotland) Act 1815 had established a so-called “Jury Court”,
consisting of one chief judge and two “Lords Commissioners of the Jury Court in Civil
Causes”, following what was deemed to be the unsatisfactory condition of civil jury trial in
Scotland.\textsuperscript{163} The Jury Court was said by James Ivory to be “not so much a separate and

\begin{footnotesize}
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\item \textsuperscript{156} See Stair, \textit{Institutions}, IV.37.20; A.E.G. Mackay, \textit{The Practice of the Court of Session} (Vol. 1) (T. & T. Clark, Edinburgh, 1877) at 189; A.E.G. Mackay, \textit{Manual of Practice in the Court of Session} (W. Green, Edinburgh, 1893) at 69; and Erskine, \textit{Institute}, I.III.33, which stated that such
advocation did not lie in maritime questions. See also \textit{Chalmers v Napier}, 1778 Mor. 7384; and
\textit{Bruce, Suppliant}, 1700 Mor. 7414, in which the Court considered that it could advocate a cause
from an admiral-depute to the High Admiral on point of partiality, injustice or personal interest.
\item \textsuperscript{157} Erskine, \textit{Institute}, I.III.33.
\item \textsuperscript{158} Act concerning the jurisdiction of the admiral court (\textit{APS} viii, 351, c.82) (“Admiralty Court Act
1681”). See also \textit{ibid.}
\item \textsuperscript{159} Court of Session Act 1825, s.57.
\item \textsuperscript{160} Court of Session Act 1830, s.21. Admiralty actions are now regulated by Chapter 46 of the Rules
of the Court of Session.
\item \textsuperscript{161} Court of Session Act 1830, s.29.
\item \textsuperscript{162} \textit{Ibid.}, s.1.
\item \textsuperscript{163} \textit{Stair Memorial Encyclopaedia} at para. 915.
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independent judicature".\textsuperscript{164} considering that the Court of Session could simply remit by special interlocutor questions of fact to be tried in the Jury Court.\textsuperscript{165} However, the judges comprising the Jury Court were not judges of the Court of Session.\textsuperscript{166} In that regard, the Jury Court commanded a distinct jurisdiction, and although this was not as significant a development as the transfer of maritime jurisdiction, particularly given the jurisdictional proximity of the Jury Court to the Court of Session, it was nonetheless another court the jurisdiction of which was removed and transferred to the Court of Session, further enlarging its substantive jurisdiction.

The remaining “central court” in the Scottish civil judicature was the Court of Exchequer, the pre-Union jurisdiction of which was to “receive the King's custom and other things that belong thereto and to make reckoning and give count thereof at the King's Chequer”.\textsuperscript{167} Article XIX of the Treaty of Union provided that “there be a Court of Exchequer in Scotland after the Union, for deciding questions concerning the revenues of customs and excise there”.\textsuperscript{168} Accordingly, an Act of the same year constituted the new Court of Exchequer in Scotland.\textsuperscript{169} Both the pre- and post-Union Courts of Exchequer were distinct courts with privative jurisdictions\textsuperscript{170} and a distinct judiciary: consisting pre-Union of the Lord Treasurer, the Treasurer Depute and the Lords of Exchequer;\textsuperscript{171} and post-Union of the Lord High Treasurer of Great Britain, the Chief Baron of Exchequer and the Barons of Exchequer.\textsuperscript{172} Decrees of the Court of Exchequer were not subject to review by the Court of Session.\textsuperscript{173}

Despite the Court of Exchequer being on a more distinctly separate and independent footing than the High Court of Admiralty, and its decrees not subject to review by the Court of Session, it would come to suffer the same fate: its “whole power, authority and jurisdiction”

\textsuperscript{164} James Ivory, \textit{Form of process before the Court of Session, the new Jury Court, and the Commission of Teinds} (Vol. 2) (Archibald Constable, Edinburgh, 1818) at 280.
\textsuperscript{165} Jury Trials (Scotland) Act 1815, s.1.
\textsuperscript{166} Stair Memorial Encyclopaedia at para. 915.
\textsuperscript{168} Treaty of Union 1707, Art. XIX.
\textsuperscript{169} Exchequer Court (Scotland) Act 1707.
\textsuperscript{170} Erskine, \textit{Institute}, I.II.10; Mackay, \textit{Practice of the Court of Session} (Vol. 1) at 43.
\textsuperscript{171} Mackay, \textit{Practice of the Court of Session} (Vol. 1) at 187.
\textsuperscript{172} Stair Memorial Encyclopaedia at para. 917.
\textsuperscript{173} \textit{Ibid.}
was in 1856 transferred by statute to the Court of Session, which was simultaneously designated as the Court of Exchequer in Scotland.\textsuperscript{174} The administrative functions of the Court of Exchequer had already been transferred to the Treasury in London, and so the powers transferred to the Court of Session were judicial in nature.\textsuperscript{175}

The final set of courts which were brought under the jurisdiction of the Court of Session in the 19th century were the commissary courts. Also known as “consistory courts”, these were established by the Privy Council after the Reformation, in 1563,\textsuperscript{176} with jurisdiction over such matters as those concerning marriage, divorce, status, legitimacy and testamentary succession.

There was a commissary for every diocese with ordinary consistorial jurisdiction, however the Commissary Court at Edinburgh was said to have a “double jurisdiction”. This comprised its ordinary diocesan jurisdiction, which extended to the counties of Edinburgh, Haddington, Linlithgow, Peebles and part of Stirlingshire; and a “universal” jurisdiction which included within its purview a supervisory jurisdiction over inferior commissaries.\textsuperscript{177}

Although the Commissary Court at Edinburgh had the power to reduce the decrees of inferior commissaries, it could not be said to be the supreme consistorial court in the sense that mechanisms for appeal and review of consistorial decrees were put in place to the Court of Session.\textsuperscript{178} Likewise, an Act of 1609 appointed the Court of Session as the King’s Great Consistory, with a power of review over judgments of the commissaries.\textsuperscript{179} This restricted review to that by advocation only, the process being called up to the Court of Session where the circumstances of the case or the capacity or competence of the judge so required, and

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  \item[174] Exchequer Court (Scotland) Act 1856, s.1.
  \item[175] Mackay, \textit{Practice of the Court of Session} (Vol. 1) at 193.
  \item[176] Cairns, \textit{Historical Introduction} (op. cit. fn. 47) at 84, citing RPC, I, 252. Commissary jurisdiction was not ratified by Parliament until 1592 – Cairns, \textit{ibid.} at 84.
  \item[178] See Stair, \textit{Institutions}, IV.1.36 and Erskine, \textit{Institute}, I.II.6. See also J.D. Mackie and W.C. Dickinson, \textit{Relation of the Manner of Judicatores of Scotland} (1922) 19 Scottish Historical Review 254 at 270. Whereas appeals from the commissaries used to lie to Papal courts, they were directed by an Act of 1560 to the Court of Session – Cairns, \textit{Historical Introduction} (op. cit. fn. 47) at 83.
  \item[179] Act of the comissariatis and jurisdictioun gevin to archibischoppis and bischoppes (\textit{APS} iv, 430, c.8) (“Commissariots Act 1609”). See also Mackay, \textit{Practice of the Court of Session} (Vol. 1) at 44-45 and the \textit{Stair Memorial Encyclopaedia} at para. 918.
\end{itemize}
then remitted back to the commissary with instructions. 180

It was again the Court of Session Act 1830 which started stripping the commissary courts of jurisdiction, 181 with that over actions of declarator of marriage, nullity of marriage, legitimacy and bastardy, and all actions of divorce and separation, being transferred to the Court of Session. 182 This was a substantial transfer of judicial business which was previously under the privative jurisdiction of the commissaries. A not insubstantial exception was jurisdiction over testamentary succession, which remained with the commissaries.

However, this and all remaining jurisdiction was transferred out of the consistorial judicature in two further statutory reforms. First, the Commissary Court at Edinburgh was abolished in 1836 and its powers and duties regarding confirmation of executors transferred to the sheriff. 183 Secondly, all remaining commissary courts in Scotland were abolished in 1876, and the entirety of their remaining powers and jurisdiction likewise transferred to the sheriff, 184 thus completing the assimilation of consistorial jurisdiction into civil jurisdiction. The striking difference here is that statute transferred jurisdiction to the sheriff courts, rather than to the Court of Session. However, this also – albeit indirectly – enlarged the jurisdiction of the Court, for both appeal and review on what were formerly consistorial matters would now lie from the sheriff courts to the Court of Session.

These transfers of jurisdiction represent not only an expansion of the substantive and supervisory jurisdiction of the Court, but an inextricably linked centralisation of substantive and supervisory jurisdiction in the civil judicature more generally. 185 Between 1707 and 1876 the Court inherited substantive jurisdiction over business relating to churches, parishes, manses, ministers' stipends, teinds, maritime and admiralty affairs, civil jury trial, the exchequer, actions of declarator of marriage, nullity of marriage, legitimacy and bastardy, and actions of divorce and separation. Importantly, all of these were inherited from other

180 Bruce, Suppliant; Erskine, Principles at 59-60.
181 Although Cairns noted that, in the 1690s, attempt had already been made to abolish the commissary courts – see Cairns, Historical Introduction (op. cit. fn. 47) at 120.
182 Stair Memorial Encyclopaedia at para. 918.
183 Commissary Court of Edinburgh etc Act 1836. See also ibid. It appears that executry litigation tended to be brought before the burgh and sheriff courts following the Reformation in 1560.
184 Sheriff Courts (Scotland) Act 1876, s.35.
185 The Stair Memorial Encyclopaedia noted that the “picture that emerges between 1808 and 1850 is of the unification of formerly separate jurisdictions in the Court of Session as the commune forum of Scotland” – Stair Memorial Encyclopaedia at para. 919.
courts, hence substantive legal centralisation combining with wider institutional centralisation in the legal order. The Court's supervisory jurisdiction also expanded between 1609 and 1876 to include under its superintendence judgments of the commissary courts and the High Court of Admiralty. This additional concentration of supervisory power and juridical authority in the Court added to the unification and systematisation of the legal order, with a unifying hierarchy of courts reflecting a unifying hierarchy of jurisdictions.

(iv) Exertion of jurisdiction over inferior courts and judicatories
Key to the effectiveness of the supervisory jurisdiction was the extent to which it could successfully be exerted over inferior courts and judicatories. As stated above, the breadth and generality of remedies at the disposal of the Court allowed it to maintain a flexible and comprehensive supervisory jurisdiction over those courts and judicatories. Perhaps the most basic, though powerful, remedy was that of reduction; the means by which the decree of an inferior court would be formally declared invalid. This is, in itself, an expression of the Court's authority over inferior courts, and an exertion of its jurisdiction over theirs. Suspension was a similar expression of jurisdictional superiority on the part of the Court, allowing further flexibility in circumstances in which simple invalidation (i.e. reduction) was not appropriate, such as where a process required to be halted, or the implementation or execution of a decree stopped. Advocation was a wholesale exertion of superior jurisdiction, comprising the lifting of an action out of an inferior court into the Court itself, either to be disposed of therein, transferred to another court or remitted with instructions.

These remedies combined with the submission (or subjection) of inferior courts to the Court's supervisory jurisdiction, together with a general desire for justice, fairness and due process, to strengthen an emerging judicial hierarchy. As will be explained in the following section, the old remedy of falsing the doom allowed courts to exert authority over inferior courts by subjecting their decrees to review, and through this a basic “appellate” (or better, a review) structure was able to operate. Falsing gave way to advocation, suspension and reduction as remedies for review, and the continued, but more sophisticated and systematic, operation of a supervisory judicial hierarchy.
2.3.2 The evolving supervisory function

a. Supervisory processes and remedies

The supervisory jurisdiction was not a formally defined jurisdiction in the Court until relatively recently. The first appearance of the term “supervisory jurisdiction” in a Scottish case appears to have been its use by Lord Hailsham of St. Marylebone in the 1980 case of *London and Clydeside Estates Limited v Aberdeen District Council.* Its first usage by a Scottish judge appears to have been by Lord Dunpark (in the Inner House), to be followed by Lord Fraser of Tullybelton (in the House of Lords), in the 1982 case of *Brown v Hamilton District Council.* The term was then used in Rule of Court 260B introduced in 1985 after which it began to be used in cases referring to that Rule.

There was nonetheless a substantial degree of supervisory activity in the period between (and indeed preceding) the Court's institution in 1532 and the emergence of a formally defined supervisory jurisdiction. The ancient procedure of “falsing the doom” was one of the earliest mechanisms for review, significantly predating the Court, and possibly existing from as early as the 13th century. It is evidence of supervisory jurisdictions pertaining both to sessions of the King's Council, and to other early courts commanding a superior position in the judicial hierarchies. Whilst protestation for remeid of law represented a

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187 *Brown v Hamilton District Council* at 22 and 27-29, per Lord Dunpark.
188 *Ibid.* at 42 and 44-45, per Lord Fraser of Tullybelton.
189 The Working Party on Procedure for Judicial Review of Administrative Action was set up in 1983 under the chairmanship of Lord Dunpark “to devise and recommend for consideration a simple form of procedure, capable of being operated with reasonable expedition, for bringing before the court, for such relief as is appropriate, complaints by aggrieved persons (1) against acts or decisions of inferior courts, tribunals, public bodies, authorities or officers in respect of which no right of appeal is available, alleging that they have been done or taken without compliance with particular statutory procedural requirements; and (2) of failure of any body or person to perform a statutory duty, which it or he could be compelled to perform in terms of section 91 of the Court of Session Act 1868”. This led to the introduction in 1985 of Rule of Court 260B. Its apparent confinement to a particular field of administrative law concerning public or statutory matters was argued by Lord President Hope not to have altered the substantive law, which he went to lengths to show did not confine judicial review to that of public or administrative action. In particular, he stated that “since [Rule of Court 260B] was introduced by Act of Sederunt without any further enabling power having been conferred on the court by general legislation, it was a procedural amendment only which did not and could not alter in any respect the substantive law”, and that, accordingly, “neither the nature or scope of the supervisory jurisdiction nor the grounds on which it may be exercised were affected by the introduction of this new rule” – *West v Secretary of State for Scotland* at 404, per Lord President Hope.
191 See below at section 2.3.2(a)(i).
192 Lord President Hamilton likewise referred to a “supervisory jurisdiction” of the Court over such inferior judicatories as the sheriff court, the Commissioners for the Plantation of Kirks and
more limited form of review by the pre-Union Scottish Parliament, advocation, suspension and reduction comprised the principal means for conducting, and architecting a working law on, judicial review. They were effectively the precursor to the dedicated procedure for review originally embodied in Rule of Court 260B, which marked the point at which a distinct supervisory process was formally provided for in a unified procedure in the Rules of Court.

This section will illuminate the historical pedigree of Scots judicial review by focusing on how review operated in practice, and provide a narrative on the judicial activity and jurisprudence which was formative for the law on judicial review. It aims to improve understanding of the long heritage of Scots judicial review which some recent cases have acknowledged, but which have rarely sought to venture before the 20th century in any systematic way. This section will demonstrate that (i) a form of judicial review has been in existence in Scotland since at least the 13th, but certainly the 14th, century; (ii) the idea of supervisory jurisdiction has a long and indigenous pedigree in Scotland; (iii) signs of an emerging supervisory doctrine were visible long before the supervisory jurisdiction was formally recognised in Rule of Court 260B; and (iv) remedies have made a significant contribution as a medium through which the supervisory jurisdiction was conveyed, the concept of supervisory jurisdiction was developed, and a “supervisory hierarchy” of institutions was organised.

(i) Falsing of dooms

The procedure known as “falsing the doom” is obscure and has been little studied. Perhaps the most comprehensive account in relatively modern times remains that of Sir Philip Hamilton-Grierson, writing in 1926 in a comparative context with similar processes

Valuation of Teinds, the bailie court and the Commissary of Glasgow in the 17th century – see Eba v Advocate-General for Scotland (Inner House) at para. 34. However, it seems that the Court was not involved in the falsing of dooms – see Godfrey, Civil Justice at 196, and fn. 224 infra.

See AXA (Supreme Court) at para. 160, per Lord Reed; and see also J. and J. v C.’s Tutor, 1948 S.C. 636 at 643, per Lord President Cooper; and Brown v Hamilton District Council at 49, per Lord Fraser of Tullybelton. Suspension and reduction continue to exist as remedies which may (inter alia) be used to strike down unlawful acts and decisions in the context of judicial review, though advocation was abolished.

See, for example, Brown v Hamilton District Council at 28, per Lord Dunpark; West v Secretary of State for Scotland at 392-403, per Lord President Hope; Eba v Advocate-General for Scotland (Inner House) at paras. 34, 36, 40, 47 and 52, per Lord President Hamilton; AXA General Insurance v Lord Advocate [2011] C.S.I.H. 31 at para. 60; and AXA (Supreme Court) para. 57, per Lord Hope.

Godfrey, Civil Justice at 21.
found in France and Germany.\textsuperscript{196}

Falsing has been described as the reduction of decrees in matters of ordinary civil jurisdiction,\textsuperscript{197} allowing the judgments of an inferior court to be challenged in a superior court. Both Godfrey and Hamilton-Grierson regard falsing as a form of review,\textsuperscript{198} the latter noting that although it has traditionally been described in the literature as a form of appeal,\textsuperscript{199} it was essentially different from appeals as now understood.\textsuperscript{200}

Falsing was a complaint against the judge who issued judgment in the inferior court – not against the party in whose favour judgment had been made (although that party may have been summoned to attend the hearing).\textsuperscript{201} The judge himself was summoned to the reviewing court, which would either find the doom (the judgment) to be “wele gevin and evil againsaid” or “evil gevin and wele againsaid”.\textsuperscript{202} If the latter, the doom was revoked\textsuperscript{203} and the liable judge fined.\textsuperscript{204} It is precisely for its personal attack on the judge complained of, and its implication of “delinquency on the part of inferior judges” who were usually “made defendants”, that falsing was criticised as a “rude” method of redress.\textsuperscript{205}

An example of falsing was given by David Hume, citing a case in which Parliament falsed a doom of the Justiciar, sitting in his justice ayre at Cupar,\textsuperscript{206} in a civil cause. Following a report by the Lords Auditor, Parliament gave the following judgment:

\textsuperscript{196} Philip J. Hamilton-Grierson, ‘Falsing the Doom’ (1926) 24 Scottish Historical Review 1. He also covered the subject in Hamilton-Grierson, Appellate Jurisdiction of the Scottish Parliament; and Hamilton-Grierson, Judicial Committees of the Scottish Parliament at 8-9.

\textsuperscript{197} Archibald Fletcher, An examination of the grounds (Adam Black, Edinburgh, 1825) at 16.

\textsuperscript{198} See Godfrey, Civil Justice at 21-22, and see also David Hume, Commentaries on the law of Scotland, respecting crimes (Vol. II) (ed. Benjamin Robert Bell) (Bell & Bradfute, Edinburgh, 1844) at 3 and 5.

\textsuperscript{199} See, for example, Mackay, Practice of the Court of Session (Vol. 1) at 17.

\textsuperscript{200} Hamilton-Grierson, Falsing the Doom at 1.

\textsuperscript{201} Ibid.

\textsuperscript{202} Ibid. at 1-2.

\textsuperscript{203} Godfrey, Civil Justice at 22.

\textsuperscript{204} Ibid.; Hamilton-Grierson, Falsing the Doom at 1-2.

\textsuperscript{205} John MacQueen, A Practical Treatise on the Appellate Jurisdiction of the House of Lords & Privy Council (A. Maxwell, London, 1842) at 350-351.

\textsuperscript{206} A “justice ayre” was a circuit made by an itinerant judge or court.
Informatio Judicii contradicti. The Court of Parliament schawis for law, that the dome gevin in the Justice Are of Coupir, in the tolbuth of the same, befor John Halden, etc. as is abufe writtin, wes evil geven, and wele again said; and therfor ilk baron and freeholder that had soitour in the said Are, and wardit and geve voce with the said dome, is ilkane in an ammerciament sic as thai micht tyne in the said Are, and all in ane ammerciament of this Court of Parliament, sic as thai effers of law. And that I geif for dome. Quod quidem Judicium excellentissimum, Dominus noster Rex suprascriptus, in Statu regali et loco tribunali sedens, vive vocis oraculo affirmavit.\textsuperscript{207}

Falsing allowed an hierarchical\textsuperscript{208} “appellate” structure to operate.\textsuperscript{209} Hamilton-Grierson showed why this conclusion could be drawn, reporting that around the second half of the 14th century, judgments falsed in the baron court could be reviewed in the sheriff court; if falsed in the sheriff court, could be reviewed in the justiciar's court; and if falsed in the justiciar's court, could be reviewed by the King and Parliament.\textsuperscript{210} A judgment falsed in a burgh court could be reviewed by the Court of the Four Burghs.\textsuperscript{211} This latter court, which was also known as the Curia Quatuor Burgorum,\textsuperscript{212} related to the four burghs of Edinburgh, Berwick, Roxburgh and Stirling, and seems to have been under the superintendence of the Lord Chamberlain.\textsuperscript{213}

Hamilton-Grierson and \textsc{A.J.G.} Mackay reported a similar jurisdictional hierarchy with regard to falsing in a slightly later period, regulated by an Act of 1503.\textsuperscript{214} Under this regime, judgments of the baron or freeholder with jurisdiction could be reviewed in the sheriff court\textsuperscript{215} or by another immediate superior; judgments of the sheriff, steward, bailie or similar officer could be reviewed by the justiciar's court; judgments of the provost or bailies within the burgh could be reviewed by the Lord Chamberlain and the Court of the Four Burghs; and judgments of the justiciar's court and the Court of the Four Burghs (the decisions of which had hitherto been final) could be reviewed by a court of thirty or forty persons with parliamentary powers to be chosen by the King.\textsuperscript{216} Cairns noted that whilst the chamberlain

\textsuperscript{207} Hume, Commentaries at 6.

\textsuperscript{208} Hamilton-Grierson, Falsing the Doom at 5-6, and see also 17. See also Hamilton-Grierson, Appellate Jurisdiction of the Scottish Parliament at 220-221.

\textsuperscript{209} Godfrey, Civil Justice at 22.

\textsuperscript{210} Hamilton-Grierson, Falsing the Doom at 6.

\textsuperscript{211} \textit{Ibid}.

\textsuperscript{212} Fletcher, An examination of the grounds at 16.

\textsuperscript{213} \textit{Ibid}. See also Stair, Institutions, IV.1.19; and Mackay, Practice of the Court of Session (Vol. 1) at 38.

\textsuperscript{214} [Untitled Act] (\textit{APS} ii, 254, c.41) (“Briefs of Right Act 1503”). See Hamilton-Grierson, Falsing the Doom at 6-7; and Mackay, Practice of the Court of Session (Vol. 1) at 17 and 38.

\textsuperscript{215} See also Stair, Institutions, IV.1.19.

\textsuperscript{216} Mackay proposed this court of thirty or forty persons to have been intended to take the place of the
was supervising bailies in the burgh courts through the procedure of falsing around the late 15th and early 16th centuries, the last chamberlain ayre was held in 1517, and the Court of the Four Burghs – which likewise supervised inferior courts through falsing – ceased operating in the early 16th century.

Whilst falsing may have existed from as early as the late 13th century, it seems to have declined in use from 1487, and to have fallen into disuse by the end of the 16th century, replaced by bills of advocation. Godfrey reports that the last dooms to be falsed by Parliament were in 1544, twelve years after the foundation of the College of Justice, and presumably as part of Parliament's divorce from judicial business. It is clear that the remedy existed contemporaneously with the old sessions of the King's Council; however, it seems that the sessions themselves were removed from the system of falsing, presumably meaning that they did not false dooms, nor were their dooms falsed by Parliament.

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219 See Hamilton-Grierson, Falsing the Doom at 2-4.

220 Erskine, Institute, IV.II.39; see 49 infra.

221 Thomas Beveridge, A Treatise on the History, Constitution, and Forms of Process of the Bill-Chamber (Bell & Bradfute, Edinburgh, 1828) at 10. See also Stair, Institutions, IV.1.31; Brodie-Innes, Comparative Principles at 62; Erskine, Institute, IV.II.39; Mackay, Practice of the Court of Session (Vol. 1) at 29; and Hamilton-Grierson, Judicial Committees of the Scottish Parliament at 8-9.


223 Godfrey noted that there is no record of any specifically judicial proceedings (other than for treason) in the Parliamentary record after 1504, although until 1544 some committees were appointed for judicial business – Godfrey, Civil Justice at 25. The period of overlap may have been practically unavoidable as Parliament scaled down its judicial activity, and the transition made to having an institutionally separate, centralised judicial body. For an example of possibly transitional arrangements, see Hamilton-Grierson, Judicial Committees of the Scottish Parliament at 12.

224 Godfrey stated that there was “no appeal beyond the Session in its fifteen-century form or later, since Council operated independently of the ordinary legal processes of falsing the doom which had hitherto placed Parliament in a procedurally superior position to lower courts under the medieval common law” – Godfrey, Civil Justice at 196. The Court of Session, being instituted shortly before falsing became obsolete, was itself apparently little concerned with the process.

225 See the Stair Memorial Encyclopaedia at para. 806, which stated that the jurisdiction of sessions was equal in authority and competence to that of Parliament, and that, accordingly, if challenge was brought in the sessions, the “right of appeal” (to Parliament) expressed in falsing “was lost”.

48
Mackay's discussion of Stair likewise suggests that finality pertained to judgments of the sessions and that, when the Court was instituted, its judges inherited the same power and authority that the Lords of Session previously enjoyed, finality being maintained as a characteristic of their judgments.226

Falsing was therefore an early procedure through which a supervisory jurisdiction was exercised by superior over inferior courts. Given the manner in which this procedure was exercised among different levels of court, it effected a rough, “appellate”227 structure which was reflected in an hierarchy of courts. This would be likely to engender a unifying tendency in an emerging system of courts, with increasing emphasis on judicial hierarchy and a centralising force towards a supreme judicial forum. Consider, in that regard, an isolated example given by Mackay from as early as 1369, when the parliamentary committee which would later be styled as the Lords Auditor received dooms for falsing from courts as diverse as the Regality Court of Moray, the Justiciar's Court at Peebles, Edinburgh and Dumfries, and the curia usitata at Dunbar.228 Falsing provided a procedural connection between different levels of jurisdiction which culminated and unified in Parliament as the final court of review.229 Over a century later, an Act of 1487230 was reported by Erskine to have allowed a party to bring a complaint against an inferior judge to the King's Council “who were authorised to set aside the sentence, where it appeared to them irregular or iniquitous”.

Whilst the existence of falsing as a process was only contemporaneous with the Court of Session for a short period – from 1532 until its falling into disuse around the mid-late 16th century – an embryonic law on judicial review is discernible in this aged remedy. If the historical analysis is correct, then it can be said that there was a form of judicial review in Scotland from at least the 13th or 14th century. As such, when the Court was established in 1532, there may already have been an acquaintance in the wider legal order with the idea of supervisory jurisdiction. The unifying and centralising tendencies of an emerging system of courts, hanging together through falsing as a process allowing the exercise of supervisory

226 See Mackay, *Practice of the Court of Session* (Vol. 1) at 38-39.
227 Though, again, the accepted modern view is that falsing had more in common with review than appeal, as presently understood; inasmuch as it was concerned with legality rather than merits.
228 Mackay described “appeals” to Parliament, by way of falsing, as an “extraordinary remedy” – see Mackay, *Practice of the Court of Session* (Vol. 1) at 37.
229 See Godfrey, *Civil Justice* at 21-22.
jurisdiction, would have implications for the Court's own stature in the legal order, and its ability to command a centralist, supervisory function in the civil judicature – even if the sessions by which it was preceded were not directly involved in the falsing process.

As the Court became the primary locus of supervisory jurisdiction in the legal order, Parliament's supervisory role became more restricted in the judicial sphere; though it retained some form of limited supervision through the process known as protestation for remeid of law.

(ii) Protestation for remeid of law

Uncertainty continues to surround the process known as protestation for remeid of law. Cairns noted that the evidence on protestation is inconclusive, and the subject was contested even during its period of usage. This brief section is of course not the place for a detailed and original investigation into the process, but a brief examination will be made of its potential significance.

Protestation was essentially a means of seeking Parliament's review of a judgment of the Court of Session or its jurisdiction to entertain a cause. It may have been driven by concerns that the status of supreme civil court afforded the Court a degree of immunity from challenge. In that regard, John Ford detailed concerns that the Lords of Session were, in the absence of further mechanisms for redress, “Sovereigns in their Decisions”, given that they had authority to issue judgments “without Appeal to any Sovereign Power above them”. This concern was likewise echoed in the view that, given the scarcity of legislation in matters of private law, “all the property of the subject is entrusted to the will of fifteen men [the Lords of Session] who evidently possess a perpetual tyranny, because their will alone is law”. Another writer similarly likened the position of the Lords of Session to that of “fifteen Tyrants”.

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232 Cairns, Historical Introduction (op. cit. fn. 47) at 123.
233 See ibid. at 113; and the present section generally.
235 See ibid.
236 See ibid.
Protestation was an “extraordinary”, 237 “exceptional and rarely sought measure”. 238 Although it is sometimes described in the literature as an “appeal to Parliament”, it may properly be considered a form of review, as it seems principally to have been concerned with whether the Court had judged on a matter which was not within its jurisdiction, or which was properly within the jurisdiction of another court. 239 It seems essentially to have been a means of supervising and regulating the extent of the Court's jurisdiction, in line with Stair's observation that “[t]here is no question the Lords of Session may exceed their authority”, yet “no other judicature... can control the same, or warrantably judge therein, save only the Parliament”. 240 As such, Godfrey noted that protestation was concerned with “the conduct of the judges in question rather than their decision on purely legal grounds”, 241 the committee of Parliament known as the Lords of the Articles having itself noted that the reversing of a decree of the Lords of Session “must needs be upon the iniquitie of the Judges of the supream Judicator of this Kingdom in maters civill from whom ther is no appeall be the lawes of this Nation”. 242 Godfrey questioned whether protestation could even be properly regarded as a remedy, 243 a doubt supported by the fact that it was used exceptionally and rarely, that Parliament seemed reluctant to entertain protestations, 244 that it seems to have lacked an established procedure, and that it halted neither proceedings in the court complained of, nor implementation of its decree. 245 These suggest a relatively light form of supervision, perhaps by a cautious Parliament which, although it demonstrated some measure of confidence in autonomising the central judicial function, 246 sought to maintain a constitutional safeguard against a recalcitrant Court. 247 Parliament did not, after all, formally

237 Stair, Institutions, IV.1.57.
238 Godfrey, Civil Justice at 34.
239 Stair, Institutions, IV.1.56, IV.1.57 and IV.1.60. Godfrey and Stair both referred to protestation as a form of review, as did Cairns – see Cairns, Historical Introduction (op. cit. fn. 47) at 123.
240 Stair, Institutions, IV.1.1.
241 Godfrey, Civil Justice at 34. See also Cairns, Historical Introduction (op. cit. fn. 47) at 123.
242 See Godfrey, Civil Justice at 33-34. See also Stair, Institutions, IV.1.59 and IV.1.60.
243 Godfrey, Civil Justice at 34.
244 See ibid. at 29, 33-37.
245 John L. Wark (ed.), Encyclopaedia of the Laws of Scotland (Vol. X) (W. Green, Edinburgh, 1930) at §1199; Hamilton-Grierson, Appellate Jurisdiction of the Scottish Parliament at 221; Godfrey, Civil Justice at 34.
246 And was, for example, sometimes keen to remit a process back to the Court – see Godfrey, Civil Justice at 37.
247 The Court, for its part, seems to have generally been one of self-restraint and continued recognition of Parliament's constitutional status. An example of this is the Court's having sometimes remitted cases from itself to Parliament in cases of great importance, difficulty of ambiguity – see Mackie and Dickinson, Relation of the Manner of Judicatores at 266. See also Godfrey, Civil Justice at 29, 37-38 and 198-200. Godfrey warned, however, that there was no fixed relationship between institutions in this period – see Godfrey, Civil Justice at 199-200.
divest itself of its judicial function.

Stair noted that there was no statutory or customary basis for taking causes from the Court to Parliament, but Parliament nonetheless continued to receive protestations. Some of the uncertainty concerning the status of protestation may have been fuelled by the fact that, as Godfrey observed, the institution of the Court in 1532 left Parliament's historical judicial role formally and technically intact. That uncertainty was met with a royal pronouncement in 1674, when Charles II stated that protestations were not permitted from the Court to Parliament. This led to the disbarring of advocates who refused to agree, and a show of support by other advocates who withdrew from the Court. Following the Claim of Right's reversal of Charles' pronouncement, providing instead that protestation was a right and privilege of subjects, Stair said that many litigants (wrongly) sought to use protestation as a mode of appeal. Gordon Hutton reports that in 1695, Parliament appointed a committee for judging on “appeals” from the Court, with a majority of committee members being either judges or advocates of the Court, meaning that in many cases the Court's decision would be upheld. Accordingly, “at the time of Stair's death, an uneasy compromise regarding the vexed questions of appeals still remained”.

Protestation appears to have become a non-issue upon Scotland's union with England, for with the abolition of the Scottish Parliament, there was no longer controversy about its hearing causes from the Court. Instead, it was replaced by concerns about whether it was possible to “appeal” from the Court to the House of Lords; although it is questionable whether protestation was a fitting comparator to this new problem. Godfrey therefore

250 Godfrey, *Civil Justice* at 33.
251 Godfrey noted that Charles II actually sought to ban “appeals, protestations, supplications, informations, or any other manner of way” from the Court to Parliament, but that the ban on protestations was innovative – see *ibid.* at 36.
252 Cairns, *Historical Introduction (op. cit.* fn. 47) at 123.
254 Claim of Right 1689.
255 See Stair, *Institutions*, IV.1.1 and IV.1.56.
256 Hutton, *Stair's Public Career* (op. cit. fn. 249) at 63. Stair died in 1695.
257 Although the Scots commissioned to negotiate a prospective union with England in 1670 stated that there were “no appeals allowed by our law to our owne parliament from the session” (see Ford, *The legal provisions in the Acts of Union* at 123), some writers have looked to protestation to inform uncertainty on a post-Union right of appeal from the Court to the House of Lords. Considering the exceptional nature of protestation, its controversial and contested usage, and the fact that it seemed rather to be concerned with instances in which the Court was alleged to have
noted that protestation remained possible until the Scottish Parliament's abolition in 1707, \(258\) and indeed a protest for remeid of law was disposed of by the Scottish Parliament on 7th March 1707, in which a disgruntled litigant who had been unsuccessful in an action for aliment before the Lords of Session “protested for remeid of law to her majesty and her high court of parliament”. Parliament, having considered the protest, adhered to the decree pronounced by the Lords of Session. \(259\)

To the extent that protestation was a means of Parliament's reviewing decrees of the Court, several tentative conclusions \(260\) can be made notwithstanding the uncertainty and controversy surrounding the process. First, Parliament had not fully relinquished its judicial role following the establishment of the Court, even although it seemed reluctant to receive protestations for remeid of law, and these were granted rarely and exceptionally. Secondly, if the analysis is correct that protestation was primarily about confining the Court to its jurisdiction, Parliament exercised in this regard a supervisory jurisdiction over the Court. Thirdly, concerns about the perceived inviolability of a non-reviewable supreme civil court are not unique to the present day, and some of the same discomfort was shared in earlier times.

(iii) Advocation
Advocation has typically been classed or considered together with suspension \(261\) and reduction; \(262\) Mackay referring to them collectively as “the three modes of appeal” or “review”. \(263\)

Godfrey described advocation as one of the most influential procedures through which the Court of Session exerted superior jurisdiction over other courts, attributing to it the conveyance of “immense jurisdictional implications” the significance of which “can hardly
be exaggerated”.\textsuperscript{264} He described it as a technical means by which the Court could transfer to itself an action from an inferior court, and explained that:

\begin{quote}
“\textit{A substantive assertion of jurisdiction would involve reviewing the judgements of other courts, substituting a new determination, or else outright transfer of the legal action. Advocation involved such a wholesale transfer of the case to the Session from the “subordinate” court.”}\textsuperscript{265}
\end{quote}

Godfrey described advocation as the first established procedure by which the Session (or sessions) could assert its jurisdiction over other courts.\textsuperscript{266} He reports that advocation was in use by the 1530s, though still a recent innovation in that decade, and that it can be linked with the impetus of institutional and jurisdictional development which was finally expressed in the foundation of the Court itself.\textsuperscript{267} Stair said that advocation superseded the older remedy of falsing the doom, favouring advocation as a:

\begin{quote}
“\textit{far more excellent remedy; for thereby causes are not stopped at the choice or humour of parties, but the reasons of advocation are specially considered by the Lords, whether they be relevant, and have such instructions as can be expected before discussing”}\textsuperscript{268}
\end{quote}

The party seeking advocation was known as the “advocator”.\textsuperscript{269} Stair explained some of the reasons for which the Court would advocate a cause as including incompetence of jurisdiction in the inferior court, an inferior judge being within the prohibited degrees of affinity or consanguinity to a party, suspicion of bias or similar injustice, if the case required powers to be exercised which were not possessed by the inferior court, or if the difficulty or importance of the cause was of such magnitude that it should properly be addressed in a superior court.\textsuperscript{270} Erskine said that advocation could be sought on the grounds of incompetence (both in defect of jurisdiction or from “suspicion of the judge or privilege in the parties”) and iniquity (where the judge delayed justice or pronounced sentence contrary

\textsuperscript{264} Godfrey, \textit{Civil Justice} at 192.
\textsuperscript{265} \textit{Ibid.}
\textsuperscript{266} \textit{Ibid.}
\textsuperscript{267} \textit{Ibid.} at 192-193.
\textsuperscript{268} Stair, \textit{Institutions}, II.3.63. Though see Stair, \textit{Institutions}, IV.37.7, which referred to advocation’s having replacing “appeals”.
\textsuperscript{269} See, for example, \textit{Jobson and Hay v Lambert} (1828) 7 S. 83, or \textit{Byres v Forbes} (1866) 4 M. 388.
\textsuperscript{270} Stair, \textit{Institutions}, IV.1.35, IV.37.5 and IV.37.12-18. See, for example, \textit{Cuninghame v Drumquhassie}, 1567 Mor. 7409, and \textit{Lands v Dick}, 1630 Mor. 7411. On the alleged bias or consanguinity of the sheriff being grounds for the Court advocating the cause to itself, see Mackie and Dickinson, \textit{Relation of the Manner of Judicatores} at 269-270.
to law).  

Although the language of “appeal” is often used in the literature of the period, advocation was a form of review, as presently understood. Characteristic of review, it was used where a court had exceeded its jurisdiction, although it was not the only remedy competent in that situation. Advocation should have been sought (where possible) prior to litiscontestation, otherwise there would be acquiescence in the defect subsequently complained of. It carried a degree of procedural sophistication, including the requirement for a bill of advocation to be presented to the Court stating the reasons for seeking advocation, a requirement that reasons of advocation be given in writing, and an established order of procedure (including within the Bill Chamber, during its period of existence).

Stair regarded advocation as privative to the Court of Session:

“Our custom doth allow no court to advocate causes but the Session, who therefore advocate in many cases, where they cannot determine the cause, but only the reasons of advocation”.

He explained that, where a cause in an inferior court was not within the Court's jurisdiction, although the Court could not judge in the cause advocated, it was still a competent judge in the advocation itself. Thus, causes could be advocated from criminal courts, such as advocation from a sheriff in a case on theft, with remission to the Justice-General, or to another sheriff or bailie to determine the cause.

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272 Stair Memorial Encyclopaedia at para. 68.
273 As in, for example, *Byres v Forbes*; and see generally *ibid.* at para. 48.
275 See *ibid.*
276 *Ibid.*, IV.40.3 and IV.42.15.
279 *M'Intosh v Sheriff of Inverness*, 1666 Mor. 7411.
280 Stair, *Institutions*, IV.1.35. See also, for example, *Baron of Brighton v Kincaid*, 1629 Mor. 7410, which confirmed the competence of the Court to advocate criminal causes *ad hunc effectum* for remission to other competent judges. For confirmation of the competence of questions of jurisdictional *vires* being considered by the Court more generally, even when reviewing a sentence of the bailie (which was a criminal libel), see *Procurator Fiscal of the Barony of Gorbals v M'Arthur*, 1775 Mor. 7381.
The Court could advocate causes from a wide range of courts. Godfrey noted that, around
the time of the Court's institution, cases were advocated to it from courts as various as the
sheriff court,\textsuperscript{281} the regality court, the bailie court, the admiralty court\textsuperscript{282} and the barony
court.\textsuperscript{283} Stair adds to that list advocations from the Justice-General\textsuperscript{284} and the commissary
court;\textsuperscript{285} and Mackay adds that advocations were competent before (and reduction after)
decree from the Court of the Lord Lyon.\textsuperscript{286} Causes were even advocated from the
ecclesiastical judicature,\textsuperscript{287} as may particularly have been the case where civil rights were
involved.\textsuperscript{288}

Causes could be advocated to a number of other courts and bodies, such as to a bishop,\textsuperscript{289} the
Justice-General,\textsuperscript{290} the High Admiral,\textsuperscript{291} and the Privy Council.\textsuperscript{292} Where an inferior judge
against whom advocation had been intimated proceeded in contradiction of the advocation,
this gave rise to a summary action on the part of the successful advocator.\textsuperscript{293}

Although advocation was a privative, common law procedure which the Court assumed and
asserted over other (inferior) courts – having not been formally provided for in the College
of Justice Act 1532, by which the Court was instituted – advocation jurisdiction was
generally capable of restriction or exclusion by statute.\textsuperscript{294} James Maclaren said that where
statute excluded the “appellate” jurisdiction of the Court, such as where it provided that a
judgment “shall be final and conclusive, and shall not be subject to review by advocation or
suspension, or by reduction, or by any process of law whatever, any law or usage to the
contrary notwithstanding", no such action could lie to the Court.\textsuperscript{295} Advocation from the High Court of Admiralty to the Court of Session was, for example, prohibited by statute.\textsuperscript{296} Likewise, though with regard to more minor matters, advocations were restricted in cases concerning “removings” of tenants, and in actions concerning sums under 200 merks or £12.\textsuperscript{297} Indeed, it was a statute which in 1838 caused bills and letters of advocation to be superseded by notes of advocation,\textsuperscript{298} and advocation was abolished altogether by the Court of Session Act 1868, replacing it with notes of appeal.\textsuperscript{299}

Advocation was thus a procedure developed from, and shaped by, the Court's residual “common law” powers; though it was regulated, and ultimately extinguished, by statute. Stair regarded advocation as a remedy which could ensure that injustices in inferior courts were stopped,\textsuperscript{300} and therefore a powerful means of supervising the prevailing standards of justice in the judicial order. Moreover, the broad range of courts which were subject to the Court's advocation jurisdiction indicates a centralising tendency in the wider legal order through the application of supervisory processes and remedies, and advocation may have played its own part in the rendering subordinate of other jurisdictions.\textsuperscript{301} Advocation was thus one remedial channel through which the Court exerted its supervisory jurisdiction, and expressed its developing legal and constitutional function.

(iv) Suspension
Suspension was another form of reviewing\textsuperscript{302} a decree.\textsuperscript{303} The basic distinction between advocation and suspension was set out by James Johnston Darling:

\begin{footnotes}
\footnote{James A. Maclaren, Court of Session Practice (W. Green, Edinburgh, 1916) at 112. This is an example of an ouster clause, which forms the subject of Chapter 3. The judicial response to ouster clauses, and the constitutional implications thereof, forms the subject of discussion in section 3.4.}
\footnote{See Stair, Institutions, IV.37.20; Brodie-Innes, Comparative Principles at 125.}
\footnote{Court of Session Act 1838. See Mackay, Manual of Practice at 7 and 12. Advocation had originally been by way of bill, known either as a simple bill of complaint, simple supplication or bill – Godfrey, Civil Justice at 196.}
\footnote{Court of Session Act 1868, ss. 65-66. See also Erskine, Principles at 21; Mackay, Manual of Practice at 12; and Thomas A. Fyfe, The Law and Practice of the Sheriff Courts of Scotland (William Hodge, Edinburgh and Glasgow, 1913) at 304.}
\footnote{Stair, Institutions, IV.37.5.}
\footnote{See Godfrey, Civil Justice at 192.}
\footnote{Stair Memorial Encyclopaedia at para. 68.}
\footnote{This section is concerned with suspension as a means of reviewing decrees, not other forms of suspension such as “suspension and interdict” and “suspension and liberation” – see Robert Berry (ed.), Balfour's Handbook of Court of Session Practice (5th edition) (W. Green, Edinburgh, 1922) at 641.}
\end{footnotes}
“An advocation is an action by which a process is sought to be removed from an inferior court to a higher, that it may be discussed by the latter, or remitted to the inferior court, with instructions how to proceed. Suspension is the form of proceeding by which a sentence condemnatory is stayed, and an opportunity offered the applicant of having the action reheard in the supreme court.”

Adding the third remedy which is often considered alongside advocation and suspension – reduction – the general position was set out by Lord Medwyn thus: “Prior to extract, advocation is the proper form of review. When a charge is given or threatened on an extracted decree, suspension is the form. When these modes of review are impossible, reduction is competent”.

Erskine demonstrated the inter-relationship of advocation, suspension and reduction, and their competence in varying circumstances. However, a more elaborated description of their relationship and points of distinction may be set out as follows.

Advocation was competent where a final decree had not been extracted in an inferior court, and was generally incompetent after extract. It was only competent where proceedings had commenced in an inferior court.

Suspension was competent before or after extract. In the latter case, it would have been necessary for some aspect of the decree to not yet have been executed, and the execution of which was desired to be prevented or stayed – otherwise there would be nothing to suspend. Should the decree have been implemented, or the inferior court not having decreed anything to be paid or performed by a party, suspension was incompetent. It was likewise incompetent whenever advocation was competent.

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304 James J. Darling, *The Practice of the Court of Session* (Vol. 1) (William Tait, Edinburgh, 1833) at 274.
305 Buchanan v Lumsden (1837) 15 S. 958 at 960, per Lord Medwyn.
307 Stair, *Institutions*, IV.1.34; Mackay, *Practice of the Court of Session* (Vol. 2) at 452.
308 Mackay, *Practice of the Court of Session* (Vol. 2) at 443-444.
310 Berry, *Balfour's Handbook* at 259.
311 Ibid.; Brodie-Innes, *Comparative Principles* at 752.
312 Darling, *Practice of the Court of Session* (Vol. 1) at 283; Mackay, *Practice of the Court of Session* (Vol. 2) at 475.
313 Darling, *Practice of the Court of Session* (Vol. 1) at 283.
314 Brodie-Innes, *Comparative Principles* at 752; Mackay, *Manual of Practice* at 614-615; Mackay, *Practice of the Court of Session* (Vol. 2) at 482-483.
excluded, suspension was competent before extract.\textsuperscript{315} Suspension was competent where proceedings had commenced in an inferior court or, in some cases, in the Court itself.\textsuperscript{316}

Reduction – which will be explored in greater detail in the following section – was generally only competent after extract,\textsuperscript{317} and was the appropriate remedy after a decree had been fully executed\textsuperscript{318} or where it ordered nothing to be paid or performed, such as in decrees which were merely declaratory of a right.\textsuperscript{319} As in the case of suspension, reduction was competent where proceedings had commenced in an inferior court or, in some cases, in the Court of Session itself.\textsuperscript{320}

Suspension therefore allowed a stop to be brought on any unlawful proceedings, including “the execution of iniquitous decrees” and “all encroachments either on property or possession” – this even included such causes as suspension of the election of magistrates in a burgh because, as Erskine explained, the point of suspension was to summarily review the issue complained of, whereas the bringing of an ordinary action of reduction would be too time-consuming.\textsuperscript{321} Suspension has thus been regarded as a preventive remedy; Mackay referring in this regard to the “appellate and preventive jurisdiction” of the Court.\textsuperscript{322} In this vein, suspension has been stated to be:

\textit{“the process whereby the injury of rights is prevented, as distinguished from the remedies where such injury has been accomplished. Its object is to stay or arrest some act or proceeding complained of, and to retain matters in their present position until the rights of parties can be determined by a final judgment.”}\textsuperscript{323}

Suspension was (with few exceptions) privative to the Court\textsuperscript{324} and was, in particular, incompetent in the sheriff court.\textsuperscript{325} As for advocation, the statute establishing the Court (the

\begin{footnotesize}
\begin{enumerate}
\item[315] Mackay, \textit{Manual of Practice} at 614-615.
\item[316] Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 443-444. On suspension of the Court's own decrees, see \textit{ibid}. at 473-474.
\item[317] Berry, \textit{Balfour's Handbook} at 259; Mackay, \textit{Manual of Practice} at 618.
\item[318] Erskine, \textit{Institute}, IV.III.8.
\item[319] \textit{Ibid}.
\item[320] Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 443-444.
\item[321] Erskine, \textit{Institute}, IV.III.20.
\item[322] Mackay, \textit{Practice of the Court of Session} (Vol. 1) at 63.
\item[323] Mackay, \textit{Manual of Practice} at 420.
\item[324] See Mackay, \textit{Practice of the Court of Session} (Vol. 1) at 208.
\item[325] Thom v North British Bank (1848) 10 D. 1254; though see Brodie-Innes, \textit{Comparative Principles} at 278, which noted that suspension was competent in the sheriff court for sums not exceeding £25.
\end{enumerate}
\end{footnotesize}
College of Justice Act 1532) did not provide for its having an exclusive original jurisdiction over suspension (nor reduction), and it may thus be considered to have been assumed by the Court.326 Erskine said that the Court could suspend the sentences of all inferior courts in civil causes, except where that power was prohibited by statute.327 As such, it appears as a residual and general power which was carried against a number of courts including the commissary court328 and the High Court of Admiralty.329 As in the case of advocation, the procession of a judge to execution in violation of suspension was “contempt of the Lords’ authority”, and gave rise to a summary action.330

Curiously, Stair reported that it was competent for the Court to suspend the decrees of Parliament.331 This could clearly not have been regarded as an inferior court. He gave, as an example, a bill of suspension passed in 1661 against a decree of Parliament on the reason that it contained reference to a person who was not in the libel, process or citation.332 Although this holds interest from the perspective of the scope of the Court's jurisdiction in the wider judicial hierarchy (of which Parliament was once a part), Stair explained that suspension was not simpliciter, but “only... till the Parliament should determine”,333 and that such instances of suspension should have passed when Parliament – being “not a constant judicature, nor [having] fixed members, nor any custom that any of the members can suspend in the intervals” – was not sitting.334 Indeed, he noted that an Act of 1587 provided that no inferior judge – which would presumably include, in this context, a judge of the Court – could call into question a judicial decision of Parliament.335

As noted above, it was observed by Erskine that the power of the Court to suspend the sentences of all inferior courts held true unless prohibited by statute.336 Indeed, it has generally been observed that specific instances of suspension were capable of prohibition.337

326 Mackay, Practice of the Court of Session (Vol. 1) at 228.
327 Erskine, Institute, I.III.20.
328 Stair, Institutions, IV.1.36.
329 See ibid., IV.1.37; Erskine, Institute, I.III.33; and Mackay, Manual of Practice at 69.
330 Stair, Institutions, IV.3.25.
331 Ibid.
332 Ibid., IV.1.39.
333 Ibid.
334 Ibid., IV.52.13.
335 Act anent the parliament (APS iii, 443, c.16) (“Parliament Act 1587”). See ibid., IV.1.58.
336 Erskine, Institute, I.III.20.
337 Mackay, Practice of the Court of Session (Vol. 1) at 220; and see also Mackay, Practice of the Court of Session (Vol. 2) at 170 and 483; and Berry, Balfour's Handbook at 112-113.
Statute sometimes extended the scope of suspension, as in the case of the suspension of
decrees in absence in the Court.\textsuperscript{338} Suspension was also regulated by Act of Sederunt.\textsuperscript{339} It
appears, however, that where suspension was not excluded by statute, a presumption lay in
favour of its competence: for example, certain actions for removing tenants under an Act of
Sederunt of 1756 were privative to the sheriff court, but this was not regarded as preventing
the Court from having jurisdiction by suspension in those cases – statute later regulated the
form of those suspensions and prohibited advocation therein.\textsuperscript{340}

The procedure for suspension was, as for advocation, relatively sophisticated. The party
bringing the action was called the “suspender”, and the party against whom it was brought,
the “charger”.\textsuperscript{341} The suspender would present a bill (or, from 1838, a note\textsuperscript{342}) of suspension
via the Bill Chamber\textsuperscript{343} (whilst this court was in existence) to the Court. Bills of suspension
had to be supported by reasons relevant and instantly verifiable,\textsuperscript{344} and if any ground of
suspension required proof or diligence for the recovery of writings, execution was stayed for
such time as was necessary for the bringing of the supporting evidence.\textsuperscript{345} After
consideration, the Court would pronounce judgment to the effect that there were full, partial
or no grounds of suspension. These would result in, respectively, the decree “Sustain the
reasons of suspension, suspend the letters and charge \textit{simpliciter}, and decern...”; the
interlocutor “To the extent of the sum of... Suspend the letters and charge: \textit{Quoad ultra} repel
the reasons of suspension, find the letters orderly proceeded, and decern...”; and the decree
“Repel the reasons of suspension, find the letters orderly proceeded, and decern...”.\textsuperscript{346} A
decree of suspension stayed execution of the decree complained of on either a temporary\textsuperscript{347}
or perpetual\textsuperscript{348} basis.

\textsuperscript{338} See Mackay, \textit{Practice of the Court of Session} (Vol. 1) at 421.
\textsuperscript{339} See, for example, Erskine, \textit{Institute}, II.VI.55.
\textsuperscript{340} Mackay, \textit{Practice of the Court of Session} (Vol. 1) at 271. Mackay referenced \textit{Greig and Scott v Boyd and Latta} (1830) 8 S. 382, but with the incorrect citation of (1827) 6 S. 251. See also Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 491; and Berry, \textit{Balfour's Handbook} at 153.
\textsuperscript{341} Stair, \textit{Institutions}, IV.52.8; Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 169.
\textsuperscript{342} The Act which caused bills of suspension to be superseded by notes of suspension still required the
process to run through the Bill Chamber \textit{en route} to the Court of Session. See Mackay, \textit{Practice of
the Court of Session} (Vol. 1) at 71; Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 171; and see 57 supra.
\textsuperscript{343} David M. Walker, \textit{The Law of Civil Remedies in Scotland} (W. Green, Edinburgh, 1974) at 195.
\textsuperscript{344} Stair, \textit{Institutions}, IV.52.14 and IV.52.49.
\textsuperscript{345} Erskine, \textit{Institute}, IV.III.19.
\textsuperscript{346} Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 209.
\textsuperscript{347} Stair, \textit{Institutions}, IV.52.2.
\textsuperscript{348} \textit{Ibid.}, IV.52.2-3; Erskine, \textit{Institute}, IV.III.22.
In common with advocation, suspension was another remedy born of the Court's initiative, through which it exercised a supervisory jurisdiction over inferior courts (and other persons and bodies exercising jurisdiction, as explored later in this chapter). It allowed the Court to stay proceedings across the civil judicature when relevant supporting grounds were furnished, such that the Court's supervision of inferior courts as to their observance of certain standards of justice, again ties in with the structural reinforcement of the judicial hierarchy. Suspension survives as a remedy competent to the Court.  

(v) Reduction

Reduction was another process of review by which decrees could be deemed invalid. It was a mechanism allowing (inter alia) the decrees of inferior courts to be reduced, and thus “terminal” supervision by superior courts over the manner in which inferior courts exercised their jurisdiction, both procedurally and substantively. It was principally concerned with the nullity of the decree under review.

Mackay set out three broad classes of grounds on which reduction of a decree could be sought, to which we may add more specific grounds or examples of review.

The first class was on grounds separate from either the forms of the court or the merits of the judgment, such as in a case of excess of jurisdiction. This was a means of quashing a judgment in respect of a “formal but essential defect”, and is comparable to present-day review as to strict vires. This covers excess of jurisdiction in general, such as where a decree or resolution was ultra vires the court's (or deciding body's) statutory powers.

The second class was on grounds relating to the forms of the court, such as a defect or irregularity in procedure. This would include situations in which a defect in procedure had

349 Suspension is governed by Chapter 60 of the Rules of the Court of Session.
350 Mackay, Practice of the Court of Session (Vol. 2) at 120.
351 Reduction of decrees existed prior to the institution of the Court – see Godfrey, Civil Justice at 196-197. It is also a rescissory action – J. and J. v C.'s Tutor at 643, per Lord President Cooper – but is not considered here in that manifestation.
352 Stair, Institutions, IV.1.34 and IV.1.49; Mackay, Practice of the Court of Session (Vol. 2) at 501.
353 Mackay, Practice of the Court of Session (Vol. 2) at 494.
354 Ibid.
355 Maclaren, Court of Session Practice at 693.
356 As, for example, in Stirling v Commissioners of Police of the Burgh of Turriff (1874) 1 R. 935 (also known as Stirling v Hutcheon).
357 Mackay, Practice of the Court of Session (Vol. 2) at 494 and 517.
imported an “inherent nullity”, or in which there had been an “essential informality” in procedure. For example, where a decree-arbitral had been pronounced without the parties having been heard, grounds for reduction would lie. This category is broadly akin to present-day review on the grounds of procedural propriety, fairness and natural justice.

The third class was on grounds relating to the merits of the judgment in fact or law. Examples of this included cases where a decree was obtained through fraud or perjury; so too could reduction lie on a relevant and sufficient plea of res noviter veniens ad notitiam.

The Court had a general – but not exclusive – power of reduction over inferior courts. It could, for example, reduce the decrees of the sheriff court, the commissary court, the Commissary Court at Edinburgh and the High Court of Admiralty. In the case of the latter two courts, this included the reduction of decrees which may themselves have been decrees of reduction, for the Commissary Court at Edinburgh could reduce the decrees of inferior commissary courts; and, likewise, the High Court of Admiralty could reduce both its own decrees and those of inferior admiralty courts. The Court of Session could also, in certain circumstances, reduce its own decrees.

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358 Ibid. at 503; Maclaren, Court of Session Practice at 693 and 695; see also Munro v Rose (1855) 18 D. 292 at 295, per Lord Cowan.
359 M’Pherson v Ross (1831) 9 S. 797.
360 Mackay, Practice of the Court of Session (Vol. 2) at 494-495.
361 Ibid. at 501; Maclaren, Court of Session Practice at 693 and 695. See also, for example, Hercules Insurance Company v Hunter (1835) 14 S. 147.
362 Mackay, Practice of the Court of Session (Vol. 2) at 502; and see Maclaren, Court of Session Practice at 696.
363 “New things coming to knowledge”. Mackay, Practice of the Court of Session (Vol. 2) at 503-504; and as an example, see Cheape v Lord Advocate (1871) 9 M. 377. See also Maclaren, Court of Session Practice at 695.
364 Maclaren, Court of Session Practice at 701-702.
365 See, for example, Bethune’s Tenants v Bethune, 1681 Mor. 7307; and Stirling v Commissioners of Police of the Burgh of Turriff.
366 Stair, Institutions, IV.1.30 and IV.1.36. Examples include Leys v Murray, 1611 Mor. 7496 (followed by Cowan v Procurator Fiscal of the Commissariat of Glasgow, 1677 Mor. 7486); and Laird of Greenock v [Redacted], 1621 Mor. 7308.
367 Stair, Institutions, IV.1.36; Mackay, Practice of the Court of Session (Vol. 2) at 505-506.
368 Erskine, Institute, I.33.
369 In this regard, Stair distinguished “decreets of reduction” from “decreets reductive”, whilst Darling called the latter “reductions reductive” – see, respectively, Stair, Institutions, IV.46.25, and James J. Darling, The Practice of the Court of Session (Vol. 2) (William Tait, Edinburgh, 1833) at 391.
370 Stair, Institutions, IV.1.36 and IV.37.16; Erskine, Institute, I.31; Mackay, Practice of the Court of Session (Vol. 2) at 505-506.
371 Admiralty Court Act 1681. See also Stair, Institutions, IV.37.17.
372 Erskine, Institute, I.31.20 and IV.3.3; Mackay, Practice of the Court of Session (Vol. 2) at 444.
The Court could not, however, reduce the decrees of the Lands Valuation Appeal Court,\textsuperscript{373} the Registration Appeal Court\textsuperscript{374} or the High Court of Justiciary,\textsuperscript{375} although with regard to the latter, the Court had exclusive jurisdiction over the reduction of deeds, even where these touched on matters of criminal jurisdiction.\textsuperscript{376} Reduction of decrees pronounced by the “teind court” was possible in the same manner as reductions of ordinary decrees of the Court of Session, except that they had to be brought before the Lord Ordinary on Teind causes.\textsuperscript{377} The point stands, however, that inferior courts did not (other than to the extent specified above) command a power of reduction.\textsuperscript{378}

Whilst the Court’s reductive jurisdiction encompassed the decrees of itself and inferior courts, it has even been suggested that it may have extended in a limited form over “superior” bodies. Mackay raised the surprising possibility that (post-Union, of course) judgments of the House of Lords could be reduced by the Court, although the cases he cited are not conclusive on the competency of such actions.\textsuperscript{379} Separately, Erskine reported that the Court could reduce private Acts of the pre-Union Scottish Parliament.\textsuperscript{380}

Whilst a party seeking advocation was known as the “advocator”, and a party seeking suspension the “suspender”, one seeking reduction was simply known as the “pursuer”.\textsuperscript{381} Stair said that, whereas in an action for suspension, the suspender must bring all the reasons for suspension in a single action, in a reduction, the pursuer may bring “as many actions as there are relevant reasons”.\textsuperscript{382} Reduction was competent to review all decrees after extract, or before extract where either (i) the decree could be executed without extract, or (ii) no extract was necessary. Mackay noted that suspension and reduction were therefore concurrent remedies in the period after extract but prior to the execution or implementation of a decree.\textsuperscript{383} Reduction was, nonetheless, the only competent mode of review after

\textsuperscript{373} This may have been known as “retreting” or “retraction” – see Godfrey, \textit{Civil Justice} at 196-197.
\textsuperscript{374} Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 511; Maclaren, \textit{Court of Session Practice} at 698.
\textsuperscript{375} ibid.; Maclaren, \textit{Court of Session Practice} at 698.
\textsuperscript{376} Erskine, \textit{Institute}, I.III.21.
\textsuperscript{377} ibid.; Maclaren, \textit{Court of Session Practice} at 697.
\textsuperscript{378} See Stair, \textit{Institutions}, IV.37.17.
\textsuperscript{379} Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 495-496.
\textsuperscript{381} See, for example, Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 494.
\textsuperscript{382} Stair, \textit{Institutions}, IV.40.16 and IV.52.6.
\textsuperscript{383} Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 444.
execution or implementation.\textsuperscript{384} It did not, \textit{per se}, have the effect of stopping extract or staying diligence.\textsuperscript{385}

A summons of reduction could be submitted alone, or joined with an improbation.\textsuperscript{386} There was sometimes a requirement to bring an action for reduction without undue delay,\textsuperscript{387} a measure which would encourage expeditious litigation and wider legal certainty. As is generally the case nowadays, it was held that, prior to bringing an action for reduction, the pursuer must first have availed himself of available mechanisms for statutory appeal and review.\textsuperscript{388}

By contrast with advocation and suspension, statute has possibly enjoyed more limited success in restricting the power of reduction. Indeed, an underlying power to review on \textit{vires} has been regarded as possessed by the Court notwithstanding statutes which have suggested otherwise, even when the text seemed clear on this matter.\textsuperscript{389} For example, where an Act provided that a particular deliverance of the sheriff “shall not be subject to be set aside, reviewed, or affected by any Court or judicature, upon any ground or in any manner of way whatever”\textsuperscript{390} the Court reduced the sheriff’s deliverance on the basis that it was \textit{ultra vires} of the statute.\textsuperscript{391} As Lord Justice-Clerk Moncrieff explained in a separate case on the same Act:

“...I know of no case in which the common law jurisdiction of the Supreme Court has been held to be excluded, where the act proposed to be done is prohibited by statute... A clause of finality cannot protect a Sheriff’s judgment, when, taking an erroneous view of the statute, he either refuses to sanction a lawful act or sanctions an unlawful one.”\textsuperscript{392}

\textsuperscript{384} \textit{Ibid.} at 445. See also Maclaren, \textit{Court of Session Practice} at 692.
\textsuperscript{385} Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 474 and 516.
\textsuperscript{386} Stair, \textit{Institutions}, IV.20.3.
\textsuperscript{387} See, for example, Mackenzie \textit{v} Smith (1861) 23 D. 1201; and Lockyer \textit{v} Ferryman (1876) 3 R. 882. See also Maclaren, \textit{Court of Session Practice} at 696.
\textsuperscript{388} Crawford \textit{v} Lennox (1852) 14 D. 1029.
\textsuperscript{389} See Mackay, \textit{Practice of the Court of Session} (Vol. 2) at 518. Ouster clauses, and the judicial response they have provoked, form the subject of discussion in Chapter 3.
\textsuperscript{390} General Police and Improvement (Scotland) Act 1862, s.437.
\textsuperscript{391} Stirling \textit{v} Commissioners of Police of the Burgh of Turriff. See also Anderson \textit{v} Widnell (1868) 7 M. 81.
\textsuperscript{392} Lord Advocate \textit{v} Police Commissioners of Perth (1869) 8 M. 244 at 246, per Lord Justice-Clerk Moncrieff.
This is an example of a statutory ouster clause, which will form the subject of the following chapter. It may for now be observed, however, that reduction conveyed a strong exercise of supervisory jurisdiction over inferior courts and, as explored in the remainder of this chapter, other persons and bodies commanding jurisdiction. It was, and remains, the archetypal remedy of review, surviving the introduction of Rule of Court 260B393 as the specific remedy which is usually sought in proceedings for review.

b. An embryonic law of judicial review

Taken together, these processes and remedies evidence a centuries-old tradition of judicial review in the Scottish legal order. Falsing the doom was a basic form of review which effected procedural connections between different levels of court, and thus the operation of one or more judicial hierarchies. Falsing was superseded by advocation, suspension and reduction, which were more sophisticated in nature. These processes are at least as old as the Court itself and gave form and regularity to the supervisory functions which the Court inherited upon its institution in 1532, and which it developed in the centuries that followed.

A number of the hallmarks of review were present in the processes of advocation, suspension and reduction, including concern with legality, due process and natural justice; procedural propriety; the concept (if not the terminology) of vires; the striking down of decrees in excess of jurisdiction; rules against bias; a presumption against statutory exclusion of review; a requirement that statutory mechanisms for appeal and review be first utilised; and the remission of cases to inferior bodies with instructions for disposal.

An embryonic law of judicial review was thus discernible long before cases such as Forbes v Underwood – indeed, it was already relatively developed by that stage. Scots judicial review can instead be considered to originate from the late 13th, or certainly the 14th, century with the falsing of dooms; and to have begun to undergo significant development with the advent of advocation, suspension and reduction from the time of the Court's institution. The significance of cases such as Forbes v Underwood may have been evidence of an emerging, consciously unified supervisory doctrine; but even this case, decided in 1886, built upon a legal and constitutional tradition of review of some five centuries' standing.

393 See fn. 189.
2.4 The expanding scope of the supervisory jurisdiction

The chapter has thus far been primarily concerned with the Court's exercise of a supervisory jurisdiction over inferior courts in the temporal sphere. However, its supervisory jurisdiction expanded significantly in its scope of application, bringing within its purview a wide range of persons and bodies outside the temporal judicature.

Some of these were courts outside the temporal judicature, such as those within the spiritual or ecclesiastical sphere. In addition, a judicial analogy was made of arbiters, such that the Court brought arbitration within its supervisory purview. Finally, the important and rapidly expanding sphere of public administration saw a proliferation of bodies invested with powers and duties which could be exceeded, abused, misused or left unused, and the Court's existing supervisory framework would provide a rough, pre-existing template for the supervision of those bodies.

This expansion in scope of application was greatly facilitated by the generality of both the supervisory framework and the remedies deployed in its application. In the case of the former, supervision was loosely calibrated around a central doctrine of confinement to jurisdiction. This may be contrasted with, for example, English judicial review's organisation around a central principle of supervising public bodies or public power. As to remedies, the previous section has shown that advocation, suspension and reduction were general in nature and thus capable of conveying the Court's supervisory jurisdiction in a broad range of circumstances. The generality of both the central doctrine implicit in the supervisory framework, and the remedies used in its execution, imbued a flexibility which allowed the supervisory jurisdiction to be comprehensive in scope and bring within its purview persons and bodies exercising jurisdiction in a wide variety of fields. As will be demonstrated, this included bodies as diverse as church courts, contractually-appointed arbiters, and statutorily-appointed road trustees.

In addition to further illuminating the manner in which the supervisory jurisdiction acquired and developed its legal and constitutional character, this also serves to demonstrate the inappropriateness of a public / private taxonomy in describing the origins and scope of the

394 That is to say, the lay or non-ecclesiastical sphere.
395 This is not to suggest that the Court consciously developed and applied such a doctrine throughout its long history of supervision, but that its approach to supervision came to be doctrinally and methodologically characterised by it. This is further discussed in section 3.3 infra.
supervisory jurisdiction.

2.4.1 Supervision of persons and bodies commanding jurisdiction outside the temporal judicature

This sub-section briefly examines three broad areas into which the Court's supervisory jurisdiction extended. As the supervisory jurisdiction had hitherto been concerned primarily with the exercise of jurisdiction in inferior courts and other judicial bodies, the three areas investigated in this sub-section are taken from, in general terms, the closest in nature to judicial activity (supervision of other judicial bodies) to the furthest in nature therefrom. Thus, examined in turn are the supervisory jurisdiction's application to (i) ecclesiastical courts and tribunals; (ii) arbiters (who were analogised as performing an essentially judicial function); and (iii) public and administrative bodies.\textsuperscript{396}

\textit{a. Supervision of ecclesiastical courts and tribunals}

The civil and ecclesiastical courts have jealously guarded their respective spheres of jurisdiction. Even in the event of mutual tolerance,\textsuperscript{397} there would perhaps inevitably be tensions whenever the question arose as to which judicature had the “last word” on matters touching on both jurisdictions, and whether one could act with impunity in the event of disregard for justice or other kinds of irregularities prevailing in the other. Moreover, who would determine under which jurisdiction a matter should properly fall; or, put differently, who would have the “final say” on the limits of jurisdiction?

The Court of Session had long regarded itself as an incompetent judge in matters spiritual and ecclesiastical.\textsuperscript{398} Thus, for example, when a kirk session had resolved that a person was not permitted to participate in the sacrament of the Lord's Supper due to alleged immorality, and with the excluded person seeking damages on account of alleged defamation, the Court found that it had no jurisdiction in ecclesiastical matters.\textsuperscript{399}

\textsuperscript{396} Sometimes public and administrative decision-making can appear to be “quasi-judicial” in nature. However, this category – generally unlike ecclesiastical courts or arbiters – also includes distinctly non-judicial decision-making.
\textsuperscript{397} Which was not always guaranteed – see below.
\textsuperscript{398} Though not without major incident. Controversy over the autonomy of spiritual jurisdiction – against the backdrop of ongoing developments in the relationship between church and state – reached its judicial climax in the so-called “Disruption cases”, perhaps most vividly encapsulated in \textit{Presbytery of Strathbogie, Suspenders} (1840) 2 D. 585. The Disruption of 1843 soon followed, whereby 121 parish ministers and 73 elders left the Church of Scotland to form the Free Church of Scotland.
\textsuperscript{399} \textit{Robertson v Preston}, 1780 Mor. 7465. See also \textit{M'Queen v M'Gregor}, 1781 Mor. 7466;
The Court recognised, however, that to confine an ecclesiastical body to its jurisdiction was not to judge in an ecclesiastical matter. Indeed, whenever an ecclesiastical matter touched upon a point of civil right – even if an ecclesiastical matter were merely incidentally to affect a party's civil rights – the Court came to find itself a competent judge. This included instances of the manner of election of ministers, and questions of property pertaining to ecclesiastical persons or bodies. Adjudication on matters affecting civil right would therefore allow the Court to protect its own sphere of jurisdiction by enforcing legality therein, whilst respecting the autonomy of ecclesiastical jurisdiction. As Lord President Hope observed in Brown v Heritors of Kilberry:

“because the presbytery acted under a special statute... it was the duty of [the Court of Session] to keep them correct in their procedure, and to interfere wherever they exceeded their powers... [The Court] had no power of review as to the merits, which belonged exclusively to the presbytery; and that therefore, all that this Court could do, was to interfere ad civilum effectum, by setting aside the irregular proceedings”.

Adopting the language of vires, Lord President Boyle went on in Middleton v Anderson, in a gargantuan and strongly-worded judgment, to say that:

“The duty incumbent on the Presbytery and its component members is pointed out by the statute law of the land... It cannot, however, be disguised that, in their proceedings... the Presbytery commenced with acting contrary to law; and in so far as it is necessary for us to give any opinion, I must unequivocally state, that I totally disapprove of the steps that were sanctioned by them in giving effect to an act which the Church had taken upon itself to enact without lawful authority, and which has been solemnly determined, after the fullest and most deliberate consideration, to have been ultra vires, and utterly beyond the competency of the whole legislative proceeds...”

MacQueen and Spouse, Petitioners, 1781 Mor. 7469; and M'Culloch v Allan, 1793 Mor. 7471 (though which was reversed on appeal – see 1793 Mor. 7471 at 7476). A similar case to Robertson which arose almost a century later, in which a minister was charged by a presbytery with “fornication” and “indecent and scandalous familiarity” with a woman, was likewise deemed to be within the exclusive spiritual jurisdiction of the ecclesiastical courts, even although there appeared to be irregularities in procedure – Wight v Presbytery of Dunkeld (1870) 8 M. 921. See also, in this regard, Smith v Galbraith (1843) D. 665, and Auchencloss v Black (7th March 1773, unreported) (referred to in Smith).

Rutherford v Presbytery of Kirkcaldy, 1785 Mor. 7469. See also Forbes v Eden (1867) 5 M. (H.L.) 36.

Snodgrass v Logan, 1772 Mor. 7374; Dunlop v Muir, 1791 Mor. 7470.

Steel v Dalrymple, 1751 Mor. 7439.

Brown v Heritors of Kilberry (1825) 3 S. 334 at 335, per Lord President Hope. Lord Gillies agreed, adding that the correct action was one of reduction – per Lord Gillies at 335. See also Cruickshank v Gordon (1843) 5 D. 909.
power of the Church. Had those early proceedings of the Presbytery... been made
the grounds of application to this Court for our interference, as amounting to a
direct invasion of their civil rights, we must immediately have taken the necessary
steps for affording them redress”.

He addressed the accusation that the Court was usurping ecclesiastical jurisdiction in strong
terms, by going on to state that it was:

“...plainly the bounden duty of the civil court to interpret and give effect to the
statutes in question, in the same manner as they are bound to do with regard to any
other legislative enactment whatever, that involves the civil rights of the subjects of
the realm... It is the most unfounded, therefore, of all assumptions to hold that, in
merely giving effect to the statutes in question, this Court is, in the slightest degree,
trespassing on the proper spiritual rights or functions of the Church as by law
established... when these statutes are directly violated, or set openly at defiance,
then it becomes necessary that those who are guilty of such breaches of the law shall
be taught that they cannot act so with safety, let their cry of the spiritual functions of
the Church being thereby invaded, be ever so loud and clamorous”.

The Court had already expressed an interest in the regularity of proceedings prevailing in
ecclesiastical courts and bodies, and was ready to intervene whenever an ecclesiastical
body failed to execute a statutory duty. It must be emphasised that the Court would not
intervene in every case of irregularity, and set the “bar” at a higher level before it would
review procedures within and decisions emanating from the ecclesiastical sphere, than was
the case when review of a procedure or decision in the temporal sphere was concerned.

An analysis of the law was made to this effect by Lord Justice-Clerk Aitchison in M'Donald
v Burns, a case which Lord Macphail recently considered to remain “a binding
authority”. It was therein said that decisions emanating from the ecclesiastical judicature
were only open to review in “exceptional circumstances”.

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404 Middleton v Anderson (1842) 4 D. 957 at 978, per Lord President Boyle. Emphasis added.
405 Ibid. at 982, per Lord President Boyle. He even went on to describe the accusation that the Court
was in collision or competition with the jurisdiction of the General Assembly as a “childish idea” –
ibid. at 988.
406 Kellie v Winraham, 1629 Mor. 7313; Dickson v Heritors of the Parish of Newlands, 1768 Mor.
7464.
407 Moderator of the Presbytery of Caithness v Heritors of the Parish of Reay, 1773 Mor. 7449.
408 As, for example, in Wight v Presbytery of Dunkeld.
409 M'Donald v Burns, 1940 S.C. 376.
411 M'Donald v Burns at 382, per Lord Justice-Clerk Aitchison.
412 Wight v Presbytery of Dunkeld; Smith v Galbraith; M'Donald v Burns at 383-384, per Lord
Justice-Clerk Aitchison.
there would either have to be gross irregularity or plainly *ultra vires* behaviour. As Lord Justice-Clerk Aitchison observed, the Court would entertain actions arising out of the judgments of ecclesiastical bodies in two situations:

“(first) where the religious association through its agencies has acted clearly and demonstrably beyond its own constitution, and in a manner calculated to affect the civil rights and patrimonial interests of any of its members, and (secondly) where, although acting within its constitution, the procedure of its judicial or quasi-judicial tribunals has been marked by gross irregularity, such fundamental irregularity as would, in the case of an ordinary civil tribunal, be sufficient to vitiate the proceedings... It must be so fundamental an irregularity that it goes beyond a mere matter of procedure, and becomes something so prejudicial to a fair and impartial investigation of the question to be decided as to amount to a denial of natural justice, as, for example, if a conviction of an ecclesiastical offence were to take place without an accusation being made, or without allowing the person accused to be heard in his defence”.

It is that essence of a clear transgression of *vires*, whilst affording some latitude as to tolerance of procedural irregularity, that underlines the jurisdictional character of the Court's supervision in the ecclesiastical sphere.

Importantly, the very matter of *jurisdiction* was regarded by the Court as its exclusive province – it alone would have the final say on the limits of jurisdiction. Notwithstanding respect for the privative ecclesiastical jurisdiction of ecclesiastical courts, the Court would police the boundaries and observance of that jurisdiction and must therefore be regarded as superior to ecclesiastical courts in the wider legal and constitutional order. That is to say, even although the Court has privative (superior) jurisdiction in civil matters, and the ecclesiastical courts have privative jurisdiction in ecclesiastical / spiritual matters, the Court lays claim to a deeper, more fundamental privative jurisdiction: that over jurisdiction

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413 *M'Donald v Burns* at 383-384, per Lord Justice-Clerk Aitchison. See also *M'Millan v Free Church of Scotland* (1859) 22 D. 290 at 314, per Lord President McNeill.

414 Here in the sense of either strict excess of jurisdiction (for example, the religious body was empowered to do 'A' or 'B', but purported to do 'C') or gross irregularity in proceedings – in the former case, the Court intervenes on the basis of confinement to jurisdiction, whereas in the latter, the Court intervenes when it regards a transgression of principles of justice and fairness to be of an intolerable level.

415 *M'Donald v Burns* at 382, per Lord Justice-Clerk Aitchison.

416 The privative jurisdiction of the Church of Scotland over (internal) spiritual matters was enshrined in the Church of Scotland Act 1921. Section 3 of the Act provides that “nothing in this Act contained shall affect or prejudice the jurisdiction of the civil courts in relation to any matter of a civil nature”. The civil courts may therefore claim to be servicing their routine deference to Parliament by recognising the privity of ecclesiastical jurisdiction.
itself. It therefore purports to command a deeper legal-systemic and constitutional function that the ecclesiastical courts do not. The Court would thus, as Lord President Boyle made clear, have the last word on the boundaries of ecclesiastical jurisdiction:

“... however indisputable [the jurisdiction of the Church] may be supposed to be, in regard to what is confessedly a matter purely spiritual or ecclesiastical, that can in no degree countenance the power arrogated by the Church, to declare, of its own authority, what is truly of that nature... [it can] only be in the Supreme Civil Court where the question as to the civil right can be adjudicated”.

It can therefore be seen that the Court organised its supervision of the ecclesiastical judicature around the concept of confinement to jurisdiction, whether conferred by statute or by the ecclesiastical body's own constitution. Indeed, so long as the matter was purely ecclesiastical – even if there were (mild) irregularities in procedure – it was deemed to be within the jurisdiction of the body concerned. Whilst further research would be required to identify the point at which the Court came consciously to organise its supervision of ecclesiastical bodies around the concept of jurisdictional vires, a trend is nonetheless discernible in that regard. The term “ultra vires”, for example, had been used in cases on ecclesiastical jurisdiction from at least 1838. It might only have been in this period that the Court was coming to consciously think in terms of a doctrine of jurisdiction, and a concomitant, unified doctrine underlying its own supervisory jurisdiction; even if it had been engaging in supervisory activity – principally over inferior courts and other judicial bodies – ever since its institution in 1532. It was indeed said as early as in 1838 that:

“[i]n every civilized country, there must be some supereminent Court or Judicature, to control all other courts or judicatures, and prevent the confusion which might otherwise arise from conflicting jurisdictions... In Scotland, the Court of Session possessed this supereminent power of control, and had already repeatedly exercised it over Presbyteries when committing any excess of power, or encroaching on civil

417 *Middleton v Anderson* at 987-988, per Lord President Boyle. Indeed, it seems that the matter of jurisdictional vires is regarded as itself a civil (as opposed to, for example, an ecclesiastical or criminal) matter.

418 See also *Earl of Kinnoull v Presbytery of Auchterarder* (1838) 16 S. 661 at 735, per Lord President Hope; and *Lockhart v Presbytery of Deer* (1851) 13 D. 1296 at 1298, per Lord President Boyle.

419 Though see *M'Donald v Burns*, infra.

420 *Lockhart v Presbytery of Deer* at 1298, per Lord President Boyle.

421 As, for example, in *Earl of Kinnoull v Presbytery of Auchterarder* at 735 and 739, per Lord President Hope and Lord Gillies, respectively; *Middleton v Anderson* at (inter alia) 977-978, per Lord President Boyle; and *M'Millan v Free Church of Scotland* (1861) 23 D. 1314 at 1340, per Lord Ivory.
This kind of judicial statement suggests that the Court had become, or was becoming, more self-conscious about the doctrinal basis of its role in these cases, and this particular statement that a body of relevant jurisprudence was by 1838 already in existence. Through its adjudication in cases touching on ecclesiastical jurisdiction, the Court was able to navigate the contours and limits of its own supervisory jurisdiction, and reflect on its own legal and constitutional function.

b. Supervision of arbiters

The scope of application for the supervisory jurisdiction embraced not only courts and tribunals, but was extended by analogy to bring within its purview other persons and bodies performing essentially judicial or adjudicatory functions. One such class of person was the arbiter.

Arbitral proceedings and awards could be challenged on either statutory or common law grounds. For example, the 25th Act of the Articles of Regulation 1695 provided for reduction in the event of corruption, bribery or falsehood. However, the Court imposed its own standards on arbitration, deploying the general remedies of suspension and reduction to strike down proceedings and awards which failed to meet certain procedural, substantive or jurisdictional expectations.

Earl of Kinnoull v Presbytery of Auchterarder at 735, per Lord President Hope. Emphasis added. It was also said that “[t]here were numerous decisions, in which... the Court... must have reviewed the procedure of the Church Courts in settling a minister, and decided that the Church Courts had done wrong; vindicating thereby the control of the Civil Court, even in cases purely ecclesiastical, where the Presbytery, in the administration of ecclesiastical law, had exceeded their powers and trenched on civil rights” – ibid. at 737, per Lord President Hope.

John M. Bell, Treatise on the Law of Arbitration in Scotland (T. & T. Clark, Edinburgh, 1861) at 323. Individual instances of arbitration were (and still are) governed either within a statutory or contractual framework; subject to background statutory regulation of arbitration, now much increased per the Arbitration (Scotland) Act 2010.

The 25th Act of the Articles of Regulation was disapplied in relation to arbitration by the Arbitration (Scotland) Act 2010, s.28.

See the Stair Memorial Encyclopaedia at para. 81 and Walker, The Law of Civil Remedies at 206 and 210-211. In some cases the remedy sought and granted was suspension; but, it seems, never advocation (presumably because this would remove a question of arbitration out of an arbitral forum).
Perhaps the most straightforward instance of an arbiter being deemed to have acted *ultra vires* was in purporting to act or decide in excess of the powers conferred upon him or limits stipulated in the arbitral contract. This has been framed in terms of the arbiter's jurisdiction, and may have attracted the language of *intra* and *ultra vires* from at least 1777, but certainly from 1800.

However, the Court went further in its regulation, imposing fairness and natural justice requirements on arbiters, such that “there is this limit to [an arbiter's] powers, *viz.*, that he shall do strictly equal justice between the parties – that he shall not allow to the one that which he denies to the other.” Accordingly, decrees-arbitral have been liable to reduction when the parties were not heard, or when just one of the parties was heard or when proceedings were conducted in the absence of one of the parties.

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426 *Steel v Steel* (1809) Fac. Coll. (22nd June 1809), discussed in John Parker, *Notes on the Law of Arbitration in Scotland* (2nd edition) (John Anderson, Edinburgh, 1830) at 14-15; *Reid v Walker* (1826) 5 S. 140 at 143, per Lord Glenlee; *Carruthers v Hall* (1830) 9 S. 66; *Napier v Wood* (1844) 7 D. 166; *Adams v Great North of Scotland Railway Company* (1889) 16 R. 843; *Holmes Oil Company Limited v Pumpherston Oil Company Limited* (1891) 18 R. (H.L.) 52 at 55, per Lord Watson; Henry Home (Lord Kames), *Elucidations Respecting the Common and Statute Law of Scotland* (William Creech, Edinburgh, 1800) at 328; Parker, *Notes on the Law of Arbitration* at 14-15; Bell, *Law of Arbitration* at 328. See also *Pitcairn v Drummond* (1822) 1 S. 401. The same principle has at common law survived into more recent times: see, for example, *Shanks & McEwan (Contractors) Limited v Mifflin Construction Limited*, 1993 S.L.T. 1124 at 1129, per Lord Cullen. He also took the view that a reasonableness test may apply to arbiters – see *Shanks & McEwan* at 1130. A distinction is drawn between an arbiter’s purporting to act *ultra vires* and purporting to act *ultra fines compromissi* – see the *Stair Memorial Encyclopaedia* at para. 83.

427 *Forbes v Underwood* at 467-468, per Lord President Inglis; *Holmes Oil Company Limited v Pumpherston Oil Company Limited* at 55, per Lord Watson.

428 *Kames, Elucidations* at 328. This is, however, a “New Edition”, published posthumously, the original being published in 1777. See, for usage in the context of a live case, *Reid v Walker* at 143, per Lord Glenlee.

429 *Mitchell v Cable* (1848) 10 D. 1297 at 1308, per Lord Fullerton.

430 *Langmuir v Sloan* (1840) 2 D. 877; *Field & Allan v Lownie* (1909) 2 S.L.T. 317. The view has been expressed, however, that failure to hear both parties may only be regarded as fatal whenever justice requires that the parties be heard (and therefore not in every case) – Fraser P. Davidson, *Arbitration* (W. Green, Edinburgh, 2000) at 356-357. See, however, a qualification expressed in *M’Nair’s Trustees v Roxburgh* (1855) 17 D. 445, although Lord Deas therein commented that “in most cases parties ought to be heard” – *M’Nair’s Trustees* at 450. Other factors, such as whether an arbiter should allow legal representation, or whether and how an arbiter receives evidence, seem to depend on the context of the individual arbitration, and in particular what justice demands in the circumstances – Davidson, *Arbitration* at 227-234; and see, for example, *Macdonald v Macdonald* (1843) 6 D. 186 at 189, per Lord Fullerton; and *Paterson & Son Limited v Glasgow Corporation* (1901) 3 F. (H.L.) 34 at 40, per Lord Robertson; and *Henderson v M’Gown* (1915) 2 S.L.T. 316. See also *Holmes Oil Company Limited v Pumpherston Oil Company Limited* at 55, per Lord Watson.

431 *Earl of Dunmore v M’Inturner* (1835) 13 S. 356; *Mitchell v Cable* at 1308, per Lord Fullerton.

432 *Heggie and Company v Stark and Selkirk* (1825) 3 S. 339; *Drew v Drew* (1855) 2 Macq. 1; *Tranent Coal Company v Polson and Robertson* (1877) S.L.R. 184 at 185, per Lord Ormidale.
The Court has in this regard analogised arbitral with judicial proceedings, as Lord President Inglis famously stated (but was not the first to state\textsuperscript{433}) in \textit{Forbes v Underwood}:

\begin{quote}
“The position of an arbiter is very much like that of a judge in many respects, and there is no doubt whatever that whenever an inferior Judge, no matter of what kind, fails to perform his duty, or transgresses his duty, either by going beyond his jurisdiction, or by failing to exercise jurisdiction when called upon to do so by a party entitled to come before him, there is a remedy in this Court...”\textsuperscript{434}
\end{quote}

That analogy was re-affirmed\textsuperscript{435} and has persisted to the present day:

\begin{quote}
“An [arbitral] award being analogous to a court decree, albeit made by a private individual, it is assumed that the arbiter has exercised a judicial function and properly applied the relevant legal principles to the determination of the issues between the parties”.\textsuperscript{436}
\end{quote}

The Court therefore brought arbitration within the purview of its supervisory jurisdiction by analogising the arbitral with the judicial function. Together with those cases touching on ecclesiastical jurisdiction, it may have served as a medium through which the Court could again self-reflect on its own legal and constitutional function by considering and developing the doctrinal basis of its supervisory jurisdiction. Its supervision was no longer confined to the superintendence of inferior courts in the same (judicial) hierarchical structure of which the Court was head, nor was it confined to the superintendence of courts; but now extended to the supervision of persons and bodies conducting a court-like, that is to say judicial, function. This would have provided fertile ground for the search for an alternative, and more comprehensive, doctrinal basis for the exercise of the Court's supervisory jurisdiction, than mere superintendence of judicial bodies. Instead, the superintending gaze of that jurisdiction now extended more widely in the legal order, policing judicial bodies \textit{and} bodies conducting judicial functions, thus expanding the legal and constitutional basis of the supervisory jurisdiction.

\textsuperscript{433} See, for example, \textit{Maule v Maule} (1814) 4 Dow 363 at 380-381, per Lord Eldon; and \textit{Morisons v Thomson's Trustees} (1880) 8 R. 147, per Lord Justice-Clerk Moncrieff at 154, who referred to the “quasi judicial mind of an arbiter”. Lord Kames had also analogised judicial and arbitral functions – see Kames, \textit{Elucidations} at 144 and 326.

\textsuperscript{434} \textit{Forbes v Underwood} at 467-468, per Lord President Inglis. See also \textit{Mitchell-Gill v Buchan}, 1921 S.C. 390 at 395, per Lord President Clyde.

\textsuperscript{435} \textit{Holmes Oil Company Limited v Pumpherston Oil Company Limited} at 55, per Lord Watson.

\textsuperscript{436} Davidson, \textit{Arbitration} at 359.
c. Supervision of public and administrative bodies

(i) The emergence of public and administrative bodies with jurisdiction in the modern state

As a consequence of developments in wider society, such as in communications, technology, industry, socio-economic standards and the coordination of a national “state”, there was an increasing desire, and perhaps need, for greater administration and regulation in those fields. This gave rise to an emergence and proliferation of a number of public and administrative bodies, such as trustees for roads, railways and harbours, and the vesting of new powers in pre-existing bodies and officials such as commissioners of supply, justices of the peace and magistrates. Often, these jurisdictions were initially local in nature or extent, but were later integrated into an increasingly coordinated framework of national regulation.

This is illustrated in the field of road, bridge and ferry administration, developments in which were broadly representative of a more general trend in the rise of the public and administrative sphere, with the rise of the modern state. As David Walker wrote:

“The intimate connection between facility of communication and the trend of social, economic and legal development may be traced in the progress of legislation relative to the roads, bridges and ferries of Scotland. As in other departments of law and public administration, the broad line of progress discernible is the movement from unorganised effort to local and private enterprise and so to larger-scale and eventual national regulation and control.”

In earlier periods, legislation often operated on a local scale – sometimes for just a single length of road – before coming to make provision for roads more generally. In addition, earlier legislation typically conferred jurisdiction on local bodies and officials, and then increasingly vested more comprehensive jurisdiction in bodies and officials with a wider or more general scope of power, duty or responsibility.

Walker narrated the fairly scant regulation of roads prior to the 17th century, before tracing developments in the three categories into which he classified roads in Scotland: statute-labour roads, turnpike roads and Highland roads and bridges.


Although jurisdiction was conferred on the Scottish Privy Council over certain matters relating to roads, bridges and ferries – see ibid. at 197-198. Statutes post-abolition of the Privy Council naturally did not renew its jurisdiction in that regard – ibid. at 199.

Ibid. at 196-197.

Turnpike roads were those on which one or more toll-gates were established.
Statute-labour roads were in 1617 brought under the jurisdiction of justices of the peace in their respective shires. Subsequent statutes conferred on justices of the peace further powers and duties over roads, and the Highways and Bridges Act 1686 enjoined commissioners of supply in their jurisdiction. This was the subject of further legislation until statutory consolidation in the area of road regulation in 1878.

The first statute on turnpike roads was a private Act relating to the County of Edinburgh, and Walker reported that it appears that at least 350 “Road Acts” were passed between 1750 and 1844, of which many were limited in duration and applied only to particular sections of road. Although some general legislative provisions were made for turnpike roads, statutory consolidation of the regulation of turnpike roads began in 1823, with the Turnpike Roads (Scotland) Act 1831 containing provisions such as on the qualification, meetings and powers of road trustees, their proceedings, borrowings and accounts (or what may be described as their powers and jurisdiction) and also for the nomination, conduct and ejection of toll-gatherers. They were likewise brought under the national framework in 1878.

Walker dealt with Highland roads and bridges in a separate category because he regarded them as producing “separate problems and special legislation”. The Scottish Highland Roads and Bridges Act 1803 established a Board of Commissioners for Highland Roads and Bridges, with allocated powers and duties (and, again, what may be described as “jurisdiction”). The Board was dissolved by the Highland Roads and Bridges Act 1862, which transferred jurisdiction to the commissioners of supply in each county, or, in the cases of Argyll and Caithness, to existing road trustees.

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441 Act anent high-ways and bridges (APS viii, 590, c.13) (“Highways and Bridges Act 1686”). See Walker, Roads, Bridges and Ferries (op. cit. fn. 437) at 197-199. This jurisdiction covered roads, bridges and ferries – see ibid. at 211.
442 See ibid. at 199-200.
443 Ibid. at 201.
444 Ibid.
445 Ibid. at 202.
446 See ibid. Walker noted that the Board met in London.
447 Ibid.
As stated, each of these categories of road were united under the comprehensive, national regulatory framework introduced by the Roads and Bridges (Scotland) Act 1878. With the introduction of a new, national framework came the establishment of new jurisdictions, namely county road trustees, operating locally as District Committees, and overseen by a County Road Board. The Local Government Act 1889 integrated this framework for the national administration of roads into a newly established structure of county councils. The Development and Road Improvement Funds Act 1909 established a Road Board, which was superseded by the Ministry of Transport established by an Act of 1919, and which signified the arrival of national road administration in its modern era.

Throughout this long period of development in the regulation and administration of roads was a flourishing of jurisdictions in bodies local, regional and national. The rise in public and administrative activity relating to roads was part of a broader trend in the public and administrative sphere, encompassing the regulation of such diverse areas as schools, health and welfare. Bodies as various as School Boards, Parochial Boards for the Management of the Poor, District Boards of Lunacy and Commissioners for the White Herring Fishery had statutory powers conferred upon them – powers which could be exceeded, abused, misused or left unused. Pre-existing officials and bodies – such as commissioners of supply, justices of the peace and magistrates – had their powers enlarged and were in a similar position as to their possession of a jurisdiction which could likewise be improperly exercised.

Accordingly, with the rise and expansion of the public and administrative sphere came a flourishing of powers, duties and jurisdictions requiring supervision as to their proper exercise and usage. The judicial supervision of such powers would most naturally fall to the

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448 See ibid. at 203, which noted that some areas continued to operate under local Acts until the Local Government Act 1889. The 1878 Act was the point at which bridges were brought within the general regulatory framework for roads – see ibid. at 209.

449 See ibid. at 203.

450 Ministry of Transport Act 1919.

451 But not without further reform and re-organisation.

452 See Gilbert Watson, 'Education' in McLarty and Paton, History of Administrative Law at 105-117.

453 See A.A.L. Evans, 'Health' in ibid. at 130-147.

454 See T. Ferguson, 'Poor, Welfare and Social Services' in ibid. at 177-194.

455 See Watson, Education (op. cit. fn. 452) at 107 et seq.

456 See the Poor Law (Scotland) Act 1845 and Ferguson, Poor, Welfare and Social Services (op. cit. fn. 454) at 184.


458 See John E. de Watteville, 'Fisheries' in ibid. at 118 et seq.
Court of Session. First, this was the supreme civil court, residing at the apex of the civil judicial hierarchy. Secondly, it already commanded a powerful supervisory jurisdiction over judicial bodies and persons or bodies exercising judicial functions. Thirdly, that jurisdiction, and the remedies by which it was exercised, were sufficiently flexible and general in nature as to bring public and administrative bodies within their purview. Indeed, the supervision of such bodies would perhaps provide the most fertile ground of all for the conscious development of an emerging doctrine of confinement to jurisdiction, as the central theme of the supervisory jurisdiction; and thereby, further cause for self-reflection and assertion of the Court's wider legal and constitutional function.

(ii) Supervision of emerging public and administrative bodies

As powers and duties were conferred on new and existing bodies in the emerging field of public and administrative regulation, so was there be a corresponding need to ensure that powers and duties were exercised within their proper limits. Whereas the Court had hitherto exercised a supervisory jurisdiction primarily over courts and other judicial bodies, its pre-existing framework and tradition of supervision could serve as basis for comparable superintendence over the emerging array of public and administrative bodies. Indeed, the generality and flexibility of the Court's supervisory jurisdiction could provide a suitably pliable framework within which to supervise those new bodies and jurisdictions – especially as its supervisory jurisdiction had already been extended to encompass ecclesiastical courts and arbiters.

The language of “ultra vires” was in use in Scots judicial review by the 1750s, reinforcing the idea of supervision according to parameters of jurisdiction. Within the area of road administration discussed in the previous sub-section, the numerous instances of statutorily-established road trustees were subject to the supervision of the Court in the performance of their statutory duties. Disputes as to which officials or bodies commanded jurisdiction over certain roads were also judicially resolved.

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459 A number of the cases used in the first part of this section are taken from the Stair Memorial Encyclopaedia.

460 See 103 infra. As earlier noted, the term appears in ecclesiastical cases from at least as early as 1838 (see 72 supra), and with regard to arbitration from at least as early as 1800 (see 74 supra).

461 For just one example, see Grant v Gordon (1833) 12 S. 167, in which road trustees were found to have acted ultra vires of the County of Banff Roads Act 1804.

462 As in Pollock v Thomson (1858) 21 D. 173, in which it was held that the Dumbartonshire Road Act 1829 did not render certain roads subject to the jurisdiction of justices of the peace or commissioners of supply.
The Court's supervision of course extended far wider than the field of road administration. Subject to the Court's assessment of *vires* were bodies as various as river and harbour trustees, railway commissioners, railway corporations, tramway corporations, commissioners of supply, justices of the peace, magistrates, sheriffs, police commissioners, parochial boards (including for such diverse functions as the management of schools and the administration of welfare), assessors, public boards and corporations, tribunals (whether primarily judicial or administrative in character) and, in later times, regional and county councils, and other local authorities. The application of the Court's supervisory framework to the emerging public and administrative sphere has undoubtedly had profound implications for both government (on all levels) and the state more generally, as well as for the role of courts therein. It has therefore had corresponding importance for the legal and constitutional function of both the Court and its supervisory jurisdiction.

Some of these bodies were established by statute, whilst others were established by some other instrument or means, but nonetheless had statutory powers conferred upon them.

As, for example, in a case concerning the River Clyde and Harbour of Glasgow Trustees, who were held to have acted *intra vires* of their empowering statutes – *Wright v Scott* (1855) 18 D. (H.L.) 45.

See, for example, *Lanarkshire Steel Company Limited v Caledonian Railway Company* at 59, per Lord McLaren.

*Caledonian Railway Company v Greenock and Wemyss Bay Railway Company* (1878) 5 R. 995.

See, for example, a determination on the *vires* of acts performed by a statutorily-incorporated tramways company – *Ogston v Aberdeen District Tramways Company* (1895) 23 R. 340 (reversed (though not contrary to the point here made) at (1896) 24 R. (H.L.) 8).

See Mitchell, *Constitutional Law* (1st edition) at 197 and, for example, *Wakefield v Commissioner of Supply of the County of Renfrew* (1878) 6 R. 259.

Justices of the peace exercised both judicial and administrative (or “ministerial”) functions – see, for example, *Love v Lang* (1872) 10 M. 782. See also Mitchell, *Constitutional Law* (1st edition) at 197; and Edward, *Administrative Law* (op. cit. fn. 48) at 291.

Magistrates exercised both judicial and administrative powers – see, for example, *Ashley v Magistrates of Rothesay* (1873) 11 M. 708.

Sheriffs could (and can) exercise both judicial and administrative functions.

See, for example, *Thomson v Dundee Police Commissioners* (1887) 15 R. 164 (police commissioners held to have acted *ultra vires* of the General Police and Improvement Act 1862 and the Dundee Police Act 1882).

See, for example, *Buchanan v School Board of Tulliallan* (1875) 2 R. 793.

See, for example, *Willock v Rice* (1848) 10 D. 1259 (*ultra vires*) and *Rankine v Dempster* (1893) 20 R. 980 (*intra vires*) for parochial boards purporting to exercise powers related to the Poor Law (Scotland) Act 1845.


J.D.B. Mitchell argued that “there is nothing new in administrative tribunals”, pointing out that the Commissioners for the Plantation of Kirks and Valuations of Teinds, established in the 17th century, were an example of such – *ibid* at 241.

See, for example, *Midlothian County Council v Oakbank Oil Company Limited* (1903) 5 F. 700.
Furthermore, the fact that a supervisory jurisdiction was already fairly well-established in the Court's jurisprudence prior to the emergence of the public and administrative sphere militates strongly against (and, in fact, disproves) any proposition that judicial review has been (in Scotland) solely about judicial control of governmental or even administrative action – notwithstanding the fact that this sphere came to typify the subject matter of most judicial review litigation. This is also reinforced by the Court's supervision of jurisdiction prevailing in the ecclesiastical judicature and arbitration. Instead, it rather seems that the wide array of public and administrative bodies grew into a legal order which already contained a general and flexible framework for the Court's supervision of jurisdiction.

2.5 The constitutional importance of the historical pedigree of the supervisory jurisdiction

It is clear that the Court played a central role in the development of its supervisory jurisdiction, with a strong sense of self-definition and self-orientation. Inspired by a broad sense of equitable superintendence, the Court retained the generality of the supervisory jurisdiction's scope of application, the remedies deployed in its exercise, and the doctrinal basis of its supervision.

J.D.B. Mitchell referred in this regard to the “formlessness” and generality of Scots judicial review. He described it as having a relatively generalised basis in the sense that it has lacked specialised procedures, and its use of relatively formless and general remedies, with specific reference to reduction. These he contrasted with the position in England, where “the scope of judicial review was... largely determined by the forms of action”, and in particular the more restricted scope of the three prerogative writs of certiorari, mandamus and prohibition. Mitchell's reference to the “formlessness” of Scots judicial review was therefore in contrast to his description of the “formalism” of English judicial review.

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480 Ibid. at 250-251.
481 Ibid. at 210-211.
482 Ibid. at 250. These are now known, following the enactment of the Civil Procedure Rules 1998, as the three prerogative orders of “quashing orders”, “mandatory orders” and “prohibiting orders”, respectively. See, in particular, Rule 54.2. See also fn. 485.
The remedy of reduction is quintessential of the philosophy of the supervisory jurisdiction; general as to the sheer breadth of grounds on which the remedy may be invoked, and its comprehensive scope of application over justiciable subject matter, being not confined to any one department of law (such as public law or the acts and decisions of public bodies), but of universal application for the judicial annulment of acts ranging from the “unlawful decision of a public body” to “the contested will of a private individual.” The formlessness and generality of reduction is reflected both in its historical origins and in its organic development, having never been rigidly formalised either procedurally or in its scope of application.

This organic development of a general and doctrinally- and remedially-flexible supervisory jurisdiction from the supervision of inferior courts, to encompass ecclesiastical bodies, arbiters, public and administrative bodies, and even private bodies, points to an (emerging)

484 Including no jurisdiction, excess of jurisdiction, defective citation, fraudulent misrepresentation, res noviter veniens ad notitiam, departure from procedure or practice (statutory or otherwise), unauthorised appearance of legal representatives, mistake, (sometimes) error, inherent nullity, bias (actual or potential), or some other element of procedural impropriety, illegality or failure to observe standards of fairness and natural justice, such as the right to a fair hearing, the receiving of reasons, and legitimate expectations. Some of these grounds are taken from Walker, The Law of Civil Remedies at 163-166 and 177-181; whilst some others are taken from Lord Diplock’s discussion of the “three heads of judicial review” in Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374 at 410-411.

485 As has characteristically been the case in England and Wales. Bodies or decisions lacking some “public” element have tended to fall outside the scope of judicial review in England and Wales, having primarily developed through the three prerogative writs referred to above in fn. [X]. David Edward regarded English law as having “no precise equivalent” to reduction, with advocacy (abolished in 1868, as observed at 57 supra) “the true parallel to certiorari”, notwithstanding claims that reduction was “akin to certiorari” – see Edward, Administrative Law (op. cit. fn. 48) at 286. It is only in more recent times that judicial review in England and Wales has been extended to include within its purview non-statutory bodies and bodies exercising non-statutory functions; but it is, in this regard, still less comprehensive in scope than in Scotland. For the position in England and Wales, see generally Sir William Wade and Christopher Forsyth, Administrative Law (10th edition) (Oxford University Press, Oxford, 2009).

486 Edward, Administrative Law (op. cit. fn. 48) at 287. See also Tom Mullen, ‘Standing to Seek Judicial Review’ in Aileen McHarg and Tom Mullen (eds.), Public Law in Scotland (Avizandum, Edinburgh, 2006) at 241. This is not to say that the Scottish courts have been untroubled by categorisations. Classification of decisions “administrative”, “judicial” and “quasi-judicial” is one example of what might be described as a problematic and ultimately rejected taxonomy – see, in this regard, Brown v Hamilton District Council; and see also the Stair Memorial Encyclopaedia at para. 14.

487 The relative formlessness and generality of reduction is still accommodated (along with other remedies which may be exercised in response to a petition for judicial review) by Rule 58.4 of the Rules of the Court of Session.

central doctrine of confinement to jurisdiction. It also underlines the constitutional and wider legal-systemic function served by the Court in exercise of its supervisory jurisdiction. The Court had already played a strong role in shaping and framing the constitutional landscape prior to the creation of the United Kingdom, including its role in the systematisation of the judicial order and – from the more basic falsing of dooms to its creation and development of a comparatively sophisticated and powerful triumvirate of general supervisory remedies – a law of judicial review. At the point of Union, the Court had therefore fashioned an antecedent supervisory function in an already-established legal and constitutional order, which it continued to develop thereafter. It was the principal architect in the long process of the supervisory jurisdiction's development from the crude and unrefined power of the pre-1532 auditorial and conciliar sessions, to the present-day jurisdiction petitioned via Chapter 58 of the Rules of the Court of Session. The Court, having created a comprehensive structure for the supervision of compliance with jurisdiction in the wider legal order, thus procured an ingrained legal-systemic function built on its own, relatively freestanding, constitutional foundations.

Of course, the Court has not been a completely freewheeling institution, and has itself been shaped by the wider legal and political order of which it is a constituent part. That includes statutory enactments bearing on its manner of operation. It is, however, the wider legal and constitutional system which has itself allowed for the growth and development of both the Court as an institution, and its powerful supervisory jurisdiction, and thus “authorising” their scope and purview. The Court has had, as a (major) part of that wider system, a degree of self-interest in its own self-definition and self-orientation, but the system has been receptive to that. The historical pedigree therefore illuminates a deep constitutional claim capable of being made by the Court, as one of ingrained and default participation in the shaping and framing of the legal and constitutional order. This chapter reveals that whilst some might regard the historical starting point as being a “sovereign” and “supreme” U.K. Parliament, against which the Court's judicial review activities must be measured, and a particular history to which the Court must be accountable; the historical analysis portrays a court which played such a central and formative role in the architecture of a constitutional order in which it commands a comprehensive supervisory jurisdiction, that it has had, almost by definition, a relatively autonomous and freestanding constitutional foundation of its own.

489 The legal-systemic authorisation and legitimation of the Court's judicial review activities is considered in section 6.3.
This chapter therefore draws out a number of interconnected strands. The first is the emergence of the Court of Session as the first centralised, characteristically judicial institution in the Scottish legal order. The second is its ascending position within the legal order, exerting its increasing authority as supreme civil court by commanding a supervisory function over inferior courts and judicatories. In so doing, it played a key role in the centralisation and systematisation of the judicial order, bringing those courts within its supervisory purview and strengthening the idea (and realisation) of a judicial hierarchy, with the Court at its head. The rising prominence of the Court's supervisory function in the legal order provided a strong foundation on which to extend its supervisory gaze across bodies outside the temporal judicature, including ecclesiastical courts, arbiters and public and administrative bodies. The generality of that exercise gave rise to the Court's claiming that it was confining bodies to their jurisdiction, and in so doing the Court defined a legal-systemic function which it asserted as intrinsic to its purpose as supreme civil court.

The strong sense of self-orientation and self-definition which the Court has had in the legal and constitutional order, and which it has expressed through its substantively self-defined supervisory jurisdiction, points to a distinct constitutional foundation both for the Court, and for its supervisory jurisdiction. If the Court was or is a locus of constitutional definition or authority in the system, that is potentially in tension with another locus of such authority – Parliament. It is to that tension that the thesis now turns, framed in the context of the statutory ouster clause.
3.1 Introduction

The Court of Session can be regarded as a source of constitutional authority, having \textit{constituted} a significant part of the legal and constitutional order. Parliament is another, perhaps more orthodox, source of constitutional authority, acting on its own relatively freestanding constitutional foundation, and itself enacting laws constitutive of the legal and constitutional order. These may be regarded as plural, parallel sources of constitutional authority, for neither Parliament nor the Court can draw their constitutional and institutional authority from an incontrovertible, central source of constitutional authority, such as a constitutional text. Instead, each institution asserts its own independent constitutional foundations.

They must, however, occupy the same legal and political space, and act with regard to the same legal and constitutional order. Their respective constitutional competences are neither defined nor delineated by some common source of constitutional authority; and so they must assert and interpret their own place and function within the constitution. This suggests an underlying tension, not only between the institutions, but the plural constitutional foundations which underlie them; each institution embodying, and purporting to act in exercise of, a distinguishable source of constitutional authority.

This tension may be variable across the field of judicial review, and of the law more generally. One area in which tensions are particularly visible, however, is the specific context of judicial review of statutory ouster clauses. This area is chosen by the thesis as a heightened point of tension, as Parliament and the Court embody and assert apparently divergent, and potentially competing, visions of the constitution.
An “ouster clause” is a statutory provision by which Parliament attempts to limit or exclude the capacity of the courts to judicially review. Most typically, this has comprised attempts to render final the decision-making authority of a designated person or body, such as a board, committee, official, arbiter, tribunal or (inferior) court. This has sometimes been coupled with an explicit prohibition on appeal to, or review by, either courts generally, or the Court in particular. In so legislating, Parliament expresses a vision of the constitution in which it is entitled to restrict the jurisdiction of courts in this way.

The judicial response to ouster clauses has not been unequivocal. Far from responding slavishly by unconditionally applying all ouster provisions to their full extent, the courts have sometimes restricted their scope or even denied them of their effect. In imposing their own interpretation on ouster clauses, and defining the way in which these provisions fit into the existing law and legal order, courts assert their own vision of the constitution – one in which they are entitled to impose their own interpretation, and to determine and adjudicate on whether, to what extent and how the ouster provision takes effect. Even in those cases in which the Court determines that an ouster provision takes effect against it, there is constitutional significance in the fact that the Court itself adjudicates on this matter.

This does not appear to coincide with Parliament's vision of the constitutional role of the Court, as expressed through its enactment of ouster clauses. Each institution purports to speak authoritatively about the jurisdiction of the Court. As such, this implies an underlying tension between the visions of the constitution, or constitutional worldviews, respectively espoused by Parliament and the Court. It represents both a heightened point of institutional

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490 Ouster provisions may also be found in delegated legislation; or in contracts, for example, which refer disputes to arbitration. Statutes may also require the referral of disputes to arbitration. In provisions of that kind, it has not been uncommon to provide that the arbiter's decision is final, without further appeal to, or review by, the courts.

491 Anisminic Limited v Foreign Compensation Commission [1969] 2 A.C. 147 is commonly cited as the classic case on ouster clauses, however there appears to be no obvious reason why it should be of especial interest here, unless the discussion is one on error (which this chapter is not – see the Stair Memorial Encyclopaedia at paras. 45 and 120). Anisminic is an English case and does not appear to introduce any more general principle regarding the courts' treatment of jurisdiction which was not already trite law for at least a century previous in Scotland, and for three centuries previous in England (see Wade and Forsyth, Administrative Law (10th ed.) at 610-611). For an early Scottish example preceding the 19th century – which was a particularly busy one for the law on ouster clauses in Scotland – see the Act for repairing several Roads leading into the City of Glasgow (26 Geo. II, c.90) (“Glasgow Roads Act 1753”), referred to in Russell v Trustees for repairing the roads leading to Glasgow. The idea of a judicature being constituted by statute to “finally determine” can be found of the old sessions themselves, per the Lords of Session Act 1426.
tension, and a constitutional tension, in the sense that each institution is a relatively autonomous locus of constitutional definition or authority within the wider constitutional system.

Before considering those underlying tensions in greater detail, an overview will be given of the range and principal contours of ouster clauses. Chapter 4 will then turn to a consideration of the search which this tension forces for conciliation between, or accommodation of, these apparently conflicting or competing constitutional worldviews.

3.2 The voice of Parliament: the principal contours of ouster clauses

Ouster clauses may be categorised according to their form, extent and principal contours. They may be (i) explicit or implicit, (ii) general or specific, (iii) contingent or non-contingent, and (iv) directory or non-directory. In each case, they may fall somewhere between the extremes in each category.

These categorisations are not exhaustive, but are intended to give an overview of some of the main features by which ouster clauses can be distinguished. This is significant for the thesis in that, as will become clear, some features are more likely to encounter resistance from the courts (for example, general ouster clauses) than others (such as specific ouster clauses). The examples given under each heading cover a substantial period of time, from around the early 19th century (with a few earlier examples) to the present day. This serves both to provide a background to present-day inter-institutional tensions in this area, and to suggest trends or developments in the legislative and judicial treatment of ouster clauses.

It is worth noting at the outset that Parliament sought to disapply the exclusionary effect of ouster clauses enacted prior to 1st August 1958, with the exception of those relating to time limits. Accordingly, a number of the ouster clauses presented in the following sub-sections are no longer in force. They are still included in the discussion, however, because they form an integral part of the background to the current position of ouster clauses, and they also played an important role in the ongoing development of institutional relations between Parliament and the Court. In particular, they show how the constitutional worldview of Parliament, as expressed in ouster clauses, was met by the constitutional worldview of

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492 Tribunals and Inquiries Act 1992, ss. 12(2) and (3). This was substantially a re-enactment of the Tribunals and Inquiries Act 1958. Time limits are considered at 101-102 infra.

493 In some cases, they have been repealed by other Acts.
Court, as found in its various responses. Thus, even those ouster clauses that are no longer in force have left an imprint on the constitutional dynamics between Parliament and the Court. They have been a medium through which inter-institutional tensions have quite visibly manifested, and through which the Court has asserted competing constitutional authority to that of Parliament in its responses to ouster clauses. As such, they are relevant to contemporary investigation.

3.2.1 Explicit vs. implicit ouster
A provision might explicitly seek to exclude or limit the jurisdiction of the courts, or such an effect might simply be capable of implication from the provision in question.

An example of an explicit ouster clause is contained in the Small Debt (Scotland) Act 1837, which provides that:

“No decree given by any Sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review, or stay of execution, other than provided by this Act, either on account of any omission, or irregularity, or informality in the citation or proceedings, or on the merits, or on any ground or reason whatever.”

Subject to the Court's interpretation of this provision (which holds great significance for its effect), it seems quite clear as to what Parliament intended to achieve with this clause. The language used is clear, decisive and unequivocal, and purports to be comprehensive in excluding appeal or review of the sheriff's decrees.

Explicit ouster clauses have not always been so detailed in their specification of excluded remedies or grounds of review, but have nonetheless been explicit as to an expressed intention to exclude the possibility of review. Examples include a provision in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 that “the decision of the sheriff... shall be final and not subject to review”, and a like provision as to the decision of the sheriff in the Long Leases (Scotland) Act 1954. An ouster provision may, of course, purport explicitly to render final the decision or determination of an entity other than the sheriff, such as the Court of Session itself, as provided in the Education (Scotland) Act 1980

494 Small Debt (Scotland) Act 1837, s.30; as discussed in Manson v Smith (1871) 9 M. 492.
495 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, s.39(6).
496 Long Leases (Scotland) Act 1954, s.28(2).
which stated that “the judgment of deliverance of the Court... shall be final and not subject to
review”\(^{497}\). Similarly, a provision may be explicit about some other aspect of the envisaged
ouster, such as its specificity or contingency.\(^{498}\) An example of this may be found in the
Arbitration (Scotland) Act 2010, which provided that “a tribunal's award is not subject to
review or appeal in any legal proceedings except as provided for in Part 8 of the Scottish
Arbitration Rules”.\(^{499}\) In each of these cases, it is reasonably clear, on an ordinary
construction of language, that Parliament intends for the jurisdiction of the courts (either
courts in general, or specific courts) to be ousted in prescribed circumstances.

A provision may, however, merely imply that the jurisdiction of the courts is excluded.
Perhaps the most ordinary instance of this has been the simple finality clause, whereby a
provision purports to render final the decision or determination of some person or body,
without specifically stating that said decision or determination is not susceptible to review.

One of the more characteristic instances of the simple finality clause has been that purporting
to render final the decision of the sheriff (or sheriff principal) in a given case. It was thus
provided in the Bankruptcy (Scotland) Act 1985 that “[t]he decision of the sheriff in an
appeal under subsection (7) or (11) above shall be final”\(^{500}\). It was likewise provided in the
Antisocial Behaviour etc. (Scotland) Act 2004 that “[t]he decision of the sheriff principal on
an appeal under this section shall be final”;\(^{501}\) and in the Edinburgh Tram Acts of 2006 that
where consent was in certain circumstances unreasonably withheld or given subject to
unreasonable conditions, a person may “refer the matter by summary application to the
sheriff and the decision of the sheriff on the matter shall be final”.\(^{502}\) A number of other
examples may be given in which the decision of the sheriff or sheriff principal has been
purported by statute to be final.\(^{503}\)

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\(^{497}\) Education (Scotland) Act 1980, s.121, as amended by the Education (Scotland) Act 1981.

\(^{498}\) On specificity, see 91-94; and on contingency, see 94-96, infra.

\(^{499}\) Arbitration (Scotland) Act 2010, s.13(2).

\(^{500}\) Bankruptcy (Scotland) Act 1985, s.13A, as amended by the Bankruptcy and Diligence etc.
(Scotland) Act 2007.

\(^{501}\) Antisocial Behaviour etc. (Scotland) Act 2004, ss. 36, 72 and 92.

\(^{502}\) Edinburgh Tram (Line One) Act 2006, s.16; Edinburgh Tram (Line Two) Act 2006, s.16.

\(^{503}\) Building Societies Act 1874, s.24; Burgh Police (Scotland) Act 1892, s.67; Glasgow Building
Regulations Act 1900, s.9(2); Church of Scotland (Property and Endowments) Act 1925, s.28(1)
and (5); Sewerage (Scotland) Act 1968, s.15(2); Water (Scotland) Act 1980, s.104, as amended by
the Local Government etc. (Scotland) Act 1994; Civic Government (Scotland) Act 1982, s.91(2),
as amended by the Local Government etc. (Scotland) Act 1994; Roads (Scotland) Act 1984,
s.63(3); Bankruptcy (Scotland) Act 1985, s.28(8), as amended by the Bankruptcy (Scotland) Act
1993; Housing (Scotland) Act 1987, ss. 130(1) and 324(1) and (5); Term and Quarter Days
Simple finality clauses have appeared with regard to the decisions and determinations of other persons and bodies, such as the Treasury,\footnote{Enterprise and New Towns (Scotland) Act 1990, s.28(4); Planning (Hazardous Substances) (Scotland) Act 1997, s.31(6); Town and Country Planning (Scotland) Act 1997, s.242(3).} the Secretary of State,\footnote{Hill Farming Act 1946, s.24(3); Sewerage (Scotland) Act 1968, s.51(5); Marriage (Scotland) Act 1977, ss. 9(6) and 10(4); Roads (Scotland) Act 1984, s.21(8); Enterprise and New Towns (Scotland) Act 1990, s.16(4); Local Government Finance Act 1992, s.4; Planning (Hazardous Substances) (Scotland) Act 1997, s.18(5); Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, s.11(5); Town and Country Planning (Scotland) Act 1997, s.120(2) and (6).} the Scottish Ministers,\footnote{Environmental Protection Act 1990, s.45(10A), as amended by the Water Industry (Scotland) Act 2002, s.20.} the Chairmen of Committees of the House of Lords and the Chairman of Ways and Means in the House of Commons,\footnote{Private Legislation Procedure (Scotland) Act 1936, s.3(2).} General Commissioners,\footnote{Income Tax Act 1918, All Schedules Rules, Rule 22(2).} the Crofters Commission,\footnote{Crofters Holdings Act 1886, s.25; Crofters Common Grazings Regulation Act 1891, s.2, as amended by the Small Landholders (Scotland) Act 1911.} the Water Industry Commission for Scotland,\footnote{Pensions Appeal Tribunals Act 1943, s.6(3).} the Scottish Insurance Commissioners,\footnote{Pensions Tribunals Act 1972, s.11.} the Board of Education,\footnote{Debtors (Scotland) Act 1987, s.82(2), as amended by the Public Services Reform (Scotland) Act 2010.} a traffic commissioner,\footnote{Game (Scotland) Act 1772, s.11.} a returning officer,\footnote{Debtors (Scotland) Act 1855, s.10, as amended by s.I. 1952/1334 and the Local Government (Scotland) Act 1994; Railway Companies (Scotland) Act 1867, s.5; General Police and Improvement (Scotland) Act 1862, Amendment Act 1877, s.4(3) and (5); Miners' Welfare Act 1952, s.17(3), as amended by the Constitutional Reform Act 2005; Solicitors (Scotland) Act 1958, s.7, as amended by the Solicitors (Scotland) Act 1976; New Roads and Street Works Act 1991, s.158(2), as amended by the Constitutional Reform Act 2005; Tenements (Scotland) Act 2004, s.6(4).} statutory arbiters,\footnote{Debtors (Scotland) Act 1855, s.10, as amended by s.I. 1952/1334 and the Local Government (Scotland) Act 1994; Railway Companies (Scotland) Act 1867, s.5; General Police and Improvement (Scotland) Act 1862, Amendment Act 1877, s.4(3) and (5); Miners' Welfare Act 1952, s.17(3), as amended by the Constitutional Reform Act 2005; Solicitors (Scotland) Act 1958, s.7, as amended by the Solicitors (Scotland) Act 1976; New Roads and Street Works Act 1991, s.158(2), as amended by the Constitutional Reform Act 2005; Tenements (Scotland) Act 2004, s.6(4).} pensions tribunals,\footnote{Pensions Appeal Tribunals Act 1943, s.6(3).} the Court of Session,\footnote{Debtors (Scotland) Act 1855, s.10, as amended by s.I. 1952/1334 and the Local Government (Scotland) Act 1994; Railway Companies (Scotland) Act 1867, s.5; General Police and Improvement (Scotland) Act 1862, Amendment Act 1877, s.4(3) and (5); Miners' Welfare Act 1952, s.17(3), as amended by the Constitutional Reform Act 2005; Solicitors (Scotland) Act 1958, s.7, as amended by the Solicitors (Scotland) Act 1976; New Roads and Street Works Act 1991, s.158(2), as amended by the Constitutional Reform Act 2005; Tenements (Scotland) Act 2004, s.6(4).} the Inner House of the Court of Session,\footnote{Debtors (Scotland) Act 1855, s.10, as amended by s.I. 1952/1334 and the Local Government (Scotland) Act 1994; Railway Companies (Scotland) Act 1867, s.5; General Police and Improvement (Scotland) Act 1862, Amendment Act 1877, s.4(3) and (5); Miners' Welfare Act 1952, s.17(3), as amended by the Constitutional Reform Act 2005; Solicitors (Scotland) Act 1958, s.7, as amended by the Solicitors (Scotland) Act 1976; New Roads and Street Works Act 1991, s.158(2), as amended by the Constitutional Reform Act 2005; Tenements (Scotland) Act 2004, s.6(4).} and the circuit court of justiciary or the Court of Justiciary at Edinburgh.\footnote{Burial Grounds (Scotland) Act 1855, s.10, as amended by s.I. 1952/1334 and the Local Government (Scotland) Act 1994; Railway Companies (Scotland) Act 1867, s.5; General Police and Improvement (Scotland) Act 1862, Amendment Act 1877, s.4(3) and (5); Miners' Welfare Act 1952, s.17(3), as amended by the Constitutional Reform Act 2005; Solicitors (Scotland) Act 1958, s.7, as amended by the Solicitors (Scotland) Act 1976; New Roads and Street Works Act 1991, s.158(2), as amended by the Constitutional Reform Act 2005; Tenements (Scotland) Act 2004, s.6(4).}
Finality provisions have also been fairly characteristic where decisions or determinations were to be made by third party experts or persons of a specialist skill, such as arbiters, inspectors, raters, valuers, architects and surveyors, and medical referees.\(^{520}\) Thus in the Airdrie-Bathgate Railway and Linked Improvements Act 2007, for example, finality was purportedly conferred on the determination of an arbiter: “[a]ny dispute as to the completion of a work shall be determined by arbitration, and the determination of the arbiter (or other person to whom the dispute is referred) shall be final and binding”.\(^{521}\) A similar provision is found in the Edinburgh Airport Rail Link Act 2007.\(^{522}\)

### 3.2.2 General vs. specific ouster

A provision may seek to limit or exclude the jurisdiction of the courts on a general or specific basis.

A number of statutory provisions have sought to oust jurisdiction in general terms, such as by stating that a decision or determination “shall not be subject to review” without elaboration on such matters as which courts are to be prohibited from conducting review, or which remedies or grounds of review are to be excluded. Examples may be taken in this regard from the Bankruptcy Act 1856, in which it was provided that “the deliverance awarding sequestration shall not be subject to review”;\(^{523}\) the Long Leases (Scotland) Act 1954, in which it was provided that “[t]he decision of the sheriff in any application made to him under this or any other section of this Act shall be final and not subject to review”;\(^{524}\) and the Education (Scotland) Act 1980, in which it was provided that “the judgment of deliverance of the Court [of Session]... shall be final and not subject to review”.\(^{525}\)

However, an ouster clause might provide more specifically for the envisaged extent of its limitation or exclusion of jurisdiction.

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\(^{520}\) On arbiters, see the Small Landholders (Scotland) Act 1911, s.7(11) (pre-amendment); on architects and surveyors, the War Damage to Land (Scotland) Act 1941, s.2(1), and the City of Edinburgh District Council Order Confirmation Act 1991, s.50(5)(a); and on medical referees, the Workmen's Compensation Act 1906, s.8(1)(f), and the Workmen's Compensation Act 1925, s.43(1) (f).

\(^{521}\) Airdrie-Bathgate Railway and Linked Improvements Act 2007, s.6(8), and see also s.7(7).

\(^{522}\) Edinburgh Airport Rail Link Act 2007, s.7(6), and see also s.8(6).

\(^{523}\) Bankruptcy Act 1856, s.31.

\(^{524}\) Long Leases (Scotland) Act 1954, s.28(2).

\(^{525}\) Education (Scotland) Act 1980, s.121, as amended by the Education (Scotland) Act 1981.
It might, for example, purport to restrict review by specific courts, sometimes (but not always) specifying in which courts review shall be permitted. It was thus provided in the Railways Clauses Consolidation (Scotland) Act 1845, for example, that “[no proceeding shall be] removed by suspension or otherwise into any superior Court” and that “if any party shall feel aggrieved... he may... appeal to the General Quarter Sessions”.\textsuperscript{526} It was likewise provided in the Sheriff Courts (Scotland) Act 1907 (still current, as amended) that “[a]ll causes not exceeding £5000 in value... shall be brought... in the sheriff court only, and shall not be subject to review by the Court of Session”.\textsuperscript{527}

A provision might purport to restrict the deployment of specific remedies – a restriction which has tended to feature in earlier statutes. It was, for example, provided in the Parochial Schools (Scotland) Act 1803 that a “presbytery... shall acquit or pass sentence or censure, suspension or deprivation... which judgment shall be final without appeal to, or review by any Court, civil or ecclesiastical”, and that, in case a sentence of deprivation was pronounced, the schoolmaster would be ejected from the school and school-house by a warrant of the sheriff “of which no bill of suspension, nor advocation, nor action of reduction, shall be competent”.\textsuperscript{528}

It was provided in the Savings Bank (Scotland) Act 1819 that the sheriff’s decision in a dispute arising among persons concerned with an institution governed by the Act:

\textit{“shall be final and conclusive and binding on all parties, and in no case whatever shall it be competent to bring such decision under the review of any court of law whatever, by appeal, suspension, advocation, reduction or any other form of process”}.\textsuperscript{529}

It was similarly provided in the Turnpike Roads (Scotland) Act 1823 that:

\textit{“where, by this act, the adjudging of any penalty, forfeiture, fine, or any other matter, is committed to the sheriff, stewar, or the justices of the peace assembled in their quarter sessions of the several shires and stewartries in Scotland, the judgment

\textsuperscript{526} Railways Clauses Consolidation (Scotland) Act 1845, ss. 149 and 151, discussed in Caledonian Railway Company v Fleming (1869) 7 M. 554.

\textsuperscript{527} Sheriff Courts (Scotland) Act 1907, s.7, as amended by the Sheriff Courts (Scotland) Act 1971 (as amended by the Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2007/507); and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.

\textsuperscript{528} Parochial Schools (Scotland) Act 1803 – see Brown v Heritors of Kilberry (1825) 4 S. 176.

\textsuperscript{529} Savings Bank (Scotland) Act 1819, s.IX, as amended by the Sheriff Courts (Scotland) Act 1971.
of such sheriff, stewart, or justices assembled as aforesaid, shall be final and
conclusive, and shall not be subject to review by advocation or suspension, or by
reduction, or by any process of law whatever, any law or usage to the contrary
notwithstanding.”

Ouster provisions might also purport to restrict review on specific grounds, either by
specifying permitted grounds and/or prohibited grounds. An example of the former may be
taken from the Elections (Scotland) (Corrupt and Illegal Practices) Act 1890:

“An election may be questioned by an election petition on the ground – (a) That the
election was wholly avoided by general bribery, treating, undue influence, or
personation; or (b) That the election was avoided by corrupt or illegal practices; or
(c) That the person whose election is questioned was at the time of the election
disqualified; or (d) That he was not duly elected by a majority of lawful votes.”

An example of the latter may be taken from the Valuation of Lands (Scotland) Act 1854, at
issue in Moss’ Empires v Assessor for Glasgow:

“no valuation... shall be challengeable, or be capable of being set aside or rendered
ineffectual, by reason of any informality, or of any want of compliance with the
provisions of this Act, in the proceedings for making up such valuation or Valuation-
roll”.

A provision might also specify that certain grounds of review may be invoked, but that all
other review is excluded, as in the Arbitration (Scotland) Act 2010:

“(1) Legal proceedings are competent in respect of –

(a) a tribunal's award, or

(b) any other act or omission by a tribunal when conducting an
    arbitration,

only as provided for in the Scottish Arbitration Rules (in so far as they apply

530 Turnpike Roads (Scotland) Act 1823, s.112. Similar provisions can be found in the County of
Banff Roads Act 1804; the Ordnance Survey Act 1841, s.3, as amended by the Sheriff Courts
(Scotland) Act 1971; and the Railways Clauses Consolidation (Scotland) Act 1845, s.147.
531 Elections (Scotland) (Corrupt and Illegal Practices) Act 1890, s.30(1), at issue in Kerr v Hood,
1907 S.C. 895. It was provided in s.30(2) of that Act that “[a]n election shall not be questioned on
any of those grounds by way of reduction or suspension, or by any form of proceeding except by
an election petition”, but this was held not to exclude review by way of reduction based on another
ground.
532 Moss’ Empires v Assessor for Glasgow (House of Lords).
533 Valuation of Lands (Scotland) Act 1854, s.30.
to that arbitration) or in any other provision of this Act.

(2) In particular, a tribunal’s award is not subject to review or appeal in any legal proceedings except as provided for in Part 8 of the Scottish Arbitration Rules.”

3.2.3 Contingent vs. non-contingent ouster

An ouster provision might seek to limit or exclude the jurisdiction of the courts contingent on the satisfaction of certain conditions or, alternatively, to do so non-contingently.

Examples of a non-contingent ouster clause may be taken from the Lands Clauses Consolidation (Scotland) Act 1845, in which it was provided that “the determination of the sheriff upon such question shall be final and conclusive, and not subject to review or appeal in any form or court whatever”.

A more recent example may be taken from the United Reformed Church Act 2000:

“The declaration by the person presiding over the Unifying Assembly at that Assembly that the Unifying Declaration has been passed in accordance with the Proposals for Unification shall be final and conclusive as to that fact and as to the satisfaction of all preliminary procedures and conditions defined and declared in the Proposals for Unification and the date, validity and effectiveness of the Unifying Declaration shall not thereafter be questioned on any ground in any court or proceeding whatsoever”.

Similarly, the ouster provision at issue in the oft-cited English case of Anisminic Limited v Foreign Compensation Commission – that “[t]he determination by the [Foreign Compensation Commission] of any application made to them under this Act shall not be called in question in any court of law” – can be categorised as an instance of non-contingent ouster.

By contrast, an ouster provision might purport only to limit or exclude the jurisdiction of the courts in certain circumstances, or where certain criteria are fulfilled. The most obvious example is where ouster is stated to operate only after the expiry of a time limit. It was thus

534 Arbitration (Scotland) Act 2010, s.13(1) and (2).
535 Lands Clauses Consolidation (Scotland) Act 1845, s.22.
536 United Reformed Church Act 2000, s.3; with a similar provision in s.4.
537 Anisminic Limited v Foreign Compensation Commission.
538 Foreign Compensation Act 1950, s.4(4).
provided in the Burial Grounds (Scotland) Act 1855 that an appeal may be made to the Court of Session, “whose decision shall be final, such appeal always being presented within fourteen days of the date of the sheriff's judgement”539 – the purported consequence of attempting to present that appeal beyond the fourteen-day time limit being that it will not be competently received by the Court; thus ousting its jurisdiction in those circumstances. Indeed, its effect reaches further than merely rendering an appeal out of time and thus incompetent, by also rendering the receiving of such an appeal by the Court as incompetent.540

In a more recent statute – the Marriage (Scotland) Act 1977 – it was provided that:

"if a reason given for a confirmation of the rejection of a nomination is that the nominating body is not a religious body, that body may, within 42 days of receiving notice of the confirmation, appeal against the confirmation to the Court of Session and seek the determination of that court as to whether the body is a religious body".541

The exclusionary effect of the provision as to the Court's receiving such an appeal was therefore contingent on the relevant time period having expired.

Similarly, the Water (Scotland) Act 1980 provided that “[i]t shall be competent to appeal to the sheriff-principal against the decision of the sheriff on any application to him under this Act... within 21 days after the date of that decision”,542 and the Town and Country Planning (Scotland) Act 1997 that, with regard to planning orders, any person “aggrieved by any order... [and who] wishes to question the validity of that order on the grounds that the order [was] not within the power of [the] Act” must make a relevant application to the Court of Session “within 6 weeks from the date on which the order is confirmed”.543

The contingent operation of an ouster provision is not confined to the case of time limits, but also, for example, by reference to the determination of a court itself. In the Pilotage Act 1913, for example, it was provided that the decision of the sheriff was final “unless special

540 Although the question will arise as to whether it ousts the jurisdiction of the Court to consider the appeal, and/or to review the original decision.
541 Marriage (Scotland) Act 1977, s.9(6).
542 Water (Scotland) Act 1980, s.104, as amended by the Local Government etc. (Scotland) Act 1994.
543 Town and Country Planning (Scotland) Act 1997, s.239.
leave to appeal from the same to the [Court of Session] on a question of law or a question of mixed law and fact is given”. In the Miners' Welfare Act 1952, it was provided that “[a] decision of the Court of Session in pursuance of the last foregoing subsection shall be final unless that Court gives leave to appeal to the [now] Supreme Court against the decision”. This purports to exclude the jurisdiction of the Supreme Court in the event that the Court of Session does not give leave to appeal, and is thus contingent on the determination of the Court. This is distinguishable from, for example, a provision in the New Roads and Street Works Act 1991 whereby an arbiter:

“may, and if so directed by the Court of Session shall, state a case for the decision of the Court on any question of law arising in the arbitration; and the decision of the Court shall be final unless the Court or the [now] Supreme Court give leave to appeal to the Supreme Court against the decision”.

In that case, the Supreme Court may itself give leave to appeal, and so its jurisdiction is not likely to be regarded as potentially excluded as in the case of the Miners' Welfare Act 1952; rather, the Supreme Court's jurisdiction would be voluntarily divested, or declined to be exercised, should it fail to give leave to appeal from the Court.

3.2.4 Directory vs. non-directory ouster

An ouster clause might be non-directory, in that it seeks to exclude the jurisdiction of particular courts or courts generally, without directing complaints or issues to specific fora. Alternatively, it might be directory in the sense that it seeks to direct complaints and applications for appeal or review to specific fora. The latter may, in addition to directing such applications, explicitly exclude appeal to or review by other fora (directory and exclusionary), or it may be silent on whether other fora may receive those appeals or applications for review (directory and implicitly exclusionary; or directory and non-exclusionary).

As observed above, it was provided in the Railways Clauses Consolidation (Scotland) Act 1845, for example, that “if any party shall feel aggrieved... he may, unless otherwise specially provided, appeal to the General Quarter Sessions”. That is to say, the Act

544 Pilotage Act 1913, s.28(4) read in conjunction with s.28(7).
545 Miners' Welfare Act 1952, s.17, as amended by the Constitutional Reform Act 2005.
547 Railways Clauses Consolidation (Scotland) Act 1845, s.151.
directed appeals to the General Quarter Sessions, but was silent as to whether this also had the effect of excluding the jurisdiction of (for example) the Court of Session.

Other examples include the Crofters Common Grazings Regulation Act 1891, in which it was provided that a particular dispute “shall be decided summarily by the Crofters Commission and their decision shall be final”,548 the Planning (Hazardous Substances) (Scotland) Act 1997, in which it was provided that a particular question “shall be referred to the Treasury, whose decision shall be final”;549 and the Antisocial Behaviour etc. (Scotland) Act 2004, in which it was provided that a decision of the sheriff principal on appeal “shall be final”.550 In each case, the statutory provision directs complaints or issues to a specified entity – in these cases, the Crofters Commission, the Treasury and the sheriff principal, respectively – the decision or determination of which is purportedly made final, but without elaboration on whether the jurisdiction of the Court of Session (or other courts) is excluded. In other words, any such exclusion can at most be implied from this kind of directory clause.

This stands in contrast to a directory and (explicitly) exclusionary clause, such as that found in the Sheriff Courts (Scotland) Act 1907 where it was stated that “[a]ll causes not exceeding £5000 in value... shall be brought... in the sheriff court only, and shall not be subject to review by the Court of Session”.551 In this provision, issues are both directed to the sheriff court and excluded from the jurisdiction of the Court.

Indeed, sometimes a statute would, rather than stating that the jurisdiction of the Court was excluded, state that it was not excluded, or that it was still permitted notwithstanding that complaints were to be directed to (other) specific fora. An early example of this can be found in the Commissariots Act 1609, which provided that the Commissaries of Edinburgh had a sole power of reduction over the sentences and decrees of inferior commissaries, but that the Lords of Session had a power of review should the Commissaries of Edinburgh “perform not their duty”.552 A further example may be taken from the Debtors (Scotland) Act

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548 Crofters Common Grazings Regulation Act 1891, s.2, as amended by the Small Landholders (Scotland) Act 1911.
549 Planning (Hazardous Substances) (Scotland) Act 1997, s.31(6).
550 Antisocial Behaviour etc. (Scotland) Act 2004, ss. 36(4), 72(8) and 92(6).
552 Commissariots Act 1609. It was reported in Callendar v Boway, 1687 Mor. 7403 that the Lords of Session advocated to themselves the reduction of a “decreet dative” pronounced by the
1838, which provided that particular causes were to be directed for determination by the sheriff principal, whose “judgment shall be subject to review in the Court of Session”.

It may therefore depend on the context of the individual case – or the determination of the Court – as to whether a directory clause which is silent on point of exclusion is regarded as excluding or failing to exclude its jurisdiction.

3.3 The voice of the courts: the judicial response to ouster clauses

3.3.1 Trends in the judicial response

The judicial response to ouster clauses has been mixed, and affected by the particular appearance and strength of appearance of the above characteristics. Importantly for considering inter-institutional relations in the constitutional context, the courts' response has not been one in which ouster clauses have been slavishly and unquestioningly applied to their full extent on an ordinary construction of language.

Three general statements may be made about the judicial regard for ouster clauses. The first is that the Court has been reluctant to imply limiting or exclusionary effect on its jurisdiction, requiring patent articulation of such an intended effect as a prerequisite condition of its recognition. The second is that the more sweeping, unspecific or indiscriminate the ouster provision, and the lesser the opportunity for genuine redress, the slower has the Court been to accept encroachment on its jurisdiction. The third is that ouster provisions have typically been regarded by the Court as failing to oust its jurisdiction as to the very supervision of compliance with jurisdiction itself. Each of these general trends will be substantiated in turn.

a. Requirement for clear, express and unambiguous words

The courts have tended to require the patent articulation of intended limiting or exclusionary effect as a prerequisite condition of the recognition of such effect. The Court has regarded it as a “general rule” and even a “constitutional principle” that express words would be

Commissary of Stirling, even though by the aforementioned Act “the Commissaries of Edinburgh are appointed the sole judges to the reduction of inferior Commissaries' decreets”. However, the report fails to acknowledge the power of review invested in the Lords of Session by the same Act.

Debtors (Scotland) Act 1838, s.21, as amended by the Sheriff Courts (Scotland) Act 1971.

Marr & Sons v Lindsay (1881) 8 R. 784 at 785 and 786, per Lord President Inglis and Lord Mure, respectively.

Harper v Inspector of Poor of Rutherglen (1903) 6 F. 23 at 25, per Lord Trayner. Lord President Clyde spoke in Bain v Ormiston, 1928 S.C. 764 at 770 of the “well-known principle whereby the
required in order to exclude its jurisdiction. As David Hume explained:

"...as the erecting of any such absolutely independent Jurisdiction is contrary to the general, and on the whole the salutary rule of our practice; so the enactment must be positive and peremptory, – free of all manner of ambiguity, – to receive this extraordinary construction. If the terms made use of are in any degree equivocal, as, for instance, if the Statute only say that the Lieutenancy, or that the Justices "shall finally try or determine" the inherent power of the Supreme Court to control all inferior judges, and to rectify what is amiss in their proceedings, shall be held to remain."  

The deemed inadequacy of a simple finality clause in excluding the Court's jurisdiction to review has a long pedigree, and from at least as early as 1611, where, notwithstanding a provision in the Usury Act 1597 that certain questions should be directed to "the justice" for decision, this was held not to exclude the jurisdiction of the Lords of Session, who proceeded to decide the cause in question. In a case from 1707, the Common Good of Royal Burghs Act 1693 provided that the acts and sentences of certain commissioners "shall have the strength and effect of acts and sentences of the court of exchequer", however the Court held that this did not exclude the jurisdiction of the Lords of Session "unless they were expressly debarred".

Another early case comes from 1754, in which an Act had empowered justices of the peace to "hear, and finally determine and adjudge" certain offences relating to the destruction of trees, but which the Court regarded as failing to exclude its power of review. Similarly, in setting-up of a new civil jurisdiction in special matters does not necessarily imply the exclusion of the Court of Courts theretofore competent to try such causes", and referred also in that regard to Erskine, Institute, I.II.7.

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556 See, for example, the comments of Lord Justice-Clerk Moncrieff in Adamson v Edinburgh Street Tramways Company (1872) 10 M. 533 at 536; and Lords Hunter and Anderson in Norfor v Education Authority of the County of Aberdeen, 1923 S.C. 881 at 888 and 890, respectively (although Lord Justice-Clerk Alness (dissenting) thought the statutory provision in that case to have clearly excluded the jurisdiction of the Court over the question in point – see ibid. at 890-892). However, see Lindsay v Orr (1831) 9 S. 426, especially at 428; and Bain v Ormiston at 773, per Lord President Clyde.


558 It is nocht lesum to tak mair annuelrent or proffeit nor ten for the hundrethe ("Usury Act 1597").

559 Officers of State v Cowtie, 1611 Mor. 7327.

560 Act anent the common good of royall burrowes ("Usury Act 1597") ("Usury Act 1597").

561 Ainsley v Provost Scot, 1707 Mor. 7330. It should be borne in mind that decrees of the Court of Exchequer were not subject to review by the Court of Session.

562 Buchanan v Towart, 1754 Mor. 7347. It was pleaded in this case that, notwithstanding the
Russell v Trustees for repairing the roads leading to Glasgow, the Glasgow Roads Act 1753\(^{563}\) had provided that justices of the peace were “authorised and empowered to hear and determine the matters in dispute, and whose order therein shall be final and conclusive”. The Court held that this provision did not exclude its jurisdiction to review the judgments of the justices of the peace where they had ruled on an intended road alteration which was not authorised by the Act.\(^{564}\)

In Colquhoun v Buchanan, it was held that the Salmon Fisheries (Scotland) Act 1862, which provided for the sheriff to “have power to decide summarily any question arising on any claim” as to the qualifications of salmon fishings proprietors, did not exclude the Court's power of reduction.\(^{565}\) Likewise, it was held in Thompson v Parochial Board of Inveresk that a provision in the Poor Law (Scotland) Act 1845 that “all actions on account of anything done in the execution of this Act shall be brought before the Sheriff-court” failed to exclude the Court's power of reduction.\(^{566}\)

Lord President Inglis stated in Marr & Sons v Lindsay that “the general rule is that the right of appeal from an inferior to a superior Court cannot be taken away except by express words”;\(^{567}\) with Lord Trayner stating in Harper v Inspector of Poor of Rutherglen that “[t]he constitutional principle is that every judgment of an inferior Court is subject to review, unless such review is excluded expressly or by necessary implication”;\(^{568}\) and Lord Justice-Clerk Macdonald and Lord Stormonth-Darling held in Kerr v Hood that exclusionary words would have to be “clear and unambiguous”, and that “it is always exceedingly difficult to exclude the jurisdiction of the Supreme Court [meaning the Court of Session] in matters provision in an Act that justices shall have a power to finally determine disputes as to the wages of certain seamen, “many sentences of Justices on such disputes have, since that statute, come under the review of the Court of Session”. It was also pleaded that “wherever a statute intends the determination of a court to be final, it uses an expression of its intention much more exact and copious than is contained in these words, “finally determine””.

\(^{563}\) Glasgow Roads Act 1753.

\(^{564}\) Russell v Trustees for repairing the roads leading to Glasgow.

\(^{565}\) Colquhoun v Buchanan (1866) 4 M. 682; with regard to the Salmon Fisheries (Scotland) Act 1862, s.18.

\(^{566}\) Thompson v Parochial Board of Inveresk (1871) 10 M. 178; with regard to the Poor Law (Scotland) Act 1845, s.86. See, however, Buchan v Bowes (1863) 1 M. 922, in which finality was upheld.

\(^{567}\) Marr & Sons v Lindsay at 785, per Lord President Inglis. He did, however, go on to say (ibid.) that “[t]hat is a rule which may be said to be subject to some qualification, because, if the jurisdiction exercised by the Sheriff is a jurisdiction which is specially given to him by statute, and in which this Court has not previously had jurisdiction, it may be much more easily implied that the Sheriff's jurisdiction is not only privative, but final and not subject to review”.

\(^{568}\) Harper v Inspector of Poor of Rutherglen at 25, per Lord Trayner.
where such exclusion does not rest upon an express enactment of the Legislature”. 569 Accordingly, the Court has been slow to imply exclusionary effect: in the words of Lord Mure, “as a general rule, review cannot be excluded by implication”. 570 As such, ouster provisions have generally been interpreted against implied exclusion. 571

b. Presumption against sweeping, unspecific or indiscriminate ouster

The more sweeping, unspecific or indiscriminate the ouster provision, and the lesser the opportunity for genuine redress, the slower has the Court been to accept encroachment on its jurisdiction.

For example, a directory clause will in principle be given effect – though typically only as to the merits requiring determination (on point of jurisdiction, see below) – providing that the prescribed course of appeal or complaint “obviates sufficiently the risk of wrong or abuse”. 572

A similar philosophy is found with regard to time limits. These afford a good example of provisions which are typically not sweeping or indiscriminate attempts at ouster, because Parliament seeks merely to exclude the jurisdiction of the Court after the expiry of a specified period of time. This may, for example, have the basic objective of encouraging timeous applications or appeals, and ensuring a settled state of affairs (and thus certainty and stability) after the expiry of that time period. The Court has respected the effect of ouster clauses after the expiry of time limits, such as with regard to similar provisions found in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, 573

569 Kerr v Hood at 900 and 901, per Lord Justice-Clerk Macdonald and Lord Stormonth-Darling, respectively.
570 Marr & Sons v Lindsay at 786, per Lord Mure.
571 Caledonian Railway Company v Glasgow and Redburn Bridge Road Trustees (1849) 12 D. 399; Thompson v Parochial Board of Inveresk (1871) 10 M. 178; Sharp v Parochial Board of Latheron (1883) 10 R. 1163; Dalgleish v Livingston (1895) 22 R. 646 at 658, per Lord Rutherfurd Clark; Harper v Inspector of Poor of Rutherglen; Norfor v Education Authority of the County of Aberdeen; Corporation of the City of Glasgow v Assessor of Public Undertakings, 1936 S.C. 754.
573 Hamilton v Secretary of State for Scotland, 1972 S.C. 72; and Martin v Bearsden and Milngavie District Council, 1987 S.C. 80 – both with regard to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, Sch. 1, paras. 15 and 16.
Country Planning (Scotland) Act 1972,\textsuperscript{574} the Roads (Scotland) Act 1984\textsuperscript{575} and the Town and Country Planning (Scotland) Act 1997,\textsuperscript{576} whereby, in each case, a person aggrieved by certain schemes, orders and actions had a right to make an application to the Court within a period of six weeks, such schemes, orders and actions being thereafter unquestionable in legal proceedings. Interestingly, the case in which the final aforementioned Act was at issue – \textit{Collins v Scottish Ministers} – was distinguished in a case in which an appeal was required by a statutory instrument to be brought within a period of 28 days, but without a provision that the decision at issue would thereafter be unquestionable in legal proceedings. The Court held that it could therefore apply its Rules of Court to consider the appeal late.\textsuperscript{577}

c. \textit{No ouster of the supervision of compliance with jurisdiction}

Ouster provisions have typically been regarded by the Court as failing to oust its jurisdiction as to the very supervision of compliance with jurisdiction itself. As such, even where an ouster provision's purported finality has been respected on the merits – and that, to do otherwise “would be to make the court an appeal tribunal”\textsuperscript{578} rather than a court of review – finality as to questions of jurisdiction has not been respected.\textsuperscript{579} Hume explained the rationale for this:

“...even where Statute has in plain and positive terms declared, that there shall be no review of the proceedings of a certain special Judicature in any form, yet still, to have the benefit of that provision, this Judicature must take care to keep within the bounds of its commission, must not exceed its statutory powers, – must not travel out

\textsuperscript{574} \textit{Pollock v Secretary of State for Scotland}, 1993 S.L.T. 1173 – with regard to the Town and Country Planning (Scotland) Act 1972, ss. 231 and 233. Lord Cameron of Lochbroom explained that “the distinction between absolute ouster clauses and time limited ouster clauses is that the latter be regarded not as ousting the jurisdiction, but merely confining the time within which it can be invoked” – \textit{Pollock v Secretary of State for Scotland} at 1181, per Lord Cameron of Lochbroom.

\textsuperscript{575} \textit{Robbie the Pict v Miller Civil Engineering Limited}, 2001 S.C.L.R. 1103 – with regard to the Roads (Scotland) Act 1984, Sch. 2, paras. 1, 2 and 4 (as renumbered by the Transport and Works (Scotland) Act 2007).


\textsuperscript{577} \textit{Brown v Heritors of Kilberry} (1825) 4 S. 176; \textit{Macfarlane v Mochrum School Board} (1875) 3 R. 88; and \textit{Trustees of Donaldson's Hospital, Edinburgh v Esslemont}, 1925 S.C. 199 at 205, per Lord President Clyde, with regard to an arbiter being incapable of being the final judge of his own jurisdiction. See also \textit{Dalgleish v Livingston}; and \textit{Sitwell v Macleod} (1899) 1 F. 950, in which the Court considered whether a decision of the Crofters Commission was final with regard to a statutory finality clause; and Kames, \textit{Historical Law Tracts} at 302-304.
of its territory, or neglect that course of proceeding which is prescribed by the Statute. It is obvious, that no special Judicature can be constituted absolute and uncontrollable judge of the extent and construction of its own charter, and that in excluding the power of review, the Legislature must be held to speak with relation to those proceedings, that are done in pursuance, or in execution of the powers granted by the Act.”

This approach can be found throughout a long pedigree of cases; the Court having repeatedly made the point that finality could attach only to *intra vires* decisions, and was incapable of attaching to *ultra vires* decisions.

In a case from 1756, for example, Lord Kilkerran held that a statute which had provided that the justices should “finally determine” certain questions between road trustees and other persons, did not exclude the supreme jurisdiction of the Court “to determine what it is that falls within their powers; but whatever matter is found to be within their power, this Court cannot review their proceedings”.

In another case from 1756, the Court stated that if justices of the peace address a wrong they are statutorily empowered to address, their sentence is, in that regard, final. If, however, they “exceed their bounds” and “assume a jurisdiction which they have not... their proceedings must be null, as *ultra vires*”.

In another early case, from 1793, road trustees had been authorised by statute to carry out certain functions, an appeal against their judgment lying to the Quarter Sessions, the decisions of which were purportedly final. The case having come by bill of advocation before the Court, it was held that:

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580 Paton (ed.), *David Hume's Lectures* at 271.

581 *Magistrates of Perth v Trustees on the Road from Queensferry to Perth* (1756) (Kilkerran's Notes) Brown's Supplement, Vol. 5, 318 at 319, per Lord Kilkerran. This case was discussed in, *inter alia*, *Brown v Hamilton District Council* at 42; *West v Secretary of State for Scotland* at 394; and *Eba v Advocate-General for Scotland* (Inner House) at para. 41. See, further, *Russell v Trustees for repairing the roads leading to Glasgow*; and *Lundie v Provost and Magistrates of Falkirk* (1890) 18 R. 60 at 65, per Lord President Inglis.

582 *Lord Prestongrange v Justices of the Peace of Haddington*, 1756 Mor. 7350. The Court held itself in that case as having no power of review where the Haddington County Roads Act 1749 empowered justices of the peace at their next General Quarter Sessions to “hear, examine, and finally determine... without further or other appeal” complaints of abuse of powers conferred by the Act. It may be inferred, however, that, had the justices themselves exceeded their powers or jurisdiction, the Court would have arrived at a different result.
“...the judgments of the quarter sessions were not liable to review in such points, as
fixing the line of road, or the position of the toll-bars, which were discretionary in
their nature, and in the exercise of the powers exclusively committed to the trustees.
But it was on the other hand agreed, that a right to review, in case of the smallest
excesses of power, was essential, and was not excluded by the words of the act. It
could not be supposed, (it was observed) that the trustees or Justices were meant to
be themselves the sole and exclusive judges of the extent of their own powers, or that
such a jurisdiction, which might even be held to be in some measure
unconstitutional, was intended to be given.”

The trustees had “exceeded their powers” and so “their judgment was liable to review”.584

In the 1797 case of Patillo v Maxwell, the Court reviewed a decision of commissioners of
supply, whose jurisdiction did not extend, under the terms of the relevant statute, to the
person whom they had sentenced. This was notwithstanding similar complaints in a
previous case in which the Court refused to review a sentence of the Commissioners, on the
basis that “it was the meaning of the legislature, that the sentence of the Commissioners
should not be reviewable by any Court of law”.585 The Court in Patillo:

“were of opinion, that, although bills of this kind ought not to be passed, except
where very good and sufficient reasons are shown; yet, their powers of reviewing the
sentences of the Commissioners, arising from their inherent and constitutional
jurisdiction, were not excluded by this statute”.586

In Heritors of Corstorphine v Ramsay, it was provided in the Parochial Schools (Scotland)
Act 1803 that certain judgments of presbyteries with regard to schoolmasters were to be
final. The Court nonetheless held that it would review such judgments where a presbytery
refused to act or exceeded its powers.587

It was held in Grant v Gordon that “[w]here parties do not act within the provisions of the
statute, but go out of it, their actings are not covered by any peculiar privileges which the
statute confers”, defeating a time bar in that case.588 The same idea was put forth in
Campbell v Young:

583 Countess of Loudon v Trustees on the High Roads in Ayrshire.
584 Ibid. at 7401.
585 Foote and Marshall v Major Stewart, 1778 Mor. 7385 at 7386.
586 Patillo v Maxwell, 1797 Mor. 7386 at 7388.
587 Heritors of Corstorphine v Ramsay (1812) Fac. Coll. 243 (10th March 1812).
588 Grant v Gordon at 170, per Lord President Hope.
We cannot listen to a proposition so monstrous as that, because a party says he acts under the statute he is to do as he pleases. If he deviates from the statute, the exclusion of our jurisdiction is no longer applicable.

In Caledonian Railway Company v Glasgow and Redburn Bridge Road Trustees, the words “the orders and judgments of the said Sheriff, when pronounced without a record, shall be final and conclusive, and not subject to review by suspension or advocation, or to reduction, on any ground whatever”, which appeared in the Railways Clauses Consolidation (Scotland) Act 1845, were read narrowly, such that Lord President Boyle commented that he found “not one word which makes the judgment of the Sheriff in every case final and unreviewable”.

In Lockhart v Presbytery of Deer, Lord Ivory said that:

“...where we are interfering with an inferior civil judicatory, whose jurisdiction in that particular matter has been declared exclusive, and not subject to review, our right to control its proceedings arises from the fact, that the inferior judicatory has exceeded its powers. We interfere, because the inferior court has gone beyond its province, and has, by doing so, lost the protection of the statute under which it possesses exclusive jurisdiction.”

It was likewise said in Dunbar v Levack that even where “all review of proceedings under a statute is excluded”, where the sheriff had acted ultra vires, it was for the Court of Session, “as a court of review... our duty to interfere, and say whether the proceedings are ultra vires or not”. As explained by Lord President McNeill, “[j]urisdiction there must be, else the deliverance or act of the inferior tribunal cannot be supported”. Consequently, “the action of reduction [had to] be considered”.

The Small Debt (Scotland) Act 1837 excluded reduction, advocation, suspension, appeal and any other form of review of a sheriff’s decree, and provided an avenue of appeal only to the Circuit Court of Justiciary or, when it was not sitting, the High Court of Justiciary.

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589 Campbell v Young (1835) 13 S. 535 at 541-542, per Lord Justice-Clerk Boyle.
590 Railways Clauses Consolidation (Scotland) Act 1845, s.147.
591 Caledonian Railway Company v Glasgow and Redburn Bridge Road Trustees at 403, per Lord President Boyle.
592 Lockhart v Presbytery of Deer at 1301, per Lord Ivory.
593 Dunbar v Levack (1858) 20 D. 538 at 543, per Lord Cowan.
594 Ibid. at 542, per Lord President McNeill.
595 Ibid.
596 Small Debt (Scotland) Act 1837, s.30.
including on point of incompetency or defect of jurisdiction. The Court of Session held in *Murchie v Fairbairn*, however, that it was competent for it to reduce an extract small debt decree on the allegation that it had been altered by the sheriff clerk several days after extract, so as to cover a larger sum than that decreed for by the sheriff. It did this, notwithstanding the provisions of the Act, by opting for a particular interpretation of what constituted a “decree”, “incompetency” and “review”; and in so doing, found itself to have jurisdiction.

Lord Ardmillan stated with regard to a particular directory provision in *Caledonian Railway Company v Fleming* that “[a] case may go to the Quarter Sessions on various grounds... [but] [i]t can only come to this Court [the Court of Session] on a limited number of grounds, and one of them is jurisdiction”. Lord Justice-Clerk Moncrieff added in *Lord Advocate v Police Commissioners of Perth*:

“I know of no case in which the common law jurisdiction of the Supreme Court has been held to be excluded, where the act proposed to be done is prohibited by statute... A clause of finality cannot protect a Sheriff's judgment, when, taking an erroneous view of a statute, he either refuses to sanction a lawful act or sanctions an unlawful one”.

In *Ashley v Magistrates of Rothesay*, the Public Houses Amendment Act 1862 had provided that:

“no warrant, sentence, order, decree, judgment, or decision made or given by any Quarter Sessions, Sheriff, Justice or Justices of the Peace, or Magistrate, in any cause, prosecution, or complaint, or in any other matter under the authority of the said recited Act or of this Act, shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution, on any ground or for any reason whatever other than by this Act provided”.

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598 *Murchie v Fairbairn*.
599 *Caledonian Railway Company v Fleming* at 556, per Lord Ardmillan.
600 *Lord Advocate v Police Commissioners of Perth* at 246, per Lord Justice-Clerk Moncrieff. The converse also applies: a clause of finality protects a sheriff's judgment if he acts *intra vires* of statute – consider, in this regard, *County Council of Roxburgh v Dalrymple* (1894) 21 R. 1063. The same is hinted at with regard to certain courts and tribunals in *Walsh v Provost and Magistrates of Pollokshaws*, 1907 S.C. (H.L.) 1 at 3, per Lord Loreburn L.C. In *Milne & Co. v Aberdeen District Committee* (1900) 2 F. 220, and *Yeaman v Little* (1906) 8 F. 702, it was said that a sheriff would be protected by an ouster clause where he acts within jurisdiction, even where he commits an error in fact or law (the so-called “*intra vires* error in law”). For a discussion of the effect of error on jurisdiction, see the *Stair Memorial Encyclopaedia* at paras. 45 and 47-51, and *Eba v Advocate-General for Scotland* [2011] U.K.S.C. 29 at paras. 27-49.
601 Public Houses Amendment Act 1862, s.34.
Where magistrates were regarded as having exceeded their powers, Lord President Inglis held that, in response to the defenders’ plea that this section rendered the present action incompetent:

“the plain answer to the objection founded upon this section is, that the present is not a process of review, nor is it in any proper sense a stay of execution. It is a proceeding brought in the Court for the purpose of setting aside as incompetent and illegal the proceedings of an inferior Court, and the jurisdiction of this Court to entertain such an action cannot be doubted, notwithstanding the entire prohibition of review of any kind. This is not review, as I said before, but it is the interference of the Supreme Court for the purpose of keeping inferior Courts within the bounds of their jurisdiction. The Magistrates having exceeded their powers under the statute their order, whatever it may be – or decision – is liable to be set aside.”

Lord President Inglis observed in Stirling v Commissioners of Police of the Burgh of Turriff that where there had been deviation from statutory requirements, effect had been denied even to “very strong” ouster clauses.

In Earl of Camperdown v Presbytery of Auchterarder, the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 provided in several sections that certain orders of the sheriff were to be “final and conclusive, and not subject to review by any Court whatsoever”, and that if the matter was taken on appeal to the Lord Ordinary, his decree would be “final and not subject to review”. Lord President Balfour said that in order to overcome the finality provisions of the statute:

“it would require to be shewn not only that these Judges had erred on the merits but that they had done something not warranted by their powers, in other words, something ultra vires, or, as I observe it is otherwise put, that they had refused to exercise their jurisdiction.”

Lord Adam added that the Court could not exercise appellate functions in the face of a statutory finality clause, whilst Lord Kinnear stated that to “review” the judgment in this case would be to violate the statute, for no excess of jurisdiction had been proved in that

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602 Ashley v Magistrates of Rothesay at 716, per Lord President Inglis.
603 Stirling v Commissioners of Police of the Burgh of Turriff at 941, per Lord President Inglis.
604 Ecclesiastical Buildings and Glebes (Scotland) Act 1868, s.14, and see also s.3.
605 Ibid., s.20.
606 Earl of Camperdown v Presbytery of Auchterarder (1902) 5 F. 61 at 65, per Lord President Balfour.
607 Ibid. at 66, per Lord Adam.
In *Caledonian Railway Company v Glasgow Corporation*, Lord President Dunedin said that if a body “attempt[s] to do something quite different from what the statute allows then they are doing an *ultra vires* act, and no finality clause will or can protect their illegal acting from the restraint of the Supreme Court”.

A more recent example may be taken from *Watt v Lord Advocate*, in which the Court considered the efficacy of a finality provision in the National Insurance Act 1965. It was provided that “[s]ubject to the provisions of sections 64 to 72 of this Act, the decision [of the National Insurance Commissioner] of any claim or question in accordance with those provisions... shall be final”. Whilst there was a question as to whether an error of law by the Commissioner took him beyond his jurisdiction, Lord President Emslie said that, if it did, “the finality provisions of section 75(1) do not in any way affect the undoubted jurisdiction of this Court to reduce it”. Lord Johnston concurred, stating that in those circumstances “the decision is not saved by section 70(1) of the Act, the finality clause, and falls to be reduced”.

At issue in *McDaid v Clydebank District Council* was the Town and Country Planning (Scotland) Act 1972, in which it was provided that the “validity of an enforcement notice shall not, except by way of appeal under this section, be questioned in any proceedings whatsoever on any of the grounds specified in paragraphs (b) to (e) of subsection (1) of this section”. Lord Allanbridge, sitting in the Outer House, regarded this ouster provision as excluding the jurisdiction of the Court, even although he had “little difficulty in concluding that... the enforcement notices were *ultra vires* and invalid”. He said that he was “quite satisfied that the jurisdiction of the Court [was] excluded by the terms of section 85(10)”. The decision resulting from that view was reversed on appeal to the Inner House, Lord

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609 *Caledonian Railway Company v Glasgow Corporation* (1905) 7 F. 1020 at 1027, per Lord President Dunedin.
610 National Insurance Act 1965, s.75(1).
611 *Watt v Lord Advocate*, 1979 S.C. 120 at 128, per Lord President Emslie. It was concomitantly observed that “if the error of construction was one which it was within his power to commit his decision would not be open to review in this or any other Court” – *ibid.* at 129.
613 Town and Country Planning (Scotland) Act 1972, s.85(10).
Cameron stating that one could not “seek to take advantage... of an alleged finality or exclusion clause... a clause which is only effective where compliance with the statutory code has been possible”.616 The enforcement notice was in that regard held to be a nullity, Lord Avonside adding that the respondents “cannot attempt to shelter behind provisions of the Act which would or could apply if they had done their duty”.617

In Renfrew District Council v McGourlick, an action for reduction of a sheriff's interlocutor, Lord McCluskey considered the extent of a provision in the Public Health (Scotland) Act 1897, which stated that:

“no appeal shall be competent from any decree or order of any... justice, or... sheriff, except in cases certified in terms of the preceding section; and no decree or order, or any other proceeding, matter, or thing done in the execution of this Act shall, excepting as herein provided, be subject to review in any way whatever”.618

He stated that:

“the first duty of this court is to discover from the statute what the sheriff's jurisdiction was, what his powers were under the statute, and what restrictions were placed by the statute upon the manner in which he exercised those powers. It is, I consider, clear that a finality provision such as appears in s.157 cannot oust the jurisdiction of the court to determine whether or not what purports to be a decree or order made under the statute is truly a decree or order within the whole provisions of the statute” 619

Lord Davidson commented in Purdon v City of Glasgow District Licensing Board that even where finality was not explicitly conferred by statute, but where a particular provision “indicates an intention on the part of the legislature that decisions of licensing boards... should be final”, that did “not mean that such decisions [could] in no circumstances be the subject of a successful application for judicial review”.620

617 Ibid. at 168, per Lord Avonside.
618 Public Health (Scotland) Act 1897, s.157.
620 Purdon v City of Glasgow District Licensing Board, 1989 S.L.T. 201 at 204, per Lord Davidson; with reference to the Licensing (Scotland) Act 1976, s.13(2).
Finally, in *Glasgow City Council, Petitioners*, an education authority sought reduction of a sheriff's interlocutor annulling their decision to expel a disabled child from a school. Despite the Education (Scotland) Act 1980 providing that “[t]he judgment of the sheriff on an appeal under this section shall be final”, the Court reduced the sheriff's interlocutor on the ground of having erred in law.\(^{622}\)

### 3.3.2 Constitutional implications of the (possibility of the) judicial response

These observations might at first seem unremarkable. Parliament has, by way of statute, conferred certain powers or jurisdictions upon specified bodies, and has stated that in the exercise of those powers or jurisdictions, a decision or determination is to be final. The Court has responded by stating that if a body has remained within the bounds of its jurisdiction, its decisions and determinations shall be final; but if a body exceeds its jurisdiction, it has acted beyond the powers conferred upon it, and its purported decision or determination is not final, but unlawful. That may appear, on the face of it, to be a straightforward instance of the Court upholding the will of Parliament, for it can reasonably be argued that Parliament did not intend that bodies upon which it conferred jurisdiction should exceed that jurisdiction.

That is not, however, the whole story. First, there are those cases which do not present a clear example of patently *intra vires* or *ultra vires* conduct – though as will be shown below, even when they do, the same underlying constitutional phenomenon is at play. The Court applies its own standards and criteria for assessing the *vires* of a decision or determination, and on that basis the scope and extent of ouster clauses.

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621 Education (Scotland) Act 1980, s.28F(9).

622 *Glasgow City Council, Petitioners*, 2004 S.L.T. 61. This case did, however, run against the grain of a line of cases which held that an *intra vires* error of law was unreviewable. See fns. 600 and 611. The theme of confinement of statutory bodies to their powers or jurisdiction, notwithstanding finality clauses, has run through a number of other cases which have not been discussed in this section, including *Russell v Trustees for repairing the roads leading to Glasgow; Brown v Heritors of Kilberry* (1825) 4 S. 176; *Edinburgh and Glasgow Railway Company v Earl of Hopetoun* (1840) 2 D. 1255; *Shearer v Hamilton* (1871) 9 M. 456; *Shiell v Mossman* (1871) 10 M. 58; *Caledonian Railway Company v Greenock and Wemyss Bay Railway Company*; *Farquharson v Sutherland* (1888) 15 R. 759; *Moss' Empires v Assessor for Glasgow* (House of Lords); and *Provost, Magistrates and Councillors of the Burgh of Kelso v Alexander*, 1939 S.C. 78.
Cases on fairness and natural justice represent just one instructive area in that regard. The judicial narrative on fairness and natural justice is explored in more detail in Chapter 6, but a few cases may be considered at this stage for the purpose of demonstrating the strength of the judicial hand in assessing legality, and the concomitant effect on inter-institutional relations in the area of ouster clauses.

In the 1827 case of *Smith and Tasker v Robertson*, the Clerk of a Justice of the Peace Court had acted as the agent of one of the parties. Despite the Justices being empowered “finally to determine” questions arising under the Hawker and Pedlar’s Acts, the Court did not assess the merits of the Justices’ decision, but found both the decision and the proceedings from which it arose to be “null and void”. 623 The Court regarded the proceedings as falling foul of its own conception of standards which ought to prevail in decision-making processes, thus vitiating the decision, and notwithstanding either the finality clause included in the statute, nor the absence of any legislative prohibition on proceedings being conducted in such a manner.

In *Manson v Smith*, the Depute Sheriff Clerk of Shetland brought an action in the Small Debt Court in which he signed the summons in that same capacity. Despite Lord Benholme’s dissent624 on the basis that the Small Debt (Scotland) Act 1837 provided that no decision pronounced under the authority of that Act “shall be subject to reduction, advocacion, suspension, or appeal, or any other form of review or stay of execution... [on] any ground whatever”, except to the Court of Justiciary under that section;625 the Court of Session held that the proceedings in question were null *ab initio*. Lord Justice-Clerk Moncrieff described the proceedings as “illegal and null”, and stated that “[n]o one can be judge in his own cause, and by our law the clerk of an inferior Court is precisely in the same position as the Judge in that respect”, citing the 1824 case of *Campbell v McCowan* as authority.626 On the purported operation of the finality clause, he stated that the “exclusion of suspension in the clause in the Small-Debt Act never can be pleaded in support of a proceeding which is illegal and null”.

623 *Smith and Tasker v Robertson* (1827) 5 S. 788. The case does not specify the precise Act at issue.
624 *Manson v Smith* at 496, per Lord Benholme.
625 Small Debt (Scotland) Act 1837, s.31.
626 *Manson v Smith* at 494, per Lord Justice-Clerk Moncrieff. Lord Cowan referred to an unspecified case from 1740 as having “laid down authoritatively that it was illegal and unwarrantable for a clerk of Court to act as procurator in the Court of which he is clerk” – ibid. at 495, per Lord Cowan.
627 Ibid., per Lord Justice-Clerk Moncrieff.
“It is material, in considering the effect of the finality clauses of the Small-Debt Act, to keep in mind the radical defect... which tinges these proceedings, because where there is constitutional illegality, the Supreme Court can interfere at any stage, and put an end to them... The procedure was vitiated at every step by constitutional illegality. It is not a case to which that Act, therefore, has any reference.”

In *School Board of Lochgilphead v School Board of South Knapdale*, the Education (Scotland) Act 1872 provided that:

> “any question or dispute regarding the area of any parish or burgh for the purposes of this Act shall be settled by the Board of Education, or by the Sheriff... on an application by the school board authorised by the Board of Education, and the determination of the Board of Education or of the Sheriff, as the case may be, shall be final”.

The Board of Education took a decision relating to a parish in representation of which no party had the opportunity of being heard. The Court held that, notwithstanding the finality clause, the decision of the Board was not final because it was issued without hearing the interested parties, but that as to the merits (which were also submitted for determination), the Court could not provide an answer “for want of jurisdiction.” Lord President Inglis regarded the Board as “not within the powers conferred... if they determine the question without having both parishes represented”, notwithstanding the construction of the finality clause. This was a strong indication that the Court viewed the matter as one of jurisdiction, and that it took upon itself the authority to attach such substantive requirements in the determination of jurisdiction.

In the more recent example of *Hanlon v Traffic Commissioner*, a number of holders of taxi operators' licences in Glasgow had appealed to the traffic commissioner against a decision of the licensing authority in terms of the Civic Government (Scotland) Act 1982. Whilst the petition failed on the basis of acquiescence and personal bar, the finality purportedly conferred on the traffic commissioner's decision by section 18(7) was not regarded as preventing the Court from investigating an admitted breach of natural justice on the part of

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629 Education (Scotland) Act 1872, s.9.
630 *School Board of Lochgilphead v School Board of South Knapdale* (1877) 4 R. 389 at 393.
631 *Ibid.* at 391, per Lord President Inglis.
In such cases, the Court supplies its own substantive criteria for determining the valid extent of ouster clauses, filling them with content which is not obviously apparent. In particular, the Court has shown that it will apply its standards of decision-making to determine the very (extent of) legality of both processes and procedures “protected” by ouster clauses, and, in turn, the ouster clauses by which they are “protected”.

Assessment according to other judicially-created standards, such as reasonableness, rationality, bias and proper exercise of discretion, provide similar examples of a strong judicial hand in the determination of the valid scope and extent of ouster clauses.

These cases are not, for the purpose of this thesis, categorically distinct from those in which the Court assesses \textit{vires} according to “simple excess of jurisdiction”. They represent, perhaps, a more contentious form of judicial activity. Whereas it might be relatively uncontroversial for the Court to regard as \textit{ultra vires} a body’s deciding ‘C’, when it was only authorised by statute to decide ‘A’ or ‘B’ – notwithstanding any ouster clause – the Court is clearly performing a more contentious function when it decides that a body has acted \textit{ultra vires} by failing to act “reasonably”, “rationally” or “fairly”, for example. The Court regards itself as competent not only to strike down decisions on those bases, but also to decide what is “reasonable”, “rational” and “fair”.

\textit{Hanlon v Traffic Commissioner}. The Court’s imposition of standards of fairness and natural justice has not been confined to cases in which a finality clause has been at issue. For example, in \textit{Barrs v British Wool Marketing Board}, 1957 S.C. 72, a wool producer, dissatisfied with a valuation of his wool made by an appraiser under the British Wool Marketing Scheme (Approval) Order 1950/1326, appealed to a valuation appeal tribunal in accordance with that Scheme. The tribunal proceedings took place in the presence of the original appraiser, an additional appraiser, a representative of the wool producer, and the regional officer of the marketing board. However, when the tribunal retired to reach its decision, each of these parties were present with the exception of the representative of the wool producer. The Court held that the tribunal had contravened the principles of natural justice by excluding the producer’s representative, and reduced its decision on that basis. Lord Strachan observed that it was “quite clear that such a tribunal must act fairly and in accordance with the principles of natural justice, and, if any injustice is done, the Courts will give the appropriate remedy” (\textit{ibid.} at 76, per Lord Strachan). The “conduct of proceedings was at variance with the principles of natural justice and the presence of the appraisers at the deliberations of the tribunal in the absence of any representative of the pursuer is fatal to the validity of the decision” (\textit{ibid.} at 83).
Importantly, however, the underlying constitutional phenomenon is, in both sets of cases, the same. In both the less controversial determinations of “simple excess of jurisdiction”, and the more controversial determination of *vires* according to judicially-imposed standards of decision-making, the Court applies its own vision of the constitution to the case at issue. More particularly, the Court regards itself as constitutionally authorised to determine *vires* – a task which has not been expressly committed to it by the legislature, nor by some incontrovertible source of constitutional authority, such as a central constitutional text. It regards its function as including both the contentious cases in which substantive criteria of decision-making are imposed, and the non-contentious cases in which a body has committed simple excess of jurisdiction according to an ordinary construction of statutory language. Not even in the “simplest” of the simple excess of jurisdiction cases, however, does the Court regard the effect of an ouster clause as self-evident or self-executing, but one requiring judicial investigation and the synthesis of the ouster clause with the existing legal and constitutional framework – in which the Court has itself been an important constituent and constitutive player.

It might therefore be asked why, if it is being proposed that the Court is performing a potentially controversial (and controversially self-assumed) constitutional function in judicially reviewing on such grounds as fairness, natural justice, reasonableness, rationality, bias and proper exercise of discretion – even in the absence of a statutory ouster clause – special importance is attached to ouster clauses as a point of constitutional tension; in both the contentious and non-contentious cases.

The answer to this is that the ouster clause represents a more tangible or visible “confrontation” between Parliament and the Court. The “voice” of Parliament, expressed through ouster clauses, is in essential competition with that of the Court; for the latter inevitably imposes its own interpretation and legal and constitutional worldview on ouster clauses. Even in those cases in which the Court regards an ouster clause as successfully ousting its jurisdiction, Parliament has effectively pronounced that “this decision shall be final”, whilst the Court has responded that “we shall decide what constitutes finality”. They may, in such cases, arrive at an agreed interpretation and scope of application of an ouster clause – but only after each institution has expressed its asynchronous, autonomous view: Parliament at the stage of enactment, and the Court at the stage of law application and adjudication.
The self-standing aspect of the Court's constitutional worldview ties in with the generality of its supervisory jurisdiction, set out in detail in the previous chapter. Its focus is primarily on the conduct of the body at issue, and its compliance with the Court's envisaged standards of process and decision-making. The existence of an ouster clause may, from the Court's perspective, be a matter of secondary concern, because it makes assessments of the lawfulness of decision-making processes whether or not Parliament has purported to protect a process from judicial review. This includes, as observed, an assessment of the valid extent of ouster clauses. The Court appears, in this regard, to act in the spirit of Lord Atkin's statement in a Privy Council case on appeal from India, that “[f]inality is a good thing, but justice is a better”. It asserts a manifesto which is strongly – but not entirely – oriented towards fidelity to Parliament; but also towards its own agenda for the imposition and maintenance of certain standards of justice and decision-making in the wider legal order.

The generality of the Court's supervisory activity – and the transcendence of its supervisory methodology beyond servicing the will of Parliament – is in this regard underlined by its assessment according to such standards of the decisions of private bodies, which do not derive their jurisdiction from Parliament. Examples of this from the area of fairness and natural justice include the Scottish Football Association's “departure from the rules of natural justice”, a golf club committee's potential “breach of natural justice”, and a private taxi company's failure to provide a right of representation to a taxi driver before a disciplinary committee.

Whilst the existence of an ouster clause is here being suggested as of secondary importance to the Court, this in fact emphasises the fundamental tension between divergent legislative and judicial constitutional worldviews, and in so doing underlines why the case of the ouster clause is particularly revealing. Notwithstanding the variety of ouster clauses which have been enacted by Parliament, and which seek to exclude or limit the jurisdiction of the courts to judicially review – including those which, on an ordinary construction of language, state in strong terms that the Court is not permitted to judicially review in either general or specific circumstances – the Court's view is different: it regards its constitutional function as including an assessment of compliance with its own standards and criteria for valid decision-

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634 Ras Behari Lal v The King Emperor [1933] All E.R. Rep. 723 at 726, per Lord Atkin.
635 St. Johnstone Football Club Limited v Scottish Football Association Limited.
636 Smith v Nairn Golf Club at para. 39, per Lord Macphail.
637 Tait v Central Radio Taxis (Tollcross) Limited.
making, and thus for the effect of ouster clauses. The ouster clause is, for the Court, just one factor to be considered in assessing the legality of decisions and the processes by which they are taken; their legality turning, instead, on the Court's much broader standards of decision-making. Moreover, the Court regards this function as one which does not require the express authorisation of Parliament, and which sometimes even seems to contradict the word of Parliament; asserting, instead, its own incontrovertible position as determiner of legality. That is a constitutional worldview which is fundamentally in tension with Parliament's apparent view that it is entitled to oust the jurisdiction of the courts at its own behest, and to do so in strong and comprehensive terms.

In the simple excess of jurisdiction cases, this is unlikely to be controversial or even a particularly visible tension. Thus, when, to adopt the above example, Parliament authorises a body to decide 'A' or 'B', further providing that such decision shall be final, it does not seem controversial that when the body decides 'C', the Court regards the ouster clause as failing to protect decision 'C', and strikes it down. The tension, or divergence in constitutional worldviews, will be more likely to be visible in those cases in which standards of fairness, reasonableness or rationality are imposed to strike down a decision, and especially when to do so appears to circumvent or contradict the language of a statutory ouster clause, or which involves an imputation of intention to the legislature. The difference may, however, be confined to the visibility, rather than the existence, of the tension.

638 The so-called “fig leaf” of parliamentary intention – Laws, Law and Democracy at 79. See, for example, Dunbar v Levack at 543, per Lord Cowan (“this... most beneficial statute... must, in all cases which admit of doubt, be liberally construed in order to attain the ends in the view of the Legislature”); Marr & Sons v Lindsay at 786, per Lord Mure (“this express exclusion of review would seem to lead to the inference that the framers of the Act supposed...”); Kerr v Hood at 900, per Lord Justice-Clerk Macdonald (“I can hardly believe that the Education Department intended anything of the kind. I think it perfectly possible that what was intended to be done was simply to...”) (the finality clause, in that case, was contained in an order of the Scottish Education Department made under a statutory power – Lord Ardwall considered it ultra vires of the Department to exclude the jurisdiction of the Court – see ibid. at 902-903); and Corporation of the City of Glasgow v Assessor of Public Undertakings at 760, per Lord Fleming (“it cannot be supposed that the Legislature intended a result so obviously inequitable”). See also Erskine, Institute, I.I.7. Imputation of parliamentary intention is sometimes an exercise in statutory interpretation, but it may (and sometimes has) become a more contentious exercise. It was said by Lord Justice Denning that “Parliament only gives the impress of finality to the decisions of the tribunal on condition that they are reached in accordance with the law” – R. v Medical Appeal Tribunal, ex parte Gilmore [1957] 1 Q.B. 574 at 585, per Denning L.J. – the content of “law” being determined only in part by Parliament.

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Judicial review of ouster clauses therefore emerges as a heightened point of constitutional and institutional tension between Parliament and the Court. Considering that each institution is a source of constitutional authority, how are those tensions to be resolved, and how are those divergent constitutional worldviews to be conciliated? In their apparent competition for normative dominance, how do we address the issue of deciding which institution's constitutional worldview, if any, prevails?
CHAPTER 4

MODELS FOR ADDRESSING COMPETING CONSTITUTIONAL AUTHORITY

4.1 Introduction

This chapter moves on from the apparent constitutional tensions manifesting between institutions in the context of judicial review, to consider means of settling or conciliating those tensions. It begins with a “last word” analysis, which is shown to be a worldview underlying the approach taken by a number of scholars, particularly in the English judicial review literature – namely, that in a situation of inter-institutional tension, one institution must, in the end, triumph over the other. This institution has the “last word”.

Such an approach is discredited as failing to take account of the distinctiveness of the judicial function in constitutional law, which is set out in the next chapter. The courts are not “doing the same thing” as Parliament when processing cases and issuing judgments, but are adding something distinctive to the “constitutional whole” of which they are a constituent part.

An alternative approach to a last word analysis is then considered – that of dialogue theories, which posit a more colloquial and dialogic constitutional environment, striking a middle ground between legislative and judicial supremacy. According to this approach, no institution in a given constitutional order has the last word. Dialogue theories are regarded as an improvement on a last word approach, avoiding some of its pitfalls, but they, too, have their own drawbacks. Among these are the potential for overstating the conversationality of inter-institutional relationships, overstating the advertency of principled institutional behaviour, and seeming to posit (and celebrate) a rather vague and happenchance constitutional environment in which it is difficult to ascertain what to expect from such a system. Whilst dialogue theories do not, in principle, deny the possibility of functional distinctiveness among institutions, they give it insufficient emphasis.
Functional departmentalism is then considered as a second alternative to a last word approach. This likewise seeks to strike a middle ground – in this case, between strong judicial supremacism and strong departmentalism. Whilst representing a move towards recognition of a distinctive constitutional function fulfilled by judicial institutions, this model does not appear to sit well with U.K. constitutional conditions, in particular given the lack of a central, programmatic constitutional text, which functional departmentalism seems to require for its explanatory power.

The chapter concludes with a different, more U.K.-oriented take on functional departmentalism: that of “bipolar sovereignty”. This has not been developed into a sufficiently detailed or elaborated framework to be considered as a model in its own right, but is useful for underlining institutional interdependence and the possibility of different institutions' fulfilment of distinguishable constitutional functions.

The particular order in which these analyses are presented – last word, dialogue theories, functional departmentalism and bipolar sovereignty – represent a broadly increasing openness towards functional distinctiveness and the idea of institutional interdependence. Whereas a last word approach fails almost entirely to recognise that interdependence, typically allowing for the constitutional function of judicial institutions to be liable to legislative override; dialogue theories at least tend in principle not to rule out interdependence. Functional departmentalism goes a step further by suggesting that institutions perform distinguishable constitutional functions, and are therefore contributing to some greater constitutional whole; and, as noted, bipolar sovereignty offers a U.K. take on that model.

A theory is required, however, which advances the indispensability of the distinctive judicial contribution to the constitutional whole in the specific context of the U.K. constitution. This chapter is therefore a precursor to the argument which will be made in the following chapter, that a further alternative theory – constitutional narratology – offers an analytical framework which is more appropriate to U.K. constitutional conditions, and which better captures both the functional distinctiveness and indispensability of the judicial contribution. Its distinctiveness and indispensability are emphasised in a model which does not require the

As argued below, the existence and form of individual courts may be subject to legislative override, but the constitutional function fulfilled by courts can only be carried out by judicial institutions.
existence of a central, programmatic text at the heart of the constitutional system, which takes full account of the particular extent to which Acts of Parliament are a non-narrative source of law, and which reflects the particular “storytelling” function which is regarded as part of the judicial enterprise in U.K. legal and constitutional tradition.

Before introducing constitutional narratology, each of the aforementioned approaches – last word, dialogue theories, functional departmentalism and bipolar sovereignty – will be discussed in turn.

4.2 Last word

4.2.1 The analytical framework

A “last word” approach to, or analysis of, the constitutional order is not so much an analytical framework in its own right, as it is a description of a constitutional worldview underlying the approach adopted by a number of scholars. This section gives a brief overview of that approach and some of the principal terms of debate in which it is found in the U.K. – primarily in the context of English judicial review.

There is a substantial literature on the so-called “ultra vires” versus “common law” models of judicial review. Paul Craig described the two competing approaches:

“The traditional ultra vires model, or specific legislative intent model, was based on the assumption that judicial review was legitimated on the ground that the courts were applying the intent of the legislature. The courts' function was to police the boundaries stipulated by Parliament... Advocates of the common law model of illegality challenged these assumptions... Proponents of the common law model argue that the principles of judicial review are in reality developed by the courts. They are the creation of the common law.”

The debate will not be restated in detail here. It seems, on the face of it, like a reasonably framed debate, and one in which there are two clear positions which can be taken. One explanation pulls towards the authority of Parliament for the conduct of judicial review, and

641 For a flavour of the debate, see generally Forsyth, Judicial Review and the Constitution, which includes contributions by a number of key protagonists such as Trevor Allan, Paul Craig, Christopher Forsyth, Jeffrey Jowell, Sir John Laws and Dawn Oliver. See also Stephen Broach, 'Illegality: The Problem of Jurisdiction' in Supperstone, Goudie and Walker, Judicial Review at 107-133.
the other towards the common law.\textsuperscript{642}

It is, however, a debate which is largely framed in normative terms.\textsuperscript{643} Nicholas Bamforth claimed that what both proponents of an \textit{ultra vires} theory and a common law theory share is “the conviction that one's view concerning the basis (and, in consequence, the proper parameters) of judicial review will be heavily influenced, if not determined, by one's normative view concerning the appropriate constitutional relationship between the courts and Parliament”.\textsuperscript{644}

Moreover, it is a debate the polarity of which can sometimes conceal a worldview \textit{shared} by protagonists on both sides: the exhibition by both \textit{ultra vires} and common law advocates of a “last word” approach to resolving the tension between legislature and courts.

Proponents of an \textit{ultra vires} model subscribe quite loyally to the concepts of parliamentary sovereignty and supremacy. One of the principal statements which has antagonised those favouring a common law model was made by Sir William Wade and Christopher Forsyth, who wrote that “[t]he simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law”.\textsuperscript{645} For Wade and Forsyth, the word of Parliament is all: “[the courts] have no constitutional right to interfere with action which is within the powers granted (intra vires): if it is within jurisdiction, and therefore authorised by Parliament, the court has no right to treat it as unlawful”.\textsuperscript{646} The courts, they say, “can only obey the latest expression of the will of Parliament... If they fly too high, Parliament may clip their wings”.\textsuperscript{647} The courts occupy a

\textsuperscript{642} A third position emerged – the “modified \textit{ultra vires}” theory; an apparent compromise by those favouring an \textit{ultra vires} model, but failing to achieve conciliation between the two sides of the debate.

\textsuperscript{643} This is found on both sides of the debate. On the \textit{ultra vires} side, for example, Christopher Forsyth has referred to “the utility of fig-leaves”, and argued that there is (normative) value in having things not quite appear as they actually are, and that although “[n]o one is so innocent as to suppose that judicial creativity does not form the grounds of judicial review”, courts should nonetheless invoke the “myth” of \textit{ultra vires} in order to “provide the constitutional justification of judicial review” – see Christopher Forsyth, ‘Of Fig Leaves and Fairy Tales: The \textit{Ulta Vires} Doctrine, the Sovereignty of Parliament and Judicial Review’ in Forsyth, \textit{Judicial Review and the Constitution} at 42. On the common law side, Sir John Laws’ predilection for a judiciary which guarantees a framework of fundamental principles (and freedom of thought and expression in particular) against statutory abolition thereof is well known – see 124 \textit{infra}.

\textsuperscript{644} Nicholas Bamforth, ‘Ulta Vires and Institutional Interdependence’ in \textit{ibid.} at 113.

\textsuperscript{645} Wade & Forsyth, \textit{Administrative Law} (10th edition) at 30.

\textsuperscript{646} \textit{Ibid.} at 31.

\textsuperscript{647} \textit{Ibid.} at 26.
position of “constitutional subservience”. As Jeffrey Jowell described of the ultra vires school of thought:

“Ultra vires rests securely and wholly upon the supremacy of Parliament and leaves no doubt that the courts in our system are subordinate to the legislature. All power is derived power – derived from the legislature, which is the supreme law-making authority. The courts are Parliament’s bureaucrats, implementing the legislature’s designs as agents rather than principals”.

It is clear that, for the ultra vires theorists, Parliament has the last word. Forsyth stated as much when he filed an important objection to the “abolition of parliamentary sovereignty” on the basis that it “implies that the final word on the lawfulness of administrative action is not to be found in the implied intent of the legislature”. He also regarded Parliament as “all powerful”, which vastly diminishes the judicial role in the constitution.

Those arguing for the common law position tend also to adopt a last word approach, and in some cases, also side with Parliament. Paul Craig, for example, hedged his argument by stating that Parliament may explicitly legislate so as to curtail judicial review, and that “this would be equally true irrespective of whether one perceived review to be based upon legislative intent or the common law”.

Stephen Broach criticised Forsyth for claiming that “what an all powerful Parliament does not prohibit, it must authorise either expressly or impliedly”. Broach’s contention is that “Parliament is all powerful” and that:

“[t]he sovereignty of Parliament means that, through expressions of its intent in statutory form, Parliament can lay down any legal rule that it chooses. It is,

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648 Sir William Wade & Christopher Forsyth, Administrative Law (9th edition) (Oxford University Press, Oxford, 2004) at 30. Interestingly, especially in the context of the discussion in this section, the 10th edition seems to change this view to one which refers to the “weakness of [the courts’] constitutional status”, and which claims that “the last word on any question of law rests with the courts” – Wade & Forsyth, Administrative Law (10th edition) at 26.


650 Forsyth, Of Fig Leaves and Fairy Tales (op. cit. fn. 643) at 35. Emphasis added. Though, as noted above at fn. 648, Wade & Forsyth, Administrative Law (10th edition) stated that “the last word on any question of law rests with the courts” – Administrative Law at 26.

651 Forsyth, Of Fig Leaves and Fairy Tales (op. cit. fn. 643) at 39.


653 Forsyth, Of Fig Leaves and Fairy Tales (op. cit. fn. 643) at 39.
however, simply a non sequitur to say that therefore every legal rule must be derived (whether expressly or impliedly) from such expressions of intent... The fact that Parliament has power to prohibit any particular act does not render it necessary to conclude that, unless and until such power is exercised, Parliament must be taken to have expressly or impliedly authorised the act”.

The point of disagreement between Forsyth and Broach simply seems to be as follows: Forsyth assumes that there is a constitutional principle whereby everything that Parliament does not prohibit, it must authorise or acquiesce in; and as such, any “common law” review by the courts is sanctioned by Parliament. Broach, meanwhile, regarded common law review as “a body of judge-made rules against which the lawfulness of any exercise of public power may fall to be considered”, and that this obtains for so long as “Parliament has not sought, whether expressly or by implication, to alter or overturn those common law rules”.

In both cases, Parliament has the last word: the difference between Forsyth and Broach is slight because both agree that judicial institutions must always capitulate in the face of purported statutory override; the courts ultimately yielding to Parliament. Broach, in fact, recognised this: “in effect, the debate between the two camps is really only about how hard Parliament must try before it is successful [in ousting the courts' jurisdiction]”.

Craig and Broach would be classed by Forsyth as “weak critics”, for they do not directly challenge the legislative supremacy of Parliament. By contrast, “strong critics” do mount such a challenge.

654 Broach, Illegality (op. cit. fn. 641) at 114.
655 Ibid. at 115.
656 Ibid. at 116.
657 Ibid. at 130. He further stated that, despite claiming that it is “an affront to the rule of law for an institution other than the High Court [of England and Wales] to be empowered to reach final determinations as to the state or content of the law of England”, “Parliament may override the rule of law, but only where it is shown, on the face of the statute, that it actually intended to do so” – ibid. at 120. In that vein, section 1 of the Constitutional Reform Act 2005 stated that the Act “does not adversely affect the existing constitutional principle of the rule of law”, which may imply that Parliament conceived that it was possible to do otherwise. Aileen McHarg also regarded this debate as having “become confined to a narrow, technical dispute” about legislative intent – Aileen McHarg, 'Border Disputes: the Scope and Purposes of Judicial Review' in McHarg and Mullen (eds.), Public Law in Scotland at 238.
658 Forsyth, Of Fig Leaves and Fairy Tales (op. cit. fn. 643) at 33-35.
Among Forsyth's “strong critics” are Lord Woolf and Sir John Laws. Lord Woolf said that “if Parliament did the unthinkable” in mounting a strong challenge to the power of the High Court of Justice of England and Wales to judicially review:

“then I would say that the courts would also be required to act in a manner which would be without precedent... there [are] advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold”. 659

It is not, however, clear from this statement whether Lord Woolf is asserting that Parliament is not supreme, or that it should not be supreme. Either way, it is another demonstration of a last word mentality; one in which either Parliament is entitled to do “the unthinkable” (thus upholding a legislative last word), or the courts are entitled to prevent it from doing so (upholding a judicial last word).

Sir John Laws, whom has been regarded as mounting a strong challenge to parliamentary sovereignty / supremacy, 660 wrote that “the superior courts in England... have, in the last analysis, the power they say they have”. 661 He has effectively argued for judicial supremacism, 662 championing judges as guarantors of “apolitical” values, who should not allow parliamentary or governmental abolition of “fundamental freedoms”. 663 However, although Laws clearly believes that courts should have the last word (such as in circumstances where the integrity of fundamental freedoms is under threat), it is again less clear whether he believes that they do have the last word.

659 Lord Woolf, ‘Droit public – English style’ [1995] Public Law 57 at 69. Lord Woolf was writing in the context of ouster clauses, for this comment is immediately preceded by a reference to the court's response in Anisminic Limited v Foreign Compensation Commission.

660 See, for example, Forsyth, Of Fig Leaves and Fairy Tales (op. cit. fn. 643) at 33-35; and Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' in Forsyth, Judicial Review and the Constitution at 85-87. Elliott's critique was regarded by Craig, however, as misconstrued – see Craig, Competing Models of Judicial Review (op. cit. fn. 640) at 384-386.

661 See Forsyth, Of Fig Leaves and Fairy Tales (op. cit. fn. 643) at 86.

662 A view likewise expressed in Stephen Sedley, 'Judicial Review (Publication Review)' [1993] Public Law 543 at 544; and an accusation not denied in Laws, Law and Democracy. Whilst Laws claimed that judges are constrained by the fact that their role is reactive, and that (unlike Parliament) “they cannot initiate”; he argued, elsewhere, for example, that, prior to the incorporation of the European Convention on Human Rights into U.K. law, judges should have taken it upon themselves to “deploy the tool of proportionality” – which has typically not been regarded as an ordinary common law ground of review – see Laws, Law and Democracy, and John Laws, 'Is the High Court the guardian of fundamental constitutional rights?' [1993] Public Law 59 at 78, respectively.

663 See generally Laws, Law and Democracy.
Nonetheless, there is again a demonstration of a last word mentality. One institution – whether Parliament or the courts – must dictate to the other, and its word must (or should) triumph.

4.2.2 Inadequacies and shortcomings

The relationship between Parliament and the courts is, of course, not always harmonious. The essential struggle between legislative and judicial institutions for predominance in questions of constitutional law (as well as in other areas of law) is well-known. Indeed, it has been specifically acknowledged in this thesis in the context of ouster clauses, chosen as an heightened point of tension between legislative and judicial visions of the constitution. These seem to be competing visions. The question that is often posed, and rarely convincingly resolved, is “who has the last word?”.

It was suggested in the previous section that both sides of the ultra vires and common law debate subscribe to a constitutional worldview whereby Parliament or the courts have (or should have) the last word. Their contention is largely about the source of the power or authority to conduct judicial review; in Craig and Broach's case, not its remove from Parliament as a distinct foundation of constitutional function in its own right; and in Lord Woolf and Laws' case, asserting the desirability of judicial override. Protagonists on both sides of the debate adhere to a last word analysis.

This presupposes, however, a particular construction of the constitution – one which fails to recognise the possibility that neither institution has, or can have, the last word.

This thesis is sceptical of a “last word” construction, for three broad reasons. The first is an eminently practical point: how can it be stated with confidence that a particular institution has or would have the last word? To take the example of ouster clauses, how robust are propositions that this institution or that would have the last word, when in reality no-one can be certain of what would happen were Parliament to enact an ouster clause which sought to comprehensively limit or exclude the jurisdiction of the courts in unequivocally clear, express and unambiguous terms? How can they presuppose that the other institution would “accept” the “last word” of the other, and not respond with its own, further, word; thus undermining the very possibility of a last word or final say? Even if an ouster clause were to
succeed in ousting the jurisdiction of the courts, does this fundamentally alter the constitutional position of the courts? To what extent does the success (or otherwise) of the ouster clause depend on the agreement or acquiescence of the courts to that effect? To what extent is the answer circumstance-specific? To what extent are future courts bound by whichever conclusion is arrived at in an individual case? And if there is judicial non-recognition of the purported extent of an ouster clause, what is the response of Parliament, if any? Is the outcome dictated by principle, practicality, or some combination of both? Furthermore, if the inter-institutional impasse is serious, and the integrity and resilience of the constitutional order has not hitherto been tested in such strong terms, how can the outcome be foretold? The claim that either institution – legislative or judicial – has the last word seems to generate more questions than it does answers. Framing the question as one of which institution has the last word – a necessarily exclusive competence – seems thus to be a speculative, contingent and quite restrictive analytical framework, which presupposes particular institutional responses.

The second reason why this thesis is sceptical of a last word construction is for a related logical objection: when does a word become “last” or “final”? How can the possibility of ongoing reciprocal responses, or further “words”, be precluded? Does not, and cannot, the situation become one of indefinite rounds of latest words? In which case, is a last word – a final say – even possible?

Finally, a last word analysis presumes that legislative and judicial institutions are competing for the same power, function or competence; the same “word”. It presumes that there is some central element at stake which must be appropriated either to Parliament or to the courts. Some institution must, in the end, prevail. There is one word, and it is ultimately the property of one institution.

This is a reductive approach to the problem. It may be questioned whether Parliament and the courts are indeed competing for the same “word”; the same territory of constitutional-competence. Can inter-institutional tensions such as those manifesting in the context of

664 On testing the constitutional order in this way, see section 5.2.5(b) infra.
665 One can of course state which institution he would like to have the last word, but that would be a normative, not a descriptive, claim. It was stated in the methodology of this thesis that the present research does not seek to be normative in nature.
ouster clauses be “solved” by appropriating the “final say” to one institution or the other? Is it possible to do so? It is, by contrast, conceivable that Parliament has one kind of “word”, and the courts another.\textsuperscript{667} The general approach of a “last word” understanding seems to be that there must be a locus of “absolute final say” in the system.\textsuperscript{668} There is sometimes little evidence of an acknowledgement that institutions are, or are even potentially, contributing distinguishable inputs to a greater constitutional whole, and that one depends on, and supports, the other. Indeed, a last word analysis seems categorically to exclude that possibility. It is a terminal approach, setting up institutions as competitors and combatants, one of which must dominate and triumph.

A theory is required which recognises that the constitutional order, and the ambiguous, practice-oriented U.K. constitutional order in particular, demands a more sophisticated analysis than that offered by a last word analysis. That theory must show that institutional tensions cannot necessarily be boiled down to such a simple, winner-takes-all competition for constitutional-normative authority. Rather than polarising the situation into a binary, all-or-nothing and typically fruitless search for which institution commands the last word, it should recognise that legislative and judicial institutions are participants in a political community, and are united in their shared living out of a common political project – however tacit, ill-defined or under-articulated that project might be. Rather than “ultimate authority” being “competed over as a prize”,\textsuperscript{669} constitutional authority should perhaps be treated as a matter of common, inter-institutional resource. The daily fact of the routine transaction by courts of statutory law and deference to Parliament, combined with the parliamentary (and executive) recognition of the judicial function entrusted to an independent, non-partisan judiciary, is testament to a broad institutional complementarity and co-existence which fosters the stability and continuity of the constitutional order.\textsuperscript{670}

The theory should acknowledge the complementarity and fundamental institutional and normative unity of the

\begin{footnotesize}
\textsuperscript{667} See, for example, \textit{ibid.}, which refers to the ““last” judicial voice”.
\textsuperscript{668} The same idea was acknowledged by Conrado Hübner Mendes: ““Last word”, “final say” and “ultimate authority” are radical expressions. They all abound in the literature. They reveal a desire to locate the internal sovereign, the source from which definitive answers for the demands of collective action and coordination will emerge. The imperatives of order and stability call for such settlement. Democracy and the rule of law need that” – Conrado Hübner Mendes, \textit{Is it all about the last word? Deliberative separation of powers} (2009) 3(1) Legisprudence 69 at 69. He then went on to discredit this presumption.
\textsuperscript{670} Institutional harmony and the requirement for a core of constitutional stability are discussed below at section 5.2.5(a) \textit{infra}.
\end{footnotesize}
constitutional project, and should discredit or caution against an understanding of the
constitution as a battleground which must be won and dominated by one institution.

In discussing the requirement for such a theory, it should be apparent that a last word
analysis is not the only way of understanding, constructing or approaching inter-institutional
tensions in the constitutional order. The thesis now proceeds to a consideration of alternative
theories which do not adopt that worldview, and which represent attempts to move away
from a last word analysis. These are, in turn, dialogue theories, functional departmentalism,
bipolar sovereignty and constitutional narratology, which in that order represent an
increasing openness towards the possibility of a distinctive constitutional function being
fulfilled by courts, and institutional interdependence as its concomitant result.

4.3 Dialogue theories
4.3.1 The analytical framework
Dialogue theories offer one response, and challenge, to a last word approach. Whilst they
are primarily discussed in a U.S. context, and are often concerned with specifically U.S.
problems, it is worth considering this approach as a rejection of a last word analysis.

Dialogue purports to seek a middle ground between legislative and judicial supremacy. It
pictures a constitutional landscape in which institutional relationships are horizontal and
non-hierarchical. In particular, there is said to be dialogue between legislative and judicial
institutions, as well as executive institutions and wider society more generally.

671 They are, in fact, a response to the so-called “countermajoritarian difficulty”. See, for example,
Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics

672 Such as regarding “the Constitution” as a text – see, for example, Friedman, Dialogue and
Judicial Review at 654 – or in reference to “Framers” of the Constitution (Bickel, The Least
Dangerous Branch at 677) and such other features of the U.S. system as the claim that “Presidents
select judges whose ideologies resemble their own” – Bickel, The Least Dangerous Branch at 675-
676. The U.S. aspect of dialogue theories is at times redolent of functional departmentalism,
discussed at section 4.4 infra, whereby constitutional interpretation takes place across different
branches of the state – see Louis Fisher, Constitutional Dialogues: Interpretation as Political

673 For confirmation that dialogue rejects the notion of a last word, see, for example, Fisher,
Constitutional Dialogues at 273; and Friedman, Dialogue and Judicial Review at 658 and 668.

Osgoode Hall Law Journal 169 at 177.

675 Conrado Hübner Mendes, ‘Not the last word, but dialogue: Deliberative separation of powers II’
(2009) 3(2) Legisprudence 191 at 191.
Whilst dialogue theories command a diverse body of literature in their own right, a central theme is of “continuing colloquy” between institutions.\(^{676}\) Courts resolve constitutional disputes by “participating in and fostering debate about the proper course of government”.\(^ {677}\) They “elicit partial answers and reactions from other institutions”,\(^ {678}\) and “try tentative answers [themselves]”.\(^ {679}\) Institutions negotiate the constitutional way forward in a “process of give and take”,\(^ {680}\) with courts assuming a “highly interactive” role in the “dialogue over the meaning of the Constitution”.\(^ {681}\)

A number of metaphors have been used to describe the process of dialogue. A recurring metaphor has been that of institutions conversing through their decisions and deliberations.\(^ {682}\) Alexander Bickel wrote that constitutional principle is “evolved conversationally[,] not perfected unilaterally”,\(^ {683}\) whilst Barry Friedman wrote that “constitutional interpretation is an elaborate discussion between judges and the body politic”.\(^ {684}\) Neal Katyal proposed that judges could act as “advice-givers” to other branches of the state, by sending signals and stimulating debate.\(^ {685}\) This could also take the form of less active forms of communication, such as the exercise of self-restraint in constructively leaving certain matters undecided or incompletely decided.\(^ {686}\) Courts can “prod other institutions to speak”.\(^ {687}\) Other metaphors have included Erik Luna's description of the court as a cartographer, providing “constitutional roadmaps” for the legislator to navigate,\(^ {688}\) and courts as “society's tennis partner, always volleying the ball back”.\(^ {689}\)

In sum, dialogue represents an ongoing process of to-ing and fro-ing between institutions and wider actors in society. Institutions are engaged in continual rounds of constitutional dialogue, and each institution is constrained by the political system which surrounds them,

\(^{676}\) See, for example, Bickel, *The Least Dangerous Branch* at 240; and Fisher, *Constitutional Dialogues* at 273.

\(^{677}\) Friedman, *Dialogue and Judicial Review* at 654.

\(^{678}\) Bickel, *The Least Dangerous Branch* at 240.

\(^{679}\) Ibid.

\(^{680}\) Fisher, *Constitutional Dialogues* at 273.

\(^{681}\) Friedman, *Dialogue and Judicial Review* at 668.

\(^{682}\) Although it has been said that dialogue is not about institutions “engaged in placid and friendly conversation” – Mendes, *Not the last word, but dialogue* at 191.

\(^{683}\) Bickel, *The Least Dangerous Branch* at 244.

\(^{684}\) Friedman, *Dialogue and Judicial Review* at 653.


\(^{689}\) Friedman, *Dialogue and Judicial Review* at 669.
militating against claims to possession of a last word.

Dialogue theories offer a more sophisticated framework within which to seek the conciliation of apparently competing institutional tensions. They speak to a less confrontational approach to the resolution or accommodation of those tensions. They diffuse the tendency of a last word approach to polarise the situation into one in which a single institution must triumph, and recognise that the constitutional project is a multi-institutional endeavour. Dialogue theories recognise that “[n]o single institution, including the judiciary, has the final word on constitutional questions”.690 They envisage a less belligerent constitutional environment than does a last word analysis; one in which institutional participants contribute to a more deliberative and dialogic constitutional order.

Dialogue theories therefore reveal an alternative to the conception of the constitutional order as one in which a single institution must have the last word. Already, those engaged in disagreements about whether legislatures, courts or some other institution has the last word, can be seen to inhabit just one theoretical construction of the constitutional order; and it is clear that this is not the only way of approaching the issue, nor of seeking to resolve or ameliorate inter-institutional tensions. Dialogue theories provide just one – diverse – alternative to a last word analysis.

4.3.2 Inadequacies and shortcomings

However, dialogue theories may overstate the conversational and deliberative environment in which they envisage the institutions of state colloquialising. For example, it may be doubted whether judicial silence really represents a signal actively sent to Parliament, or an attempt made by the courts to stimulate debate in the legislature, executive or wider society at large; and, indeed, whether these institutions even detect these signals or interpret them as intended. Questions may be asked as to whether the relationship between institutions is really so congenial and collaborative.

It may also be asked whether dialogue theories do not more generally understate the inter-institutional tensions that from time to time seem evident. Can, for example, a Parliament which states in an ouster clause that “no review will be permitted in any court of law whatsoever”, and a court which interprets that provision only to exclude review in certain

690 Fisher, Constitutional Dialogues at 273.
circumstances, be faithfully described as in a dialogic relationship? Or does dialogue genuinely admit of disagreements, even arguments, between institutions?

Furthermore, cannot one be sceptical about the advertency of principled institutional behaviour that dialogue theories seem to imply? To continue the above example, perhaps it might be said that a Parliament which enacts the aforementioned ouster clause does so, not as a message or signal to the courts, but as a representation of political aspiration, an attempt to maximise the normative territory of Parliament, an attempted display of strong government, or perhaps even something more cynical like a concession to a particular lobby or interested party. Perhaps Parliament has not spared a thought for how a court might interpret this provision. Moreover, is Parliament a unified body to which one can attribute a singular intention?

Likewise, if the courts interpret an ouster clause in the manner aforesaid, must this represent a response to Parliament, in the sense of sending messages or signals, taking a position or making a stance? Could there not be other motivations for such an interpretation by courts, such as a genuine belief that the interpretation actually conforms to the intention of Parliament, or that the interpretation in question is necessary to render justice to an aggrieved party, a task the court considers itself obliged to fulfil? Again, there remains the possibility that the courts, in adopting such an interpretation, have not actually considered whether it might run contrary to that intended by Parliament (if a singular intention can indeed be attributed to Parliament), or have not considered the possibility that other interpretations could have been made of the provision in question.

This is not to mention those situations in which judicial statements are made which are not necessarily direct interpretations of a particular statutory provision, and thus in which there is a less direct or dialogic utterance, such as a general presentation of judicial policy or commitment. Thus, when Lord Kinnear said in Moss' Empires v Assessor for Glasgow, for example, that:

“wherever any inferior tribunal or any administrative body has exceeded the powers conferred upon it by statute to the prejudice of the subject, the jurisdiction of the Court to set aside such excess of power as incompetent and illegal is not open to

\[\text{\textsuperscript{691}}\] See, for example, Friedman, Dialogue and Judicial Review at 670.
could this not be considered to be so indirect a reference to the constitutional relationship between Parliament and the courts (if, indeed, it is interpreted as such) that it is too much to describe it as an exercise in dialogue? The “conversation” between Parliament and the courts often seems too indirect, oblique or incidental to merit its description as dialogue; and so too might dialogue theorists be in danger of retrospectively imposing their own visions of correspondence or communication on the intercourse between institutions, by imputing intentions or interpretations to one or the other.

There is a further problem with dialogue theories in explaining the constitutional relationship between Parliament and the courts. That is a systemic problem which seems to produce the opposite concern from a last word analysis: whereas a last word analysis purports to tell us which one institution will or must prevail, dialogue theories seem to envisage a system that is so constitutionally happenchance, vague and dawdling, that we are given scant indication of how best to approach situations of heightened inter-institutional tension. In that difference lies a perhaps unexpected similarity between a last word analysis and dialogue theories, which is that they both seem to overstate the politicality of the system, in which there seems to be an implicit chaos between institutions. Under a last word analysis, that manifests as an inter-institutional battle for constitutional territory in which victory is marked by winning subsidiarity from the other institution; whilst a dialogic constitution seems to be so diffuse and discursive, with such little systemic direction, that it is difficult to know what, if anything, to expect from such a system. Neither approach sufficiently focuses on the possibility of institutions' functional distinctiveness.

4.4 Functional departmentalism

4.4.1 The analytical framework

Another alternative to a last word approach is “functional departmentalism”, which is a sub-category of, or more structured take on, dialogue theories in general. Dawn Johnsen described this as a middle ground between strong judicial supremacism and strong departmentalism. She described strong judicial supremacism as requiring other branches of

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692 Moss' *Empires v Assessor for Glasgow* (House of Lords) at 6, per Lord Kinnear.
693 Whereas this thesis recognises the politicality of the system, it seeks to emphasise both its *systemic* nature, and its reliance on underlying culture and tradition.
694 This feature is accentuated by the absence of a central constitutional text, a difference which would seriously disrupt much of the U.S. analysis were it to be applied to the U.K.
the state to defer to a supreme court as the “ultimate interpreter of the Constitution”. At the other end of the spectrum is strong departmentalism, which recognises the authority of different branches or “departments” of the state to interpret the constitution on an independent, “near-plenary” basis.

According to Johnsen, between these two extremes lies a middle ground of “functional departmentalism”, in which different branches of the state have limited authority to act on independent constitutional interpretations, the limits of which are defined by context-dependent, functional considerations. According to Keith Whittington, functional departmentalism is where “each branch, or department, of government has an equal authority to interpret the Constitution in the context of conducting its duties”, each being “supreme within its own interpretive sphere”. This latter approach, it is said, recognises the collaborative, shared, inter-institutional constitutional endeavour.

According to Johnsen, functional departmentalism could be framed in the context of the U.S. Constitution as follows:

“the Marbury [v Madison] Court claimed relatively limited interpretive authority for the courts: to interpret and apply the Constitution only in the course of resolving justiciable cases and controversies. The Court did not purport to resolve whether and when fidelity to the Constitution requires Congress and the President to adhere to the Court's interpretations as they exercise their own constitutional powers.”

This, she said, could give rise to the following questions:

“Congress and the President, too, are constitutionally obligated to uphold, and thus must first interpret, the Constitution. How should they approach this responsibility? Should they follow relevant Supreme Court precedent, even precedent with which they disagree, or may they take official action premised on constitutional views at

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696 Johnsen, Functional departmentalism at 106 and 109.
697 Ibid. at 109-110.
699 See Johnsen, Functional departmentalism at 109.
700 Ibid. at 105.
These suggest, as in the case of dialogue theories, some specifically U.S. characteristics and problems which might not apply or might take on a different guise in the U.K. context. The most obvious difference is that the U.S. has a central constitutional text which textually obligates branches of the state other than the courts to uphold the Constitution, however there are other features of the system – such as the presidential power of legislative veto – which do not have a ready comparator in the U.K.

Nonetheless, there is in the U.K. an evident form of “interpretation” by branches of the state other than (and in addition to) the courts. Parliament, for example, acts out a form of constitutional interpretation in exercise of its legislative powers, which are not to be found in a central constitutional text. In the executive branch, the Prime Minister commands and exercises significant conventional powers, which are again not to be found in a central constitutional text. The exercise of those powers, together with the exercise of prerogative powers by other government ministers, may likewise be considered a tacit form of constitutional interpretation. The legal opinions of the Government Law Officers – in the Scottish context, the Lord Advocate, Solicitor-General and Advocate-General – which touch upon matters of constitutional law, comprise another form of constitutional interpretation within the executive branch. Constitutional interpretation can thus be argued to occur, albeit in a more implicit form, in the absence of a central constitutional text; and, importantly for functional departmentalism, it can be seen to take place across multiple institutions and offices of state.

There are certain analytical advantages to a functional departmentalist over a last word approach to the U.K. constitution. If each of these “interpreters” of the constitution – legislative, executive and judicial – derive their institutional authority from the constitution

701 Ibid. at 105-106.
702 Among the U.S. Constitution's most notable textual requirements to uphold the Constitution are, in this regard, provisions found in Art. 2 (which requires the Presidential Oath to be as follows: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States”); and Art. 6 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution”) (emphasis added).
703 The Lord Advocate and Solicitor-General are members of the Scottish Government (and thus of the Scottish executive), whilst the Advocate-General is a member of the U.K. Government (and thus of the U.K. executive).
(which is a factual as well as a legal phenomenon\textsuperscript{704}), which does not orbit around a central, constitutional text; then there is already evidence of a form of context-dependent, “departmental” constitutional self-interpretation that bears some similarity to a functional departmentalist analysis. The U.K. constitution seems far more practice-oriented than in systems governed by a central, constitutional text. Accordingly, there is at some level a form of self-appropriation of functions and competences by institutions of state right across the legislative, executive and judicial spheres. How, particularly in the absence of a central constitutional text (which does not resolve all controversies, but at least provides an incontrovertible source to use as a starting point), are these claims to be reconciled and prioritised? Any prioritisation must be a normative phenomenon. A last word analysis seeks to prioritise institutions’ respective claims to constitutional interpretation and, accordingly, emerges as a highly normative approach to constitutional construction and interpretation.

As contrasted with dialogue theories, a last word analysis again emerges as the weaker candidate to functional departmentalism in seeking to describe and explain inter-institutional, constitutional relationships. Functional departmentalism points to a necessary institutional complementarity, where institutions co-exist in political community, united in their shared living out of a common constitutional project. Can one introduce into such a constitutional order the possibility for a single institution’s terminal last word, an absolutely final say, and ultimate authority on matters of constitutional interpretation?

In the context of a state in which such a power is indeed ascribed to one institution by a central constitutional text (such as to a constitutional court), that concern is probably addressed, at least in the first instance, by that text. It is thus likely to offer a relatively incontestable source of constitutional authority, even if it is open to interpretation.

In the U.K., with its absence of a central constitutional text, there is no such reference point for ascertaining which institution has the final say, or highest authority, on matters of constitutional interpretation. The practical operation of the U.K. constitutional order dictates the nature of inter-institutional relationships, rather than its orientation on fundamental rules enshrined in a central constitutional text. Johnsen underlined the need for what she called

\textsuperscript{704} Inasmuch as state institutions do not owe their existence, nor their constitutional allegiance, to a central constitutional text, nor to a defining “constitutional moment”, but are the result of a less determinate, more organic, historical emergence.
“constitutional fidelity”,\textsuperscript{705} but whereas in the U.S. context this will include fidelity to the central constitutional text, it would seem in the U.K. to require fidelity to the practical operation of a rather more ambiguous and practice-oriented constitution – at least if the constitutional order is to be stable and continuing.\textsuperscript{706} Inter-institutional constraints are practical rather than textually prescribed.\textsuperscript{707} Constitutional fidelity, argued Johnsen, “often depends on the branches' effectiveness in determining their own constitutional obligations and then exercising principled self-restraint, as well as on the branches' substantial powers to check each other and on the ultimate power of the electorate”.\textsuperscript{708}

In the U.K., the principles of self-restraint might rather be argued to arise from the practical dictates of a stable and continuing constitutional order, than from fidelity to a central constitutional text. Whilst individual institutions have an interest in defending (what they perceive as) their own constitutional functions and competences against encroachment or erosion, and thus to “fight their own corner”, it is not in the interests of any institution to exceed or transgress the prudent limits of its constitutional powers; limits which are constrained by the palatability of one institution's behaviour to other institutions and to the populace at large. A Parliament which dismissed the role, independence or impartiality of the courts would weaken the stability of the constitutional order and, in so doing, damage its own standing within that constitution. Courts which used judicial review to attack legislation too frequently or without compelling justification would likewise threaten the stability of the constitutional order, and damage their own integrity. All constitutional actors rely on the stability, coherence and integrity of the constitutional order as a whole for their own status and credibility within that constitution.\textsuperscript{709}

Again, whereas functional departmentalism highlights the necessary distribution of constitutional-interpretative authority across institutions, a last word analysis dismisses it. Whereas functional departmentalism suggests that no institution can monopolise the terms of constitutional authority, a last word analysis seeks to nominate a monopolist.

\textsuperscript{705} Johnsen, \textit{Functional departmentalism} at 115.
\textsuperscript{706} On which, see section 5.2.5(a) \textit{infra}.
\textsuperscript{707} Of course, statutes are textual prescriptions which can (to some extent) constrain institutions such as courts. Ouster clauses are an example of that. However, as observed in the previous chapter, the Court has its own relatively freestanding constitutional foundation which at some level contends with those of other institutions of state. Moreover, Parliament's power to make statutes is not prescribed by a higher constitutional text around which the state is organised, but by the practical operation of the evolved system.
\textsuperscript{708} Johnsen, \textit{Functional departmentalism} at 115.
\textsuperscript{709} This theme is continued at section 5.2.5 \textit{infra}. 

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4.4.2 Inadequacies and shortcomings

Functional departmentalism does not, however, provide an analytical framework which adequately described or encapsulates inter-institutional relationships in the Scottish and wider U.K. constitution.

First, it seems too thin a framework within which to understand anything more about institutions' respective constitutional functions than we already do. In the U.S. Constitution, which has at its core a fundamental constitutional text, there is a central reference point from which to work in ascertaining the respective constitutional functions and competences of institutions, and their constitutional authority or “legitimacy”. In that sense, the (textual aspect of the) U.S. Constitution is constitutionally programmatic in a broad sense. It forms the starting point from which all constitutional analysis and interpretation flows. The U.K. constitution is, as already considered, rather more practice-oriented, and of course lacks any single text that can be considered constitutionally programmatic.710 For that reason, the starting point from which all constitutional analysis flows is observation of individual and collective institutional behaviour.711

If the U.K. constitution is the product of institutional practice, that to a great extent defines the limits of constitutional authority enjoyed by each institution. The delimitation of constitutional competence is observed from practice and the constitutional culture it engenders, rather than in conjunction with a central, programmatic constitutional text. In such a practice-defined system, it can be asked what a functional departmentalist analysis would add. As an analytical framework, it seems, in fact, to assume a truistic quality, because the “departmental” limits of constitutional authority are, essentially, whatever the institutions (collectively) say they are. Those institutions are constrained by less tangible, practical considerations – which are far from insignificant – but not by an incontestable governing framework embodied in a central constitutional text. In other words, constitutional “legitimacy” is in the U.K. much more of a factual or practical than legal phenomenon, inasmuch as it is not prescribed centrally by a constitutional text, but is observed from practice and its consequences. Functional departmentalism thus appears to lend somewhat unnecessary nomenclature to something which, in the U.K., seems rather

710 Some might argue that the Treaty of Union should be treated as constitutionally programmatic; however, for good or ill, it is barely regarded as such.

711 Shaped by, and shaping, legal and constitutional tradition.
obvious; namely, that institutions must act within the practical constraints of the system.

Furthermore, it appears from Johnsen's discussion of functional departmentalism that she is proposing an analytical framework which would be more useful in a more structured constitutional order underpinned by a central constitutional text. It seems, indeed, to be crafted for a U.S. analysis. For example, when she stated that “Congress and the President, too, are constitutionally obligated to uphold, and thus must first interpret, the Constitution”, it is difficult to respectively substitute “Parliament” and “the Prime Minister”, and for the statement to be meaningful in the U.K. constitutional tradition.

Indeed, constitutional interpretation begins, in the U.S., from a central constitutional text – a tangible, programmatic source of constitutional law. In the U.K., constitutional interpretation begins from the more sprawling legacy of inter-institutional practice. Constitutional interpretation by legislative, executive and judicial institutions in the U.K. can – and might characteristically – be as tacit or subtle an activity as a government minister declining to resign from office following a public disagreement with government policy, in breach of the convention of collective ministerial responsibility; or the House of Lords voting to oppose a Government Bill, in breach of the Salisbury Convention; or a court deciding that a particular omission in parliamentary procedure falls foul of, and qualifies, the common law “enrolled bill” rule. In short, constitutional interpretation seems in the U.K. too ambiguous and indeterminate a phenomenon to be confined to the kind of “departmental” definitions which, at the constitutional level, functional departmentalism seems to require. This is in addition to the thinness of functional departmentalism as a useful analytical framework for application in the U.K., and its apparent paucity in adding clarity or explanatory power to inter-institutional relationships in the U.K. constitutional order.

4.5 Institutional interdependence and bipolar sovereignty

A remaining, valuable aspect of the functional departmentalist analysis is recognition of different institutions' fulfilment of distinguishable constitutional functions. In this vein, Lord Browne-Wilkinson suggested institutional interdependence when he said that “the courts and Parliament are both astute to recognise their respective constitutional roles”. Nicholas Bamforth took this to suggest a "mutuality of concern" implying “a deeper constitutional

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712 See 133 supra.
interdependence between the courts and Parliament”.  

A similar idea was discernible in the concept of “bipolar sovereignty”, a term first used by Sir Stephen Sedley, who wrote extra-judicially of the U.K.’s having an “organic constitution” in which there was a:

“new and still emerging constitutional paradigm, no longer of Dicey’s supreme parliament to whose will the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown’s ministers are answerable – politically to Parliament, legally to the courts.”

He also acknowledged a similar idea in a judicial setting by reference to “a mutuality of respect between two constitutional sovereignties”.

These ideas evoke a conception of a constitutional framework in which a plurality of institutions share, or have some collective role to play in, the organisation of constitutional relations. In particular, they move away from a last word analysis, in which one institution has the “final say” on constitutional matters. They suggest, more specifically, that it is not for Parliament alone to define the shape of the constitutional order, but that other institutions may have some part to play in its definition.

The distinction between respective constitutional functions fulfilled by different institutions is vital in adopting an holistic approach to the constitutional order, and in particular where tensions arise between those institutions. Whilst institutions must maintain some degree of relational harmony, and an underlying commitment to the shared constitutional project in

714 Bamforth, *Ultra Vires and Institutional Interdependence* (op. cit. fn. 644) at 136, and generally at 113-139.

715 Stephen Sedley, ‘Human Rights: A Twenty-First Century Agenda’ [1995] Public Law 386 at 389. The term “bi-polar” was not defined at its original point of use, however there are at least three senses in which it might be considered as to its content or meaning: (i) of, relating to or having two poles or extremities; (ii) having two opposite, contradictory or mutually repelling natures or qualities; or (iii) the sense invoked by the term “bipolar disorder”, implying a disruptive and chaotic switching or alternation between two markedly different states. Accordingly, “sovereignty” (however that is to be defined) may considered to (i) comprise more than one source or manifest in more than one location (for example, in legislative and judicial institutions); (ii) contain potentially conflicting ideas (such as about the roles or functions of legislative and judicial institutions); or (iii) “move” or shift between institutions. The “bipolar sovereignty” framework has not been explained or elaborated upon in sufficient detail, however, to be adopted as an analytical model in its own right.

which they are participants, the possibility for inter-institutional tension continues to exist. Those tensions were acknowledged by Lord Woolf, who wrote extra-judicially that:

“I have no doubt that there is and has been... tension between the judiciary and the executive, and that the tension has from time to time increased as a result of the decisions of judges on application for judicial review. I, however, do not regard this as a matter of concern... The tension created by judicial review is acceptable because it demonstrates that the courts are performing their role of ensuring that the actions of the Government of the day are being taken in accordance with the law. The tension is a necessary consequence of maintaining the balance of power between the legislature, the executive and the judiciary upon which our constitution depends. The tension is no more than that created by the unseen chains which, in the absence of a written constitution, hold the three spheres of government in position. If one chain slackens, then another needs to take the strain. However, so long as there is no danger of the chains breaking, the fact that this happens is not a manifestation of weakness but of strength.”

Those tensions are regarded in this thesis as a natural feature of a constitutional framework in which judicial and legislative institutions perform distinguishable constitutional functions. Having raised the possibility of functional distinctiveness in the context of institutional interdependence, the thesis now turns to consider what specific constitutional (and legal-systemic) function the Court performs in the context of judicial review.

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717 See section 5.2.5(a) infra.
CHAPTER 5

JUDICIAL AND CONSTITUTIONAL NARRATOLOGY

5.1 Introduction

In Chapter 3, institutional tensions between Parliament and the Court were framed in the context of judicial review of ouster clauses. It was suggested that those tensions demonstrated a potentially divergent and conflicting expression of normative and constitutional worldviews by each institution, with Parliament regarding itself as entitled to limit or exclude the jurisdiction of the Court, and the Court regarding itself as entitled to pronounce on the valid extent of ouster by reference to its own standards of decision-making. Judicial review of ouster clauses was argued to hold a sharpened or particularly visible divergence in constitutional worldviews, but the phenomenon was said also to be evident as a general tension across the wider sphere of judicial review.

Chapter 4 sought to demonstrate that a last word approach to settling or conciliating those tensions in constitutional worldviews was inadequate, and that whilst dialogue theories and functional departmentalism potentially offered improvements on that approach, they were neither sufficient to encapsulate the particularities of U.K. constitutional conditions, and failed to give sufficient emphasis to functional distinctiveness. Functional departmentalism and a related analysis – bipolar sovereignty – were acknowledged to be valuable, however, in suggesting the fulfilment by different institutions of distinguishable constitutional functions, and following therefrom, institutional interdependence.

In the remainder of the thesis, it is argued that the distinguishable constitutional (and legal-systemic) function performed by the Court in the context of judicial review is a constitutional-narratological function. This is advanced as a more holistic framework of analysis through which to view the U.K. constitutional order and the Court's (or courts') role and functionality within it. The form, situation and extent of narrative is shown to be variable across legal systems, but to be primarily found in legislation and judicial decisions. The argument is rather about the Court's underlying constitutional function, than about the Court itself.
Whilst the extent to which legislation is a non-narrative source of law may accentuate the extent of judicial narratology, it is argued that the latter embodies the fulfilment of a distinctive constitutional function which can only be performed by courts. This is indispensable to the operation and operability of a stable, multi-institutional constitutional order in which institutional interdependence is underlined by the necessarily different “words” they contribute to a greater constitutional whole. In other words, institutions should not be viewed as competing over a central constitutional competence, or “same word”.

It is emphasised that this does not translate into multiple last words; that is to say, one type of last word for Parliament and another type of last word for the courts. The point will be made that the idea of multiple last words in fact regresses towards a singular last word approach; furthermore, the courts' performance of any distinctive narratological function is not insulated from external constraints, militating against any claimed finality for the courts. Indeed, the core requirement for a certain degree of inter-institutional harmony and complementarity is vital for the continuing operability and functionality of the constitutional order as a whole, which further denies the possibility for any court (or legislature) to claim an incontrovertible “last word”.

It is acknowledged that whilst some of the main characteristics of judicial narratology are not peculiar to the field of constitutional law, there is a deeper narratological function at play which takes on a particularity in the field of constitutional law. It advances a particular manifesto of constitutional authority, in which the courts attribute to themselves a privileged function in the interpretation and delineation of that authority. The assumption and self-attribution of this interpretative authority points to a deep process of self-norming, with its attendant notions of self-reference, self-evaluation, self-corroboration and self-perpetuation. Moreover, judicial narrative has the quality and authority of law, distinguishing it from non-authoritative narratives such as might be found in political or academic discourses on constitutional law. This points to an exclusive judicial claim to the performance of a distinct narratological function within the constitutional order.

The extensive self-normativity of this exercise may raise questions about its legitimacy, and there will be some who are concerned by the suggestion that the courts necessarily command such a strong and exclusive constitutional function. However, that suggestion is made

720 See 148 infra.
neutrally; neither in celebration nor in condemnation of such a position being assumed by the courts. It is instead presented as a phenomenon of the constitutional order which must be confronted by supporters and sceptics alike.

The thesis does, however, explain what *legal-systemic* legitimation exists for the self-normativity of the constitutional-narratological function, by exploring what it is about our constitutional system which internally legitimates the courts’ assumption and performance of that function. Two related phenomena of the system – traditionality (which was introduced in Chapter 1) and functional necessity – are suggested to internally legitimize the judicial assumption and performance of that function, and these may, in turn, produce a systemic requirement that judicial claims are made to jurisdictional “inherency” or indefeasibility – or at least encourage courts to make those claims – particularly in the absence of a central constitutional text from which courts can in the first instance source their constitutional authority.

These issues form the subject of this and the following chapter. Chapter 6 closes by considering the institutional specificity of the courts’ distinctive constitutional-narratological function. It is first asked whether the advent of the Upper Tribunal poses a challenge to the Court of Session's performance of that function, and any associated claims to jurisdictional indefeasibility. It is concluded that it does not. It is then asked whether the U.K. Supreme Court, as a court hierarchically superior to the Court of Session, poses such a challenge. It is suggested that whilst the Supreme Court shares the constitutional-narratological function, as a very recent innovation in our constitutional order, there is no strong evidence as yet to suggest that the Court's performance of that function is waning. In any event, the Court remains the principal workhorse of the judicial review caseload, and even were its role in the provision of constitutional narrative to be increasingly assumed by the Supreme Court, the latter would inherit, and still have to confront, a tide of constitutional law (and legally-authoritative narrative) which had been generated by the Court of Session. That includes the extensive manner in which the Court has shaped Scottish legal and constitutional tradition.

The consideration of the potential impact of the Upper Tribunal and the Supreme Court (and the possible expectation that contentious cases will proceed on appeal to the Supreme Court) on the assumption and performance of the constitutional-narratological function by the Court of Session leads into the closing argument of the thesis, which is to reiterate the point earlier
made that it is the underlying function of the courts that is indispensable to the constitutional order, rather than its emanation in any specific court. Were the Court to be abolished by Parliament – which it is argued remains possible – the constitutional-narratological function may (and perhaps must) be taken up by an existing or replacement judicial institution.

Fundamentally, this underlines the particularity and distinctiveness of the constitutional-narratological function as one which must be undertaken by judicial institutions. Individual courts may come and go, but their underlying constitutional function arguably cannot.

5.2 The concepts of judicial and constitutional narratology

5.2.1 The analytical framework

It is argued in this thesis that the Court performs a constitutional-narratological function. This is an alternative approach to a last word analysis which moves towards a greater and deeper recognition of functional distinctiveness than that offered by dialogue theories, functional departmentalism or bipolar sovereignty. It also moves towards a more holistic approach to the constitution as a political project in which institutions are parallel and complementary participants, the constitution being the sum of its constituent parts. This section introduces the concept of judicial narratology, which is refined into constitutional narratology, as a part thereof, in section 5.2.3 below.

Courts use narrative as a means of adding explanatory power to an otherwise naked adjudicative decision. It allows, in the first place, for the elaboration of judicial decisions, most obviously in and elaborating upon the ratio decidendi of a decision – explaining why this particular decision was reached in this particular case; how the interface between the facts of the case and the existing law led to this particular decision being made. The rationale of the case is discernible beyond a bare interlocutor which, in itself, does not bear the appearance of a legally-reasoned decision.

The narratological function which this thesis argues to be performed by courts is, however, more broadly defined. It embraces not only this chronicling and storytelling aspect of adjudication, but also one that is deeply synthetic (that is to say, provides or facilitates synthesis) in the internal rationalisation of the law and legal system. By explaining how legal norms interrelate and acting as a “voice” of the law, judicial narratology serves a

721 And legislative narrative, for the purposes of contrast.
cohesive function, internal to the law, by which themes in the law are authoritatively explained, clarified, rationalised and developed. This performs a deep legal-systemic function by facilitating the coagulation and consolidation of law into a unified and thematically coherent body of norms.

The narrative analogy presupposes, of course, the existence of a narrator. The role of the judge as a narrator or storyteller is discernible in, and illuminated by, Ronald Dworkin's "chain novel" analogy. This was an attempt to explain the contribution of individual judges to the corpus of the common law. Dworkin viewed judges as writers, authors – novelists – each writing a chapter which both builds on the legacy of a story or tradition inherited by a judge, and adds to that tradition, such that his contribution must be confronted by future judges. Dworkin explained the “chain novel” analogy as follows:

"Each novelist aims to make a single novel of the material he has been given, what he adds to it, and (so far as he can control this) what his successors will want or be able to add. He must try to make this the best novel it can be construed as the work of a single author rather than, as is the fact, the product of many different hands. That calls for an overall judgment on his part, or a series of overall judgments as he writes and rewrites. He must take up some view about the novel in progress, some working theory about its characters, plot, genre, theme, and point, in order to decide what counts as continuing it and not as beginning anew."

Dworkin's reference to the singularity of the novel points to the unity and univocality of law as an integrated whole. It implies the need for coagulation and coherence in the oneness of law. The law is the law – and there can only be one law; everything else is non-law. Law is a particular kind of normative order; but it is necessarily (in the context of a single jurisdiction, at least) a single normative order. In stating that an individual judge's contribution to the chain novel should “fit”, Dworkin explained that the judge assumes the character of a chain novelist, not an independent creative writer. Individual, legally-reasoned decisions contribute to a greater jurisprudential whole, gradually developing, shaping and refining the law.

722 By which is meant legally-authoritative.
724 Ibid. at 229-230.
725 Ibid. at 230.
726 Ibid. at 232.
The judicial-narratological function (that is to say the narratological function performed by courts) operates both horizontally and diachronically. Horizontal cohesion refers to the relationship between extant legal norms. Litigation tests connections between parallel legal norms, by forcing their conciliation within the framework of a unified legal order which aspires to consistency. For example, in a case in which two statutory provisions are at issue, the court is required to authoritatively determine their relationship so that they co-exist in “mutual logical non-contradictoriness”.\(^\text{727}\) They must be conciliated, because the oneness of law implies an aspiration towards singularity and consistency. The same applies in settling the relationship between any two legal norms, such as judicial decisions, procedural regulations or legal principles. In testing and settling those connections – and there may previously have been no articulated connection between those norms – the courts gradually, case-by-case, coagulate the norms of the legal order into an increasingly cohesive whole. This underlines the univocality of law, with judicial decisions acting interstitially to provide logical and systemic connections between individual norms, and also adding (or having the potential to add) thematic coherence to the law as a collective mass of norms. Legal reasoning is an expression of the judicial-narratological function, serving as a powerful expository and explanatory force within the law itself, and emphasising the rationality of the legal order.

Diachronic cohesion refers to the relationship between legal norms across time. In particular, it refers to the relationship between a present norm and “the law's past”. It was stated in Chapter 1 that the historicality and traditionality of law required that newly generated legal norms confront an existing mass of law and legal tradition. Litigation again provides the specific context in which that confrontation is most pronounced, and by which that relationship is authoritatively defined.\(^\text{728}\) This means conciliating a legal norm with the existing norms, institutions and traditions of law, which define how a specific legal norm is known, interpreted and experienced. This likewise emphasises the rationality of the legal order, because it involves the ongoing (rational) conciliation of newly generated legal norms with a system and tradition of legal and political pre-understanding.

\(^{727}\) Tuori, *Ratio and Voluntas* at 153.

\(^{728}\) This is not to say that there is no relationship between legal norms until they are the subject of adjudication, nor that there is no “confrontation” between newly generated legal norms and the law's past when a new statute is enacted. Instead, it is to say that their relationship is not *authoritatively articulated* until they are the subject of adjudication. Legislation may prescribe the relationship between certain legal norms, but the precise, context-dependent implications of those relationships will in most cases still remain susceptible to further (judicial) definition and delineation.
The judicial-narratological model is assisted by two distinctions drawn by Kaarlo Tuori. His first distinction is between *ratio* (reason) and *voluntas* (will); and his second between the surface layers and deep layers of law. *Voluntas* is primarily expressed by the legislator, as it seeks to use the law instrumentally, as a means to achieving political goals. It represents instrumental political will to change the legal order, embodied in legislation. *Ratio* is regarded as “sedimented or layered reason, which informs legal actors' pre-understanding and unfolds its influence primarily through this pre-understanding”. The existing legal system and wider legal tradition, including basic normative, institutional and methodological understandings, are crucial parts of that *ratio*.

Tuori's second distinction proposes two levels of the legal order which are argued to obey “divergent rhythms”. The surface layer consists of statutes and judicial decisions, whilst the deeper layer consists of general legal concepts and principles, legal theories and doctrines, and patterns of argumentation — and we may also add to that list the deep, existing legal culture and legal-hermeneutic tradition. Whilst *voluntas* is primarily a surface-level phenomenon, *ratio* is found in the deeper layers of the legal order. Accordingly, Tuori argued that there are tensions between *voluntas* and *ratio*; including those between “the law's autonomy and its ineffaceable societal and cultural moorings”, and “the law's positivity and systematicity”. Whilst the “law's surface level is constantly changing... its putative deep structure or deep culture represents legal *longue durée*”.

The judicial-narratological framework of analysis – which will be further refined into a constitutional-narratological model in section 5.2.3 below – recognises these deeper layers of the legal order to a much greater extent than the alternative models explored in the previous chapter. It submits that the courts operate at the interface of these tensions by synthesising legal norms (including those newly generated) with the existing legal tradition; the surface

729 Tuori, *Ratio and Voluntas* at 62.
730 *Ibid.* at x. Tuori recognised that *voluntas* is not entirely confined to the sphere of legislation, but that it characterises legislation more than other sources of law.
731 *Ibid.* at 40. The faster pace of change in the law's surface, and the slower pace of change in the deeper layers of the legal order, were observed at 14 *supra*.
733 See, for example, *ibid.* at x, 40, 66 and 69. More will be made of these distinctions in the course of this and the following chapter.
layers with the deeper layers. They perform an aggregative and integrationist function, working to achieve the oneness and univocality of law. This is achieved by setting a legally-authoritative narrative to the law.

An important feature of judicial narrative is that it is internal to the law. This may be contrasted with other types of narrative discourse, such as that offered by academics, politicians or the media which, although they may be considered authoritative on some level, cannot vindicate the unique claim of judicial narrative, which is one of legal authority. It has the quality of law.\textsuperscript{736} It is, so far as the legal order is concerned, the most authoritative kind of narrative, exclusive of others. In this regard, it serves a legal-systemic function; one which is argued in this thesis to be indispensable for the rational operability of a law and legal system.

Whilst the following section explores the possibility of legislative narrative, that is narrative in a more limited sense, for it does not perform the broader, legal-systemic narratological function which has been attributed to courts. Judicial institutions perform a core constitutional function which cannot be performed to its requisite extent by legislation; the narratological function being unique to courts.

As such, and specifically in the context of constitutional narratology, this framework of analysis will be shown to better and more holistically accommodate legislative and judicial institutions within an overarching, necessarily multi-institutional constitutional framework. Even in situations of inter-institutional tension, and claims to a “last word” asserted by an institution, constitutional narratology rejects the idea of mortal competition over a central constitutional competence by emphasising that legislative and judicial institutions perform distinguishable constitutional functions – contributing indispensable parts to a greater constitutional whole.

The particular extent to which legislation is a non-narrative source of law may nonetheless accentuate the extent or conspicuousness of judicial narratology. The following section will consider narrative in the context of legislation, both in order to highlight the differences

\textsuperscript{736} Other narrative sources of law, such as the work of the institutional writers, receive their formal legal authority in the context of live cases; and thus via judicial narrative. In a limited sense, executive narrative may also have a legal quality, such as reasons given for particular decisions taken by a minister, which may give rise to a claim for legitimate expectations etc.
between legislative and judicial narrative, and also to show how legislation's paucity of narrative may accentuate the extent or conspicuousness of judicial narrative.

5.2.2 Legislative narrative distinguished
The extent to which legislation is a narrative source of law varies across legal systems. This point is illustrated by contrasting the legislative acts of three legal orders: the U.K., France and the European Union. U.K. and French legislative acts are particularly low in narrative content, whereas E.U. directives are relatively rich in narrative content. A brief overview is given of each of these for the purpose of illustration, with an additional example taken from the U.S. State of Florida.

Acts of the U.K. and Scottish Parliaments are essentially a non-narrative source of law. Their operative provisions are terse and programmatic, and they do not contain preambles. Acts of Parliament often included preambles until the late 19th century, but these typically added little or nothing in the way of narrative quality. Where they did provide narrative, this tended to be little more than a brief outline of relevant Acts previously enacted, even when initially seeming lengthy. Only occasionally did preambles convey significant narrative quality, such as on the rationale for the Act, the doubts or questions it sought to settle, and its more general aims and objectives. Whilst narrative preambles could be used by judges to assist with statutory interpretation, “if an enactment [was] itself clear and unambiguous, no preamble [could] qualify or cut down the enactment”.

Private Acts of the U.K. Parliament do, however, contain preambles. Acts of Parliament often included preambles until the late 19th century, but these typically added little or nothing in the way of narrative quality. Where they did provide narrative, this tended to be little more than a brief outline of relevant Acts previously enacted, even when initially seeming lengthy. Only occasionally did preambles convey significant narrative quality, such as on the rationale for the Act, the doubts or questions it sought to settle, and its more general aims and objectives. Whilst narrative preambles could be used by judges to assist with statutory interpretation, “if an enactment [was] itself clear and unambiguous, no preamble [could] qualify or cut down the enactment”.

738 See, for example, the Parochial Buildings (Scotland) Act 1862, the Glebe Lands (Scotland) Act 1866 and the National Debt Act 1870.
739 See, for example, the Militia (City of London) Act 1820, the Highway (Railway Crossings) Act 1839 and the Burial Act 1855.
740 See, for example, the Hosiery Act 1843 and the Slave Trade Act 1843.
741 See, for example, the Judicial Committee Act 1844, the Hares (Scotland) Act 1848 and the High Peak Mining Customs and Mineral Courts Act 1851.
742 Powell v Kempton Park Racecourse Company Limited [1899] A.C. 143 at 157, per Earl of Halsbury, L.C.
743 Acts of the old Scottish Parliament sometimes contained preambles. An example from each of the 15th to 18th centuries will be given for the purpose of illustration. The [Untitled Act] (APS ii, 42, c.1) (“Crown Lands Act 1455”) opened with “In the first forsamekill as the poverte of the crowne is of tymis the cause of the poverte of the crowne...”. The [Untitled Act] (APS ii, 544, c.26) (“St. Andrews Act 1563”) began “Item, forsamekill as it was menit to the quenis grace and lorids of articlis, in name of all that within this realme ar desyrous that learnyng and letters flores, that thay wald tak tent to the waisting of the patrimonie of sum of the fundatiousniss maid in the collegeis of the cite of Sanctandros and uthers placis within this realme for the interteniment of the youth, and that few sciences, and speciallie thay that ar maist necessare, that is to say the toungis and humanitie, ar in ane part not teicheit within the said citie, to the greit detriment of the haill liegis of this realme.
As the practice of including preambles subsided, long titles took their place. They – like many of the old preambles – tend to be relatively short and to add little in the way of explanatory power to the Act itself. They take on a formal and formulaic appearance, rather than the provision of meaningful, explanatory narrative context. For example, the long title of the Scotland Act 1998 reads:

An Act to provide for the establishment of a Scottish Parliament and Administration and other changes in the government of Scotland; to provide for changes in the constitution and functions of certain public authorities; to provide for the variation of the basic rate of income tax in relation to income of Scottish taxpayers in accordance with a resolution of the Scottish Parliament; to amend the law about parliamentary constituencies in Scotland; and for connected purposes.

The long title of the Constitutional Reform Act 2005 reads:

An Act to make provision for modifying the office of Lord Chancellor; and to make provision relating to the functions of that office; to establish a Supreme Court of the United Kingdom, and to abolish the appellate jurisdiction of the House of Lords; to make provision about the jurisdiction of the Judicial Committee of the Privy Council and the judicial functions of the President of the Council; to make other provision about the judiciary, their appointment and discipline; and for connected purposes.

thair childrene and posteritie, desyring thairfor the quenis majestie and lordis foirsaidis to avise and rypelie considder that the rentis and fundatiounis of the saidis collegeis mycht be employit to sic men of knawlege and understanding quha hes the toungis and humanitie for instructioun of the youth and uther science according to the instructioun of the saidis collegeis and for weilfair of the haill liegis of this realme and thair posteritie; thairfoir...”.  The Act for repairing high ways and bridges (APS vii, 574, c.37) (“Highways and Bridges Act 1669”) commenced with “Our soverane lord, considering how necesser it is for the good of the people that hie ways be made and maintauned for readie and easie passage, travell and traffick through the kingdom, and that the care therof, which hath been layd upon the justices of peace, hath yet, for the most parte, proven ineffectuall in regaird the saids justices have not had spetiall orders and warrands for that effect; for remeid whairof...”. Finally, the Act for a treaty with England (APS xi, 295, c.50) (“Treaty with England Act 1705”) opened with “The estates of parliament, considering with what earnestness the queen's majesty has recommended to them the settling of the succession to the imperial crown of this her ancient kingdom in the Protestant line falyieing heirs of her own body, and also to enter into a treaty with her kingdom of England as the most effectual way for extinguishing the heats and differences that are unhappily raised betwixt the two nations, and in prosecution of her majesty's royal and just purpose of having a treaty set on foot betwixt her two independent kingdoms of Scotland and England, without which these things of great consequence betwixt them cannot be accomodat, therefore...”.

Short titles were given retrospectively to statutes that were still in force by such legislation as the Short Titles Act 1892.
Acts of the U.K. and Scottish Parliaments therefore emerge as a particularly formal and under-narrated form of legislative act. Law is treated instrumentally. Legislative will is conveyed tersely and crisply; Parliament promulgates in a prescriptive and programmatic fashion, declaring what the law is – but no more. In declining to clothe statutes with explanatory narrative, Parliament's legislative acts are, in this sense, fairly rudimentary, fragmentary and largely un- or under-explained. Although there may be expressions of rationale for the legislation in the parliamentary record, such as a government statement accompanying a Bill in its progress through Parliament, we are given, in the legislation itself, little stated indication of the rationale underlying its enactment, its intended effects or how it is to relate to the wide array of other laws which continue to be in force.

Acts of the U.K. and Scottish Parliaments are low in narrative quality even when seeking to respond to, or disapply the effect of, individual cases – i.e. legislative responses to judicial decisions. Consider, in this regard, the Damages (Asbestos-related Conditions) (Scotland) Act 2009 passed by the Scottish Parliament. This Act was seen as a response to the House of Lords decision in Rothwell v Chemical and Insulating Company Limited, in which it was held that pleural plaques did not constitute actionable harm, and could therefore not constitute injury remediable by an action for damages. The Scottish Parliament thereafter legislated that asbestos-related pleural plaques were in Scotland to be regarded as a non-negligible personal injury, and that they constituted actionable harm for the purposes of an action for damages for personal injury. It was provided that “[a]ny rule of law the effect of which is that asbestos-related pleural plaques do not constitute actionable harm ceases to apply to the extent that it has effect”. That was an indirect reference to Rothwell, which neither named the case, nor sought to confront the court's decision.

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745 See, for example, fn. 751.
746 Tuori, Ratio and Voluntas at 38, 40 and 62.
747 This does not command legal interpretative authority, and to the extent that it gains any by application of Pepper v Hart [1993] A.C. 593, it does so at the courts' discretion and in their own manner of interpretation, as they interpret ambiguous or obscure statutory provisions.
749 Damages (Asbestos-related Conditions) (Scotland) Act 2009, s.1(1) and (2).
750 Ibid., s.1(3).
751 The long title of the Act is merely: “An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes”.

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This may be contrasted with an alternative approach – albeit an atypical one – taken in a rather forthright statute from the U.S. State of Florida, in which “legislative intent” was addressed, specific reference made to individual cases, and instruction on how those cases were to be connected in the narrative of the law:

(1) The Legislature finds that the case of Delgado v. State, 776 So. 2d 233 (Fla. 2000), was decided contrary to legislative intent and the case law of this state relating to burglary prior to Delgado v. State. The Legislature finds that in order for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure, or conveyance surreptitiously.

(2) It is the intent of the Legislature that the holding in Delgado v. State, 776 So. 2d 233 (Fla. 2000) be nullified. It is further the intent of the Legislature that s.810.02(1)(a) be construed in conformity with Raleigh v. State, 705 So. 2d 1324 (Fla. 1997); Jiminez v. State, 703 So. 2d 437 (Fla. 1997); Robertson v. State, 699 So. 2d 1343 (Fla. 1997); Routly v. State, 440 So. 2d 1257 (Fla. 1983); and Ray v. State, 522 So. 2d 963 (Fla. 3rd DCA, 1988). This subsection shall operate retroactively to February 1, 2000.

(3) It is further the intent of the Legislature that consent remain an affirmative defense to burglary and that the lack of consent may be proven by circumstantial evidence.

(4) The Legislature finds that the cases of Floyd v. State, 850 So. 2d 383 (Fla. 2002); Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003); and State v. Ruiz/State v. Braggs, Slip Opinion Nos. SC02-389/SC02-524 were decided contrary to the Legislative intent expressed in this section. The Legislature finds that these cases were decided in such a manner as to give subsection (1) no effect. The February 1, 2000, date reflected in subsection (2) does not refer to an arbitrary date relating to the date offenses were committed, but to a date before which the law relating to burglary was untainted by Delgado v. State, 776 So. 2d 233 (Fla. 2000).

Whilst this statute should not be taken as representative of Florida Statutes in general, it affords a strong example of direct legislative narrative in a manner unseen in Acts of the U.K. and Scottish Parliaments, which opt for a more indirect, oblique and collateral posture. Interestingly, this particular statute uses language redolent of that used in judicial decision-making: in particular, the repeated statement that “the Legislature finds that...”.

753 It would be a difficult or strained exercise to accommodate within a dialogue theory framework of analysis the very indirect “communication” between legislature and court in the example of Rothwell and the Damages (Asbestos-related Conditions) (Scotland) Act 2009.

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In France, legislative acts primarily consist of amendments and additions to the codes. They are, as in the case of Acts of the U.K. and Scottish Parliaments, terse and programmatic expressions of law. The following example may be taken of the Civil Code:

“Art. 144 A male and a female may not contract marriage before they have completed their eighteenth year.

Art. 145 Nevertheless, the Government procurator of the place where a marriage is to be celebrated may grant dispensations as to age for serious reasons.

Art. 146 There is no marriage where there is no consent.

Art. 146-1 The marriage of a French person, even where contracted in a foreign country, requires his being present.

Art. 147 No one may contract a second marriage before the dissolution of the first.”

The Constitutional Code is likewise terse and programmatic; again, some examples may be taken from it:

“Art. 4
(1) Political parties and groups are instrumental in the exercise of the suffrage. They are formed freely and carry on their activities freely. They must respect the principles of national sovereignty and democracy.

(2) They contribute to the implementation of the principle set out in the second paragraph of Article 1 as provided by statute.

(3) The law guarantees the pluralistic expression of opinions and the equitable participation of political parties and groups in the democratic life of the Nation...

Art. 20
(1) The Government determines and conducts the policy of the nation.
(2) It has at its disposal the administration and the armed forces...

Art. 64
(1) The President of the Republic is the guarantor of the independence of the Judiciary.
(2) He is assisted by the Conseil Superieur de la Magistrature.
(3) An organic law determines the status of members of the Judiciary.

French Civil Code, Arts. 144-147 (Unofficial translation by Georges Rouhette and Anne Rouhette-Berton, accessed from the website of the French Government (Legislation Portal)).
This gives just a flavour of some of the codes' provisions, but it illustrates that French legislative acts are, in common with their U.K. counterparts, low in narrative content.

In contrast with both U.K. and French legislative acts, European Union directives are relatively rich in narrative content. In particular, they characteristically include a preamble which can often be lengthy. The Electricity Directive of 2009, for example, has a preamble consisting of 68 paragraphs before introducing the articles which comprise its operative part. The preambles of the Defence Procurement Directive of 2009, the Renewable Energy Directive of 2009 and the Services Directive of 2006 run to 79, 97 and 118 paragraphs respectively. Moreover, the European Court of Justice treats these preambles as an aid to interpretation.

It can therefore be seen that the extent to which narrative features in legislative acts is variable among legal systems. It is a significant component of E.U. directives, in which preambles provide relatively rich explanatory, narrative context to the legislative act in question, which is used by courts as an aid to interpretation. Whilst U.K. Acts of Parliament contained preambles until the late 19th century, these were rarely of narrative significance beyond a brief recall of relevant legislation enacted prior to the Act in question. Instead, they and the long titles by which they were succeeded (and those of the post-devolution Scottish Parliament) typically add little or nothing in the way of explanatory narrative. A comparison of these two systems' primary legislative acts therefore reveals one to be a

759 Such preambles also feature in other E.U. legislative acts, such as Commission Implementing Decisions, Commission Regulations and European Council Regulations. International treaties often contain preambles, as do some constitutional codes.
760 See, for example, Case C-138/11, Compass-Datenbank GmbH v Republic Österreich (2012/C287/17) at para. 50; and Case C-370/12, Pringle v Ireland (2013/C26/27) at paras. 61, 65 and 171.
narrative source of law, and the other to be essentially a non-narrative source of law. In one system, a significant narrative function is fulfilled by legislative institutions, whilst in the other it is not.

Nonetheless, as has already been argued, legislation is incapable of fulfilling the deeper legal-systemic, narratological function set out in this chapter. The extent to which legislative narrative affects the judicial-narratological function will primarily be determined by the legal and constitutional tradition in a given system, as will particularly emerge from the discussion in section 5.2.4 below.

5.2.3 Refining judicial narratology into constitutional narratology: functional particularity in the constitutional context

The principal conceptual outline of judicial narratology has thus far been broadly cast as a generic, legal-systemic function. It is now necessary to rein in the parameters of the discussion to the particularly constitutional dimension of judicial narratology.

This is achieved in the first instance by recognising that judicial narratology is both a legal-systemic and a constitutional function. Tuori offers an initial insight into why this is the case:

“Constitutional law holds a key position in managing the tension between the law's voluntas and ratio. On the one hand, through its provisions on lawmaking, a constitution established the law's positivity and provides the political legislator's voluntas access to law. But on the other hand, particularly through its provisions on basic rights and constitutional review, a constitution also imposes restrictions on this same voluntas. The law's voluntas is formed in the political system, while a constitution fulfils a peculiar intermediary function at the interface between the legal and political systems...”761

A conspicuous part of this analysis which does not quite fit the U.K. context is that it appears to contemplate a central constitutional text, in particular by referring to the “provisions” of a constitution. Nonetheless, the same basic principle holds that constitutional law holds a key position in managing the tension between the law's voluntas and ratio. This is because the courts apply principles, methodologies and pre-understandings (ratio) of constitutional law in interpreting and applying statutes (which express legislative voluntas). In doing so, they perform a deep constitutional function because of the role they play in sourcing

761 Tuori, Ratio and Voluntas at xix.
constitutional norms. The “constitution” takes on a substantive rather than a formal sense in the U.K., inasmuch as it is expressed, not in a single textual document, but as “norms fulfilling certain specific functions in the legal system.” The courts are an important source of those norms, many of which are contained in their jurisprudence, or in the wider ratio of the legal order, which they access in the context of adjudication. In performing their narratological function, the courts perform a constitutional function, because in synthesising a statute with the existing legal order, they impose constitutional (and broader legal-systemic) pre-understandings – both structural and normative – on the statute in question. Put differently, their performance of a judicial-narratological function on a statute necessarily presupposes a particular (judicial) constitutional worldview.

The effect this has in the area of constitutional law can be seen by taking as example the case of Scottish devolution. The Scotland Act 1998 effected a major structural innovation in the constitutional order by creating and empowering a Scottish Parliament and an associated Scottish administration. Notwithstanding the far-reaching consequences of the Act, the courts have performed a significant narratological function, both in clothing the legislative framework for devolution with general explanatory power, and in the deeper function of synthesising and coagulating multifarious legal norms into a thematically coherent body of law in the ongoing unfolding of the Act within the legal order. Moreover, this could not have been achieved to its requisite extent by legislation alone.

Even although the Scotland Act changed the constitutional landscape in the U.K., it left many questions unanswered. For example, the Act did not tell the legal order how particular sections were to be interpreted when a range of interpretations was possible, how the Act was to relate to common law grounds of review, the appropriate intensity of review of Acts of the Scottish Parliament and devolved secondary legislation, whether and to what extent courts might review Acts of the Scottish Parliament on point of unreasonableness or irrationality, how the courts were to treat presiding officer statements, whether the “enrolled bill rule” was to apply to Acts of the Scottish Parliament, whether the doctrine of implied repeal applied in the same way as to Acts of the U.K. Parliament, whether the Act had or should have been treated as having an “entrenched” status, and so on. In other words, the Act left many horizontal and diachronic connections untested and unarticulated.

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762 See *ibid.* at 208.
To the extent that answers to questions of this type are not found in legislation – and typically they are not – they are to be found unfolding in court judgments. Litigation forces a continued negotiation between the statutory framework that is invoked and tested, and the remaining corpus of the law; in other words, an ongoing conciliation of the Scotland Act with other legal rules which compete for habitation in the overall legal framework. Through narratology, the courts perform much of the task by which the Scotland Act is integrated with the tapestry of the existing law. They synthesise the articulated voluntas of Parliament with the ratio of the existing legal tradition.\footnote{Of which Parliament and the courts are, of course, a part.}

Again, this would apply even were Acts of Parliament to be a narrative source of law; albeit, in that case, the courts might treat narrative preambles (or any other narrative component of legislation) as an ordinary aid to interpretation. It would still fall to the courts, however – even were there to be narrative preambles as lengthy as those found in E.U. directives – to provide the authoritative narrative on the unfolding synthesis of an Act with the existing legal framework. In this way, legislation is oriented within the terms of an existing legal system, including its existing legal culture and tradition. The decline of legislative narrative in the U.K. may therefore be a consequence and, to some extent, a cause, of a system in which judicial narratology is such a key feature.

The ongoing unfolding of the Scotland Act in the wider legal order can be seen in a number of cases in which the horizontal and diachronic situation of the Act has been synthesised with other legal norms through judicial narratology. A brief examination of the cases illustrates this phenomenon.

In Whaley v Lord Advocate, the Court held that the Scottish Parliament had the power to legislate contrary to international law, and that the specific facts at issue (regarding the prohibition of foxhunting) did not qualify as contraventions of rights embodied in the European Convention on Human Rights and thus did not take the Scottish Parliament beyond its legislative competence.\footnote{Whaley v Lord Advocate, 2004 S.C. 78.} The latter finding was confirmed in Adams v Scottish Ministers.\footnote{Adams v Scottish Ministers, 2004 S.C. 665, on appeal from 2003 S.C. 171.}
It was held in *Somerville v Scottish Ministers* with regard to a time bar on the bringing of proceedings under the Human Rights Act 1998 against acts or decisions of a public body that were non-compliant with the European Convention on Human Rights, that such a time limit did not feature in the Scotland Act 1998 and thus could not hold with regard to analogous proceedings under the latter Act.\textsuperscript{767}

The case of *AXA General Insurance v Lord Advocate* touched on a number of different areas of law. Among its more notable findings were that the supervisory jurisdiction should only be exercised with regard to review of Acts of the Scottish Parliament in exceptional circumstances; that those Acts were not subject to review on the grounds of irrationality, unreasonableness or arbitrariness; that the rules on title and interest should not apply with regard to cases which concern matters of public law; and that judges should insist that they retain the power to judicially review in order to protect the rule of law.\textsuperscript{768}

In *Imperial Tobacco v Lord Advocate*, it was held that provisions defining the legislative competence of the Scottish Parliament should be interpreted purposively, but that the Scotland Act 1998 should not be regarded as a “constitution”; and that the Acts of Union did not prohibit separate legislative treatment of trade with regard to the constituent parts of the United Kingdom.\textsuperscript{769}

*Cameron v Procurator Fiscal* was the first case in which a provision of an Act of the Scottish Parliament was struck down as *ultra vires* of the Scottish Parliament. It was held that section 58 of the Criminal Justice and Licensing (Scotland) Act 2010, which amended section 24 of the Criminal Procedure (Scotland) Act 1995 concerning bail conditions, was incompatible with Article 5 of the European Convention on Human Rights, and was therefore declared “not law”. The Court limited the retroactivity of that finding “in the interests of clarity and legal certainty”; and the case set an initial template for the successful striking down of an Act.\textsuperscript{770}

\textsuperscript{768} *AXA* (Supreme Court).
\textsuperscript{769} *Imperial Tobacco Limited v Lord Advocate* [2012] C.S.I.H. 9.
In Scotch Whisky Association, Petitioners, several grounds of challenge to the legality of the Alcohol (Minimum Pricing) (Scotland) Act 2012 were rejected. Of particular interest was an argument that the Act would result in disparity in the U.K. common market in alcoholic drinks, with minimum pricing in Scotland, but not in England, contrary to Art. XVIII of the “Acts of Union” concerning the regulation of trade customs in the U.K. It was held that the Acts of Union have effect subject to the Scotland Act 1998, and that the minimum pricing framework neither sought to restrict freedom of trade of, nor to give any preference in trading conditions to, traders in either Scotland or England. On those bases, the Court did not find the Act to be incompatible with the Acts of Union.

In these cases, the courts provided legally-authoritative narrative on matters which were either not articulated in the Scotland Act 1998 at all, or to an extent which would provide the horizontal and diachronic cohesion necessary for the Act to be properly applied to the facts of the case. The courts provide the interstitial narrative between legal norms, so as to cohere and coagulate them into a law of “oneness”; a univocal law. These cases represent exactly that unfolding integration of the normative framework embodied in the Scotland Act with the wider normative framework of the law and legal system in which the Act was made, settling hitherto untested and unsettled connections between co-habiting legal norms. Further such unfolding will occur in the context of future litigation – in this process, the (“official”) story of the Scotland Act unfolds, as it pads out and settles into the wider legal (and constitutional) framework into which it was but one legislative input.

It is due to the limited capacity of legislative institutions to perform this constitutional function – notwithstanding the extent of legislative narrative – that the functional particularity of the constitutional-narratological exercise is underlined. This is neither to dismiss nor denigrate the potency and real practical effect of legislative acts of constitutional significance, nor is it to downplay the role of Parliament in steering the course of constitutional development and landscaping. Parliament’s contribution to constitutional law is clearly very significant – the Scotland Act 1998 ranks as just one of a number of major

771 Perhaps the argument could have, or should have, been framed as one relating to the Treaty of Union (the document constitutive of the U.K. constitutional order), rather than the Acts of Union (Acts of the extinguished Scottish and English Parliaments). Section 37 of the Scotland Act 1998 provides that “The Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to this Act”, however they do not state the relationship between the Treaty of Union and the Scotland Act 1998. This is more than a semantic distinction – see, in this regard, David Walker, The Union and the law (2007) 56(6) Journal of the Law Society of Scotland 14.

statutes of constitutional importance enacted in recent decades, among such legislation as the European Communities Act 1972, the Human Rights Act 1998, the Constitutional Reform Act 2005, the Tribunals, Courts and Enforcement Act 2007 and the European Union Act 2011.

Instead, this construction reinforces the functional indispensability of both statutes and court judgments by pointing to the distinguishable constitutional functions that legislative and judicial decisions assume. Whilst Parliament is a powerful legislative driver of the corpus of constitutional (and other areas of) law, its contribution to the constitutional whole is instrumental and programmatic; its statutes are terse, sporadic expressions of positive law in relative disjunction from each other. Moreover, Parliament is simply unable to provide the kind of extensive integrative, synthetic facility required in its statutes' ongoing conciliation (both horizontal and diachronic) with the existing legal framework.

It is in courts – not legislatures – that connections between existing legal norms are tested and settled, and it is by way of narrative that those settlements are reasoned, explained and authoritative articulated. It is the narratological capacity of courts that provides the principal medium by which the law and legal system internally rationalise in the ongoing negotiation between voluntas and ratio; in providing both horizontal and diachronic cohesion between legal norms, as well as in the generation and maintenance of coagulant themes in the law. Judicial narrative is the primary vehicle for the rational unfolding of both statutory and non-statutory legal norms, in the context of a continuing and pregnant legal order.

The implications of the courts' fulfilment of a distinctive and indispensable constitutional function are important for institutional relations, especially in situations of inter-institutional tension, a subject explored in the previous two chapters. The unique constitutional function performed by courts through constitutional narratology reserves to the courts an essential position in the playing out of those tensions. The situation is not one in which legislative or judicial institutions are entitled to insist on a “last word” or “absolute final say” as a kind of trump card. Nor are those institutions – as proposed by dialogue theories – equals in extended and indeterminate conversation. Institutions are not competing for the same word – their respective constitutional functions are distinctive and indispensable, neither in mortal competition nor interminable and rudderless chatter. Parliament's distinctive constitutional role is to programatically steer the course of constitutional (and wider legal) development,
whilst the courts’ distinctive constitutional role is to provide the legal-systemic substratum by which programmatic statutes are absorbed and integrated into, coagulated with, and tested against, the existing legal order. Parliament may therefore be said to perform a legislative-programmatic function; and the courts a constitutional-narratological function. These functions are complementary. The contention of this thesis is that whilst individual courts may come and go, the underlying constitutional function they perform does not.

5.2.4 The importance of constitutional culture

Constitutional culture is an essential part of the existing legal order, heavily conditional of Tuori’s ratio (layered, sedimented reason). This governs much of the pre-understanding contained deep within the legal tradition, and the approach taken towards constitutional issues. The form and extent of both legislative and judicial narrative, and the constitutional presuppositions adopted with regard to the judicial function, are jurisdiction-specific. Thus, in the U.K., the prevailing constitutional culture defines much of the attitude taken towards the appropriate role and extent of the judicial function; and within the U.K., differences in constitutional culture may exist in its constituent jurisdictions, such as between Scotland and England.

A brief consideration of U.K. contrasted with French constitutional culture illustrates this point. Despite legislation in both the U.K. and French systems being terse and programmatic, and an essentially non-narrative source of law, the constitutional conception of the judicial function is radically different. As Mitchel Lasser explained, the French republican tradition essentially demands that the legislature is the law-maker, whilst unelected judges must apply that law as an expression of popular will. The power that judges do inevitably wield is conciliated with this political and constitutional fundamental through a formal distinction between law creation and law application: whilst the legislature is formally regarded as generating law, judges generate jurisprudence, which does not attain the formal status of “law”. Judges utter law, but they do not make it: they are “la bouche de la loi”. Lasser described this understanding of sources of law as quite possibly constituting “the conceptual lynchpin of the entire French legal system”.

774 Ibid. at 168-169. On French legal culture more generally, see ibid. at 179-202.
775 Lasser emphatically denied that jurisprudence is “case law” – ibid. at 174.
776 Ibid. at 171.
Meanwhile, it is an accepted feature of U.K. constitutional tradition (and the common law methodology in particular) that judges make law. There is a general expectation that judges authoritatively articulate and “tell stories” about – narrate – the law as a feature of legal reasoning and judicial decision-making. Particularly where controversial, unsettled or changing areas of law are at issue, the *ratio decidendi*, or the reason for deciding, is expected to be readily accessible and publicly declared.\(^{777}\) This may include a chronological or historiographical component, in addition to public justification of a judicial decision reached by reference to a legally-authoritative past – a taking up of, and adding to, a “chain novel” of univocal law, to be inherited in future cases. Whilst there is in the U.K. an expectation that legislation consists of normative propositions (and not, for example, the kind of provisions found in Florida Statute § 810.015), there is a concomitant expectation that the judicial role is explanatory and narratory;\(^{778}\) and where difficult or controversial issues of law are concerned, expository.

These differences are reflected in the style of published judicial opinion in each system. In France, the *Cour de Cassation* issues terse and syllogistic judgments exhibiting little or nothing in the way of doubt, discussion or divergence in opinion. Its judgments are issued monolithically in the name of a collegiate court, without named judges' individual views being discernible, nor any dissenting judgments or detailed consideration of the legal issues in question. Despite the existence of divergent narrative discourse in the French system, this is largely concealed from public view.\(^{779}\)

By contrast, both the Court of Session and the U.K. Supreme Court issue expressive, expository and sometimes verbose judgments which, particularly in those cases which are controversial or which touch on unsettled issues, frequently admit of doubt, discussion or divergence in opinion. Individual judges are named; they offer judgments in their own names, including those dissenting from the majority view. Judgments are often detailed and

\(^{777}\) In France, much of the *ratio* is “hidden” within unpublished judicial discourse. The *Cour de Cassation’s* judgments are described by Lasser as “intensely non-dialogic” and “resist[ing] any discussion that could introduce uncertainty or debate into the text of the decision” – see *ibid.* at 31-38, 48-61 and 166.

\(^{778}\) This is meant relative to the more plainly normative quality of law posited in statutes. The performance of the judicial role is inescapably a normative exercise, but is, generally speaking, more tacitly normative.

\(^{779}\) See Lasser, *Judicial Deliberations* at 47 et seq.
rich in their exploration of legal issues, sometimes even drilling down into deeper theoretical and jurisprudential issues. Judicial participation in the internal synthesis, rationalisation and coagulation of the law and legal order is regarded as a public and publicly visible discipline.\textsuperscript{780}

This contrast with the French system, and in particular with the French conception of the judicial role, reveals the importance of underlying constitutional culture in understanding both the legal-systemic and deeper constitutional role performed by courts. It reveals that the legal-systemic and constitutional role which is proposed by this thesis to attach to courts in the U.K. is a reflection of the particular constitutional tradition of the U.K.

The detailed historical analysis in Chapter 2 shows the extent to which the Court of Session participated in shaping Scottish legal and constitutional culture or tradition. Its prominent role in framing a comprehensive supervisory framework through general remedies, and in establishing an enduring constitutional narrative on the role, function and scope of judicial review, have both implicated the Court as a formative institution in the wider legal and constitutional framework, and written its narratological function into the deeper layers of law. The supervisory jurisdiction, and the constitutional and legal-systemic function it conveys, are characteristic aspects of Scottish legal and constitutional tradition. These have become part of the legal and political pre-understanding in Scotland, having penetrated deep into its constitutional culture.

\textbf{5.2.5 Functional indispensability and the rejection of a last word analysis}

Two remaining conceptual issues will be addressed before proceeding to a deconstruction of constitutional narratology into the two levels on which it will be argued to operate. First, it will be shown that the argument which is being developed in the present chapter is truly a rejection of a last word analysis, and is not a manifesto for a “judicial last word”. Secondly, it will address the constitutional-narratological model’s apparent lack of certainty in providing guidance or resolution in the event of genuine inter-institutional conflict, and in this regard it will be emphasised that this model is – like its alternatives – contingent upon the existence and operability of a continuing constitutional order.

\textsuperscript{780} This is not to rule out the presence of any non-public aspect to judicial decision-making in the U.K. For example, the U.K. Supreme Court judges meet in private to discuss a case prior to issuing final judgments therein.
a. Institutional harmony and the core of constitutional stability

The present opportunity will be taken to ensure that a clear position is being maintained against a last word analysis. Indeed, this thesis rejects a last word for either legislative or judicial institutions, and this rejection is a necessary precondition of the functional distinctiveness argument.

It may be argued that if the proposition is made that Parliament and the courts assert necessarily different “words”, this moves towards the possibility of there being multiple last words. That is to say, if Parliament has a legislative-programmatic word (let us call it “A”), and courts have a constitutional-narratological word (“B”), then Parliament has a last word on A, whilst courts have a last word on B. This would be redolent of functional departmentalism, which reserves limited authoritative interpretation to different departments of state according to their own functional spheres.

That is not, however, the argument that is being made. To propose a system of multiple last words is to regress towards the idea of mortal competition between trump claims made by institutions. In other words, if Parliament tries to play “trump card” A to trump B, and a court tries to play B to trump A, this is to treat A and B as in direct competition, and signals a return to a struggle over a core constitutional competence – a *same* word. It also proposes a fundamental division or compartmentalisation of authority, rather than treating it as essentially shared between the institutions that are *constitutive* of the state.  

This would undermine the very point that is being made about the functional distinctiveness and indispensability of constitutional functions served by Parliament and the courts to the greater constitutional whole. It undermines the idea of institutional interdependence; that each institution is adding some distinctive, essential ingredient to a functioning constitutional

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781 See Walker, *Sovereignty Frames*.

782 Exclusivity is not necessarily the same as finality. Whilst the courts may perform an exclusive function (let us call it ‘A’), and Parliament another exclusive function (‘B’), it may be said that A is exclusive to the courts, and B is exclusive to Parliament. However, A cannot necessarily trump B, nor vice versa. This is particularly the case if A and B are constituent parts of a greater whole (‘X’). Thus whilst the courts may argue that it is for them alone to perform function A, and Parliament may argue that it alone performs function B, neither can (i) lay exclusive claim to X, which is the sum of A and B; nor (ii) have a final say on X, because the content of X is always determined by A plus B. The functions which are represented by A and B in this example are, respectively, a constitutional-narratological function and a legislative-programmatic function.
order. The argument is that the constitution depends for its very operability upon both the legislative-programmatic function served by Parliament, and the constitutional-narratological function served by courts.

This emerges as a model which promotes, rather than undermines, constitutional stability. A last word approach requires a basic equivalence in constitutional functions exercised by respective institutions, failing to take account of functional complementarity or interdependence. By insisting that one institution must triumph and prevail over all others, it is an approach which conceptually destabilises a constitutional order, offending the very idea of checks and balances, and potentially dangerous in a system such as that of the U.K. which does not have a central textual constraint on constitutional competence. A serious claim to a last word or a final say, whether by legislative or judicial institutions, is a challenge to the institutional and normative integrity of the existing constitutional order. An advocate for such a claim mounts a like challenge.

By contrast, the constitutional-narratological model both promotes and requires constitutional stability. Neither institution is unconstrained in the assertion of its own word. A certain cohesion between institutions of state – and certainly between legislative and judicial institutions – expressed in their living out of a common constitutional project, is a necessary precondition for the continuing existence of a functioning, multi-institutional constitutional order. The necessarily joint constitutional endeavour in which Parliament and the courts participate emphasises institutional interdependence, with all constitutional actors relying on the stability, coherence and integrity of the constitutional order as a whole for their own status and credibility within that constitution. It is therefore not for A and B to compete as last words in situations of inter-institutional tension, and neither should be viewed as the more essential ingredient.

In the U.K., the absence of a central constitutional text by which to basically configure the constitutional order accentuates the practice-oriented nature of institutions united in their collective fulfilment of a common constitutional project (which, as already acknowledged, may be tacit, ill-defined or un- or under-articulated). There is at least a broad, essential

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783 See Bamforth, *Ultra Vires and Institutional Interdependence* (op. cit. fn. 644) at 136, and generally at 113-139. Bamforth regarded the proposition of a constitutional foundation for judicial review which contained no element of institutional interdependence as “a task of enormous philosophical difficulty, if not impossibility” – *ibid.* at 138. See section 4.5 supra.
understanding – perhaps unspoken – of what this constitutional, political exercise is in which the institutions of state daily participate. The constitutional project is not centrifugal, in the sense that institutions move away from a central point on their own paths and follow their own divergent pursuits; but is rather more centripetal, in the sense that institutions are continually drawn towards the core of the political community in which they participate. They must assemble and unite around the factors and values that promote the stability of the constitutional order – or otherwise undermine their own stability.

This requires a fundamental rejection of a last word analysis, and such a rejection is a necessary precondition for the logical coherence of constitutional narratology as an alternative model of analysis. It is precisely the functional distinctiveness to which this model points that underscores the indispensability of the constitutional order's constituent institutional parts, and cautions against a terminal prioritisation of, or mortal competition between, those parts. That also rules out the idea of multiple last words, which have the (perhaps unintended) effect of regressing into competition over a central stake or claim to exclusive constitutional competence.

b. Contingency of a continuing constitutional order

It is clear, however, that A and B can be in tension. It is clear that Parliament and the courts may profoundly disagree on constitutional competences, and the lack of a central constitutional text – as in the U.K. – may accentuate the apparent politicality of any such struggles; the less capacity to point to a central constitutional reference point from which to source basic constitutional competence or authority.

The constitutional-narratological model has, notwithstanding its emphasis on recognising the distinctiveness of constitutional functions served by respective institutions of state, far from ruled out the possibility for inter-institutional tensions to arise. As an analytical model, it has said very little about what should happen in the event of a genuine, escalating inter-institutional dispute about who commands a particular constitutional competence or who performs a given constitutional function. It has offered little in the way of certainty, and seems rather unfulfilling when contrasted with a last word approach, which instead strives

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784 And that, to use Tuori's terminology, there may be tension between *voluntas* and *ratio*.

785 This criticism was also made of dialogue theories – see 132 supra. However, constitutional narratology places much greater and deeper emphasis on functional distinctiveness and indispensability; and furthermore, it seems more apt in the U.K. context than dialogue theories.
towards a “solution” to such tensions, and to point to a path, as it were, out of the tension: and that with a tone of certainty.

The basic premise of a last word approach is, however, a false one. Its “solutions” do not in principle contribute to the stability of the constitutional order, because it cannot attest that inter-institutional tensions will dissipate. That is perhaps an even less likely occurrence where there is no central constitutional text to which institutions can point, and any claims to exclusive constitutional competence or authority look rather more baldly political in nature.

The argument has been made that a last word approach may in fact destabilise the constitutional order, and may fuel inter-institutional tensions. The point is ultimately that a last word approach can do no better what the constitutional-narratological model is incapable of doing, which is to transcend the limits of a continuing constitutional order. Dialogue theories, functional departmentalism, bipolar sovereignty and, it seems, any theory which purports to explain an extant constitutional order, are likewise constrained.

When a genuinely irresoluble inter-institutional conflict takes a constitutional order beyond its bearable levels of stress, that constitutional order will break down. In other words, if A and B cannot be reconciled (and assuming, of course, that there is no constitutional mechanism for reconciling them), none of the analytical models set out in this thesis – a last word approach included – offer a way forward. Each model ceases to be an adequate means of describing the constitution, because when the functionality of the constitutional order breaks down, there is of course no longer a functioning constitution to describe. Any event which is fatal to the constitutional order would overwhelm the finality of any institutional “last word”; and would be as terminal for parliamentary claims to absolute legislative supremacy as it would be for judicial claims to jurisdictional indefeasibility.

This marks off the limits of constitutional narratology as being contingent on the existence and operability of a continuing constitutional order, just as it necessarily would have marked off the limits of the alternative models described in this thesis. The constitutional-narratological model is not envisaged to be a panacea for all constitutional difficulties, but to offer a more robust and holistic descriptive model of the constitutional order as it stands. It

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786 This may be actioned by, for example, a revolution, or end to inter-institutional cooperation.
787 It is paradoxical that a “last word” cannot translate into an indefeasible factual claim, and thus cannot mean absolutely final, ultimate or immutable. Any institutional last word can no more be “last” than the constitutional order can have limits to its continuing operability.
seeks to diffuse inter-institutional tensions and to accommodate competing claims to constitutional competence by emphasising the necessary complementarity of the constitutional endeavour. As an analytical framework, it must be understood within the context of those limits.
6.1 Deconstruction of constitutional narratology

Constitutional narratology has been advanced as an alternative analytical model to a last word analysis, dialogue theories, functional departmentalism and bipolar sovereignty. It was argued that whilst the judicial-narratological function applied generically across all fields of law in which courts adjudicate, there was a deeper narratological function at play which took on a particularity in the field of constitutional law.\footnote{See section 5.2.3 supra.}

This section deconstructs constitutional narratology into two levels or layers with the purpose of suggesting that narratives which appear on what Tuori called the “surface levels” of law, are underpinned by meta-narratives at a level which would accord with Tuori’s “deeper layers” of law. A key feature of meta-narratives is that they may be only partly or tacitly articulated, or even unarticulated, implicit as a subtext within other streams of narrative. Their substance may be regarded as axiomatic or tacit within the legal order.

That, however, particularly recommends closer examination, rather than discouraging it. Neil Walker said that:

“[t]he familiar always bears a second look, and what we should look for in taking that second look is both how the familiar successfully concocts and presents itself as familiar, and the massive social power that such familiarity secures and announces.”\footnote{Walker, \textit{Out of place and out of time} at 18. He also quoted, in this regard, Ludwig Wittgenstein, who said that “the aspects of things that are most important for us are hidden because of their simplicity and familiarity” \textendash; see \textit{ibid.} at 14.}

The substance of meta-narratives touches upon all aspects of the subtext of judicial behaviour, but in the context of this thesis, its expression of presumptions, preconceptions and assertions about legal-systemic functionality, and institutional and constitutional authority, are particularly important.
In the field of constitutional law, meta-narratives are at work on deep questions of legal and constitutional authority, and in particular about why courts are eminently qualified or authorised to interpose in disputes about constitutional competence. They animate such questions as: “why is it for the courts to decide what constitute the boundaries of jurisdiction?”; “why is it for the courts to supervise the exercise of power, both public and private?”; “what authorises the courts to insist that upholding the rule of law is their paramount duty, even if that contravenes apparent parliamentary intention?”; “what authorises the courts to decide what is the meaning and content of the rule of law and parliamentary supremacy, and to decide whether and to what extent these doctrines play out in the context of live cases?”; and “what authorises the courts to say they have an immutable and irremovable jurisdiction?”.

These and similar questions have arguably the deepest implications for the place and functionality of courts in the legal and constitutional order. For the courts to authoritatively shape these issues and, moreover, be capable of shaping them, is to assert the authority of the courts qua constitutional actors. The court delineates constitutional functions and inter-institutional relationships; and, moreover, it assumes the authority to make those delineations. This is an assertion of authority which raises the most fundamental questions about courts as political entities, and the power dynamics of, and between, state institutions.

These questions need not arise conspicuously in order for meta-narratives to be discernible which touch on deep constitutional and legal-systemic issues. In West v Secretary of State for Scotland, for example, the Court sought to make a comprehensive doctrinal exposition of the nature of the supervisory jurisdiction. This is of constitutional significance because it is an expression of the Court's assumption of authority to assert a framework for its own supervision of jurisdiction – a framework which has the quality of law – and to provide a legally-authoritative narrative on the law of judicial review. The command of a non-

Meta-narratives are also at work in other areas of law. For example, in the field of contract law, there might be regarded as meta-narratives in an area such as implied terms. The courts may articulate narratives on the rules and doctrines of implied terms in contracts, but may also articulate – or at least live out – a meta-narrative about why the courts are eminently qualified or authorised to supply implied terms in contracts. The point is not so much about the implication of those terms, as that the courts imply them and are legally-authorised to do so. This is an exercise which is particularly heightened absent statutory authority, or where doubts or ambiguities exist regarding statutory authority. Such a meta-narrative is, however – even in private law – of constitutional significance because it is concerned with the courts' legal (and, because it is not statutory, or not fully related to statutory authority) constitutional authority to, in this case, imply terms in contracts.
statutory supervisory jurisdiction is a very significant constitutional function and, even more so, the Court's assumption of authority to assert the constitutionality of its own constitutional function (and the possibility for it to do so). Sometimes this is an explicit exercise,791 but often it is much less so.

Before the chapter proceeds to a discussion of the particular features of constitutional meta-narrative and questions of authority and legitimacy, an overview is given of the principal narratives in Scots judicial review. These are intended to be illustrative of the types of narrative that exist in this area of law, and are not intended to be comprehensive.

6.1.1 Narratives in Scots judicial review

a. The "supervising excess of power / jurisdiction" narrative

The origins of this narrative792 may be found in a number of early cases, and having already been discussed in section 3.3 above, will only be briefly recounted here.

The idea of the Court supervising persons and bodies for excess of power or jurisdiction is traceable to at least 1756.793 There are two cases from that year in which supervision according to compliance with the boundaries of jurisdiction is evident. In *Lord Prestongrange v Justices of the Peace of Haddington*, it was stated that if justices of the peace “exceed their bounds” and “assume a jurisdiction which they have not... their proceedings must be null, as *ultra vires*”.794 Likewise, it was held in *Magistrates of Perth v Trustees on the Road from Queensferry to Perth* that it was for the Court, in exercise of its supreme jurisdiction, “to determine what it is that falls within [justices’] powers; but whatever matter is found to be within their power, this Court cannot review their proceedings”.795

In *Countess of Loudon v Trustees on the High Roads in Ayrshire*, it was held that there was, with regard to statutorily-empowered road trustees, “a right to review, in case of the smallest excesses of power”, that this was “essential”, “not excluded by the words of the act”, and

791 Such as, for example, by the Supreme Court in *AXA* – see 190-193 and 197-198 infra.
792 “Narratives” here mean themes in the (case) law which set a legally-authoritative story to rules or principles of law.
793 At least with regard to case reports which displayed an overt concern for confining bodies to their jurisdiction. As noted in Chapter 2, judicial review had a much longer and earlier pedigree, and so the idea probably had earlier origins.
794 *Lord Prestongrange v Justices of the Peace of Haddington*. See 103 supra.
795 *Magistrates of Perth v Trustees on the Road from Queensferry to Perth* at 319, per Lord Kilkerran.
that because the trustees had indeed “exceeded their powers... their judgment was liable to review”. 796

In *Heritors of Corstorphine v Ramsay*, it was provided in the Parochial Schools (Scotland) Act 1803 that certain judgments of presbyteries with regard to schoolmasters were final. The Court nonetheless held that it would review such a judgment where a presbytery refused to act or exceeded its powers. 797

Lord Justice-Clerk Boyle said of a presbytery in *Ross v Findlater* that:

“[f]here has been manifest excess of power, and this, as the Supreme Civil Court, is bound to redress all the wrongs of the lieges, and to keep all inferior jurisdictions within the law. We are entitled to quash the proceedings of the Presbytery, but without interfering on the merits of the question”. 798

In *Guthrie v Miller*, he likewise stated that the Court would interfere where there was “clear excess of power”, 799 Lord Alloway adding that the “doctrine laid down from the Chair as to jurisdiction cannot be disputed”. 800

In *Campbell v Brown*, Lord Lyndhurst L.C. said that there was in the Court “that superintending authority over inferior jurisdictions... for the purpose of confining those inferior jurisdictions within the bounds of their duty”. He continued: “the Court of Session has exercised a superintending authority over inferior jurisdictions, when they have been guilty of an excess of their jurisdiction”. 801

The excess of jurisdiction narrative is again visible in *Earl of Kinnoull v Presbytery of Auchterarder*, in which Lord President Hope observed that:

“[i]n every civilized country, there must be some supereminent Court of Judicature, to control all other courts or judicatures... In Scotland, the Court of Session possessed this supereminent power of control, and had already repeatedly exercised

796 *Countess of Loudon v Trustees on the High Roads in Ayrshire* at 7401.
797 *Heritors of Corstorphine v Ramsay*.
798 *Ross v Findlater* (1826) 4 S. 522 at 527, per Lord Justice-Clerk Boyle.
799 *Guthrie v Miller* (1827) 5 S. 663 at 665, per Lord Justice-Clerk Boyle.
800 Ibid., per Lord Alloway.
801 *Campbell v Brown* (1829) 3 W. & S. 441 at 448, per Lord Lyndhurst L.C.
It was held in *Cruickshank v Gordon* that the ecclesiastical courts are not reviewable when they confine themselves to their peculiar province, but the Court will intervene when the church courts exceed their (exclusive) jurisdiction. As observed earlier, it was said by Lord Ivory in *Lockhart v Presbytery of Deer* that the Court's "right to control its proceedings arises from the fact, that the inferior judicatory has exceeded its powers. We interfere, because the inferior court has gone beyond its province". In *Dunbar v Levack*, Lord President McNeill stated that “[j]urisdiction there must be, else the deliverance or act of the inferior tribunal cannot be supported”. Lord Ardmillan also stated in *Caledonian Railway Company v Fleming* that a case protected by a finality provision could only come to the Court "on a limited number of grounds, and one of them is jurisdiction". Excess of jurisdiction was also the determinative factor for review in *Earl of Camperdown v Presbytery of Auchterarder*.

Lord President Inglis made at least three authoritative statements of the law on this matter. In *Ashley v Magistrates of Rothesay*, he said that where an inferior court purported to exceed the bounds of its jurisdiction, “the jurisdiction of [the] Court to entertain” an action for “setting aside as incompetent and illegal the proceedings” of an inferior court “cannot be doubted”. In *Macfarlane v Mochrum School Board*, he said that bodies which were entirely creatures of statute, and which sought to exercise their powers in a manner other than in conformity with statute, would have their proceedings liable to be set aside as incompetent. More famously, in his oft-cited passage in *Forbes v Underwood*, he stated that the Court, in exercise of its exclusive, supereminent jurisdiction, may confine judges, arbiters and other public officers to their jurisdiction.

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802 *Earl of Kinnoull v Presbytery of Auchterarder* at 735, per Lord President Hope.
803 *Cruickshank v Gordon*.
804 *Lockhart v Presbytery of Deer* at 1301, per Lord Ivory. See 105 *supra*.
805 *Dunbar v Levack* at 542, per Lord President McNeill.
806 *Caledonian Railway Company v Fleming* at 556, per Lord Ardmillan.
807 *Earl of Camperdown v Presbytery of Auchterarder*. See 107-108 *supra*.
808 *Ashley v Magistrates of Rothesay* at 716, per Lord President Inglis.
809 *Macfarlane v Mochrum School Board* at 98, per Lord President Inglis.
810 Discussed at 74-75 *supra*.
811 *Forbes v Underwood* at 467-468 and 470, per Lord President Inglis.
Lord Kinnear, in *Moss' Empires v Assessor for Glasgow*, said that “there can be no question at all of the jurisdiction of the Court of Session to entertain an action” for reduction “wherever any inferior tribunal or any administrative body has exceeded the powers conferred upon it by statute”. He added that “[t]he jurisdiction of the court to set aside such excess of power as incompetent and illegal is not open to dispute”.812

Lord Johnston, in *Watt v Lord Advocate*, said that it was not clear from the case law how far wrong in misconstruing certain questions a tribunal may go before “stepping outside its jurisdiction”, but that it was “clear from the authorities that a tribunal which asks itself the wrong question or decides a question not submitted to it acts beyond its jurisdiction”.813 In *Watt v Strathclyde Regional Council*, Lord Clyde, in discussing the nature of the supervisory jurisdiction, referred to an “alleged excess of power”.814

Lord President Hope famously consolidated and powerfully articulated the excess of jurisdiction narrative in *West v Secretary of State for Scotland*. He discussed some, but not all, of the cases cited in this section, presenting a chronological narrative on the manner in which the supervisory jurisdiction embraced the doctrine of excess of jurisdiction. The central message of *West* was that the “sole purpose” of the Court's supervisory jurisdiction was to ensure that persons and bodies did not exceed or abuse their jurisdiction, power or authority,815 and that it accordingly did not depend for its exercise on any distinction between public and private law.816

*West* may be criticised in some regards – such as in its articulation of a tripartite relationship test as the touchstone of reviewability,817 or in its historical assessment of the role of the abolition of the Scottish Privy Council on judicial review,818 – but it represents an enduring

812 *Moss' Empires v Assessor for Glasgow* (House of Lords) at 6, per Lord Kinnear.
813 *Watt v Lord Advocate* at 133, per Lord Johnston.
814 *Watt v Strathclyde Regional Council* at 331-332.
815 *West v Secretary of State for Scotland* at 385 and 413, per Lord President Hope.
816 Ibid.
817 For example, is the “tripartite” relationship between a company's articles of association, its board of directors and its members to be captured by this test? Or that between a trustee, trustee and beneficiary? Conversely, does the test sufficiently capture exercises of prerogative power? Notwithstanding these doubts, the test was applied in some cases, such as *Fraser v Professional Golfers' Association*, 1999 S.C.L.R. 1032; and *Crochet v Tantallon Golf Club*.
narrative on Scots judicial review which has been accepted, repeated or otherwise relied upon in subsequent cases.\textsuperscript{819} It is also \textit{de rigueur} in Scots public law curricula. This was, perhaps, to have been expected: the case was unusually comprehensive in its doctrinal assessment of this area of law. For the same reason, it might be expected to endure as a cornerstone of the “supervising excess of power / jurisdiction” narrative in Scots judicial review for some time to come.

\textit{b. The “supervising public power” narrative}

A narrative which has failed to win consistent support in the Scottish courts is that in which judicial review is a means of supervising public power. The origins of this narrative predate the modern period of judicial review, with cases as early as one from 1533 suggesting that the Court performed some kind of regulation of excess of public power, even with regard to the King.\textsuperscript{820}

Some of the cases which could be explained under the “excess of jurisdiction” narrative could also have been set to a “supervision of public power” narrative. These include \textit{Heritors of Corstorphine v Ramsay}, which sought to compel public bodies (in that case, road trustees) to proceed;\textsuperscript{821} \textit{Thomson v Dundee Police Commissioners}, in which the Court addressed the non-compliance of police commissioners with legislation;\textsuperscript{822} and \textit{Forbes v Underwood}, in which Lord President Inglis stated that the rule which allowed the Court's “supereminent jurisdiction” to extend to its remedy of an inferior judge's transgression of jurisdiction, likewise applied “to a variety of other public officers, such as statutory trustees and commissioners”.\textsuperscript{823}

Other cases, such as those on the supervision of arbiters, could not easily have been accommodated within this narrative stream. Whilst it could only have been used to describe many exercises of the supervisory jurisdiction over judicial bodies if those were regarded as “public bodies” or those exercising “public functions” or “public powers”, this narrative could have become a major theme in the law of judicial review with the proliferation of


\textsuperscript{820} \textit{Baron v Earl of Morton}, 1533 Mor. 7319.

\textsuperscript{821} \textit{Heritors of Corstorphine v Ramsay}.

\textsuperscript{822} \textit{Thomson v Dundee Police Commissioners}.

\textsuperscript{823} \textit{Forbes v Underwood} at 467-468, per Lord President Inglis.
public and administrative bodies from around the mid-18th century, as those bodies increasingly came to typify the kind of body routinely subject to the Court's supervisory jurisdiction.

However, that narrative did not appear to surface with any degree of definition. An apparent recognition of the relevance to Scots judicial review of a distinction between public and private law was visible in *Brown v Hamilton District Council*.824 Furthermore, the case of *Connor v Strathclyde Regional Council* was decided on the basis that employment by a public body did not *per se* inject an element of public law into the case, and in consequence, a petition for judicial review was held to be incompetent.825 However, that case was condemned in *West* as a doctrinal “misunderstanding” as to the basis of a decision's reviewability.826 So too had the relevance of a public / private distinction been questioned in *Tehrani v Argyll and Clyde Health Board (No. 2)*.827 David Edward pointed to the distinctiveness of Scots (from English) judicial review, which included an insistence that Scots law did not use a public / private distinction in determination of its doctrinal approach to reviewability.828

To the extent, therefore, that there was a narrative in Scots judicial review whereby the Court's supervisory jurisdiction was about supervising the exercise of public power, this now seems to be an unfashionable interpretation.

c. The “supervising judicial and quasi-judicial powers” narrative

A narrative emerged on the supervision of judicial and quasi-judicial powers; or powers exercised by judicial and quasi-judicial bodies. In *Barrs v British Wool Marketing Board*, for example, it was held that a valuation tribunal's being a “quasi-judicial body” rendered it subject to the Court's supervisory jurisdiction, inasmuch as “acting judicially” meant that certain principles of fairness and natural justice had to be observed.829

824 *Brown v Hamilton District Council*.
826 *West v Secretary of State for Scotland* at 405, per Lord President Hope; reaffirmed in *AXA* (Supreme Court) at para. 57, per Lord Hope. *AXA* did, however, suggest the utility of differentiating private from public law cases in judicial review with regard to standing – see *AXA* (Supreme Court) at paras. 58-63 (per Lord Hope) and 165-175 (per Lord Reed) – however this does not go to the doctrinal basis of a decision's reviewability.
827 *Tehrani v Argyll and Clyde Health Board (No. 2)* at 352, per Lord Weir.
828 See Edward, Administrative Law (op. cit. fn. 48) at 295, discussed at 82 supra; and see also Wade and Forsyth, Administrative Law (10th edition) at 548.
829 *Barrs v British Wool Marketing Board*. As noted at 74-75 supra, *Forbes v Underwood* concerned
In *Brown v Hamilton District Council*, Lord Robertson expressed the following opinion on Lord President Inglis' aforementioned\(^{830}\) comments in *Forbes v Underwood*:

“...it is in my opinion clear that the Lord President was confining his remarks to subordinate judges who are acting in a judicial or at least quasi-judicial capacity – in *Forbes v Underwood* it was an arbiter. Local authorities are not acting in a judicial capacity in carrying out executive functions under the Housing (Homeless Persons) Act, nor in my opinion are they carrying out quasi-judicial functions. They are simply acting as administrators of executive functions placed upon them by the Act... So the citizen aggrieved by the act of such an authority carrying out these functions is not affected in my opinion by the restrictions set out by Lord President Inglis”.\(^{831}\)

Lord Fraser of Tullybelton was, in the same case, of the opinion that there were:

“few traces in Scottish cases up to and including *Forbes v Underwood*, or indeed until long after that case, of a distinction being drawn between administrative and judicial decisions... The distinction between administrative and judicial decisions had some place in modern Scottish decisions such as *Barrs v British Wool Marketing Board*... owing, I think, mainly to the influence of English decisions where technical rules relating to the prerogative writs formerly made it important”.\(^{832}\)

In *Tehrani v Argyll and Clyde Health Board (No. 2)*, Lord Weir opined that, in his view, *Forbes v Underwood* was:

“authority for the proposition that where quasi-judicial machinery is stipulated in a private contract for use in certain circumstances, the court may exercise its supervisory jurisdiction. This proposition applies to the contract between the petitioner and the board because a quasi-judicial tribunal was set up to consider the allegations made against the petitioner”.\(^{833}\)

It does not appear that this narrative, in which the importance of a decision's judicial or quasi-judicial character is decisive, has visibly resurfaced since *Tehrani*. Its brief popularity seems to have diminished, perhaps overshadowed by the narrative set out in *West*.

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\(^{830}\) See 75 supra.

\(^{831}\) *Brown v Hamilton District Council* at 20, per Lord Robertson.

\(^{832}\) *Ibid.* at 43, per Lord Fraser of Tullybelton.

\(^{833}\) *Tehrani v Argyll and Clyde Health Board (No. 2)* at 352, per Lord Weir.
d. The “fairness and natural justice” narrative

One of the recurrent narrative themes has been the requirement for compliance with certain standards of fairness and natural justice in process and decision-making. This area was touched upon in section 3.3.2, but will be given a brief overview in the present section.

This stream of judicial narrative has a long pedigree. Cases did not always specify “natural justice” as a specific ground of review, but variously used other terms such as “the great principle of eternal justice”, 834 “the eternal principles of justice”, 835 “the fundamental principles of justice”, 836 “the principles of fair justice between man and man”, 837 “the plain principles of justice”, 838 “the principles of eternal justice”, 839 “the plainest principles of justice”, 840 “equal justice between the parties”, 841 “principles of law and justice”, 842 “the principles of justice”, 843 and “the ordinary principles of fairplay”. 844 Counsel also referred in one case to “the principles of impartial justice”. 845

It was observed in Chapter 2 that the Court played a central role in the promotion of standards of justice prevailing in the wider legal order. Cases from at least as early as the establishment of the Court show a particular concern for that aim. For example, it held in 1533 that it could discharge or suspend “ony privie writing” from the King “quhilk is direct contrare the administratioun of justice, or hinderis and postponis the samin”. 846 In a case from 1569, the Court again stated such a strong commitment to the administration of justice that it was prepared to defy a direction from the King as to how to proceed in favour of a particular party, “because the administratioun of justice sould not be stoppit be the Kingis privie writings”. 847

834 Sharpe v Bickerdyke (1815) 3 Dow 102 at 107.
835 Heggie and Company v Stark and Selkirk at 341, per Lord Justice-Clerk Boyle.
836 Smith and Tasker v Robertson at 789, per Lord Justice-Clerk Boyle.
837 Earl of Dunmore v M’Inturner at 360, per Lord Justice-Clerk Boyle.
838 Ibid.
839 Alston v Chappell (1839) 2 D. 248 at 252, per Lord Justice-Clerk Boyle.
840 Mitchell v Cable at 1306, per Lord President Boyle.
841 Ibid. at 1308, per Lord Fullerton.
842 Lockhart v Presbytery of Deer at 1301, per Lord Ivory. He was in fact stating that if the Court of Session was not entitled (at that time) to review a sentence on its merits, “even in the extreme case, that [the sentence] is plainly against all principles of law and justice – still less can we interfere with any of the steps of procedure by which that sentence has been reached”.
843 Moore v Clyde Pilotage Authority, 1943 S.C. 457 at 464, per Lord President Normand.
844 Ibid. at 466, per Lord Fleming.
845 Alston v Chappell at 249.
846 Baron v Earl of Morton.
847 Earl of Morton v Fleming, 1569 Mor. 7325.
Lord President Boyle proclaimed in a case from 1848 that “we are entitled to insist not only that justice must be done, but that it must be done in a proper manner”.\(^{848}\) Initially, reference was sometimes made in ambiguous terms, such as to a judge's “iniquity”, which was regarded as giving rise to the Court's power to advocate civil causes to itself from inferior courts.\(^{849}\) Similarly, the Court held itself competent to judge the “nullities” of a decree of the Commission for Plantation of Kirks and Valuation of Teinds where these were “palpable”.\(^{850}\)

However, the various heads which together make up fairness and natural justice are also discernible in the early cases. These included bias (actual or potential), failing to hear a party, conducting procedure in the absence of one or both parties, and otherwise failing to deal equally and fairly between the parties.

As to bias, for example, the Court advocated a cause to itself so that magistrates would not be “both judge and party” in a particular case,\(^{851}\) a 17th century precursor to what became the widely accepted principle that no man could be a judge in his own cause – or the rules against bias. This sometimes applied even where other, distinct branches of jurisdiction were concerned, such as criminal or admiralty jurisdiction.

Thus, the Court held itself competent to advocate criminal causes for the purpose of remitting them to “other more competent unsuspected Judges”.\(^{852}\) In another case it advocated a criminal cause from the sheriff to the Justice-General, one of the complaints being of the partiality of the sheriff.\(^{853}\) In advocating from one criminal court to another, rather than to itself, the Court intervened in the interests of the prevailing standards of justice in the judicial order, whilst respecting the boundaries of civil and criminal jurisdiction. The Court had, however, sometimes held itself competent to judge on nullities in criminal processes,\(^{854}\) such as in reducing a criminal sentence pronounced by the sheriff-substitute, where “there was no form in which relief could be obtained from the supreme criminal court”.\(^{855}\)

\(^{848}\) *Mitchell v Cable* at 1307, per Lord President Boyle.
\(^{849}\) *Lands v Dick*.
\(^{850}\) *Earl of Roxburgh v A Minister*, 1663 Mor. 7328.
\(^{851}\) *Wilson v Town of Perth*, 1670 Mor. 7409.
\(^{852}\) *Baron of Brighton v Kincaid*.
\(^{853}\) *M'Intosh v Sheriff of Inverness*.
\(^{854}\) *Livingston v Gordon of Troquhen*, 1683 Mor. 7329; *Maxwell v McArthur*, 1775 Mor. 7381.
\(^{855}\) *Kerr and Shaw v Hay*, 1774 Mor. 7420 at 7421. This appears to have been an appeal to the
The Court seemed less careful with regard to encroaching on admiralty jurisdiction. The Admiralty Court Act 1681 proclaimed the High Court of Admiralty “a supreme court” and provided that “the decreets and acts of all other inferior courts of admiralty are subject to the review and reduction” of the High Court of Admiralty. However, the Court held that the Act only protected the High Court of Admiralty, and that admirals-depute could be stopped “on the head of partiality, injustice, or being parties”.

In *Sellar v Highland Railway Company*, a statutory arbitration between a proprietor of fishings and a railway was the subject of disagreement between arbiters, and was thus referred to an oversman. It was then discovered by the proprietor of fishings that the arbiter whom had been appointed by the railway company was a stockholder in that company. The Court held that, even although the size of the arbiter's stockholding was negligible, this pecuniary interest disqualified him, and the arbitral award was accordingly reduced. In the appeal which followed to the House of Lords, Lord Buckmaster said that the:

> “importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the Judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience in its preservation may be cheerfully endured”.

The narrative stream on bias has been developed in more recent cases, particularly in the criminal courts. In *Bradford v McLeod*, a sheriff made a comment at a social function, in the context of the then-current miners' strike, to the effect that he “would not grant legal aid to miners”. The solicitor who witnessed these comments made a motion for the sheriff to recuse himself, at the beginning of a number of trials in which miners charged with picket line offences came before that sheriff. The sheriff refused the motion at each trial, and 14 miners who had been convicted by the sheriff in these circumstances sought the suspension of their convictions and sentences on the basis of a miscarriage of justice. The High Court of

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856 Admiralty Court Act 1681.
857 Bruce, Suppliant.
858 *Sellar v Highland Railway Company*, 1918 S.C. 838.
860 This is significant because some of the criminal cases have in this area been cited with approval in the Court of Session, and the judicial office-holders are, in both the Court of Session and the High Court of Justiciary, the same. For example, the offices of Lord President of the Court of Session and Lord-Justice General of Scotland were combined in 1836.
Justiciary upheld those suspensions, Lord Justice-Clerk Ross stating that the sheriff erred in failing to realise that “it was not enough that justice should be done, but that justice must also be seen to be done”. He also made approving reference to Lord Justice-General Cooper’s comments in an unreported case from 1953 that “it is vital in every criminal prosecution not only that justice should be done but that justice should be visibly done”.

In *Doherty v McGlennan*, the complainer on a charge for assault was a local Member of Parliament. The sheriff, having found the accused guilty of the charges and having adjourned the diet for sentence to a later date, invited the Member of Parliament into his chambers for a private conversation. The High Court of Justiciary suspended the sentence, holding that “a reasonable bystander could well form the suspicion that the sheriff was not being impartial in having a private meeting with the complainer before sentence had been imposed”.

It was held in *Mellors, Petitioner* that the test of potential bias was whether the “fair minded and informed observer, having considered the facts, would conclude that bias on the part of the court was a real possibility”. This test was affirmed in the Court of Session in *Brown v Scottish Ministers*, *Davidson v Scottish Ministers (No. 2)* and *Helow v Advocate-General for Scotland*, in the last of which, on appeal to the House of Lords, Lord Hope of Craighead explored what might be the characteristics of a “fair minded and informed observer”.

Some recent decisions on various potentially vitiating circumstances include it being held that there could be no objective justification for any suspicion of bias where a judge had previous knowledge of a particular family from his service as an advocate-depute, and that collective membership of a debating society did not compromise the impartiality of judicial

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861 *Bradford v McLeod*, 1986 S.L.T. 244 at 248, per Lord Justice-Clerk Ross. This was still regarded as a good statement of the law in *Richardson v Pirie* [2011] H.C.I.A.C. 43.
862 *Bradford v McLeod* at 247, per Lord Justice-Clerk Ross, quoting *Stewart v Agnew* (18th June 1953, unreported) (High Court of Justiciary), per Lord Justice-General Cooper.
869 *Haney v H.M. Advocate (No. 1)*, 2003 J.C. 43.
proceedings. Conversely, it could be concluded that there was a risk of apparent bias where a judge was called upon to rule judicially on the effect of legislation which he drafted or promoted during the parliamentary process, and a real possibility that he would “subconsciously strive to avoid reaching a conclusion which would undermine the very clear assurances he had given to Parliament”. A statement of the kinds of factors that may result in disqualification was made in the English case of Locabail (U.K.) Limited v Bayfield Properties Limited, considered in some Scottish cases.

As to the manner in which parties are heard – or not heard – the Court has intervened when a decision-maker has not dealt equally between two parties to a dispute. In Moss’ Empires v Assessor for Glasgow, for example, Lord Justice-Clerk Dickson stated that it could be “considered a principle of eternal justice that no man should have his case decided against him except in open Court or without his being heard”.

Such issues often came to light in the context of petitions for review of arbitration proceedings. In Mitchell v Cable, Lord Fullerton stated that “there is this limit to [an arbiter’s] powers, viz., that he shall do strictly equal justice between the parties – that he shall not allow to the one that which he denies to the other”. To deal “fairly” between the parties meant to deal “equally” with them. The Court thus struck down decrees-arbitral for want of compliance with standards of fairness and natural justice, such as the parties not having been heard, just one party having been heard, or proceedings having been conducted in the absence of one of the parties. It was regarded as “fully settled” law in

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870 Robbie the Pict v H.M. Advocate, 2003 J.C. 78.
874 Moss’ Empires v Assessor for Glasgow, 1916 S.C. 366 at 376, per Lord Justice-Clerk Dickson. He did, however, qualify his remarks by stating of “the principles of eternal justice” and “the fundamental principles of justice”: “[w]hat these principles are I confess I have some difficulty in exactly defining... But, apart from the question whether or how far they can be applied in cases under the common law, it is very difficult to give effect to them in dealing with statutory law, especially when that law is of a highly artificial and empirical character” – ibid.
875 Mitchell v Cable at 1308, per Lord Fullerton.
876 Ibid. at 1309, per Lord Jeffrey.
877 See and fns. 359 and 430 supra.
878 See fn. 431.
879 See fn. 432.
1848 that an arbiter's deliberate refusal to allow a party to adduce evidence when necessary for achieving justice in the case at hand, was a sufficient ground for reducing a decree-arbitral;\textsuperscript{880} although it was not necessary for reduction that an arbiter, having, for example, denied a party the opportunity of being heard, intended thereby any moral corruption, moral wrong or wilfully dishonest motive or purpose.\textsuperscript{881}

Standards of fairness and natural justice were also applied to other decision-making bodies, such as a pilotage authority, which was held to be required to give a pilot “an effective hearing” and also to “proceed in accordance with the ordinary principles of fairplay which are regarded as essential”.\textsuperscript{882} In that case, the pilotage authority was regarded as contravening those principles by treating as evidence against the pilot the finding of an harbour committee, to which four members of the pilotage authority had been party.

The Court also held itself competent to intervene in ecclesiastical jurisdiction when the procedure of a judicial or quasi-judicial tribunal was “marked by gross irregularity... so fundamental... [that it] becomes something so prejudicial to a fair and impartial investigation of the question to be decided as to amount to a denial of natural justice”, such as where a person was to be convicted of an ecclesiastical offence without an accusation having been made, or without affording an accused the opportunity of defending himself.\textsuperscript{883}

Lord President Clyde stated in \textit{Barrs v British Wool Marketing Board} that quasi-judicial bodies, such as tribunals, must “conform to certain standards of fair play, and their failure to do so entitles a Court of law to reduce their decisions”. It was added that “[f]air and equal opportunity afforded to all interests” is the “fundamental basis upon which the tribunal must operate”.\textsuperscript{884}

An example of conduct which was contrary to the principles of natural justice was where a football club was not informed by a committee of the Scottish Football Association that any charge was being considered against it, that it was not told the nature of the charge, and that it was not given any opportunity to attend a meeting of the committee or to make

\textsuperscript{880} \textit{Mowbray v Dickson} (1848) 10 D. 1102 at 1109, per Lord Justice-Clerk Hope; see also \textit{Paterson & Son Limited v Corporation of Glasgow} (1900) 2 F. 1201.

\textsuperscript{881} \textit{Miller v Millar} (1855) 17 D. 689.

\textsuperscript{882} \textit{Moore v Clyde Pilotage Authority} at 466, per Lord Fleming.

\textsuperscript{883} \textit{M'Donald v Burns} at 383-384, per Lord Justice-Clerk Aitchison.

\textsuperscript{884} \textit{Barrs v British Wool Marketing Board} at 82, per Lord President Clyde.
representations before it.\footnote{St. Johnstone Football Club Limited v Scottish Football Association Limited.}

Most recently, it was held that, where material is relied upon to make a case against a practitioner in disciplinary proceedings, it must be disclosed to that practitioner in order that he can properly prepare a defence. Lord Drummond Young said that failure to do so is to act in breach of the principle “audi alteram partem”, and will “almost inevitably result in the reduction of any decision based on such material”.\footnote{M v Law Society of Scotland, 2013 S.L.T. 462 at 469, per Lord Drummond Young; and see also 471.} Other potential requirements, such as the giving of reasons, depended on whether fairness required their being given in the context of the individual case.\footnote{Smith v Nairn Golf Club.}

Whilst the “fairness and natural justice” narrative can therefore be seen to have various strands, the cases also show a long-standing narrative stream on the administration of justice, with particular regard to fairness implications for those subject to decision-making procedures, and with relevant jurisprudence spanning at least from 1533 to the present day.

6.1.2 Meta-narratives in Scots judicial review

a. The “inherent jurisdiction” meta-narrative

A long-standing theme in the case law has been the “inherent jurisdiction” meta-narrative. Inherency can be said either to have been used inconsistently as a concept, or in differing senses. An analysis of the cases reveals a gradient of definitions, ranging from inherency as implicitness, to inherency as indefeasibility. Implicitness holds certain powers or functions to be impliedly at the disposal of courts, absent external (statutory) conferral, but to be capable of statutory removal. Indefeasibility more strongly suggests that certain powers or functions cannot be removed from courts. The latter is the principal focus in this section, as it arguably holds greater implications for the constitutional relationship between the legislature and the courts – although both are important in the context of judicial self-norming and the sources of constitutional authority, discussed in sections 6.2 and 6.3 below.

(i) Inherency as a measure of implicitness

Before turning to consider inherency as indefeasibility, consideration will briefly be made of inherency as implicitness. Erskine set out the concept of implied jurisdiction as follows:
In all grants of jurisdiction, whether civil or criminal, supreme or inferior, every power is understood to be conferred without which the jurisdiction cannot be explicated. By the same rule, every judge, however limited his jurisdiction may be, is vested with all the powers necessary either for supporting his jurisdiction and maintaining the authority of the court, or for the execution of his decrees.\(^{888}\)

Erskine's idea of an implied jurisdiction is therefore that if a court has jurisdiction over a particular matter, then it must necessarily be within the jurisdiction of the court to do whatever is necessary to discharge or fulfil that jurisdiction. In formulary terms, if it is within the jurisdiction of the court to do 'A', and the doing of 'A' also requires the doing of 'B', then it is within the jurisdiction of the court to do 'B'. In the absence of an instrument (and, in particular, a statute) conferring a specific power, the court claims that it commands that power by default.

Thus in Thomson v Edinburgh and District Tramways Co. Limited, for example, the Court regarded itself as having the power to find one defendant liable in expenses to another; absent statutory provision to that effect.\(^{889}\) In McQuater v Ferguson, Lord President Dunedin described the sheriff's power over expenses as incidental to the sheriff court's being a court of law.\(^{890}\) Lord Kinnear described this power as part of the sheriff's ordinary jurisdiction, unless "expressly taken away by the statute".\(^{891}\)

This idea also featured in more recent cases; as in Newman Shopfitters Limited v M J Gleeson Group plc, in which the Sheriff Principal (Macphail) of Edinburgh said that:

"...the powers of the sheriff are not limited to those confided to him by statute, and so his statutory powers only limit the exercise of the inherent jurisdiction to the extent that it cannot be exercised in a way which is inconsistent with statute law or statutory rules of court".\(^{892}\)

\(^{888}\) Erskine, Institute, I.II.8.  
\(^{889}\) Thomson v Edinburgh and District Tramways Co. Limited (1901) 3 F. 355.  
\(^{890}\) McQuater v Ferguson, 1911 S.C. 640 at 646, per Lord President Dunedin.  
\(^{891}\) Ibid. at 646-647, per Lord Kinnear.  
\(^{892}\) Newman Shopfitters Limited v M J Gleeson Group plc, 2003 S.L.T. (Sh Ct) 83 at 88, per Sheriff Principal Macphail. He also cited Sir Jack Jacob in Halsbury's Laws of England (Vol. 37) (4th edition, 1982) at para. 14 and repeated in the reissue of Vol. 37 (2001) at para. 12, which referred to "the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them".

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These powers have sometimes been referred to as “inherent” powers. In Moore v Scottish Daily Record and Sunday Mail Limited, for example, the Court held that it was ultra vires for it to “invoke its inherent jurisdiction to charge court fees when Parliament has expressly deprived it of the power to regulate such fees”.\footnote{Moore v Scottish Daily Record and Sunday Mail Limited [2008] C.S.I.H. 66, overturning Billig v Council of the Law Society of Scotland (No. 2), 2008 S.C. 150.} This use of “inherency” as signifying implicitness also featured in Global Santa Fe Drilling (North Sea) Limited v Lord Advocate.\footnote{Global Santa Fe Drilling (North Sea) Limited v Lord Advocate [2009] C.S.I.H. 43.} This line of reasoning seems fairly benign – that courts may exercise powers which must necessarily be exercised in fulfilling other (non-implied) functions, unless those powers are removed by statute. The courts assume default powers which, in accordance with an underlying fidelity to Parliament, may be removed by the legislature without a sense of institutional confrontation.

(ii) Inherency as a measure of indefeasibility

Whereas the above cases generally adhere to the view that such implied or “inherent” powers may be removed by Parliament, there has sometimes been a shift towards the suggestion of the indefeasibility of those powers; that is to say, that they cannot be removed by Parliament. Lord Justice-General Emslie, for example, said in Hall v Associated Newspapers Limited that:

“[t]he law of contempt of court covers many diverse forms of conduct one of which is conduct that is liable to prejudice the administration of justice generally, or in relation to the case of a particular individual. Its source is to be found in the indispensable power which is inherent in every Court to do whatever is necessary to discharge the whole of its responsibilities”.\footnote{Hall v Associated Newspapers Limited, 1979 J.C. 1 at 9, per Lord Justice-General Emslie.}

Although this may appear to be another reference to implied powers which are “inherent” in courts, such powers are here described as “indispensable”. This is to leave open the interpretation that, contrary to the above assessments, Parliament may be incapable of removing those powers.

Other cases travel further along the gradient towards inherency as indefeasibility. This is particularly (though not exclusively) visible in the cases on ouster clauses which, having been explored in detail in Chapter 3, will not be revisited here. Whilst those cases which held that express words were necessary to exclude the jurisdiction of the court would also
fall under the implicitness heading, some examples may be selected for the purpose of illustrating the “inherency as indefeasibility” narrative which is also detectible in a number of those cases.

Sometimes the suggestion of jurisdictional indefeasibility has been strong. For example, it was stated in *Patillo v Maxwell* that the Court had an “inherent and constitutional jurisdiction” to judicially review.\(^{896}\) Lord President Boyle, in another case, said of a statutory ouster clause which purported to exclude “review by suspension or advocation, or to reduction, on any ground whatever” that he found “not one word which makes the judgment of the Sheriff in every case final and unreviewable”.\(^{897}\)

Lord President Inglis' statement that the jurisdiction of the Court to entertain an action to set aside as incompetent and illegal the proceedings of an inferior court “cannot be doubted, notwithstanding the entire prohibition of review of any kind”\(^{898}\) is suggestive of indefeasibility; likewise his statement in *Forbes v Underwood* that the power of judicial review “belongs to the Court of Session as the Supreme Civil Court”. He described that as its “supereminent jurisdiction”, which may be in exercise of its high equitable jurisdiction or its *nobile officium*,\(^{899}\) and which was an exclusive jurisdiction which “cannot possibly belong to any other Court in the country”.\(^{900}\)

Lord Kinnear stated in *Moss Empires' v Assessor for Glasgow*, that “there can be no question at all of the jurisdiction of the Court of Session to entertain an action” whenever an inferior tribunal or administrative body had exceeded its powers, adding that “[t]he jurisdiction of the court to set aside such excess of power as incompetent and illegal is not open to dispute”.\(^{901}\)

Lord Justice-Clerk Moncrieff said that a finality clause “never can be pleaded in support of a proceeding which is illegal and null”,\(^{902}\) with Lord Cowan adding in the same case that, in considering the effect of a finality clause, “where there is constitutional illegality, the

\(^{896}\) *Patillo v Maxwell* at 7388.

\(^{897}\) *Caledonian Railway Company v Glasgow and Redburn Bridge Road Trustees* at 403, per Lord President Boyle.

\(^{898}\) *Ashley v Magistrates of Rothesay* at 716, per Lord President Inglis.

\(^{899}\) In its older, broader sense – see 20-21 supra.

\(^{900}\) *Forbes v Underwood* at 468, per Lord President Inglis.

\(^{901}\) *Moss' Empires v Assessor for Glasgow* (House of Lords) at 6, per Lord Kinnear.

\(^{902}\) *Manson v Smith* at 495, per Lord Justice-Clerk Moncrieff.
Supreme Court can interfere at any stage, and put an end to them”.

Lord President Emslie referred in a more recent case to the Court’s “undoubted jurisdiction” to reduce *ultra vires* decisions as “not in any way” being affected by a statutory ouster clause.

Among those cases which do not fall into the ouster clause category is the recent example of *Hepburn v Royal Alexandra Hospital NHS Trust*, in which Lord President Hamilton explicitly recognised the distinction between “implied” and “inherent” powers, but had “no difficulty” in attributing “inherent” powers to the Court.

He placed significant emphasis on the historical development of the Court, and in particular the manner of its inheritance of jurisdiction from the King’s Council. Importantly for judicial review, he stated that “[t]he Court of Session's jurisdiction to supervise the *vires* of acts of inferior tribunals is but an illustration of the inherent power of that court”.

He also approvingly cited the judgment of Lord Justice-General Emslie in *Cordiner, Petitioner*, that the Court of Session and the High Court of Justiciary had “an inherent and necessary jurisdiction to take effective action to vindicate their authority and preserve the due and impartial administration of justice”. Importantly, this appeared not only to be a reference to the source of that power, but to its effect, for he immediately followed that statement by saying that neither court had “any power either at common law or under statute to interfere with the exercise by the other of this important but essentially domestic jurisdiction”.

Lord Reed went on in the same case to say that:

> “the court possesses an inherent power to do whatever is necessary in order for it to maintain its character as a court of justice. This power is described as “inherent” because it is essential to the court's performance of its constitutional function... Its juridical basis is the authority of the court to uphold, protect and fulfil the judicial function of administering justice according to law... The court possesses the power to bring the proceedings to an end... because it cannot otherwise fulfil its constitutional function as a court of justice”.

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904 *Watt v Lord Advocate* at 128, per Lord President Emslie.
905 *Hepburn v Royal Alexandra Hospital NHS Trust* at para. 19, per Lord President Hamilton.
907 *Ibid.* at para. 18, per Lord President Hamilton.
909 *Cordiner, Petitioner* at 18, per Lord Justice-General Emslie.
910 *Hepburn v Royal Alexandra Hospital NHS Trust* at para. 47, per Lord Reed.
Lord Reed's double reference to the Court's "constitutional function" potentially suggests an appeal to some deeper functional claim for the Court which is premised on its historically-derived constitutional (and constitutive) role, and which is capable of being interpreted as an assertion of jurisdictional indefeasibility.

Although these almost deliberately ambiguous statements of potential indefeasibility of jurisdiction\(^\text{911}\) are important in identifying this narrative stream, much of the "inherency as indefeasibility" meta-narrative is more subtle in appearance, and sometimes implicit and unarticulated. As proposed in section 6.1.3(e), below, narratives often rely on meta-narratives for their doctrinal force or efficacy. Accordingly, many of the other cases on ouster clauses discussed in Chapter 3, and the narratives discussed above, assert a constitutional worldview whereby the Court commands the (largely self-ordained) legal and constitutional authority to assert and apply its own paradigms of jurisdiction, fairness, natural justice, and so on; and to use these to substantiate its own legal and constitutional authority. The assertion of that kind of worldview was discussed in section 3.3.2 with regard to ouster clauses, and may be extended to the narratives discussed above.

\(^{911}\) The blurring of distinctions between inherency as implicitness and indefeasibility has been criticised in the Australian courts. Some cases are similar to those under the inherency as implicitness narrative. For example, in *Sparks v Bellotti*, Wickham J. noted that where "the enabling statute, or rules or regulations lawfully made thereunder, is silent as to adjectival or procedural matters – that is the manner of the exercise by the court of its duties and powers – then the court has an unexpressed power to control its procedures" – *Sparks v Bellotti* (1981) W.A.R. 65 at 68-69, per Wickham J. (District Court of Western Australia). In the more recent case of *DJL v Central Authority*, the High Court of Australia held that the Full Court of the Family Court of Australia, whilst a court the original and appellate jurisdictions of which were created by statute, had "in addition such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred" – see *DJL v Central Authority* [2000] H.C.A. 17 at para. 25 (High Court of Australia, approvingly quoting *Parsons v Martin* [1984] F.C.A. 408 (Federal Court of Australia), below). In some cases, however, it has been argued that such "implied" powers should not be described as "inherent". For example, in *R. v Forbes, ex parte Bevan*, Menzies J. said that "[i]nherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction: if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as 'inherent jurisdiction', which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have 'inherent jurisdiction'" – *R. v Forbes, ex parte Bevan* [1972] H.C.A. 34 at p.7, per Menzies J. (High Court of Australia). A similar point was made by the Federal Court of Australia: "[i]n view of the way in which the phrase ‘inherent jurisdiction’ is used in many of the cases, it seems advisable generally to avoid the use of it to refer to this incidental and necessary power of a statutory court" – *Parsons v Martin* at para. 35.
This points to a general orientation towards an inherency as indefeasibility meta-narrative because the Court autonomously asserts and superimposes a constitutional worldview on top of that asserted by Parliament, as discussed in section 3.3.2. The Court not only exercises elements of jurisdiction by default (including elements of “implied” jurisdiction) but also lays claim to an enduring prerogative to provide a constitutional substratum whereby narratological functions are fulfilled. The constitutional-narratological function may even be an expression of the indefeasibility meta-narrative, for its assertion requires a living out of independent constitutional foundations which do not readily accommodate legislative defeasibility of jurisdiction.

b. The “rule of law” meta-narrative

A recently emerging narrative is that the rule of law is a basis on which the courts are entitled to intervene by way of judicial review. This was given unprecedented exposure in the English case of *Jackson v Attorney-General*, which concerned a challenge to the legal validity of the Hunting Act 2004, on the basis that the Parliament Act 1949 did not receive the consent of the House of Lords. This, the appellants alleged, was not compliant with the Parliament Act 1911.

The case – which would come to be positively cited in the Scottish courts – is notable in the present context for the doubts which were expressed as to the continuing fitness of a doctrine of unlimited parliamentary supremacy. Lord Steyn began by warning that the:

“power of a government with a large majority in the House of Commons is redoubtable... As Lord Hailsham explained in The Dilemma of Democracy (Collins, London, 1978)... the dominance of a government elected with a large majority over Parliament has progressively become greater. This process has continued and strengthened inexorably since Lord Hailsham warned of its dangers in 1978.”

He then warned of the possibility that the Parliament Act 1949 could “theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens”.

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912 Though with two of the five judges presiding – Lords Hope of Craighead and Rodger of Earlsferry – being Scottish.

913 See the discussion on *AXA General Insurance v Lord Advocate*, below.


915 *Ibid.* at para. 102, per Lord Steyn.
“This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts... The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.”

Lord Hope continued this theme. “Parliamentary sovereignty”, he said:

“is no longer, if it ever was, absolute... It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified”.  

After touching on the ramifications for parliamentary supremacy of the European Union legal order and the Treaty of Union 1707, Lord Hope brought the matter back to Dicey:

“Nor should we overlook the fact that one of the guiding principles that were identified by Dicey at p.35 was the universal rule or supremacy throughout the constitution of ordinary law... The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament’s legislative sovereignty.”

The rule of law was given passing reference in Eba v Advocate-General for Scotland, in which Lord Hope described it as “the basis on which the entire system of judicial review rests”, and linked this to the principle of the Court's supervision of bodies which had exceeded or abused their power or jurisdiction.

916 Ibid.
917 Ibid. at para. 104, per Lord Hope of Craighead.
918 Ibid. at para. 107, per Lord Hope of Craighead.
919 Eba v Advocate-General for Scotland (Supreme Court) at para. 8, per Lord Hope.
Lord Hope returned to a discussion of the rule of law in *AXA*. He spoke of “the part which the rule of law itself has to play in setting the boundaries of [the] relationship” between “the democratically elected legislatures and the judiciary”. Reiterating the view he expressed in *Jackson* that “the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based”, he echoed Lord Steyn’s concern about the dominance of government in Parliament. He also went on to say that:

“It is not entirely unthinkable that a government which [enjoys a large majority in the Scottish Parliament] may seek to use [that power] to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual... The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.”

Importantly, although Lord Hope appeared to be referring to the Scottish Parliament in this passage, he did not rule out the possibility for the courts to use the rule of law as a ground on which to challenge the legality of an Act of the U.K. Parliament. Instead, he stated merely that there were “conflicting views about the relationship between the rule of law and the sovereignty of the United Kingdom Parliament” which may require judicial conciliation, and that “[t]he fact that we are dealing here with a legislature that is not sovereign relieves us of that responsibility”.

Furthermore, his statement that the rule of law – which is posited as some kind of self-standing norm – “requires that the judges *must retain*” the power in question asserts that, first, they already have that power, and second, there is potential for insisting on jurisdictional indefeasibility.

The rule of law was also conceived in *AXA* as a basis for review by Lords Mance and Reed. The case may preface a distinctive stream of narrative whereby the rule of law is posited as a constitutional justification for judicial intervention; in the first place (and least controversially) in confining the (non-sovereign) Scottish Parliament to its “jurisdiction”; but potentially also for challenging legislation of an “extreme kind” which emanates from the United Kingdom Parliament.

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920 *AXA* (Supreme Court) at para. 42, per Lord Hope.
925 *Ibid.* at para. 97, per Lord Mance.
926 *Ibid.* at paras. 143, 149, 150 and 169, per Lord Reed.
U.K. Parliament. That is a leap which cannot yet be made – or has not yet been made – but it has been expressed, for the time being, indefinitely in scope. If continued, it may mark a further stage in the evolution of the courts' assumption of constitutional authority to define and delineate frameworks for the assessment of legality; and comprise a yet more potent judicial superimposition of a constitutional worldview on top of that asserted by Parliament.

6.1.3 Narrative attributes and the relationship between and among narratives
This section will touch upon some of the attributes of judicial narratives, and the relationship between and among narratives. It comments on the advertency of the narrative exercise, the plurality and non-exclusivity of narratives, the lack of assurance as to the consistency or complementarity of narratives, the lack of assurance as to the quality or sophistication of narratives, and the relationship between narratives and meta-narratives.

a. Advertency of narration
It is not suggested in this thesis that a judicial-narratological function is advertently performed in all cases. There are judges who would read this thesis and conceive of the idea of judicial narratology for the first time. Likewise, some judges might already have regarded themselves as performing such a function, but have described it using a different analogy or other terminology.

As such, it is not claimed that, as a rule, judges consciously write judgments in such a way that they see the explanatory part of their judgment as judicial narrative, which clothes and lends explanatory context to the naked adjudicative decision – and any statutory rule that is under consideration – in the way to which this chapter has adverted. Thus, when Dworkin said that judges are “chain novelists”, each writing a chapter which both builds upon previous chapters and which must be confronted by future judges\(^\text{927}\) – whether or not Dworkin claimed that judges *knowingly* do so – this thesis suggests that the analogy is a useful metaphor for what judges do, regardless of whether they *consciously* perform their narratological function.

Accordingly, judicial narratology is a theoretical device which seeks to characterise a functional and systemic phenomenon within our legal and constitutional order. It is descriptive and explanatory – not imputative. As with all theories, there is inescapably an

\(^{927}\) Dworkin, *Law's Empire* at 229.
element of the commentator imposing his theoretical framework upon the object about which he theorises. That is, to some extent, in the nature of the exercise. Therefore, according to the theoretical framework advanced in this thesis, judges perform that function – whether advertently or inadvertently.

b. Plurality and non-exclusivity

It is apparent from the above section that there is not one constitutional narrative, but several. The aim has indeed been to set out a plurality of narratives, each of which embodies or represents a theme, contemporary or obsolete, in the law on judicial review. They offer a range of legally-authoritative resources for the development and rationalisation of the law and legal doctrine in this area. The plurality and non-exclusivity of narratives is seen in three regards: (i) judges may change or depart from existing narratives, or offer different narratives, in subsequent cases; (ii) different judges presiding over broadly contemporaneous cases may offer different narratives; and (iii) different judges sitting in the same individual case can offer different narratives, a fact made especially plain by the possibility of dissenting judgments (or even single judgments which contain internal contradictions or a blending of, or switching between, narratives).

Moreover, although a judge might proclaim that a particular narrative or interpretation is “correct”, and that others are “wrong”, this claim is not always made, or at least not in such a clear-cut manner. Narratives may be suggestive in their quality, or may seek to draw upon, or borrow from, other narratives. They may qualify, develop or add to other narratives, such that bright lines – although useful and perhaps necessary for conducting a basic taxonomical analysis, as in this chapter – cannot necessarily be drawn between them. There may be overlap and blurring at the edges, or doctrinal cores or similarities shared between narratives. Different parts of different narratives, or shared parts of different narratives, might all be current or “true” at any given time. Narratives are neither self-contained nor self-sufficient.

Finally, there is a more general epistemological point to be made, which is that no single narrative is, from an objective viewpoint, necessarily “true”. The claim may be made by a judge that his interpretation is the correct one, or that which is “truest” to the law or its basic normative framework. A legal order may (and is likely to) be structured and normed in such a way that there may be a possibility for there to be “true” and “false” claims within its normative framework, but if one is to step outside the mesh of rules and other norms which
make up the legal order, a degree of critical distance should lead one to conclude that “truth” is a value-statement internal to the context and normative order in which it is made. “Truth” is therefore a subjective and relative concept: it is subjective to the value-reference points within the normative order in which it is made, and it is relative to claims which are “less true” or “less valid”.

As such, even when a judge claims that a given narrative is “true” or “the correct one”, even if this is, according to a viewpoint internal to the normative order in which that claim is made, the “truest” or “most correct” narrative; this is, even then, time- and space- specific. The “truth” is liable to change over time. Accordingly, every interpretation or narrative competes with other, existing accounts, and also with future, differing accounts.

The value of narratives is therefore not in their “truth” or “correctness”, but in their general explanatory power which can and does act as a powerful cohesive and coagulant in law and legal doctrine. As commentators (relatively) external to, and (relatively) objective from, the mesh of norms comprising the legal order, we should treat the plurality of non-exclusive narratives as a diverse explanatory resource which, having legal-authoritative value internal to the legal order (in that judicial narratives are made in the context of court judgments, and thus are “law”), may be regarded as strong points of reference, orientation and situation within the law.

c. No assurance of consistency or complementarity

Just as narratives may overlap and share agreed legal or doctrinal viewpoints, so may they conflict with each other. Some narratives may contradict others, or dispute their “truth”, validity or desirability. They must – of course – be distinguishable at some level to be regarded as narratives in the plural, among which there is capacity for differentiation.

This is of course a reminder that we are confronted with a plurality of narratives, pointing to a diversity of interpretations or viewpoints within the law itself. As such, whilst there is obvious practical value in navigating legal rules and discerning “what the law is” – as individuals must navigate those rules and orientate their behaviour in the context of the legal order which they inhabit – there is also value in “taking a step back” and seeing the system

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928 For an interesting account of the time and space dynamics of law, see generally Walker, Out of place and out of time.
for what it is, freer of some of the normative constraints which necessarily apply when trying to furnish answers on “what the law is”. This point ties in with a broader methodological approach in this thesis, which is one the primary interest of which is in the functionality and phenomenology of the system as a whole.

d. No assurance of quality or sophistication

Just as there is no assurance of consistency or complementarity between and among narratives, nor is there assurance of consistency within a given narrative. Like any story, it can contain errors or inconsistencies, or even be unconvincing, “bad” or contain bad parts. These negative attributes can manifest aesthetically or substantively.

The case of West v Secretary of State for Scotland illustrates this point. Despite being one of the principal cases in the Scots law on judicial review, and continuing to command authority, one can be critical of elements of its narrative component. As noted above, the judgment can be criticised as to its normative desirability, such as in its articulation of a tripartite relationship test as the touchstone of reviewability. It can be also be criticised on point of factual “correctness”, in particular in its historical assessment of the role of the abolition of the Scottish Privy Council on judicial review. Indeed, just that assessment was corrected in Eba v Advocate-General for Scotland.

The judgment was, however, compelling enough to remain authoritative in this area of law. Its narrative was apparently not “all bad”; and has probably remained compelling because of its explanatory plausibility and its relative advantage over other narratives in that regard. As Neil Walker explained:

“[a] good story about the situation of a particular constitution, or of a piece of legislation, or of a particular stream of common law... must resonate with other good stories within the relevant type and genre, and indeed must fit with the more tacit systemic and structural situating characteristics associated with that type”.

Furthermore, it “must be capable of maintaining its narrative integrity – its basic sense of its own plausibility and legitimacy – in the face of the situating narratives associated with other law types”.

929 See 174 supra.
930 See ibid.
931 Walker, Out of place and out of time at 27.
932 Ibid. at 28.
Some narratives have not been so compelling, at least in the respect that they have failed to command, or sustain their command of, lasting authority. The “supervising public power” narrative might fall into that category, perhaps because it was regarded as erroneous, incoherent (either in itself or in its relationship with other narratives or the wider system) or somehow “bad”, whether aesthetically or substantively. The same applies to the “supervising judicial and quasi-judicial powers” narrative. Each narrative competes for habitation in the wider framework of authoritative interpretative materials and resources in the law, and the quality, sophistication and plausibility of a narrative will affect the extent to which it is authoritative, and thus used as a point of reference, orientation and situation.

**e. Relationship between narratives and meta-narratives**

The relationship between narratives and meta-narratives is complex, not least because narratives may be presented in a way that is intertwined, and may blend almost imperceptibly into the deep conceptual, methodological and normative subtext by which they are underpinned.

In general, however, narratives implicitly, and sometimes explicitly, rely on meta-narratives for their doctrinal efficacy or force. This broadly reflects Tuori’s distinction between the surface and deeper layers of law. For example, in proposing that the doctrinal basis of judicial review is the supervision of excess of jurisdiction, or the supervision of public power, or the supervision of judicial and quasi-judicial powers; the courts assume the legal and constitutional authority to make those propositions. Questions arise as to why the courts are eminently qualified to be the supervisors, and what gives them the legal and constitutional authority to make those propositions; particularly because, once made, they acquire legal authority.

In some cases, the Court simply asserts its jurisdiction by declaring it, without substantive justification. It claims that its jurisdiction is “requisite”, or that it “cannot be doubted”, or is “not open to dispute”. In other cases, there is an explicit invocation of meta-narrative, with the Court addressing questions of its own legal and constitutional authority. An instance of what appears to be a more substantive attempt to legitimate the jurisdiction of

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933 *Campbell v Brown* at 448, per Lord Lyndhurst L.C.
934 *Ashley v Magistrates of Rothesay* at 716, per Lord President Inglis.
935 *Moss’s Empires v Assessor for Glasgow* (House of Lords) at 6, per Lord Kinnear.
the courts is by reference to the rule of law. For example, Lord Hope said that “the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based”,\textsuperscript{936} that “the rule of law... is the basis on which the entire system of judicial review rests”,\textsuperscript{937} and that “the rule of law requires that the judges must retain the power to insist that legislation” which sought to abolish judicial review “is not law which the courts will recognise”.\textsuperscript{938} Similarly, Lord Reed claimed that “the essential function of the courts is... the preservation of the rule of law”.\textsuperscript{939}

These remain, however, postulations of jurisdiction; instances of self-appropriated entitlement to make constitutional claims. The rule of law is a good example of this, for even although it is cited as though it were an objective, freestanding norm, it is highly unclear what it comprises, and judges are in a good position to (selectively) fill it with content. Much is left out of the discussion: what the rule of law actually is, where it came from, what is its extent, why it is for the courts (and these courts) to be its guardian, and so on. As such, a great deal is left unarticulated and is simply implied (or left to the imagination).

Accordingly, there is, beneath these claims and the narratives articulated by the Court, a subtext; a meta-narrative. There is a particular constitutional worldview – a judicial worldview on the constitutional location and function of the courts – implied in the Court's assumption of jurisdiction, its assumption of legal and constitutional authority to assume that jurisdiction, and the legally-authoritative narrative that it sets to the law. Thus, whilst references to “inherent” jurisdiction, or to the rule of law, appear to address issues of the Court's own legitimacy, they do not articulate the full story underlying the particular conception of the constitution that is being invoked.

This is not only a powerful jurisprudential tool for the courts, but an expression of their constitutional authority. The fact that meta-narrative is largely unarticulated does not necessarily weaken its status, but may in fact emphasise it, because implying or living out a meta-narrative can have the effect of cementing constitutional authority more strongly than

\begin{itemize}
\item \textsuperscript{936} Jackson v Attorney-General at para. 107, per Lord Hope of Craighead; repeated in AXA (Supreme Court) at para. 51, per Lord Hope.
\item \textsuperscript{937} Eba v Advocate-General for Scotland (Supreme Court) at para. 8, per Lord Hope.
\item \textsuperscript{938} AXA (Supreme Court) at para. 51, per Lord Hope.
\item \textsuperscript{939} Ibid. at para. 169, per Lord Reed.
\end{itemize}
by constantly articulating it. It may suggest that it is so deeply rooted in the legal and constitutional culture and tradition, that it is taken for granted, and therefore treated as not worth articulating.

6.2 Particularities of constitutional narratology

It was argued that the constitutional-narratological function held some of the deepest implications for the location and functionality of the courts in the legal and constitutional order. This section considers the features that give rise to that claim. It is shown that constitutional narratology implicates the Court in a self-attribution of constitutional authority, that this involves a deep process of self-norming, and that this points to the exclusivity of the judicial narratological function.

6.2.1 Self-attribution of constitutional authority

One of the most salient aspects of the Court's fulfilment of a constitutional-narratological function, which is distinguishable from systems underpinned by a central constitutional text, is the extent to which it is involved in a self-attribution of constitutional authority. The Court assumes the authority to assert its own, legal-authoritative vision of the constitution, providing narratives (and living out meta-narratives) on the structural and normative landscape of the constitutional order: narratives which have the force of law.

In a system with a constitutional text at its heart, the authority of a “constitutional court” would most likely be set out in codified form. In a system without such a textual core, locating the authority for the performance of the functions of a “constitutional court” is a more nuanced and contestable exercise. The very structure and pedigree of the constitutional order itself gives rise to the performance of such functions. Specifically, the emergence of a court which provides legally-authoritative constitutional narrative is the product of relatively gradual historical development. The functions emerge from the unravelling constellation of constitutional actors, from their evolving placement in the constitutional order, which is a product of the historical circumstances of and within the polity.

940 That is to say, gradual relative to the sudden break which usually characterises the enactment of a constitutional code.
That is not, in itself, phenomenologically different from how a central constitutional text comes into existence. A central constitutional text is a product of the historical circumstances of and within one or more polities, with a particular political and ideological worldview crystallised in writing and prospectively framing the future terms of the valid operation and development of a constitutional order; the “space” within which it may manoeuvre. The constitutional text is a legal phenomenon, inasmuch as it has the force of law; but it is also a factual phenomenon inasmuch as it is the culmination or climax in a period of historical development. In the U.K., the present day constellation of constitutional actors – legislature, executive and judiciary – is also the culmination of a period of historical development; but one which has not been enshrined in a central text which purports to bind and condition the valid future manoeuvre of the polity. It is not “designed”; or, at most, the system is one of accretionary or unfolding design.

As such, where a constitutional actor like the Court of Session cannot fall back on a central constitutional text for its ongoing legal and constitutional authority, nor which is affirmed in, for example, the way in which Parliament is continually re-affirmed by the democratic process, the Court participates in a kind of re-affirmation at both the ordinary and meta-level of constitutional narrative – in both the text and subtext of narratives – by proclaiming, re-asserting and re-enacting its authority. Its constitutional authority is attributed not by a prospective, central constitutional text, nor even by other state institutions in explicit terms; but by itself. It claims constitutional authority for itself, and seeks to rationalise, justify and vindicate both that authority and the claim to that authority by means of narrative and the narratological function.

The Court is therefore a source of law and constitutional authority. Thus, whereas a central constitutional text purports to prospectively frame the valid institutional parameters of constitutional authority, in the U.K. the courts purport to assume some of the essence of that function, and this is evident in such narratives as those on jurisdiction and the rule of law. It is, perhaps, an analogous mechanism for constitutional framing, but one which exists in a

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941 If the Treaty of Union is not regarded as such a text – as stated earlier, it is barely treated as one.

942 Neil Walker said that “the influence exercised by the common law on the wider socio-historical environment plays a part in supplying the evidence for its own justification. The sense of continuity – of uninterrupted unfolding or at least of unbroken integrity – that the common law ensures, or at least presents itself as ensuring in the stories it tells about itself, can then be independently cited as testimony to the tenacious virtue of the common past” – Walker, Out of place and out of time at 25.
more animate and organic form than a central constitutional text.

6.2.2 Self-norming
The courts' self-attribution of constitutional authority points to a deep process of self-norming. That is to say, the Court in large measure “norms itself” – self-validates – in attributing to itself the authority to interpret and delineate constitutional authority. This may be said to comprise four constituent aspects: self-reference, self-evaluation, self-corroboration and self-perpetuation.

The self-referential aspect is in contrast to reference to some external source of authority, which would in most systems take the form of a central constitutional text. The Court, unable to refer to such a text in the U.K. system, must use some other yardstick for the measurement of constitutional authority. There being no formulated barometer for the establishment of validly exercised constitutional authority in the system, the Court refers to principles and doctrines of constitutional authority that it has itself explicated and developed. That is not to say that the Court is indifferent to other institutions or other aspects of the constitutional or wider political order,\footnote{Recall, in particular, institutional interdependence and the requirement for a core of constitutional stability – see section 5.2.5(a) {\textit{supra}}.} but that it cites its own jurisprudence as an independent and (legally-)authoritative source of constitutional authority and interpretation.

Self-evaluation comes through in the selective invocation of rules and principles from the Court's own jurisprudence, or their selective importation into its jurisprudence (and, where these do not derive from some other legal or political institution, into the wider legal and constitutional normative order itself). The Court makes a normative assessment of the worth or value of those rules and principles – again, evaluation is not by strict reference to some external barometer of constitutional authority such as a central constitutional text. Thus, in invoking the rule of law as a justification for adopting a particular position, for example, the Court is making a normative assessment and evaluation of the rule of law as a principle.

Self-corroboration occurs through the legal effect of the Court's process of self-evaluation. The Court determines the normative desirability and appropriateness of adopting a particular position, and then certifies that position as one with legal-normative authority by asserting that position in its judgment; one which has the force of law. Accordingly, the Court does
not require the prior authorisation or corroboration of some external factor – such as a central constitutional text or the explicit agreement of Parliament – in order to give legal force to its adopted position. That is not to say that its position cannot be undone, such as by statutory override. The point is that, if and until it is overridden by statute,\textsuperscript{944} it has legal force in itself. It is legally self-corroborating.

Finally, if all of this sounds rather circular, that is because a strong degree of circularity is a feature of the constitutional system. An effect of this is a large measure of self-perpetuation in the constitutional authority of the Court. The principal legal source for the intricate constitutional position of the Court is not to be found in a central constitutional text (for there is none), nor in legislative acts (such acts failing to have general narrative or explanatory power, and at any rate not being the source of constitutional authority for the narratological function), but in the jurisprudence of the Court – which, as earlier argued, is an indispensable narrative source of law. Whereas the deeply self-normative nature of much that the Court does, and the high degree of self-reference in its own legitimation, might seem like a fairly egotistic exercise, it must be asked what other legal source is sufficiently rich and explanatory for the Court to draw upon in substantiation of its own jurisdiction and constitutional authority. In addition, it must be asked what other systemic mechanism exists for the performance of the distinctive constitutional function which this thesis has argued that the Court carries out; namely that which synthesises and conciliates legal norms with the existing legal order, and which coheres and coagulates the law. Perhaps the Court has little option but to be so self-referential. As such, the continual re-assertion and re-affirmation by the Court of its own constitutional authority means that there is, necessarily, a degree of self-perpetuation in its ongoing claim to that authority.

None of this immunises the Court from external pressures: if Parliament, or the populace at large, no longer pay any attention to the judgments of the Court, but instead regard as authoritative the judgments of some other body, then the Court loses the legal (and factual) capacity to self-perpetuate. Accordingly – and this links back to the points made about institutional interdependence and the contingency of a continuing constitutional order\textsuperscript{945} –

\textsuperscript{944} There are, in addition, doubts about the extent to which all aspects of the Court's authority, or the constitutional functions it vindicates, are subject to statutory override. For a recent judicial articulation of such doubts, see \textit{AXA General Insurance v Lord Advocate} following on from \textit{Jackson v Attorney-General}.

\textsuperscript{945} See section 5.2.5 \textit{supra}.
there must continue to be a sufficient degree of harmony among constitutional actors, a sufficient level of ongoing commitment to a shared political project, and a multi-institutional participation in a common political community; in order for the Court's self-normativity (including its self-perpetuation) to be realisable and realised. So long as that shared commitment is maintained, however, the system not only allows for the Court's jurisdictional and constitutional-authoritative self-perpetuation, but – in the absence of external yardsticks for measuring constitutional authority, such a central constitutional text – might be said to require it. This underlines that Parliament and the Court are parallel sources of constitutional authority.

6.2.3 Exclusivity of the judicial narratological function

A third feature which amplifies the implications of the constitutional-narratological function is the exclusivity of the judicial claim to that distinctive constitutional and legal-systemic function. The courts claim, whether tacitly or explicitly, that it is for courts and courts alone to confirm the legality of acts and decisions which are subject to litigation. This encompasses a comprehensively broad range of litigable acts, as diverse as a party seeking to rely on a contractual provision, a person claiming damages for negligence, a company's compliance with a statutory provision, a tribunal's compliance with rules of natural justice, and a minister's exercise of prerogative powers.

Moreover, this comprises not only the act of adjudicating on legality, but clothing judicial decisions with narrative in performance of the explanatory, integrative, rationalising function which has already been discussed; and moreover, living out meta-narratives or subtexts when adjudicating, and carrying out the narratological function. Even when Parliament enacts strong programmatic statutes, such as the European Communities Act 1972 or the Scotland Act 1998, it is the courts which provide the legally-authoritative narrative component to these Acts: they issue authoritative interpretations of their provisions, conciliate the norms they embody with the wider legal normative order (both horizontally and diachronically), and tell (or imply) authoritative stories about the place, role, function or legacy of those Acts in the wider legal order.\textsuperscript{946} In asserting their sole proprietorial right to judge and authoritatively narrate and “narratologise”, the courts therefore not only stake a claim to

\textsuperscript{946} In the case of the European Communities Act 1972, the narratology of the interface between the European Communities (later, European Union) and domestic legal orders is found in such cases as Factortame Limited v Secretary of State for Transport [1990] 2 A.C. 85, R. v Secretary of State for Transport, ex parte Factortame Limited (No. 2) [1991] 1 A.C. 603, and Thoburn v Sunderland City Council [2003] Q.B. 151.
constitutional authority – they stake a claim to an exclusive form of constitutional authority.

6.3 Legal-systemic legitimation of the self-normativity of the constitutional-narratological function

The extent to which the Court self-norms and self-authorises gives rise to questions of legitimacy: “what gives the Court the right to self-norm?”; “why is the Court able to self-norm to this extent?”; “how, in a democracy, can we account for the Court as such a powerful source of constitutional self-determination and self-normativity?”.

This section addresses those questions by considering what factors support or substantiate the existence and systemic legitimacy of the extensive judicial self-norming phenomenon in our constitutional order. This is not to champion courts or judicial supremacism, but to ask what it is about our constitutional system that legitimates the judicial self-normativity of which some discussion has been made.

Two related factors – traditionality and functional necessity – each of which is a profoundly situational and situating phenomenon of law, are argued to systemically legitimate the self-normativity of the courts' narratological function in the constitutional context. It is proposed that they go some way towards substantiating claims to jurisdictional indefeasibility or ineradicability; in other words, lending systemic credibility to jurisdictional indefeasibility claims made by courts in the context of judicial review (including those which seem to contradict the language of ouster clauses). On this basis it might even be argued to be necessary for the courts to advance some kind of manifesto for jurisdictional indefeasibility.

6.3.1 Situational phenomena

a. Traditionality

The role of traditionality was discussed in Chapter 1. It will be recalled that whilst statutes are an instrumental and programmatic source of positive law, they are deeply conditioned by – and the product of – an antecedent legal tradition. Statutes derive their very legal authority from the wider systemic context in which they are made, as an element of the particular

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947 The preference in this section has been to opt for the term “legitimate” rather than “legitimise”. The reason for this is that the latter has connotations of approval, and this section does not aim to approve the self-normativity of the judicial exercise. “Legitimate”, by contrast, is considered to appear more objective, and therefore to ask in a more value-neutral manner what factors – so far as the system is concerned – serve as legitimators.
tradition of that system. This is the very same tradition from which judicial decisions draw their legal authority. In both instances, statute and judicial decision – legislature and court – draw their constitutional authority from a common legal tradition.

The extensive self-norming phenomenon of the constitutional-narratological function is a systemic feature of the Scottish legal tradition. Indeed, the broad reach of traditionality embraces both the “designed” system (such as one with a central constitutional text) and the system of accretionary or unfolding design. The assumption by courts of the narratological function discussed in this thesis becomes a part of the traditional context in which the present law and legal system is situated. It becomes a facet of our law and legal system. Krygier’s argument that judging is “an archetypally traditional and tradition-referring practice... a specific and characteristic mode of making and justifying practical decisions... by reference to authorized institutional tradition”\textsuperscript{948} suggests both the deeply traditional context of the judicial self-assumption of the narratological function, as well as the self-corroborating dimension of that functional assumption becoming an aspect of the law itself.

Krygier, too, referred to institutional tradition, asserting that, in law, “past maintenance is institutionalized”.\textsuperscript{949} The Court is an institutional vehicle for the maintenance of this legal and constitutional tradition, certifying the legality of its vindication of the narratological function – as we have seen – by significant reference to itself: by self-evaluating, self-corroborating and self-perpetuating its vindication of that function. The Court's ability to do that is, as the accounts given by Krygier and Walker help us to understand, an aspect of the particular legal and constitutional tradition in Scotland and the wider U.K.; or, adding Tuori's framework of analysis, an aspect of its deeper layers of law.

Again, the importance of the historicality of law is emphasised, for it is through the particular historical development of the supervisory jurisdiction in Scotland that a tradition has grown in which the narratological function is performed by courts in the manner, and to the extent, that it is. The Court played a prominent role in the unfolding design of the Scottish constitutional order (and the Scottish dimension of the wider U.K. constitutional order), and a central role in the development of courts qua constitutional actors, specifically in the context of judicial review. As explored in Chapter 2, the Court was a key player in the

\textsuperscript{948} Krygier, Law As Tradition at 245.
\textsuperscript{949} Ibid. at 241. Emphasis added.
increasing systematisation of the judicial order, the increasing scope of its supervisory jurisdiction, and in gradually fashioning for itself a claimed indefeasibility of jurisdiction in the assessment of compliance with legality. In other words, the Court had such a central role in building up its own enduring, independent constitutional foundation, that it has a parallel claim to entrenched constitutional functionality alongside that of Parliament.

This re-affirms that the historical dimension of the evolution of the constitutional order is not merely of historical importance. It is precisely through that evolution, that unfolding design, that any of the present-day institutions of state can lay claim to their vindicated constitutional competences. The legal and constitutional past is, as Krygier explained, “an authoritative significant part of its present”, meaning that the past is part of a living tradition.\footnote{Ibid. at 245.}

In that sense, the “authority” for the Court to behave in this heavily self-normative and self-referential way is principally derived from the tradition by which the legal and constitutional order is animated. Our legal and constitutional tradition allows for it – just as it allows for Parliament to perform its legislative functions. Parliament cannot point to any incontrovertible foundational moment, nor to any exclusive and incontestable source of constitutional authority, any more than can the Court.\footnote{The U.K. Parliament was formally created by the Treaty of Union, however its “supremacy” (and much else of its character) is unaccounted for in that text. It derives, in substance, from a less determinate past. The Treaty also confirmed the continuing status and authority of the Court of Session as the supreme civil court in Scotland, underscoring the fact that the Court preceded the very U.K. state itself. Furthermore, no provision was made in the Treaty for appeals to be made from the Court to the Appellate Committee of the House of Lords, and yet these appeals grew up in practice – of further testament to the “unfolding design” of the system.} The claim of one institution is neither uncontroversially exclusive nor subordinative of that made by the other; a fact affirmed by the requirement for institutional interdependence.

The point is reiterated that this is not an unchangeable state of affairs, but as part of Krygier's “tradition”, Tuori’s “deep layers of law”, its potential pace of change is slow. Krygier explained that the legal and constitutional past is present only to the extent that the “authoritative past” is treated as significant in the present,\footnote{Krygier, Law As Tradition at 248. Emphasis added.} and this is, as Walker described, a selective exercise. Nonetheless, the existing tradition is such that the Court enjoys a significant degree of self-interest in portraying its own constitutional functions, for it commands independent constitutional authority to select upon which sources and materials
in the law it draws in performance of its narratological function.953

b. Functional necessity
A second factor which offers systemic legitimation for the Court's performance of a constitutional-narratological function is functional necessity.

This has already been adverted to in the discussion of the functional indispensability of constitutional narratology. It was argued that the constitutional function exercised by courts through the integrative, explanatory and contextualising medium of narrative was a distinguishable and necessary contribution to a greater constitutional whole. It has also been observed that the Court cannot cite an independent and incontrovertible source of constitutional authority – such as a central constitutional text – for its performance and vindication of that function. Its deeply self-normative conduct, and in particular the extent of its self-corroboration, has served as a catalyst for a transition from an exercise of de facto authority to de lege authority; in other words, it has made certain claims to constitutional authority, and as a generator of legal norms, those claims have gained legal force.

It is not only because of the particular legal and constitutional tradition in the U.K. that this self-stated claim to constitutional authority is systemically legitimated, but also because the very functionality of the broader constitutional system might be said to require it: if the Court has no independent and incontrovertible source of constitutional authority upon which it may draw, then it must stake its own claim to it.

The Court has, of course, a certain degree of authorisation and acquiescence from Parliament. This can be traced back to the College of Justice Act 1532 in the first instance, through the Treaty of Union, to more recent legislative acts such as the Court of Session Act 1988. These represent general (formal) parliamentary acquiescence with the Court's claim to comprehensive civil jurisdiction. It is, however, a typically ambiguous and widely cast acquiescence which neither confirms nor denies an independent constitutional foundation for the Court and the constitutional functions it performs. It is neither enough for the Court to rely on those legislative acts in citation of its independent constitutional foundation, nor is it desirable for it do so – particularly in the context of inter-institutional tensions, such as those

953 It is true that a general deference to Parliament is part of that tradition, however that again emphasises the extent to which institutional interdependence is a feature of the system.
represented by ouster clauses.

In consequence, the Court cites its own jurisprudence as legal testament to its accretionary constitutional authority. In this way a distinct foundation of constitutional authority is built up. This is both a cause and an effect of traditionality: because of the accretionary or unfolding nature of U.K. constitutional “design”, the Court self-corroborated and built up an independent source of constitutional authority, which became an aspect of Scottish (and, later, U.K.) constitutional tradition; whilst the particular constitutional tradition provided systemic authorisation for the Court to self-corroborate, build and maintain an independent source of constitutional authority. As such, the Court's earlier claims to constitutional authority were self-reinforcing, and its subsequent claims can, in that regard, cite the “legal” authority of its own, earlier claims.

6.3.2 A systemic requirement for judicial claims to jurisdictional indefeasibility?

In light of this discussion, there should be greater understanding, and perhaps tolerance, of judicial claims to, or suggestions of, jurisdictional indefeasibility. This applies both in terms of the source and effect of constitutional authority, for the two are dependent on systemic legitimation. Rather than seeing such judicial claims as a challenge to the authority of Parliament, or a purely self-interested staking out of constitutional territory, it might be argued that the system requires courts to stake a claim to independent constitutional authority, both in the absence of a central constitutional text, and as a systemic counterweight to the claim to independent constitutional authority made by Parliament.

If the system does not require judicial claims to jurisdictional indefeasibility, it certainly encourages them. Particularly in an age of representative democracy, universal suffrage, elective accountability and executive legitimacy parasitic on the legislature, it is relatively straightforward for Parliament to stake out a “legitimate” claim to independent constitutional authority. On the other hand, judges must first overcome the fact that they are unelected and enjoy security of tenure in asserting the legitimacy of their constitutional functions. Their situation remains, in principle, precarious, inasmuch as they cannot cite an incontrovertible constitutional foundation, such as might be embodied in a central constitutional text. Courts are therefore encouraged to “prove themselves” and justify their activities, particularly when adjudicating in controversial cases or those which can be interpreted as challenging either Parliament or government. Citation of the “rule of law” may become progressively...
commonplace in this regard, as courts are perhaps increasingly expected to at least formally cite some “external” standard in vindication of their legal-systemic and constitutional authority.

6.4 Institutional specificity of the constitutional-narratological function

It remains to consider the institutional specificity of the constitutional-narratological function. This is addressed in two contexts. The first is the extent to which the advent of the Upper Tribunal poses a challenge to the Court's performance of a narratological function. The second considers whether the U.K. Supreme Court, as a court hierarchically superior to the Court, poses a challenge to the latter's performance of that function. In other words, does the existence of a court which is hierarchically superior to the Court qualify or undermine the fundamentality of its constitutional-narratological function?

6.4.1 The Upper Tribunal

The Upper Tribunal was established by the Tribunals, Courts and Enforcement Act 2007. This brought a number of tribunals within a unified appellate structure with the Upper Tribunal at its head. Particularly notable, for the purposes of this chapter, was a jurisdiction to judicially review statutorily invested in the Upper Tribunal. So far as cases arising under the law of Scotland were concerned, there was to be, in specified circumstances, a “transfer” of judicial review applications from the Court of Session to the Upper Tribunal. In some cases this transfer was to be mandatory and in others optional. What was envisaged was an exercise by the Upper Tribunal of a power akin to the Court's supervisory jurisdiction, with “the same... powers of review” and “apply[ing the] principles that the Court... would apply” in deciding an application made to its supervisory jurisdiction.

This would appear to be an unprecedented grant to a body in Scotland other than the Court to exercise a power equivalent to the supervisory jurisdiction. Whilst it is of practical and perhaps symbolic significance that the workload of “judicial review” is now shared by the

954 Although it is highly unclear what the “rule of law” comprises; and courts are in a good position to fill it with content. One aspect of this, it seems, are judicial claims that the courts are dischargers of an essential constitutional function; such that the “rule of law” might simply be a formal casting of constitutional and legal-systemic features that have long been existent.

955 Tribunals, Courts and Enforcement Act 2007, s.20.
956 Ibid., s.20(1)(a).
957 Ibid., s.20(1)(b).
958 Ibid., s.20(2).
959 Ibid., s.21(2).
960 Ibid., s.21(3).
Court and the Upper Tribunal – and in some cases, statute requires that it is transacted in the latter instead of the former – it is here contended that this is best regarded as a contingent licence, rather than a transfer, of jurisdiction; and that even then it can only be regarded as such in a limited sense. Four reasons are offered in support of this proposition.

First, the statute does not transfer the *jurisdiction* of the Court to the Upper Tribunal. Instead, it permits, and in some cases requires, the transfer of certain *applications* from the Court to the Upper Tribunal. The import of this is threefold – first, applications are first made to the Court and only thereafter are they transferred by order to the Upper Tribunal; secondly, only a limited class of applications are so transferred; and thirdly, an order of the Upper Tribunal is to be treated as having the same effect and enforceability as a corresponding order made by the Court, which draws upon the corporate and institutional authority of the Court. Each of these facts points to a corporate reliance of the Upper Tribunal on the Court, inasmuch as the former is, by statute, to derive significant aspects of its jurisdictional authority from, or by reference to, the Court.

Secondly, section 21 seems careful to craft the jurisdiction of the Upper Tribunal in such a way that it is not in receipt of a formally designated “supervisory jurisdiction”. Instead, it is said to have “the function” of deciding applications transferred to it from the Court, and to exercise powers analogous to those exercised under the supervisory jurisdiction. According to the strict letter of statute, therefore, there remains (in the Scottish legal system) one body, and one body alone, which commands a supervisory jurisdiction – namely, the Court.

This leads into the third point, which is that the jurisdiction of the Upper Tribunal is entirely statutory. Whereas the Court and its jurisdiction are the product of a wide array of statutory measures and residual non-statutory sources, the Upper Tribunal exists at the sole behest of, and only to the extent prescribed by, the Act. In addition to this major difference in the sources of law and authority to which each institution owes its origin, this speaks to the limits of each institution's jurisdictional authority. In the case of the Court, the supervisory jurisdiction is an open-ended and indeterminate jurisdiction in which the sources of decision-making are not confined to existing (statutory) prescriptions. However, in the case of the Upper Tribunal, whilst it will interpret and apply statutes appropriate to a given case, and whilst it is bound by the Act to apply principles that the Court *would* apply in deciding an application to the supervisory jurisdiction, that is, in the case of the Upper Tribunal, a
necessarily diagnostic exercise. That is to say, the Upper Tribunal can only apply principles that the Court has already applied in its own case law, for it is only those principles of which it can be said that the Court would – not “might at some time in the future” – apply. Likewise, it is presumably the case that only those principles that the Court would apply at the present time and in the present circumstances that the Upper Tribunal must apply, and not principles that, for example, the Court historically applied, but of which it has since disapproved. The important point is that the Upper Tribunal does not seem empowered to develop its own principles without reference to the jurisprudence and methodology of the Court. Its decision-making capabilities are therefore far more prescribed, limited and diagnostic than those of the Court, even in analogous cases.

Finally, and importantly, the constitutional-narratological function continues to be fulfilled by the courts: the High Court of Justice of England and Wales,961 the Court of Session in Scotland,962 and the U.K. Supreme Court in both cases,963 have provided the initial explanatory and narrative context to the manner in which the Tribunals, Courts and Enforcement Act is to integrate with the existing law and legal order. The Act set out a basic, rudimentary framework for consolidating the tribunal structure and linking it to the court system; but the constitutional relationship between the Upper Tribunal and the courts is substantially fleshed out by the courts, the judgments of which have much more to say than the Act about the manner and context in which the legislation plays out. The cases of Eba v Advocate-General for Scotland and R. (on the application of Cart) v The Upper Tribunal have provided the initial starting points in, respectively, the Scots and English jurisprudence on the constitutional narrative of the Act, and these will be further developed in future cases.

The question may well be asked, however, whether the Upper Tribunal, in deciding cases and producing judgments which, like their Court of Session counterparts, have integrative, explanatory and narrative power, is not itself assuming a constitutional-narratological function. That possibility cannot be completely ruled out – but to the extent that it can be said to exist, it is necessarily a more limited function than that fulfilled by the Court.

962 Eba v Advocate-General for Scotland (Inner House).
963 R. (on the application of Cart) v The Upper Tribunal [2011] U.K.S.C. 28; Eba v Advocate-General for Scotland (Supreme Court).
In the first place, the Upper Tribunal is a creature of statute, and the entirety of its powers derive from statute. As such, it is far more liable to statutory abolition, and less able to resist it, than the Court. Accordingly, whereas in an attempted statutory ouster of jurisdiction, for example, the Court would, by means of the narratological function, employ narrative devices to contextualise, and at some level challenge or qualify, that ouster provision; the Upper Tribunal would, in the face of ouster of its jurisdiction, be unable to respond in the same way. Even although it is bound to apply principles that the Court would apply in applications to the supervisory jurisdiction, the Upper Tribunal, as a creature of statute, cannot fall back on residual, non-statutory powers or elements of jurisdiction in order to challenge or qualify an ouster provision, and its jurisdiction must surely be ousted. Otherwise, further purported exercise of the ousted jurisdiction would take the Upper Tribunal ultra vires of its statutory powers. Ouster of the Upper Tribunal's jurisdiction, moreover, would not in itself constitute any ouster of the Court's jurisdiction, such that there would still be some institution in the wider constitutional order – the Court – which commands a supervisory jurisdiction.

Secondly, the Upper Tribunal does not command a general jurisdiction. It is empowered only to adjudicate on a limited class of cases, as specified by the Act, and thus commands a very specific jurisdiction. This seems too narrow to allow for the Upper Tribunal to perform any more general constitutional-narratological function.

Thirdly, and perhaps most importantly of all, the Upper Tribunal remains hierarchically inferior to the Court. Its judgments are themselves subject to the Court's review. In others words, the Upper Tribunal is itself subject to the supervisory jurisdiction, which, comprising as it does of statutory and non-statutory elements, means that the Upper Tribunal is subject not only to statutory constraints, but also to the superintendence of an institution whose constraints include non-statutory – that is to say, common law – constraints. The imposition of those constraints, and the capacity for them to be imposed, implies a deeper constitutional function capable of enjoyment by the Court than by the Upper Tribunal.

It therefore seems that, to the extent that the Upper Tribunal performs any constitutional-narratological function, this is limited in scope, and is in any event considerably more limited than that enjoyed by the Court. The Upper Tribunal will, in deciding cases and providing judgments, employ judicial narrative in the sense of the provision of explanatory
power, and the integration and synthesis of legal norms with the existing law and legal system; and it will be “constitutional” in content to the extent that it touches upon matters of constitutional law.

The real point of distinction, however, lies in the apparent incapacity of the Upper Tribunal to assert a claim to the kind of deep constitutional-narratological function performed by the Court; that is to say one which is bound up in the very construction of the legal and constitutional order itself, and one which provides narrative on constitutional authority. The source of its legal authority being entirely statutory, the Upper Tribunal does not enjoy the jurisdictional autonomy necessary to constitute an independent source of legal – and constitutional – authority. It is at no stage emancipated from the hegemony of statute. It therefore cannot affect constitutional narrative in a way which innovates upon the constitutional position of the principal legislative, executive and judicial institutions, nor can it provide a self-defined narrative on authority within the constitutional order. To the extent that constitutional narrative is now a shared endeavour of the Court and the Upper Tribunal, an important distinction remains in the Upper Tribunal's necessary confinement to the provision of narrative in the surface layers of law, and its incapacity to significantly affect the deeper layers of law, or constitutional meta-narratives.

This understanding is confirmed in the case of *Eba v Advocate-General for Scotland*. The detail and outcome of the case is less important than the fact that the case happened at all in the place and the manner that it did; that is to say, in the Court of Session and as to questions about the Upper Tribunal's jurisdictional extent. This was not an ordinary case about the supervision of a generic body's compliance with its jurisdiction; but of a body the jurisdiction of which substantially overlapped with that of the Court itself. Whilst fairly ordinary principles of judicial review were applied in the case, the very fact of the Court's *adjudication* on the jurisdictional extent of the Upper Tribunal was a clear statement of the constitutional-hierarchical relationship between the two bodies. Indeed, the Court's finding – and the system's *allowance* for it so finding – that it was for the *Court* to assess the jurisdictional position of a body with which it shared jurisdictional overlap was yet another statement by the Court on the extent of its own (constitutional) authority. The case was not just about the jurisdictional extent of the Upper Tribunal, but about the jurisdictional extent of the Court itself – and its authority for assessing it. This again underlines the self-norming
phenomenon which has already been discussed, which speaks to a narrative not only about jurisdictional extent, but also to a meta-narrative about constitutional authority. The Upper Tribunal, in being subject to this supervision and assessment by the Court, highlights its impotence at the level of constitutional meta-narrative.

The same principles are likely to apply to any other secondary judicial institution. Other tribunals or adjudicative bodies the jurisdictions of which are subject to the Court's supervisory jurisdiction, are subject both to meta-narratives about jurisdictional extent and constitutional authority. Accordingly, those bodies seem unlikely to be appropriately placed to themselves generate narratives on constitutional authority. In this sense, the constitutional-narratological function appears, in its purest sense, to be (within Scotland) specific to the Court.

6.4.2 The U.K. Supreme Court
The U.K. Supreme Court poses a perhaps more difficult challenge for the argument that, in the Scottish context, the Court of Session alone enjoys the capacity to perform a constitutional-narratological function.

The right to appeal from the Court to the House of Lords was originally a common law right of appeal, due to the absence of appellate provision in the Treaty of Union. This gained a statutory footing, and that statutory right of appeal was transferred mutatis mutandis to the U.K. Supreme Court. As was the case with the House of Lords, the Supreme Court is regarded as higher in the judicial and constitutional hierarchy than the Court of Session, with the power to reverse and overturn its decisions.

964 See section 6.2.2 supra.
965 See, inter alia, the literature cited at fn. 8 supra.
966 Court of Session Act 1808, s.15; Court of Session Act 1825, s.5; Court of Session Act 1988, s.40 (as amended by the Constitutional Reform Act 2005, Schedule 9). On the historical development of appeals from the Court to the House of Lords, see Walker, Report on Final Appellate Jurisdiction at Appendices I and III.
967 Constitutional Reform Act 2005, s.40. The Supreme Court came into existence on 1st October 2009, when the relevant sections of the Act came into force. See also Tony Kelly, 'Supreme Court and special leave' (2011) 30 Scots Law Times 235.
968 Nonetheless, at the time of writing, the Scottish Courts website (About the Supreme Courts) described the Court of Session and the High Court of Justiciary as together constituting “Scotland's Supreme Courts”. There is continued uncertainty as to whether the Supreme Court sits as a U.K. court or a Scottish court when hearing Scottish appeals – see Walker, Report on Final Appellate Jurisdiction, Appendix III at C.
Furthermore, the Supreme Court appears to be regarded as something of a “constitutional court”. For example, the Final Report on the relationship between the High Court of Justiciary and the Supreme Court, chaired by Lord McCluskey, described the Supreme Court as “acting as a constitutional court in a manner familiar to many federal or otherwise multi-level jurisdictions” on matters of vires concerning devolution.\footnote{969} Elsewhere in the Report, too, was the Court considered as “acting as a constitutional court” in such matters.\footnote{970} This can reasonably be said to be indicative of a broader perception of the Supreme Court as the court where important matters of constitutional law are resolved,\footnote{971} and the fact that cases regarding the constitutional import of the Human Rights Act 1998, the Scotland Act 1998 and the Tribunals, Courts and Enforcement Act 2007 – to name just recent examples – have proceeded as far as the House of Lords or the Supreme Court, would appear to support this view. Furthermore, to take the example of the Tribunals, Courts and Enforcement Act, the Supreme Court serves, or can serve, a unifying or convergent function, broadly aligning (as it did) the constitutional position of the Upper Tribunal in England and Wales, on the one hand, and in Scotland, on the other. However, even in matters which do not directly concern other parts of the U.K. – such as in AXA (even although there was keen interest from the perspective of Welsh devolution) – there seems to be an expectation that cases of the highest import, especially in constitutional law, will proceed from the Court of Session to the Supreme Court for “final” determination.

The Supreme Court can be seen to provide constitutional narrative, and to perform a constitutional-narratological function, in cases such as \textit{Eba v Advocate-General for Scotland} and \textit{AXA General Insurance v Lord Advocate}. If the performance of that function is, in the Scottish context, shared by the Court and the Supreme Court, to what extent is there a diminished importance of the Court's fulfilment of that function, by its being shared with an hierarchically-superior court?

\footnote{969}{Final Report of the Review Group on ‘Examination of the relationship between the High Court of Justiciary and the Supreme Court in criminal cases’ chaired by Lord McCluskey (2011) at para. 18.}

\footnote{970}{Ibid. at 26 (Appendix).}

\footnote{971}{At the time of writing, the website of the Supreme Court (The Role of the Supreme Court) stated that “[t]he Supreme Court \textit{inter alia}... concentrates on cases of the greatest public and constitutional importance”.

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The first point to be made in this regard is that the Court of Session has a residual, non-statutory supervisory jurisdiction. Although cases on judicial review may be appealed from the Court to the Supreme Court, it is not necessary that they do so in order for judicial review to be achieved. An appeal may only be made on a point of law, and in order to be successful, the Supreme Court will have to be convinced that the Court of Session has erred in its interpretation or application of the law. If it is not convinced, the decision of the Court will stand (though with the possible addition of the Supreme Court's own constitutional narrative). The Court therefore remains the primary forum of review, not only because the bulk of Scottish judicial review petitions are not appealed to the Supreme Court, but also because the decision of the Court stands by default; only to be reversed by the Supreme Court in a limited class of cases in which it regards the Court as having erred on a point of law. The Supreme Court is thus not so much a generic forum for judicial review, as it is a superior court to which appeal may be made in the event that an error of law is alleged of the Court of Session. Furthermore, the right of appeal to the Supreme Court is not automatic.\textsuperscript{972}

The system is therefore not designed in such a way that the Supreme Court receives all, or even most, petitions for judicial review. The majority of the caseload is transacted by the Court of Session. In the court year 2010-2011, for example, 342 petitions for judicial review were initiated, and 242 disposed of, in the Petitions Department of the Court of Session.\textsuperscript{973} In 2011, only 10 appeals – not confined to cases on judicial review – were made from the Court to the Supreme Court, and of those, only one was allowed.\textsuperscript{974} The Court of Session is thus the principal workhorse in cases on judicial review, with only a handful ever reaching the Supreme Court.

The cases which \textit{are} appealed to the Supreme Court may, however, be argued to be those in which more fundamental or decisive questions of constitutional law or judicial review doctrine are contested. Indeed, the bulk of petitions for judicial review presented to the Court of Session are “routine” and do not seek to test some of these more fundamental issues. Of the aforementioned 342 petitions initiated in the Petitions Department, 266 related to immigration;\textsuperscript{975} such cases tending not to be doctrinally contentious. Accordingly,\textsuperscript{972}

\textsuperscript{972} See Court of Session Act 1988, s.40 (as amended by the Constitutional Reform Act 2005).
\textsuperscript{973} Civil Judicial Statistics Scotland (2010-2011) (Website of the Scottish Government) (these are the most recent relevant statistics available, with 2011-2012 statistics unsuitable for ascertaining judicial review data).
\textsuperscript{974} Judicial and court statistics (2011) (Table 7.4) (Website of the U.K. Government).
\textsuperscript{975} Civil Judicial Statistics Scotland (2010-2011).
could it not be argued that it is precisely those more doctrinally contentious cases that will end up being determined in the Supreme Court, and that the Supreme Court's performance of a constitutional-narratological function is more significant in those cases?

This line of argument may be answered in three parts. First, not all doctrinally contentious cases proceed to the Supreme Court. *West v Secretary of State for Scotland*, for example, did not proceed past the Inner House; nor did other doctrinally contentious cases, or those in which doctrinally contentious arguments were made, such as *Forbes v Underwood, Barrs v British Wool Marketing Board, Watt v Lord Advocate* and *Tehrani v Argyll and Clyde Health Board (No. 2)*. *Connor v Strathclyde Regional Council* did not proceed past the Outer House. Thus, even although, of the cases cited earlier on the constitutional ramifications of the Scotland Act 1998, only *Adams v Scottish Ministers* and *Cameron v Procurator Fiscal* were not appealed to the Supreme Court (or House of Lords) – with *Whaley v Lord Advocate, Somerville v Scottish Ministers, AXA General Insurance v Lord Advocate* and *Imperial Tobacco v Lord Advocate* having been so appealed – it cannot be said that, as a rule, the doctrinally contentious cases in constitutional law and judicial review proceed to the Supreme Court.

The second point is that a case does not have to be doctrinally contentious in order to be subject to the constitutional-narratological function of the courts. As previously argued, even although meta-narrative, in particular, is often unarticulated, a court's disposal of a case nonetheless implies a particular judicial worldview of the constitutional order. Even in the “routine” transaction of most judicial review cases, in which statutes are uncontroversially interpreted and applied, there is a tacit statement on constitutional function and authority. Accordingly, even if many of the cases that do not proceed past the Court of Session are not doctrinally contentious, this does not mean that in those cases the Court does not mobilise, affirm or contribute to existing constitutional narrative or meta-narrative. As argued earlier,

976 See 157-159 supra.
978 *Cameron v Procurator Fiscal* [2012] H.C.J.A.C. 19 and [2012] H.C.J.A.C. 31. Even although this case was heard in the High Court of Justiciary, it could still be dealt with in the Supreme Court by way of devolution issue.
979 *Whaley v Lord Advocate*.
980 *Somerville v Scottish Ministers* (House of Lords).
981 *AXA* (Supreme Court).
982 *Imperial Tobacco Limited v Lord Advocate*.
983 It is, at the time of writing, too early to say whether *Scotch Whisky Association, Petitioners* will proceed past the Outer House.
implying or living out a meta-narrative can have the effect of cementing constitutional authority more strongly than by constantly articulating it, and it may be so deeply rooted in the legal and constitutional culture and tradition (in which the Court has played a formative role) that it is taken for granted, and treated as not worth articulating. Therefore, even in what appear to be doctrinally non-contentious cases, there may be, and probably is, a constitutional subtext which involves at least a tacit performance of a constitutional-narratological function.

The third point is, meanwhile, an acknowledgement that a trend may develop whereby the Supreme Court receives more of the workload of the doctrinally contentious (or, indeed, non-contentious) cases as time goes on. Changing perceptions of the Supreme Court as something of a “constitutional court” might increasingly implicate it in the constitutional-narratological exercise; or perhaps the recent flurry of devolution cases to be taken to the Supreme Court is not, or will not be, representative of a broader trend. The balance is not fixed. It is too early to say with any degree of certainty how the relationship between the Court of Session and the Supreme Court will develop, or how the Supreme Court will itself develop and perceive itself in the long-term, and the impact which that will have on its jurisdiction and the wider legal and constitutional tradition.

This goes back, however, to Tuori’s distinction between the surface levels and deeper layers of law. Any increased assumption of the constitutional-narratological function by the Supreme Court, and any development in the legal and constitutional tradition which saw the Court of Session performing a diminishing performance of that function, would be a much slower moving, evolutionary aspect of the deeper layers of law.984 Indeed, the Supreme Court would – and does – confront a great tide of jurisprudence on constitutional law and judicial review which has been generated by the Court of Session throughout its long existence. Moreover, it confronts a tide of constitutional narrative and meta-narrative, an enduring understanding of the constitutional order, in which the Court played a formative role. Unless there is a fundamental change in the constitutional landscape, such as a revolution or dissolution of the state, the legacy of the Court would significantly outlive the

984 Assuming, of course, that the Court of Session was not abolished, at which point it would obviously cease to perform any function, let alone a constitutional-narratological one. However, its jurisprudence, and its formative role and legacy in the existing legal and constitutional tradition, is extremely unlikely to disappear with any haste unless a much more fundamental constitutional change took place.
Court itself, were the institution to be abolished. Thus, whilst there is of course a possibility that the contentious cases will become the preserve of the Supreme Court, and that the Court is relegated to some subsidiary judicial role, or even abolished altogether, this possibility does not seem enough, in itself and at this stage, to suggest that the Court's constitutional-narratological function is waning.

6.5 Conclusion
Chapters 5 and 6 have sought to suggest constitutional narratology as an alternative framework of analysis to a “last word” approach to inter-institutional tensions in the context of constitutional competence in judicial review. They have, in particular, sought to advance a framework which improves upon dialogue theory, functional departmentalist and bipolar sovereignty analyses.

It has been suggested that courts perform a necessarily distinct constitutional function from legislative institutions. Through their exercise of a constitutional-narratological function, courts provide, first, a legal-systemic mechanism facilitating the horizontal and diachronic integration, conciliation and synthesis of legal norms (including statutes) with the existing mass of law and the wider legal order; second, an interstitial and coagulant function by “filling the space” between legal norms and weaving them into a unified and univocal body of norms; and third, a chronicling, expository and explanatory storytelling function which sets a legally-authoritative narrative to the law.

These are indispensable constitutional functions. They should not be viewed as in terminal competition with the constitutional function exercised by Parliament, but necessarily complementary. The courts make the legislative function possible; the institutions are united as sharers in a political community, a common constitutional project which is greater than any one of its constituent institutions. Thus, whereas the courts perform a distinct and exclusive constitutional function, this does not confer upon them a “last word” which is distinct from a parliamentary word, but makes it a necessary part of a multi-institutional constitutional whole. The constitutional framework, itself, is constructed around this idea – particularly in the absence of a central constitutional text – whereby the constituent institutions of the constitutional order have, indeed, constituted it: they are its constitutional basis. No part of that overarching order can be regarded as “supreme”, or capable of overriding other constituent parts.
This necessarily judicial function has, however, been argued in the Scottish context not to be specific to the Court of Session as an institution. Should Parliament abolish and replace the Court, its underlying constitutional function must necessarily be taken up by the replacement institution if the constitutional order is to be stable and continuing. Statutory abolition of the Court as an institution is acknowledged by this thesis to remain possible; but statutory abolition of its underlying constitutional function is not, because the very efficacy and operability of statutes depend in part – but a vital part – on judicial application of those statutes. There must be some locus in the constitutional order – particularly one in which there is no central constitutional text – for a strong constitutional-narratological role to be fulfilled. In the Scottish and wider U.K. legal and constitutional tradition, the courts have been, and arguably must be, the institutions by which that function is fulfilled.
CHAPTER 7

CONCLUSION

The thesis has sought to frame tensions between Parliament and the Court of Session in the context of judicial review of ouster clauses. Whilst this was viewed a heightened point of tension between those institutions, it was suggested to be evident as a general tension across the wider sphere of judicial review.

The methodological approach of the thesis was carefully defined. The historicality and traditionality of law were emphasised at the outset, challenging preconceptions about the default adoption of parliamentary supremacy as the starting point of constitutional analysis, and also the extent to which the paramountcy and momentousness of statutes – especially those of constitutional importance such as the Human Rights Act 1998 or the Scotland Act 1998 – is overplayed. Instead, the importance of the law's past was emphasised as a significant part of its present. The effect of the existing legal tradition was set out as a profoundly conditioning, defining and in some measure constraining context in which newly generated norms are received into an ongoing and antecedent legal system. The Court of Session, as an historical counterweight which conveys much of these deeper layers of law, played a formative (constitutional) role in architecting the present day legal and constitutional tradition; justifying the use of that institution as the starting point of constitutional analysis in Scotland.

The historical background of the Court's deep relationship with the architecture of the constitutional order was then set out, with an emphasis on its close association with the definition and delineation of constitutional authority. It was shown that the Court inherited its initial supervisory function from emanations of the King's Council, with which it maintained a degree of jurisdictional continuity. The Court would become a powerful constitutional actor and ascend to the apex of an increasingly centralised and systematised civil judicial order, fuelled by factors such as a professionalising judiciary, the breadth and generality of remedies at its disposal, its absorption of other courts and jurisdictions, and its
exertion of jurisdiction over inferior courts and judicatories. The Court's supervisory function would evolve through its complex of remedies, moving from a broad idea of judicial review indigenous in the pre-existing framework of the falsing of dooms, to its powerful triumvirate of supervisory remedies – advocation, suspension and reduction. The Court would come to expand the purview of its supervisory jurisdiction from inferior courts and judicatories, to ecclesiastical courts and tribunals, arbiters, and public and administrative bodies. Throughout this process, there has been a strong degree of self-definition and the performance of a formative role in the architecture of the present-day constitutional order. In doing so, the Court fashioned a relatively freestanding constitutional foundation of its own, primarily through judicial review.

It was then demonstrated that ouster clauses represent an area in which divergent constitutional worldviews are particularly evident. Whereas Parliament regards itself as entitled to oust the jurisdiction of the courts to judicially review, the Court regards itself as entitled to adjudicate on the effect and extent of ouster, including its limitation or exclusion. This judicial worldview manifests even in those cases in which the Court upholds the effect of an ouster clause.

The thesis then progressed to an attempted accommodation or conciliation of those divergent constitutional worldviews. It was argued that a last word analysis – whereby the “final” determination of one institution triumphs over that of another – was based on the false premise that institutions are competing for the same core of constitutional competence. It is a reductive approach to the problem, failing to recognise the possibility that neither institution can command a last word. The thesis also considered alternative models, namely dialogue theories, functional departmentalism and bipolar sovereignty, each of which was regarded as an improvement on a last word analysis, but itself incapable of providing the kind of overarching, holistic framework necessary for the particular constitutional conditions of the U.K., and placing insufficient emphasis on the distinctiveness of institutions’ respective constitutional functions.

Constitutional narratology was then advanced as the preferred analytical framework within which to accommodate the divergent constitutional worldviews asserted by Parliament and the Court. The Court's performance of a constitutional-narratological function was regarded as fulfilling a threefold enterprise: first, the provision of a legal-systemic mechanism for the
horizontal and diachronic integration, conciliation and synthesis of legal norms (including statutes) with the existing mass of law and the wider legal order; second, the provision of an interstitial and coagulant function by “filling the space” between legal norms and weaving them into a unified and univocal body of norms; and third, a chronicling, expository and explanatory storytelling function which sets a legally-authoritative narrative to the law.

It was argued that in the Court's performance of a constitutional-narratological function, it was undertaking a distinctive constitutional function which was incapable of fulfilment to its requisite extent by Parliament. Rather than asserting a last word for the Court, this framework was shown to deny the possibility for any institution to command a last word, recognising instead their being necessary parts of a greater, multi-institutional constitutional whole. These institutions collectively constituted the legal and constitutional order – they (and the norms they enact) are, essentially, the constitution. Notwithstanding inter-institutional tensions, the constitutional order therefore requires both a basic commitment to institutional harmony and a core of constitutional stability; requirements which reject the plausibility of a last word analysis.

The thesis considered what legal-systemic legitimacy exists for this deeply self-referential, self-evaluative, self-corroborative and self-perpetuating exercise, with traditionality and functional necessity each proposed as factors which provide that systemic legitimation.

Finally, it was asked whether the constitutional-narratological function is specific to the Court of Session as an institution. This was first addressed in the context of the Upper Tribunal, which was concluded to be capable of commanding a much more limited form of this function. However, the advent of the U.K. Supreme Court could potentially challenge the extent to which the Court of Session is the principal performer of this function in the Scottish constitutional order. It is too early in the period of the Supreme Court's existence to make fixed or certain conclusions, but even were it to become the principal forum for the doctrinally contentious (and non-contentious) cases on constitutional law and judicial review, that would not necessarily imply that the Court of Session's performance of a constitutional-narratological function was waning. Moreover, even if the Court were to be abolished as an institution, it has contributed so much to both the surface and deeper layers of law, including constitutional meta-narrative and the wider legal and constitutional tradition, that – pending some much more fundamental constitutional disruption – its legacy would significantly
outlive its demise as an institution.

The absence of a central constitutional text sensitises questions of constitutional authority, and it may be the absence of that tangible constitutional anchor that leads to the tendency to place so much emphasis on statutes of constitutional importance. They do not, however, penetrate into the deeper layers of law, at least in the short term. Instead, they enter an existing law and legal order, and an antecedent legal tradition, by which they are profoundly shaped, conditioned and constrained. They must mobilise the existing institutions, processes, standards, normative criteria, concepts, methodologies and other materials and resources of the law in order to gain their own legal authority and to be capable of achieving their posited objective.

That existing law and legal tradition was profoundly shaped by the Court of Session. Its vast contribution to the structural and normative landscape of the legal and constitutional order is testament to its being a source of constitutional authority. Whilst it is unlikely that the Court as an institution would be able to resist statutory abolition, its underlying function, which it, as an institution, powerfully defined, must and will survive. It is an integral part of the constitution, and a statute is insufficient to prize it out from the normative substratum in which the constitution is grounded. The legacy of the Court is not only the creation of a comprehensive framework of judicial review, but the fashioning of a deep legal-systemic and constitutional function which has its own distinct foundations, and an enduring constitutional worldview which is embedded deep in Scottish legal and constitutional tradition.
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