



Judges or Legislators: Who should rule? Professor Sir Vernon Bogdanor FBA CBE and Professor Cristina Rodriguez

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Ladies and gentlemen, we are talking tonight about 'Judges and legislators: who should rule?', and I am going to be trying to answer that question in relation to Britain, and my colleague, Professor Cristina Rodriguez, from the New York University Law School, is going to answer that question with regards to the United States. She has the advantage over me in that she is a professional qualified lawyer, which I am not.

In discussing British Government, until recently, I think it would not matter if you did not know any law, because law played a very small part in British politics in comparison with American politics. It was once said in the 19th Century about America, by a great French commentator, Alexis de Tocqueville, that, 'In America, every political question eventually reduces itself to a legal question.' I think that is an exaggeration, but there is some truth in it, and that was never true of Britain.

If you look at the classical texts about British Government, for example, Bagehot, *The English Constitution*, published in the 19th Century, there is no chapter in it on the judiciary or the law at all, and that is true of many other texts on British Government, really until the 1950s and '60s. This is because law played a very passive role in British Government until recent years. As you would know if you came to my talks some time ago on the British Constitution, the reason for that is that the central British constitutional principle is that of the sovereignty of Parliament; that Parliament could do what it likes. This meant that, in Britain, judges could not overturn what politicians decided, as of course they can in America.

That principle or idea has come under very great challenge in recent years, and judges now play a much greater role in British Government and politics than they did. The prime instrument which has enabled them to do that is the Human Rights Act, which was passed by Blair's Labour Government in 1998, and came into force in the year 2000. The Human Rights Act is the nearest we have got to what the United States has, and many other democracies have, namely, a Bill of Rights, that is, a list of what rights the individual has and some means by which the individual can obtain redress if those rights are infringed. I think it is reasonable to say that this Act has transformed, and is transforming, our view of the relationship between Government and the Judiciary, between judges and legislators. Before the Human Rights Act came into force, we were not without rights; we did have rights, but they were really based on generalisations, on the decisions made by judges in individual cases, and decisions made in Parliament. They were derived inductively, if you like, from things on the ground, and, broadly speaking, you had a right to do anything you were not forbidden to do. If you were asked, 'Have I a right to pick up a £5 note that I see in the street?' the answer is, 'Is there any prohibition against it, and if there isn't, you have a right.' But the Human Rights Act alters that because it gives you a set of positive rights, and you can deductively derive what you can do in a given situation from those rights. For example, one of the rights in the Human Rights Act is a right to education, and that can lead you to perhaps bring public authorities to court if that right is in some way denied. So, previously, our rights were a generalisation from the past decisions of judges and parliamentarians, but they are now derived deductively from a set of principles.

The principles of the Human Rights Act, the rights laid down, as with the American Bill of Rights, are bound to be laid down in very general terms, and it is always a question of interpretation as to whether those rights are met or not, and the people who do the interpreting are judges. I will give you one example, and it

is a self-interested example, but I hope you will forgive me giving it all the same. I suspect what happened to me has happened to many people in the audience, that we have fallen foul of the law because we have fallen foul of the speed cameras along the road. But when that happens, you get a letter from the Police asking if you were the driver of the car at that particular time. One very intrepid Scot said that he was going to refuse to answer that question because he had a right not to incriminate himself, and that I think, in America, is the Fifth Amendment right - you have a right not to incriminate yourself - and he said he would not answer that question. The Scottish Courts backed up his view that he did not, but when it got to the highest court in the land in Britain, they said that this right was to be balanced against the great saving of lives which occurred when speed limits were controlled, and that that was more important than the value of his right to self-incrimination, so he lost out in the end. Although I can follow the courts' reasoning, I must confess to a bit of selfish upset at that decision, because I would like to have done the same when I got those letters!

However, judges now have a key role in interpreting the Human Rights Act, but they do not have the sort of power they have in the United States of striking down legislation, because that was thought to be incompatible with the sovereignty of Parliament. Therefore, if they think that an Act of Parliament cannot be interpreted to fit in with our rights, they issue a Declaration of Incompatibility.

Very famously, they did that a few years ago, with a case dealing with suspected terrorists who were detained without trial - the so-called Belmarsh Prison case. The courts then said this went against the principles of the European Convention relating to the right to a fair trial, and the Government, admittedly after some hesitation, altered the law in accordance with that decision. But the discretion remains with the Government and Parliament to alter the law. The courts issue a Declaration of Incompatibility - that is merely a statement, it has no legal effect, the law remains as it was - but it is then up to Parliament to act to put things right. In fact, it is fair to say that it has done so in every case so far. There are about twenty cases of Declarations, and on each occasion, Parliament, sometimes after a bit of delay, admittedly, has altered the law to fit in with that.

I will perhaps give an anecdote relating to an American judge, whom I mentioned this point to. There was a conference at my University a few years ago on the constitutional courts, at which a number of leading foreign judges were present, and by chance, I sat next to an American Supreme Court judge called Stephen Breyer. He asked me about the Human Rights Act, and he said, 'Well now, if I sign a contract with you, and that contract somehow goes against the Human Rights Act, and the courts issue a Declaration of Incompatibility, is it still a legal contract?' I said, 'Yes, it is, until Parliament decides to alter it.' He said, 'If that was the case in the United States, the Bill of Rights would be of no value whatever.' So that is an American viewpoint about it, and perhaps Cristina agrees or perhaps not, but we will find out later.

But you can see the point of the Human Rights Act is to try and reconcile the principles of human rights with the sovereignty of Parliament, because, at first sight, they would seem to clash, because after all, if Parliament is sovereign, it can do anything, including abrogating human rights. Indeed, I think that was the complaint the Americans had against the British when they had their Wars of Independence, that the sovereign Parliament was deciding to tax them without representation - in other words, taking away their rights - but Parliament said, 'We can do what we like - we are sovereign.' So this is a way of reconciling two different principles. It is a compromise.

At the time the Act was passed, I asked a very senior judge in Britain what happened if there was a clash between these two principles, parliamentary sovereignty and the protection of human rights, and he smiled at me sweetly and said, 'That's a question that ought not to be asked!' Of course, you can see why.

I thought, at the time the Human Rights Act was passed, in 1998 - it came into effect in the year 2000 - I thought that this was a very tenuous compromise, because it depends on self-restraint by Parliament, on the one hand, and by judges on the other, because if the judges use this power which is given them to try and secure judicial supremacy, then MPs and Government will object.

Let us suppose that we take, for example, legislation about terrorism. Governments and MPs say that they are accountable to the people for the security of the country, and if there is a terrorist attack, the judges will not get blamed, they will get blamed, and perhaps they will lose votes for not protecting people properly, and therefore they ought to have the last word on what is needed to preserve the security of the country. But the judges say the Human Rights Act gives us the right to decide how the balance should be secured between security, on the one hand, and the protection of rights, on the other.

I thought there would be conflict, but I thought it would take some time to occur. In fact, I was wrong: it has occurred very quickly. In 2006, just six years after the Human Rights Act was passed, the then Prime Minister, Tony Blair, said it ought to be amended, and that there should be new legislation limiting the role of the courts in the Human Rights Act, and that meant amending the Act. The then Prime Minister's comments were supported by the Leader of the Opposition, David Cameron - perhaps one of the few things on which they agreed - and David Cameron renewed a pledge, which was in the Conservative Party's 2005 Election Manifesto, to, and I quote, 'Reform, or failing that, scrap the Human Rights Act.' So both the Leader of the Government, as then was, and the Leader of the Opposition were united that it should be reformed or amended. It is fair to say that Gordon Brown, who gets a lot of flack on civil liberties, has not suggested that the Human Rights Act should be amended or reformed.

But what is remarkable, to my mind, is the speed with which it has become a bone of contention. In contrast, in the United States, it was sixteen years after the Constitution was drawn up in 1787 before the first Act of Congress was struck down in 1803, and then no other major Act was struck down until the Dred Scott case in 1857, which really led to the Civil War. The Supreme Court did not really become of importance in American politics until after the Civil War, which ended in 1865. Likewise, in France, there is also a new body, with roughly similar powers, called the Conseil Constitutionnel, established by the Fifth Republic in 1958, but that did not really establish its powers until the 1970s.

So the conflict in Britain has come to the fore much more quickly than I imagined, and it has not been noticed very much. I think the radical implications of the Human Rights Act, giving power to the judges, has not been noticed because, unlike the other countries I have mentioned, we simply do not have a written or, if you like, codified constitution. If we had a codified constitution, bringing in the Human Rights Act would have required a constitutional amendment, and there would have been a lot of discussion and debate about the significance of it. But in not having such a constitution, we perhaps did not notice its significance, and constitutional change tends to go unnoticed.

The processes were well summed up by the classical writer I mentioned earlier, Walter Bagehot, who said: 'An ancient and ever-altering constitution, such as the British, is like an old man who still wears, with attached fondness, clothes in the fashion of his youth. What you see of him is the same; what you do not see is wholly altered.' Because of our peculiar system, we can alter our arrangements very easily, without fuss or difficulty, but because it is so easy, we do not often realise what we are doing when we are altering it. We have, I think, without noticing it, brought in a kind of Bill of Rights into our system, which is very near to the Bill of Rights in other countries, but not the same, as I pointed out, and perhaps a step on the way to a fundamental law or constitution which would be a huge innovation in Britain. Indeed, Gordon Brown has been talking about the possibility of a constitution or constitutional convention.

As I say, the Human Rights Act seeks to muffle a conflict between the judges and Parliament, but perhaps does not do so very successfully. This is because the Human Rights Act is based on the European Convention of Human Rights, which was established after the War, very much influenced by British politicians, perhaps surprisingly by Conservative politicians, and particularly by Winston Churchill, who was strongly in favour of a united Europe based on the rule of law and thought this would be a step towards it. I fear that poor Churchill would be expelled from the modern Conservative Party for his views on Europe, but there it is!

The worry that people had after the War, obviously, was a return of fascism or national socialism to Europe. That, fortunately, has not come about. The worries we now have about rights deal not with these large political and social movements, but with the rights of very unpopular minorities who find it difficult to get into electoral process at all.

The Human Rights Act pre-supposes a basic consensus on human rights between judges and politicians, and I think it assumes that breaches of human rights will be inadvertent and unintended, so that there will not really be much conflict between the politicians on the one hand and the judges on the other, but there is not that sort of consensus when it comes to the rights of unpopular minorities. Two areas in particular have caused difficulties: the first is concerning asylum seekers; and the second is suspected terrorists. It is bad luck for the Human Rights Act, in a way, that both of these issues have come to the fore since the Act was passed.

Of course, the problem of asylum has long preceded the Human Rights Act, but it has grown in significance since the year 2000. It is now a highly emotive issue which politicians think could alter the voting behaviour in a General Election, and therefore they are very worried if judges interfere with their rights to adopt the sort of asylum policy they think desirable. For those who are interested, there is a very interesting article in

today's Financial Times on the possible effects of the recession on relations with asylum seekers, and whether this might assist the rise of the British National Party in future elections, and there is a poll which shows that people coming from abroad have become more unpopular because the argument is that they are taking jobs away from people already here. This is a poll result. Obviously, judges will have to deal with that situation, and they must stand against any temporary areas of prejudice, and so there is a conflict built in.

Secondly, terrorism - now, that has taken on a new form since the horrific atrocity of 9/11. We had terrorism before, but it was, in a sense, what you might call an old-fashioned form of terrorism, that of the IRA, which had a single, specific and concrete aim, namely the reunification of the island of Ireland. But global terrorism of the kind championed by Al-Qaeda is quite different. It is a new and more ruthless form of terrorism, with wide, if not unlimited aims, amongst which is the establishment of a new Islamic empire and the elimination of the state of Israel, and apparently it has terrorist cells in around sixty countries. Governments say that, to deal with this new form of terrorism, you need new methods, and these new methods may well infringe human rights; but the judges say we should not compromise our traditional principles, habeas corpus and the presumption of innocence, and these principles, they say, have been tried and tested over many centuries and have served us well. Some judges are going even further, and they are saying that our traditional principle of the sovereignty of Parliament is a judicial construct, something the judges accepted in the past, and if judges could create it, they can now equally justifiably supersede it. A number of judges have occurred, in obita remarks in recent cases, that the sovereignty of Parliament is now limited or qualified.

One judge said, in a recent case: 'In exceptional circumstances involving an attempt to abolish judicial review of the ordinary role of the courts, a new Supreme Court in Britain may have to consider whether this is a constitutional fundamental which even a sovereign Parliament, acting at the behest of the complacent House of Commons, cannot abolish.' They have said that - they imply they would not apply any legislation which sought to tamper with what they say are fundamental principles of our constitutional democracy, such as five-year Parliaments, the role of the courts, and the rule of law.

Another judge said: 'The courts will treat with particular suspicion, and might even reject, any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers.' Another said, 'The rule of law enforced by the courts is the ultimate controlling actor on which our constitution is based.' In other words, not the sovereignty of Parliament, but the rule of law.

The implication of all this is the sovereignty of Parliament is created by the judges and they could also alter it. But can they actually do that or is the doctrine of the sovereignty of Parliament really part of our much deeper constitutional history?

A great 19th Century lawyer, who really first developed this doctrine in detail, A.V. Dicey, said that: 'The roots of the idea of Parliamentary sovereignty lie deep in the history of the English people and in the peculiar development of the English constitution.' Can the judges supersede it if Parliament and the people do not want them to do so?

Whatever the state of public opinion, and that is a matter of speculation, it is clear that the Human Rights Act attempts to muffle this conflict, but is unsuccessful in doing so. There is a basic conflict, and this conflict, if not resolved, could generate a very serious constitutional problem in Britain. What I mean by a constitutional problem is not just there is a difference of view on these matters, because that is inevitable in any healthy democracy; what I mean is that there is a difference of view as to how the problem ought to be resolved. We agree that any society has to draw a balance between the rights of the individual and the needs of society for protection, but the question is: who is draw that balance - is it to be the politicians or is it to be the judges?

As I said a few moments ago, many judges would say they have a special role in protecting the rights of unpopular minorities who cannot use the electoral and democratic processes - asylum seekers, suspected terrorists and the like. They would say, in doing that, they are doing no more than applying the Human Rights Act, as Parliament has asked them to do. But the Government, and I suspect most MPs and much of the press, would say, no, it is for them as elected representatives to weigh the precise balance, because they alone are accountable to the people, in a way that the judges are not, and that the judges have rights to look at legislation, but not to seek judicial supremacy - they should not seek to expand their role by stealth.

Because they have these different views, you are beginning to get both politicians and the judges saying

that the other side has broken the constitution. The judges say that Government is breaking the constitution by seeking excessive powers to deal with terrorism and asylum, amongst other problems. They say they are infringing human rights, and then attacking the Judiciary publicly, which they do, for defending human rights. But the Government says that the judges are seeking to thwart the will of Parliament. So the constitution is coming to mean different things to different people, and it means something different to the judges from what it means to the politicians, and the argument from parliamentary sovereignty points in one direction, and the argument from the rule of law in another. I think we are, at the moment, in a transitional period, and eventually we will reach a constitutional settlement, but it is going to be a fairly rocky process, and there may be some squalls and storms ahead, so I think people who seek a quiet life should avoid studying the British constitution!

I want to now conclude by giving my own view, for what it is worth, on these matters, and it is this: that the Human Rights Act is of value, as I have indicated, primarily for small and unpopular minorities who cannot use electoral and political processes effectively. For larger minorities, they are better advised to use electoral and political processes, and I include ethnic minorities in that category. I think that the American experience shows that the main factor leading to black emancipation was not so much the decision of the Supreme Court in 1954 on *Brown v. Board of Education*, but the Voting Rights Act of 1965, which ensured that black votes counted, particularly in the Southern States, which they had not done before. In general, members of ethnic minorities in Britain are able to use the political and electoral machinery to secure their rights where they are infringed.

I think there is a danger of the philosophy of human rights going too far. It cannot resolve the wider issues in our society, the wider issues that inevitably are raised in a multicultural society. It cannot resolve our 'culture wars', if you like.

I take the following examples, which have been given by Trevor Phillips, who is the Chair of the Equality & Human Rights Commission. He has indicated a number of conflicts which are bound to occur in a multicultural society, on which there are different views as to how they should be resolved. One is the question of affirmative action. It is a big social issue in America, on which there are arguments on both sides about human rights, and different people have different views.

Another one is the question of the right of parents to choice of school, because where that is given full rein, then there tends to be the case that a number of schools are 100% white, and this means there is much less mixing between people of different ethnic groups than there might otherwise be, but many surveys have shown that the best way to secure tolerance between people of ethnic groups is for them to mix together.

Surveys in Britain showed that around half of the population of the original indigenous white population have no friend who is a member of an ethnic minority. The original survey asked people about their twenty closest friends, whether there were members of ethnic minorities, but they had to abandon that because most English people did not have twenty close friends, but the friends they did have were very rarely belonging to ethnic minorities.

Then there are all sorts of questions in relation to faith schools and whether the right for people to be educated in schools of a particular faith does not discourage the social mixing which is important in a modern culture.

Then there is the question of arranged marriages. I am not talking here about forced marriage, but arranged marriages, where there are nevertheless social pressures on young woman and, as I say, ostracism if they do not marry someone in a particular community that it is suggested they should marry. It is not forced, but at what stage do social pressures give rise to coercion.

And then the case raised by the Archbishop of Canterbury of Sharia law, and should the civil law recognise the jurisdiction of Sharia courts, which may have very different principles from our main courts, in particular perhaps in relation to the testimony of women.

All these raise very difficult questions of individual rights versus the rights of groups - individual versus group rights - and they cannot be settled, in my opinion, by a Human Rights Act, nor by the courts. There is really a clash of rights and interests here, and I think different people of good will could come down on either side, and those issues are best settled politically. There is danger of making judges decision-makers on issues which they are not really equipped to decide, and perhaps also a danger of putting liberal prejudices we may happen to have into eternal verities decided by a court. The fact that we may happen to have certain liberal views does not necessarily mean that they ought to be enforced by the judges.

There are even further dangers to this: that judges are not really equipped to make fine judgements about society or social and economic matters, and this is why I am sceptical about the value of putting social and economic rights in a constitution, because if you put, say, a right to housing - these rights are in the South African Constitution - that goes a long way towards social and economic rights. I am not wholly sympathetic to that because I think it is very difficult for judges to balance judgments about social and economic priorities. They are not really there to do so. Could they make judgements, for example, about the availability of drugs under the National Health Service or things of that kind? I think they are not able to do that, and it devalues their legal expertise.

Again, if I can quote from the American experience, it is worth remembering what Supreme Court Judge Jackson said in the 1930s; that judges were not final because they were infallible; they were only thought to be infallible because they were final. There is no appeal from a judge's decision if you do not like it. If you do not like a politician's decision, it can, in principle, be changed at the next General Election. You cannot easily change the decision of a judge.

Finally, I think it is dangerous to leave our liberties too much in the hands of judges. A lot of good things are said about the American Constitution, but it is fair to say that the Equal Protection Clause, which was put in it in 1870, was a mockery for many years if you were a non-white citizen living in the Southern States - it did not mean much. What a constitution and a bill of rights shows is what goods are actually in the shop window; the question of whether you can buy the goods and them actually available is a quite separate question.

So the philosophy of human rights is not wholly adequate to meet the kinds of challenges that we face in our multicultural society, and therefore, my own answer to this question is that judges should be given great power, but in very limited areas, where you are dealing with small and unpopular minorities - the rights of prisoners, the rights of suspected terrorists, and so on. Our political systems are rather good at defending the rights of nice people, like ourselves, but not necessarily so good at defending the rights of people who may not be so nice, and some of these people are not very nice, but they have rights all the same. It is not a nice people's rights act, it is a Human Rights Act, and I think that perhaps is worth mentioning.

I think it is also worth mentioning a story told in an old book, again about the American Constitution. It is about a church in Guildford, and on the site of the church, there was apparently an earlier building which was destroyed in 1740 when the steeple fell and carried the roof with it. One of the first to be informed of the disaster was the verger, but the verger said, 'It's impossible for the steeple to have burnt down because I've got the key in my pocket.' I think that the Human Rights Act is the key, but it will not, of itself, prevent the steeple from falling, unless you have a vigilant public opinion which is prepared to defend human rights, and I think that giving too much emphasis to the judges will prevent the growth of that vigilant public opinion.

Cristina Rodriguez

For an American, the concept of parliamentary sovereignty is almost impossible to understand. But even more difficult to understand is the notion that you would have a Human Rights Act and a Judiciary with a power to declare something inconsistent with the Human Rights Act, and then no obligation on the part of Parliament to change the law. That is even more incomprehensible, and that is because the concept of judicial review, or the authority of courts to strike down legislation as inconsistent with our Constitution, and it is not just among constitutional lawyers, it is among the population as a whole.

In survey after survey, the courts come out as everyone's favourite branch of Government. Congress rarely breaks the 20% approval mark. The President, depending on who we are talking about, can get up 50-60%, but only when the economy is good. But the country over, people are highly supportive of the work of the courts, and a lot of what the courts do, insofar as the public is concerned, is hold the Legislature to account.

What is not foreign to the United States or to Americans is the notion that judges, even though they have that power of judicial review, are limited in their ability to make judgements of social policy, and the concept of judicial review is not without controversy in our politics or in our constitutional history.

So what I want to do is talk a little bit about the two different ways in which the relationship between judges in the US system and democracy is actually quite complicated, and reflects some of the challenges that

Vernon identified as facing the UK in its attempt to make sense of this new regime.

So the first way in which the relationship between judges and democracy is fraught is in the sense that judges can be, and have been throughout our history, seen as democracy-thwarting; that they undermine the democratic will of the people and therefore should be resisted. But the other way in which there is actually a complicated relationship between democracy and judges is that judges also, historically, have been democracy-forcing, or they have enhanced the quality of our democracy and the deliberation about important issues. So I will talk about each of those in turn.

So the main reason why judicial review, from an American perspective, is something that was established early, and has been reinforced often, is because of the nature of our Constitution as a written Constitution and as a Constitution that enshrines both a structure of Government but also a set of rights that are supposed to be beyond the sovereign will of the Legislature. That was, in part, a deliberate design to reject the British model; the American colonists, for a variety of reasons, did not believe that Parliament was doing a very good job of protecting their rights, and so among the things that were thought to be necessary was to enshrine the individual liberties of citizens and to have them protected from the will of the Legislature. So the primary characteristic of our Constitution, that makes it very different I think from the British model, is that it is fundamental law; law that the Legislature cannot abrogate.

So, the question then becomes: who is it who gets to interpret the Constitution? As our now former President would say, the question is, 'Who is the decider? Who gets to say what the Constitution means?'

What you could call it the Catholic view is that it is the Judiciary who should interpret the constitution; it is the high priests of constitutional law who get to decide what the Constitution means, and then apply that meaning to what the Legislatures do. One caveat of this that is important to note is that we have a system of diffuse judicial review, which means that all of the courts in the federal system have the power to strike down legislation. It is not just a single high court, as it is in many jurisdictions; it is every court, from the trial court, through the appellate courts, to the Supreme Court of the United States, that have this power. The Catholic view, so to speak, is that it is the judges who get to interpret the meaning of the Constitution.

But there is also a very strong Protestant strain in American constitutional jurisprudence that believes that the people have a personal relationship to the Constitution and that it should not be intermediated by judges. So, because it is the people's document - after all, it was meant to enshrine the concept of popular sovereignty, not parliamentary sovereignty - over time, and in different discrete instances, which I will discuss, the people have asserted their authority to say what the Constitution means and have rejected, in various ways, what the court has said that it means.

There are two primary examples of this: the *Brown vs. Board of Education* case, to which Vernon alluded, which involved racial segregation in the American South; and *Roe v. Wade*, the Supreme Court case that recognised the right to an abortion as protected under the Constitution. In both of these instances, the courts' authority to strike down legislation as violative of constitutional rights came into very serious conflict with popular conceptions of what the constitution meant and the right of the people to get to decide how to order their lives and how to regulate.

But before I talk specifically about those examples, which are two crucial ones in the history of American constitutional law, I just want to reiterate a few of the conceptual problems with judicial review that Vernon identified that are also prevalent in the way talk about judicial review and courts in the US.

The primary concern is what we would call the counter-majoritarian difficulty, the notion that a court, which is unelected - in the US, as here, the courts, the judges, are not elected, they are appointed, for life - do not respond to the people in any direct sort of way. So the challenge to democracy is that unelected individuals can overturn the decisions of elected individuals, and therefore the decisions of the people.

A related concern to this is that this practice, over time - and this is something that may become an increasing problem in the UK, depending on how this debate works out - is that it actually has a debilitating effect on the Legislature. It leads to the Legislature's infantilisation, because the Legislature loses the sense of obligation to interpret the Constitution. So you have this, not uncommon, phenomenon in the United States, where members of Congress will vote for a piece of legislation that they think is unconstitutional; that they think is a violation of the First Amendment, which protects freedom of speech.

When the Congress passed a piece of legislation in the late-1990s / early-2000s, regulating the financing of political campaigns, trying to get at the problem of money in politics, a lot of what they did was thought to be a violation of this freedom of speech principle. But members of Congress said, 'Oh, we'll pass it - we

won't think about what's constitutional and what's not, and we'll let the courts figure that out later on.' While that might seem like a good division of labour, on one level, what it is reflective of is the fact that Congress today does not always, or even most of the time, take seriously its obligation to legislate in conformity with the Constitution.

So not only is judicial review something that undermines the popular will and the legislative will, it is also something that some people would argue makes the process of legislation less effective and less consistent with our governing charter.

There are two examples of this dynamic in action, that actually reflect that the judicial review dynamic is quite complex and that there actually is a fair amount of attempt on the parts of the courts to reflect and respond to public opinion within the context of judicial review itself.

The most important example of this is the *Brown vs. Board of Education* case. This was decided in 1954, and in it, the Supreme Court struck down what were called Jim Crow laws. These were laws that segregated students in the public schools in the American South on the basis of race. It quickly followed this ruling with a number of decisions ordering the integration of other public spaces, like golf courses and restaurants and things such as that, but the case was focused on the schools. The Court found that this policy of segregation was inconsistent with the Equal Protection clause of the Constitution, but as Vernon pointed out, or as he intimated, after the Court made this decision in 1954, almost nothing happened. For about fourteen years, the schools remained largely segregated, and the reason that was so was because there was a violent and loud backlash among the states and the people in the South. Their view was that the Court was interfering in their way of life and forcing integration onto them in a highly undemocratic fashion. So the Court was, in a sense, cowed by, as I said, the actually violent reaction of the people of the Southern United States.

But the process of racial integration was something that was, in a sense, advanced by this decision, even though the direct or immediate effect was not an integration of the institutions of the South, because this decision, along with the general ferment that was occurring in the 1950s at the time, led by civil rights leaders and other people in the South who thought the time had come to end this backward practice, started to capture the attention of people across the country about the inconsistency between this segregation in the South and the vaunted principle of Equal Protection. So this widespread disobedience that happened in the face of the Court's decision also had the effect of changing the country's sympathies as a whole on the question of integration, and it had the effect of building support for the civil rights movement as a whole, and it was the combination of that early decision by the Court and this popular reaction that ultimately led to what Vernon referred to, which was the major legislative achievements - the Voting Rights Act of 1965, and the Civil Rights Act of 1964 - which actually led to the integration of the American South, and the protection of the rights of racial minorities throughout the United States.

So the Court's relationship to the process of equality and integration was somewhat complex, in that, in the face of strong popular opposition to its views, it was not able, single-handedly as an institution, to integrate the schools and society as a whole. But the existence of a ringing endorsement of the principle of equality, and the application of that principle to the practice of segregation, was something that became a point of reference during the debates, crystallised the harms of segregation, and forced the public to a reckoning with the practice. So, in that sense, the backlash to the Court's interference in democracy ultimately had a long-term positive effect, but it was one that required mobilisation of public opinion, and could not, single-handedly, happen through the auspices of the courts.

The other example of this kind of a backlash phenomenon that demonstrates the limitations of judicial review, and the dangers of judicial review, is the *Roe vs. Wade* case. This is an even starker example of backlash, in the sense that it is one that we are still living with today. I think that what has ultimately happened on this issue is very far from what the Court imagined would happen when it made the decision in 1973, and in that sense, it is very different from *Brown*, where today, we actually are at a place that is consistent, more or less, with what the Court articulated as required by the Constitution in the segregation cases.

Roe v. Wade was decided in 1973, and at the time, there were a few states in the United States that had liberalised their abortion laws - New York State being one of them - but most states had, if not complete prohibitions on abortion, very stringent restrictions. In this context, the Court decides to wade into the problem and strikes down a state statute, from the state of Texas, that prohibited abortion, and declares, in no uncertain terms, that there was a constitutional right to an access to an abortion. This was seen, and it is still celebrated by many people who work hard on behalf of women's rights and civil liberties, as, like

Brown v. Board of Education, the foundational case that reflected the Court stepping in to protect minorities. But there is also been a critique that has grown over the decades, and is pretty deafening today; that Roe v. Wade ultimately caused a backlash against the rights of women and the right to an abortion that actually gave rise to very serious culture wars.

Some people would even blame the rise of the religious right and the election of Ronald Reagan and all of the 1980s on Roe v. Wade, because it galvanised a certain segment of the American population and gave them a single issue around which to mobilise and give money to basically the Republican Party. I think that proves too much; I think we cannot blame all of the 1980s and deregulation and Ronald Reagan on Roe v. Wade, but the point is that the Court intervened in a debate that was going on in the political process at far too early a stage. It attempted to settle a controversy that the people themselves had not settled. As a result of doing that, it caused a backlash against the courts, and basically led to the dismantling of the right of access to an abortion. This is because the consequence of Roe v. Wade and all the cases that have come after it, and the political mobilisation in response to Roe v. Wade, is essentially that the right to access an abortion in the United States is a right that exists largely for people who have means. It is a very difficult procedure to access if you do not have means. There are many states where there is a single clinic where it is available, and even in those places, the Supreme Court, in response to a lot of this popular opposition, has permitted regulations that make accessing the procedure quite difficult. So, in that sense, despite the Court's efforts to resolve the controversy, they merely unleashed a much larger controversy that has had a profound effect on our public debate and has, 35 years later, resulted in a state of affairs where there is not universal and easy access to something that is supposedly protected by the Constitution.

I should say that it is not only when the Supreme Court intervenes to strike down legislation or the democratic will of the people that people get upset. Sometimes, when the Supreme Court upholds something that a Legislature has done, you see the same kind of backlash phenomenon, and I think you could describe everything that I am discussing as an example of the very litigious nature of American society as a whole. This is something you may or may not have heard of, but the court case to generate the most recent backlash in the last couple of years is a case called Kelo v. the City of New London.

This was a case where a city in Connecticut decided that it wanted to condemn some private property, and compensate the owners of the private property, in order to give the property over to a private developer to create an office park. It was a very poor city in the state of Connecticut, and it was part of their efforts to revitalise this part of the state, and so they wanted to displace a group of people who had been in that neighbourhood for decades, and had their family homes suddenly in danger of being taken over by this private developer. I believe it was a pharmaceutical company, or affiliated with a pharmaceutical company. The Supreme Court upheld the state's decision to do that. The Supreme Court says that this is not a violation of the right to property protected by our Bill of Rights; it is something that the Government has the right to do, as long as it compensates these individuals, and the fact that it is a private developer who is going to build the office park, and not the state, is of no consequence.

That has led to an extraordinary backlash in the United States. When it happened, a couple of years ago, it was the topic of conversation on most nightly news programmes for weeks, and across the country, local governments and state legislatures have enacted laws that prohibit precisely what the City of New London tried to do, which is condemning people's homes in order to give the property to a private developer to develop the area for economic reasons.

So that is just by way of underscoring that it is not only when courts strike down legislation that popular opinion becomes mobilised and rejects the courts' views; it can also be essentially when courts uphold actions by the legislature that the people find are inconsistent with their views about what the Constitution should protect. So what I think that demonstrates is that there is a strong sentiment in the United States that the people do get to say what the Constitution means, and that goes both for the legislature as well as for the courts. But that does not diminish the threat that judicial review in particular poses to a system of democratic government and to popular support for the court.

I will now say a couple of things about the other relationship that I mentioned between the courts and democracy, and that is the courts as democracy-forcing. As I have already suggested, the courts historically have played a role in filtering public opinion through their decisions to try to interpret the Constitution consistent with public opinion. The Court's retreat after Brown v. Board of Education, and its refusal to push the integration mantra for fourteen years, is an example of that. The Court stood back once it realised what it had done and that it was not going to be able to implement its decisions. In the abortion

cases, in the subsequent jurisprudence, after 1973, the Court has increasingly permitted greater and greater regulation, essentially listening to the legislatures that have repeatedly come back and tried to restrict access to the right because of a desire to protect the life of the unborn, and in that sense, the Court has also worked public opinion into its jurisprudence.

Another clear example of that is the decision the Court rendered recently, the decision called *Heller*, in which the Supreme Court found that the Second Amendment to our Constitution protects the individual right to bear arms. I think this is one of the cultural differences between the United States and lots of the rest of the world that mystifies a lot of others, and sometimes myself, but this was an example of the Court having, for many decades, avoided deciding whether there was an individual right to bear arms in the Constitution, finally saying that that right existed in response to a decade-long social movement designed to protect precisely that right, a social movement designed to get legislation protective of that right and to combat legislation that had tried to regulate that right. So, even though the Court bases its decision in a reading of 18th Century US history and 19th Century US history, and the belief in the importance of bearing arms in the Civil War period and its aftermath in particular, it is unmistakable that the social movement that has pushed this as a basic individual right has changed the way that judges and constitutional lawyers conceptualise the right, and that is something that has come very much from the bottom up and not from the top down.

But the last way in which courts actually are participants in democracy, and the way that constitutional scholars and some judges themselves will describe what I have just described, is that courts are participating in a dialogue with the legislature; that they are crystallising issues for the legislature and the people, responding to their responses etc. But the other way in which this occurs is that the courts have played an extremely important role in forcing the Legislature to check the Executive; enforcing the Legislature to pass laws that restrain Executive action. This has primarily arisen in the context of the Bush Administration's response to the war on terrorism, where, after September 11th, the Bush Administration basically claimed unfettered power to do whatever they thought was necessary to protect the national security of the United States.

Many of the measures that the Administration took eventually made their way to court, several years after September 11th - things like the detention of enemy combatants without review of any kind, the use of military tribunals at Guantanamo to try suspects outside of the ordinary system of courts and the ordinary precepts of the rule of law. And a lot of civil libertarians during this period taking the view that the courts are supposed to be there to protect the rights of highly unpopular individuals - you cannot get a more unpopular minority than a suspected terrorist who is not a citizen of the United States. Even those who are citizens of the United States are not exactly welcome in most places. But you cannot get a better example of the unpopular minority that courts are supposed to protect, and that is part of our theory of judicial review - that is what they are there for.

But the Court, despite the view of lots of civil libertarians that it should intervene to stop what the Administration was doing right away, thought better of it and thought that it actually was not appropriate for the courts to be making national security judgements of this kind, but what it was important for courts to do is to say, well, these kinds of things that are clearly inconsistent with our traditions of habeas corpus, and innocence before guilt, and the kinds of due process rights that required before you incarcerate someone for having committed a crime, requires Congress to authorise what the Executive was doing. So they will not allow the Executive to take these steps untrammelled or unchecked by any branch of Government, but it is not for the courts to do it, it is for the democratically accountable Legislature to do it. So, in a series of opinions, the Court basically threw the ball back into Congress' court and said that, in order for the Executive to claim the power that the Bush Administration wanted for it, Congress had to authorise it. That of course all came to a head in 2006 when Congress essentially authorised the entire Bush Administration approach to the war on terrorism, much to the chagrin of members of the Court who thought that was not going to happen, as well as civil libertarians and people who are basically suspicious of untrammelled Executive authority and believe in the rule of law. So the Court's hand was forced a bit and, in a decision a year or two ago, it essentially said that even when Congress decides that certain restrictions on liberties are essential, there are basic principles of the Constitution that must be protected - namely, access to habeas corpus, which is one of the venerated inheritances that we have from England. The US Constitution is a bit of an interesting mix between complete rejection of the British model and celebration of the British model, and it is difficult to figure out the schizophrenia in a way, but the protection of habeas corpus is one of those things that is considered to be central to the protection of liberty, and so, in that instance, the Court was willing to push back against both Congress and the Executive and say, actually,

we meant it when we said that you could not violate these basic protections of liberty.

But what are we to take away from this? I think that the lesson that a non-American observer of the American system can take from this, is that the Court, even though it has what seems like an extraordinary power, is actually limited in what it can do. So over time, courts have developed constraints on their authority, as matters of self-preservation, to basically preserve themselves from popular backlash, to maintain their legitimacy as an institution, and some of those mechanisms have been the inclusion of public opinion into the way they reason about the Constitution. If you look at the history of American constitutional law and judicial review, from a pretty far distance, what you will see is that the courts are never very far in front of public opinion. Sometimes, they get out in front of it, as in *Roe v. Wade*, and generate a popular backlash, but when they do, they tend to be open to subsequent modifications of their views to accommodate, in a complicated sort of way that takes time, the views of the public. The Court, in recent years, on issues that have been highly politically charged, has actually sought to force the Executive and the Congress, the political branches, the branches that are good at social policy, to negotiate with one another, to act as a kind of intermediary, confident that the separation of powers will ultimately preserve liberties.

So, in that sense, the Court is not as frightening an institution as it might seem to someone from a tradition of parliamentary sovereignty, just as the tradition of parliamentary sovereignty is not as bizarre once you begin to think about it from the perspective of someone who is accustomed to judicial review.

I hope that I have offered reasons for thinking that the empirical study of trust is largely a distraction, that the empirical study of trustworthiness is much harder than people think, that the practical task of holding to account is much more heterogeneous than sometimes is supposed, and that evidence useful for holding to account may not be the same evidence as is useful for placing and refusing trust.

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