The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights Under the Human Rights Act of 1998

James Hyre

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights Under the Human Rights Act of 1998

Cover Page Footnote
J.D. Candidate, 2005, Fordham University School of Law, Notes & Articles Editor, Fordham Law Review.

This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol73/iss1/14
COMMENT

THE UNITED KINGDOM'S DECLARATION OF JUDICIAL INDEPENDENCE: CREATING A SUPREME COURT TO SECURE INDIVIDUAL RIGHTS UNDER THE HUMAN RIGHTS ACT OF 1998

James Hyre*

“The trouble with doing a thing for cosmetic reasons is that one always ends up with a cosmetic result, and cosmetic results, as we know from inspecting rich American women, are ludicrous, embarrassing and horrific.”

INTRODUCTION

It is not often that an established democracy decides to overhaul the framework of its government. The British Government, headed by the Labour Party, has decided to transform its governing powers without an impending crisis. For Lord Falconer, the government official spearheading the judicial reforms, “the best time to reform and improve is not at a time of crisis, but from a position of strength and stability.”

And so on June 12, 2003, the Labour government issued a proposal

* J.D. Candidate, 2005, Fordham University School of Law, Notes & Articles Editor, Fordham Law Review.

2. Lord Falconer of Thoroton, Speech to Law Society Council, at http://www.dca.gov.uk/speeches/2003/lcl71203.htm (Dec. 17, 2003) (listing the proposed reforms, including: removing the Law Lords from the House of Lords, creating a Supreme Court, ending the role of the Lord Chancellor, and establishing an independent commission to handle judicial appointments). The British Labour Party began referring to itself as New Labour during the mid-1990s to reflect the significant policy shift from the left to center, which coincided with the party’s widespread political success. Definition of New Labour, at http://www.wordiq.com/definition/New_Labour (last visited Sept. 20, 2004).
3. Id. Lord Falconer described his reasons for suggesting further reform: “I think we here in the UK can hold our heads up high about the British justice system. It is good. It does work. But just because it is good and it does work doesn’t mean that we shouldn’t seek to improve it.” Id.
for a British Supreme Court. The government believes that the renewed focus on individual rights in the Human Rights Act of 1998 ("HRA") makes it necessary to formally end the judicial role of the House of Lords to enhance the appearance of judicial independence. Motivated by the increased integration with the European Union, and the recognition of positive individual rights, the Labour government aims to secure judicial independence, in practice and in appearance.

Although the issue of judicial independence has long been an issue in the United Kingdom ("UK"), the impetus for the current proposal

4. Department for Constitutional Affairs, Constitutional Reform: A Supreme Court for the United Kingdom ¶ 1, at www.dca.gov.uk/consult/supremecourt (July 2003) [hereinafter Supreme Court]. The British government announced the abolition of the position of Lord Chancellor and the creation of the Department of Constitutional Affairs. See id. ¶ 18.

5. See Human Rights Act, 1998, c. 42, sched. 1, art. 6(1) (Eng.), available at http://www.legislation.hmso.gov.uk/acts/acts1998/80042—d.htm ("[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." (emphasis added)).


In the same piece of legislation, the Government proposes to create a distinct Supreme Court. The Law Lords will be taken out of the House of Lords and set up in a separate Supreme Court. People are increasingly sensitive to the need to underline that our judicial system is independent of both the executive and the legislature. The present arrangements, whereby the highest court in the land sits under the guise of a committee of the House of Lords, are obscure and appear to compromise the independence of the judiciary. It need not be the case that this independence has, in fact, been compromised; however, the perception of inadequate separation exists. We are not proposing any fundamental change in the nature of the Court. The principle of parliamentary sovereignty will remain. The Court will not be able to strike down legislation in the manner of such courts elsewhere. Our Supreme Court will be true to our constitutional heritage. However, I do believe that by establishing a distinct Supreme Court, for the whole of the UK, we shall enhance the credibility of the judicial system in the eyes of citizens. A distinct Supreme Court, quite definitively outwith the legislature, will, as Lord Steyn put it, "carry in the eyes of the public a badge of independence and neutrality; it will be a potent symbol of the allegiance of our country to the rule of law."

Id. Some commentators argue that the current system functions well under a balance of powers regime and no reform is necessary. See infra Part II.B; see also Robert Stevens, The English Judges: Their Role in the Changing Constitution 129 (2002) (quoting Judges Council that the Lord Chancellor had "proved invaluable in maintaining the independence of the judiciary in England and Wales and [the Judges' Council had] considerable anxiety that any other arrangement would result, in time, in the encroachment of executive government into the proper sphere of judicial independence essential in a democratic society" (citation omitted)).

7. As early as 1867, scholars were calling for the creation of a Supreme Court. See Lord Johan Steyn, The Case for a Supreme Court, 118 L. Q. Rev. 382, 382 (2002) (citing Walter Bagehot, The English Constitution 149 (Fontana Press 1993) (1867)). Lord Steyn quoted Bagehot:

I do not reckon the judicial function of the House of Lords as one of its true subsidiary functions. First because it does not in fact exercise it, next because I wish to see it in appearance deprived of it. The Supreme Court of
was the rise of New Labour and its platform for reform in the 1990s. New Labour pressed for the adoption of the HRA, which incorporated most of the European Convention on Human Rights ("ECHR" or "Strasbourg Court") and obligated domestic courts to apply international human rights law. The HRA has renewed focus on the independence of the judiciary. In practice, the English judiciary passed this inspection thanks to its reputation of independence and impartiality. But the New Labour government is attempting to reform the judiciary to improve the appearance of independence and impartiality.

Because the Law Lords are a Committee of the House of Lords, observers have questioned the appearance of independence from Parliament. Further, individual Law Lords serve on commissions to investigate matters of political importance and to lend an air of

---

the English people ought to be a great conspicuous tribunal . . . ought not to be hidden beneath the robes of a legislative assembly.  

Id. Rodney Brazier outlined a simplified method of establishing an independent Supreme Court quite similar to the government proposal. See Rodney Brazier, Constitutional Reform 180 (2d ed. 1998).


In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Id. art. 6(1) (emphasis added).

11. See Stevens, supra note 6, at 82 ("The English judges rank high on any international table of objectivity, particularly with respect to individual litigants.").

12. See Supreme Court, supra note 4, ¶ 3 ("The [HRA], specifically in relation to Article 6 of the [ECHR], now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so.").

13. See Supreme Court, supra note 4, ¶¶ 1, 3; see also Stevens, supra note 6, at 76-88. The Law Lords are members of the House of Lords—one of the Houses of Parliament along with the House of Commons.
impartiality to the proceedings. Their commission positions expose the judges to political criticism and frequent accusations of partiality. To satisfy the provisions of the HRA, the Labour government has proposed the creation of a Supreme Court independent of the House of Lords, which would sever the judiciary from Parliament and end their role of heading investigatory commissions.

This Comment examines the Labour government’s proposal to establish a Supreme Court of the United Kingdom. The immediate aim of the Supreme Court proposal was to secure the appearance of impartiality and independence of the British judiciary by severing the connection between the House of Lords and the highest court of appeal. However, the current judiciary arguably functions both independently and with impartiality, so this Comment explores the necessity and scope of a British Supreme Court. This Comment agrees that the proposed Supreme Court is necessary, but not for the reasons presented by the government.

Two issues frame this discussion of a Supreme Court of the United Kingdom. First, should there be a formal separation of powers and a

---

14. These committee positions have some parallel in the United States, e.g., the Warren Commission investigation of the Kennedy assassination, but the U.S. has generally frowned upon such quasi-judicial activities. Stevens, supra note 6, at 83.
15. See id. at 84.
16. Supreme Court, supra note 4, ¶¶ 18, 36, 57; Lord Steyn, supra note 7, at 382; see also infra Part II.A. The government and commentators cite two reasons for separating the High Court of the UK from the House of Lords. First, the position of Lord Chancellor combined all three branches of government. See Lord Steyn, supra note 7, at 382. Second, the Law Lords potentially and apparently share legislative and judicial duties that may conflict in appearance and in practice with modern conceptions of proper government. See id.
19. See Supreme Court, supra note 4, ¶ 3; see also infra Part II.B.
20. See infra Part II.B.
more explicit conception of judicial independence? If yes, does the new court need the power of judicial review of legislative acts?

After providing background information in Part I, Part II analyzes alternative responses to these questions about whether the current judiciary is already functionally independent. Part II.A describes the government’s proposal. Part II.B finds that no change is necessary because the balance of powers offers effective protection for individual rights. Part II.C considers and supports the government’s position that the appearance of independence necessitates a Supreme Court but does not grant that court the ability to overrule legislation.

This Comment argues that securing judicial independence in practice requires resolving the conflict between separating the branches and retaining parliamentary sovereignty. Part III argues that the British Government should seize this unique opportunity to shape the government of the UK by adopting the separation of powers, recognizing judicial review, and redefining the doctrine of parliamentary supremacy. This part suggests that judicial independence requires adopting separation of powers and giving the new court the power to review and overturn legislation.

I. A FRAMEWORK OF THE CURRENT STRUCTURE

Part I outlines the structure of the governing powers in the UK. This part describes three foundational concepts of the UK Government: Parliamentary sovereignty, the balance of powers, and the separation of powers. This part details the recognition of individual rights in the UK. It defines judicial impartiality and independence, and outlines the structure of the UK’s highest courts of appeal. Part I also looks at the impact of the HRA, which provides the textual and political impetus for the Supreme Court proposal.

21. Stevens, supra note 6, at 141; see also infra note 209 and accompanying text.
23. See infra Part II.
24. See infra Part II.A.
25. See infra Part II.B.
26. See infra Part II.C.
27. See infra Part III.
28. See infra Part III.
29. See infra Parts III.B-C.
30. See infra Part I.A.
31. See infra Part I.B.
32. See infra Part I.C.
33. See infra Part I.D.
34. See infra Part I.E.
35. See infra Part I.F.
A. A Brief Outline of the Governmental Structure of the UK

The basic governmental structure of the UK is simple. There are two Houses of Parliament: the Commons, whose members are elected, and the Lords, whose members are appointed and were hereditary until 1999. The government is selected from both Houses by the Prime Minister. However, the House of Commons is considered the dominant House and the base of sovereign authority.

By the early nineteenth century, parliamentary sovereignty had been accepted by lawyers and political theorists. The power to enact and repeal legislation officially resides in “the King, Lords, and Commons jointly,” with the role of the Crown now reduced to a mere formality. By reducing the role of an independent crown, Parliament has consolidated the governing power of the UK.

The House of Commons is the directly elected House of Parliament. The Commons carries out almost all of the legislative and governing functions in Parliament. While the current proposals for constitutional reform do not seek to alter the responsibilities of the

38. See Lord Irvine of Lairg, Sovereignty in Comparative Perspective: Constitutionalism in Britain and America, 76 N.Y.U. L. Rev. 1, 13 & nn.56-58 (2001). The Salisbury Convention effectively prevents the House of Lords from contesting the proposed Supreme Court and other constitutional reforms since they were “electoral pledges.” As Lord Irvine explained:
   In 1945, the Labour Party won an overall majority of seats in the House of Commons, yet the House of Lords was dominated by unelected Conservative peers who had inherited their seats. [The House of Lords] that it would be ‘constitutionally wrong’ for the House of Lords to prevent the ... commitments of the elected Government from being enacted into law .... [T]he Salisbury Convention thus emerged, according to which the unelected Chamber does not vote against legislation which seeks to give effect to electoral pledges that have been endorsed by the majority of voters.
   The Omnipotence of Parliament, in the mouth of a lawyer, and understood exclusively of the restraints and remedies within the competence of our Law-courts [as opposed to resistance by the nation as a whole], is objectionable only as bombast. It is but a puffing pompous way of stating a plain matter of fact .... [W]ithin the sphere of the Courts quicquid Rex cum Parliamento voluit, Fatum sit [whatever the King with Parliament has decided, let it be Fate]!
40. Id. (citation omitted).
41. See id.
42. See Taylor, supra note 37, at ix.
House of Commons directly, the reformation of the House of Lords into a functional legislative House would create a balanced bicameral legislature that would naturally check some of the current Commons' power. The Prime Minister is elected as the leader of the House of Commons and acts as the UK's executive head of government.

Representing the upper house of Parliament, the House of Lords has a traditionally hereditary membership. Although constructed as a house of nobility to balance the power of the public in the House of Commons, the House of Lords has "always been inferior" to the Commons. Besides its deferential legislative role, the House of Lords also serves a judicial function.

The House of Lords is a house in transition. Recent New Labour reforms have resulted in the appointment of so-called Labour Lords on the basis of achievement rather than heredity. The House of Lords Act 1999 reformed the upper house into a transitional chamber, and more reforms are proposed. If realized, the new reforms would result in a U.S. Senate-like house with expanded legislative and governing functions. The realization of the bi-cameral remodeling remains uncertain because unlike most constitutional reforms—they are not taking place during a national crisis and are subject to political sacrifice.

The executive branch has grown in power despite the obsolescence of the Crown. Traditionally, the Prime Minister is simply the first minister and part of the Parliament. In practice, the Prime Minister, a member of the House of Commons selected to lead the government, has become a presidential figure over the last 30 to 40 years. While

44. See, e.g., id. at 254-59.
45. Id.
46. Id.
49. See generally Russell, supra note 43.
50. See id. at 13; see also HOL's Next Step, supra note 17, ¶¶ 24-28.
53. See id. at 15, 261-92 (discussing the role and functions of the reformed chamber).
54. See id. at 339. Russell noted that "[e]ven true democrats in government will find it hard to prioritise a parliamentary reform which will involve their work being scrutinised more closely." Id. at 340.
55. See Picker, supra note 22, at 19.
56. See id. at 19-20 ("In fact, if not in theory, the Prime Minister is Head of State, Chief Executive and Chief Legislator, and while in Office, is not circumscribed by any clear or binding constitutional limitations." (internal quotation marks and citations omitted)).
still holding a seat in the legislative Parliament, the Prime Minister selects a Cabinet of advisors, conducts the foreign policy of the UK, and proposes legislation and constitutional reforms. Without a formal system of checks and balances or an internal balance of parliamentary power, the Prime Minister can act unilaterally to create a Supreme Court of the UK.

Because this Comment is based on the basic theories concerning the distribution of governing power in the UK, Part I.B examines the theories and how they relate to each other.

B. Parliamentary Sovereignty, a Balance of Powers, and the Separation of Powers

The political theories contributing to the distribution of governing power in the UK are quite complicated. Scholars and politicians both frequently use the terms "parliamentary sovereignty," "balance of powers," and "separation of powers" in combination to describe the British system. Therefore, a simplistic description and general understanding of the relation of the three concepts is necessary for the purposes of this Comment: Parliamentary sovereignty vests Parliament with supreme legal authority, the balance of powers requires that the government informally share its legislative, executive, and judicial powers, while the separation of powers, although always historically recognized, rises in prominence with the increased focus on individual rights flowing from the HRA.

57. See id. at 19.
58. See id. at 20.

If the Prime Minister and the Cabinet, collectively the Executive, are together in the Parliament, then the Parliament can act as a check on the Executive's power. If the executive and the Parliament are formally separate, then checks and balances can be built into the system, as in the United States. However, if the Executive and the Parliament are not formally separate, yet are in fact separate, there will then be no structural checks and balances and the Executive will have carte blanche power to act as it so desires.

Id.

59. See, e.g., Stevens, supra note 6, at 85-86. For example, in the Supreme Court proposal, the government suggests that a Supreme Court is necessary to ensure the separation of powers, but retains the concept of parliamentary sovereignty. Supreme Court, supra note 4, ¶¶ Executive Summary, 20, 23; see also infra Part II.A.

60. A. V. Dicey, Introduction to the Study of the Law of the Constitution 42 (10th ed. 1961); Douglas W. Vick, The Human Rights Act and the British Constitution, 37 Tex. Int'l L.J. 329, 335 & nn.38-41 (2002). Prof. Vick is a Lecturer of Law at the University of Stirling. See id. at 329. As will become apparent, this Comment is heavily indebted to the arguments made by Prof. Vick.

61. Stevens, supra note 6, at 86. Because all members of the Houses of Commons and Lords, the Prime Minister and the Law Lords are members of Parliament, all three governing powers reside in Parliament. See Taylor, supra note 37, at ix.
This Comment first turns to perhaps the most fundamental force behind the British constitutional system, parliamentary sovereignty, which vests the supreme power over legislation in Parliament.

1. Parliamentary Sovereignty

The historical explication of parliamentary sovereignty is clearly set out by A. V. Dicey, one of the preeminent British constitutional scholars at the turn of the 20th century. Dicey argued that Parliament was sovereign because it has "the right to make or unmake any law whatever." Dicey's original conception held that the "Queen in Parliament" gave Parliament supremacy over British political institutions. Since Dicey, scholars have refined the concept to illustrate the growing preeminence of Parliament and the reduction of the Crown's role. Jeffrey Goldsworthy, a constitutional lawyer and a professor at Monash University, examined the historical emergence of parliamentary sovereignty and defined the historical conception of the doctrine: "Parliament is able to enact or repeal any law whatsoever, and... the courts have no authority to judge statutes invalid for violating either moral or legal principles of any kind." Lord Irvine of Lairg offered a modern version of parliamentary sovereignty in his article on comparative constitutionalism that focuses on the popular sovereignty of the House of Commons, but the supremacy of parliamentary legislation remains. This modern conception of parliamentary sovereignty focused more on the democratic election of the House of Commons: "[T]he legal sovereignty exercised by Parliament now is viewed as deriving its

62. See Dicey, supra note 60, at 39-40. For a discussion on the sovereignty of Parliament, see id. at xxxiv-xcvi, 39-85, 138-80 (setting forth the definitive explication). See also Goldsworthy, supra note 39 (providing a recent historical account); Lord Irvine of Lairg, supra note 38 (articulating a modern definition).
63. Dicey, supra note 60, at 40, cited in Vick, supra note 60, at 335 n.42. Sir William Blackstone famously noted the extensive power of Parliament: "If the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above the legislative, which would be subversive of all government."
64. Dicey, supra note 60, at 39.
65. Goldsworthy, supra note 39, at 1 (citation omitted); see Dicey, supra note 60, at 39-40. The deference shown to Parliament is apparent in the proposal for the new Supreme Court: The power of a court to overturn legislation is unnecessary in the UK because "[i]n our democracy, Parliament is supreme." Supreme Court, supra note 4, ¶ 23.
legitimacy from the fact that Parliament's composition is, in the first place, determined by the electorate in whom ultimate political sovereignty resides."  

The Supreme Court proposal facially retained this conception of parliamentary sovereignty by not allowing the court to overturn any legislation.  

To make parliamentary sovereignty functional and responsive to the needs of its citizens, the UK needs a "self-correcting democracy... effected by the political mechanisms of ministerial responsibility and parliamentary scrutiny" to preserve individual rights. This concept represents a "working relationship" between the branches of government known as the balance of powers.

2. Balance of Powers

Premised on parliamentary sovereignty, the British constitutional government uses a balance of powers—legislative, judicial, and executive—among governing bodies without a formal or explicit delineation of those powers. The premise of this delicate balance is that Parliament is the sovereign head of the government, and no derivative part of that government can usurp the power of Parliament as the final arbiter of legislation.

The Act of Settlement of 1701 marked the first attempt to articulate a separation of powers in the UK. The Act attempted to limit the power of the throne to interfere with the power of Parliament. By failing to separate the powers of the judiciary from the legislature and executive, the Act limits the necessity of, and rationale for, an independent judiciary.

Without an explicit separation of powers, the UK government relies on a balance of powers that informally checks the legislative,

67. Id.
68. See Supreme Court, supra note 4, ¶ 7, 23; for an in depth discussion of these provisions, see infra Part II.A.
69. Vick, supra note 60, 341 (citation omitted).
70. Stevens, supra note 6, at 85.
71. See generally Dicey, supra note 60; see also Stevens, supra note 6, at 85-86.
72. Dicey, supra note 60, at 39-40 ("[N]o person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.").
73. The Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.), reprinted in Sources of English Constitutional History: A Selection of Documents From A.D. 600 to the Present, at 610 (Carl Stephenson & Frederick Marcham eds., 1937).
74. Stevens, supra note 6, at 9.
75. Id.
76. Id.
executive, and judicial powers. Lord Simon of Glaisdale has described the balance of powers as "something far more subtle and far more valuable" than a separation of powers. He reasoned that separation is useless without a proper balance of the legislature and the judiciary. In practice, Lord Simon said, "a balance of powers... will vouchsafe liberty of the subject and individual rights." But some believe that ensuring individual rights and preserving liberty would require formally separating the powers of government.

3. Separation of Powers

As opposed to the balance of powers, the doctrine of separation of powers seeks to empower different branches of government with legislative, executive, and judicial powers independent of each other. Perhaps the most pointed declaration of the separation of powers was drafted by John Adams in the 1780 Massachusetts Constitution. The

---

77. Id. at 85.
78. Id. citing 609 Parl. Deb., H.L. (5th Ser.) (1999) 719. Lord Simon’s statement reads:
What we had was not separation of powers but something far more subtle and far more valuable—a balance of powers. It is no use separating your executive if it has powers over the individual which are considered inordinate. The executive’s powers should be balanced by that of the legislative and the adjudicature. That is threatened by advocacy of a system purely based on separation of powers. It is a balance of powers that will vouchsafe liberty of the subject and individual rights.

Id. at 85-86.
79. See id. at 85.
80. Id. at 86.
81. See infra Part I.B.3.
82. Writing in favor of the division of governmental authority in his book *The Spirit of Laws*, Montesquieu wrote:
There is no liberty if the judiciary power be not separated from the legislature and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

83. Adams’s Article reads:
In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: To the end it may be a government of laws and not of men.

founders of the United States established a government with formal separation of powers with the legislative Congress, the executive President, and the judicial Supreme Court, although it was not as strict as Adams's conception. As Vick notes, the English conceive the separation of powers as "essential to the protection of the individual from the arbitrary exercise of power by the state."5

Unfortunately, the modern separation of powers in the UK proves difficult to define succinctly. One scholar found that UK scholars paid little attention to the principle of the separation of powers and instead focused on the balance of powers. When they did discuss the separation of powers, UK scholars dismissed the doctrine for lack of coherence preferring the balance of powers to protect individual liberties.88

Instead of Montesquieu's conception of strictly separated powers, scholars have found a highly modified form of separation of powers in the UK. Professor Vick, in a 2002 article, offered perhaps the most succinct version of the emergence of the separation of powers in the UK.90 He traces the early exposition of the concept to the thirteenth century reign of Edward I.91 He notes that the modern system of internal checks and balances is more complex than Montesquieu's conception.91 The legislative functions are intimately related to the executive power: Indeed, executive power, referred to as the government, consists mainly of members of Parliament. This close interaction between the executive and the legislature is viewed as "[the efficient secret of the [British] Constitution."93 Similarly, as N.W. Barber noted in his recent article, the Montesquieu ideal is never seen in practice.94 Instead, modern states have "many interlinked legislative bodies," the judicial power is shared by administrators and courts, and the executive picks up any power the other two leave behind.95 In a 1995 article, Barendt found that the executive and legislature were not effectively separated because there

84. See Chongwe, Judicial Review of Executive Action, supra note 82, at 105.
85. Vick, supra note 60, at 341. But see id. at n.88.
86. For a general discussion, see Maurice John Crowley Vile, Constitutionalism and the Separation of Powers (2d ed. 1998); N.W. Barber, Prelude to the Separation of Powers, 60 Cambridge L.J. 59 (2001) (arguing that efficiency, not liberty, is the basis of separation of powers); Eric Barendt, Separation of Powers and Constitutional Government, 1995 Pub. L. 599, 606 (defining the separation of powers doctrine as preserving liberty and individual rights).
87. Barendt, supra note 86, at 599.
88. Id. at 599-600 (describing the doctrine's treatment by Sir Ivor Jennings) (citing Sir Ivor Jennings, The Law and Constitution 7-28 and app. I (5th ed. 1969)).
89. See Vick, supra note 60, at 342-43 nn.90-100.
90. Id. at 342 & n.90.
91. Id. at 342 & n.92.
92. Id. at 342 & n.93-94.
93. Id. at 342 (quoting Bagehot, supra note 47, at 10).
94. Barber, supra note 86, at 70-71.
95. Id. at 71.
was no system of checks and balances. But he argued that judicial power was separated from the legislative and executive. Barendt also expressed concerns that, although separated from Parliament, the judiciary needed the power to check Parliament.

The muddled state of the separation of powers in the UK provided the Labor government with the recent impetus to reform the House of Lords. But Barendt argued that no major party "would favour constitutional reform which would impose more effective checks and balances on the executive." And, indeed, the government's proposal explicitly limited the judiciary's ability to overturn legislation.

Before turning to the structure of the British high court and the impact of the Human Rights Act, Parts I.C and I.D explore the recognition of individual rights and the definitions of judicial independence and impartiality.

C. The Recognition of Individual Rights

The UK Government has long believed that individual rights do not require positive declaration. Since the UK has no written constitution with a specific grant of rights, the right to free speech is defined not in an affirmative grant, but by negative implication. A British citizen is allowed to say whatever she wants as long as there is

96. Barendt, supra note 86, at 614.
97. Id. at 615 (finding that judges could not sit in the House of Commons, are protected from removal, and the House of Lords appellate functions were limited to judicial peers). However, Barendt also noted that the position of the Lord Chancellor and "the freedom... of the Law Lords to participate in the legislative debates of the Upper House, contravene the principle, albeit moderately and perhaps acceptably." Id.
98. Id. at 617 ("Judicial control of parliamentary privilege is vital to prevent the legislature, or one branch of it, abusing its powers.").
99. Supreme Court, supra note 4, Foreword.
100. Barendt, supra note 86, at 617.
101. Supreme Court, supra note 4, ¶ 23; see infra Part III.
102. See Vick, supra note 60, at 340-41.
103. See id. at 341 & n.82 (citing Lord Irvine of Lairg, supra note 38, at 15). As the Law Lords noted:

[W]hereas article 10 of the European Convention on Human Rights... proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon the assumption of freedom of speech, and turn to our law to discover the established exceptions to it. Attorney Gen. v. Guardian Newspapers Ltd. (No. 2), 1 A.C. 238, 261-62 (H.L. 1990); see also Sir Ivor Jennings QC on Fundamental Liberties (1933), in Towards a Constitutional Bill of Rights for the United Kingdom 121, 123 (Robert Blackburn ed., 1999) [hereinafter Sir Ivor Jennings]. But see Lord Irvine of Lairg, supra note 38, at 18-19 & n.81 (recognizing that the HRA represents a modern response to the "outdated—and exaggerated—view of the efficacy of political accountability [i.e., relying on the balance of powers to secure rights]").
no specific prohibition against it.\textsuperscript{104} And, as long as Parliament does not move to restrict free speech, the system will continue to function efficiently.\textsuperscript{105}

The UK had no positive declaration of individual rights.\textsuperscript{106} Since its adoption, some commentators argued that the HRA serves as a de facto British Bill of Rights.\textsuperscript{107} The adoption of the HRA signaled a paradigm shift in recognizing individual rights under British law.\textsuperscript{108} Previously, individual rights were not positively protected; rather, the British constitution "rel[ied] on the democratic process, the rule of law, and the UK's complex system of checks and balances to safeguard civil liberties."\textsuperscript{109} Thus, the HRA guarantees positive rights for individual British citizens that were not previously explicitly protected.

However, the HRA's guarantee of rights is not entrenched in a constitutional document beyond the reach of a future legislature.\textsuperscript{110} Because the HRA is not protected as a constitutional document, the Act can be repealed by a simple majority vote in the House of Commons.\textsuperscript{111} In addition to the potentially short-lived status of the HRA, the enforcement of the Act's provisions is weak. The Act does not override pre-existing acts, but the positive rights guaranteed by the HRA can be removed by future acts of Parliament.\textsuperscript{112} And, most importantly, courts do not have the right to invalidate incompatible acts.\textsuperscript{113} Instead the court may declare the legislation incompatible

\textsuperscript{104} See Dicey, \textit{supra} note 60, at 240 ("Our present law permits any one to say, write, and publish what he pleases; but if he make a bad use of this liberty he must be punished." (citation omitted)); Sir Ivor Jennings, \textit{supra} note 103, at 124 ("There is no more a 'right of free speech' than there is a 'right to tie up my shoe-lace'; or, if there is a right of free speech, there is also a right to tie up my shoe-lace."). Jennings illustrates the presence of rights through negative implication: "I may invite my friends to tea in my house and they may assemble on my invitation not because there is any 'right of assembly'..., but because there is no law which prevents them from doing so." Sir Ivor Jennings, \textit{supra} note 103, at 124. On the other hand, many governments grant the positive recognition of rights. See Dicey, \textit{supra} note 60, at 238-39 (contrasting the Declaration of the Rights of Man and the French Constitution of 1791 with the negative protection offered by English law). Generally, Bills of Rights function as positive recognition of rights and secure a baseline protection for each citizen.

\textsuperscript{105} See Sir Ivor Jennings, \textit{supra} note 103, at 125 ("A Government with a majority in both Houses of Parliament can restrict liberty as it pleases.").

\textsuperscript{106} See Vick, \textit{supra} note 60, at 341 ("In the United Kingdom, it has been thought that the democratic process, institutional checks and balances, and the vigilance of the 'loyal opposition' in Parliament were the best means of preventing governmental abuses of human rights." (citation omitted)).

\textsuperscript{107} See id. at 346 (citing the HRA as the culmination of a Bill of Rights movement of the last forty years whose goal was the specific protection of individual rights).

\textsuperscript{108} \textit{Id.} at 330.

\textsuperscript{109} \textit{Id.} at 330 & n.7.

\textsuperscript{110} \textit{Id.} at 330.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} See \textit{id.} at 330-31 & nn.12-13.

\textsuperscript{113} \textit{Id.}
with the HRA, but that declaration does not compel Parliament to remedy the incompatibility. Thus, while the HRA recognizes positive rights for British subjects, the lack of legislative entrenchment and judicial review limit the impact of a British Bill of Rights.

Before detailing the impact that the HRA has had on the independence of the British judiciary and exploring the role the HRA plays in establishing a Supreme Court, Part I.D defines and distinguishes judicial independence and impartiality.

D. Defining Judicial Impartiality and Independence

Article 6(1) of the Human Rights Act 1998 recognizes the right to a fair trial before an 'independent and impartial' tribunal. Judicial independence and impartiality are related but distinct concepts that require definition before this Comment can examine their impact on the new Supreme Court.

1. Impartiality

To uncover the proper understanding of judicial impartiality, this Comment looks to the HRA and its subsequent case law. Article 6(1) of the HRA requires that a court must be impartial. In their book discussing the judicial review of the HRA, Richard Gordon and Tim Ward reviewed the case law definition of impartiality. To determine impartiality, the court must decide whether there is a "real danger of bias on the part of the relevant member of the tribunal." Additionally, there are automatic grounds for judicial recusal, including financial involvement and personal interest.

The House of Lords expanded the circumstances for automatic disqualification in Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 2). There, the Law Lords clarified the impartiality standard to include matters where the judge

---

114. Id. at 331 & n.14.
118. Regina v. Gough, 1 A.C. 646, 670 (H.L. 1993). The court defined the general test for impartiality in domestic judicial review as:
   having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.
Id. (emphasis added).
119. See Gordon & Ward, supra note 116, at 183-84.
is involved with one of the parties in the promotion of the cause.\footnote{121} The expanded rule "is that a man cannot be a judge in his own cause."\footnote{122} Previously, the grounds for automatic recusal related to a judge's monetary or economic interest.\footnote{123} This expanded definition of impartiality has cast serious doubt on the actions of the Law Lords.\footnote{124} Given their potential dual role of legislator and judge, Law Lords would run afoul of the Human Rights Act and \textit{Pinochet} if they did not recuse themselves if speaking for a proposal in the House of Lords is considered acting in their own cause.\footnote{125}

In \textit{Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. and Others},\footnote{126} the Court of Appeal narrowed the grounds of personal interest recusals.\footnote{127} The court found that these disqualifications would be extremely rare.\footnote{128} It suggested that the preferred test for protecting the Article 6(1) right was by providing for the disqualification of judges when there was a 'real danger' of bias.\footnote{129}

The "real danger" test, as set out in \textit{Regina v. Gough},\footnote{130} sets up a less demanding test than that envisioned by the Strasbourg Court. A review of the case law indicates that few situations violate Article 6(1) on impartiality grounds.\footnote{131} In \textit{Davidson v. Scottish Ministers (No. 2)},\footnote{132}
the court found that a Scottish Lord failed the "real danger" test. There, the Lord had spoken three times in the House of Lords on the issue at trial. These legislative actions created "a real possibility of bias." By limiting their involvement in the legislative activities of the House of Lords, the Law Lords can satisfy the requirements of Gough and Pinochet. Judicial impartiality then requires the freedom from bias of an individual judge in an individual case, but the judicial independence from Parliament focuses on the structural foundations of the UK's high court.

The United States Supreme Court recently examined the definition of judicial impartiality. In Republican Party of Minnesota v. White, a case involving campaigns for judicial office, Justice Scalia, writing for the five-justice majority, defined judicial impartiality as "the lack of bias for or against either party to the proceeding." The Court was faced with the issue of whether a state statute could limit judicial candidates from discussing their opinions on political or constitutional issues. It found that the statute violated the positive individual right of free speech protected by the First Amendment because the statute was not narrowly tailored to preserve a compelling state interest of impartiality. By looking at the plain meaning of the term impartial, the Court decided that judicial impartiality can exist even where judges have expressed opinions on particular issues. Although informative, the U.S. Supreme Court's view on impartiality does not control here.

2. Independence

In defining judicial independence under Article 6(1), the European Court on Human Rights has said that the court must be independent

(Eng. C.A.) (dismissing Article 6(1) argument), and Adan v. Newham London Borough Council, 1 W.L.R. 2120 (Eng. C.A. 2002) (dismissing Article 6(1) argument). 132. 2002 S.L.T. 1231, available at 2002 WL 31173554 (case summary). 133. Id. at 1240. 134. In fact, the Law Lords have taken significant steps to lessen any concerns of impartiality by ceasing almost all legislative functions. See Supreme Court, supra note 4, ¶ 3; Lord Steyn, supra note 7, at 383-84 (noting that, while the Law Lords have no official bar to taking part in legislative action, the practice of participating in legislative hearings has "wither[ed] away"). 135. Because under the balance of powers the executive and legislature are not separate, the current structure may violate Article 6(1). See infra notes 141, 343-48 and accompanying text. 136. 536 U.S. 765 (2002). 137. Id. at 775. The Court considers three definitions of judicial impartiality: (1) requiring an absence of bias to a party; (2) requiring a "lack of preconception in favor of or against a particular legal view"; (3) requiring "openmindedness," which "demands . . . that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." Id. at 775-78. 138. Id. at 768. 139. Id. at 776-77. 140. Id.
of the parties involved and the executive. Factors to consider when examining independence include the manner of appointment, the duration of office, protection against external pressure, and whether the body presents an appearance of independence. Another factor is whether the court can give a binding decision. The government’s Supreme Court proposal focuses on the “appearance of independence” requirement. When examining the Law Lords’ presence within the House of Lords, few cases question their independence.

The cases that do focus on independence generally deal with administrative actions. In *V v. United Kingdom*, the ECHR held the actions of the Home Secretary in setting the punishment of a detained child violated Article 6(1). In *Smith v. Secretary of State for Trade and Industry*, an English court questioned whether employment tribunals could properly adjudicate claims against the Secretary of State for Trade and Industry. These cases highlight the dual roles of administrative agencies and the lack of separation of powers between the executive and judicial.

The independence of individual British judges when ruling on a particular case has only recently been seriously questioned. English judges share common “hallmarks of [judicial] independence—security of tenure, fiscal independence, impartiality and freedom from executive pressure.” English judges have significant protection against arbitrary removal. Under the Act of Settlement of 1701 judges could only be dismissed with the agreement of both Houses of

---

143. Id. at 186 (citing Findlay v. United Kingdom, 24 Eur. H.R. Rep. 221 (1997) (prison discipline)).
144. Supreme Court, *supra* note 4, ¶ 3 (noting that the HRA “now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so”).
146. See id. at 186 (noting that “much administrative decision making fails to satisfy [the Strasbourg] requirement[s]”).
149. See id.
151. See infra notes 188-95 and accompanying text.
152. Stevens, *supra* note 6, at 79.
153. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.), reprinted in Sources of English Constitutional History: A Selection of Documents From A.D. 600 to the Present, at 610 (Carl Stephenson & Frederick Marcham eds., 1937).
Historically, fiscal independence provides evidence of judicial independence. The Law Lords receive a salary for their judicial work paid from an account separate from the House of Lords. A third hallmark of judicial independence is freedom from political pressure and executive influence. But, while the traditional hallmarks of independence and impartiality may be satisfied, the HRA may require maintaining the appearance of both as well.

3. The Appearance of Independence and Impartiality

The continued integration between the UK and the European Union generally, and the passing of the HRA specifically, brings the appearance of judicial independence from Parliament into greater relief. The adoption of the HRA into British domestic law demonstrates the increasing importance of similar governing structures within the EU nations. While the individual nations retain their forms of national government, the protection of positive individual rights forces the UK to separate at least the structural dependence of the judiciary on Parliament.

While the judiciary already may be both independent and impartial in practice, the appearance of conflict may warrant constitutional reform. To conform to the expectations of modern European federalism, the UK judiciary must appear independent and impartial. When the UK's highest court sits in a hereditary house of parliament an obvious potential conflict arises. In fact, the government specifically addresses the appearance of judicial independence with the proposal for the Supreme Court.

The appearance of impartiality, however, will not likely be affected by the proposed court. Impartiality concerns the potential for bias of an individual judge in an individual case. The constitutional reforms aimed at the appointment of judges are of greater consequence to impartiality concerns.

154. Id.
155. Supreme Court, supra note 4, ¶ 9. The Law Lords are “paid from the Consolidated Fund not the budget of the House of Lords.” Id.
156. Stevens, supra note 6, at 79.
157. The future of parliamentary sovereignty, the basis of the British constitutional structure, is challenged by EU membership. See Lord Irvine of Lairg, supra note 38, at 3 & n.11.
158. Vick, supra note 60, at 350; see also Ashcroft, supra note 9, at 18-19 (describing the relationship between the EU and the ECHR).
159. See Lord Irvine of Lairg, supra note 38, at 3 & n.11.
160. See id.
161. Supreme Court, supra note 4, ¶¶ 2, 3.
162. See infra Part II.A.
163. See supra Part I.D.1.
164. The appointment reforms will create a standard method for dealing with concerns of impartiality. See A New Way of Appointing Judges, supra note 17.
With a working understanding of judicial independence and impartiality, this Comment details the structure of the UK’s high courts of appeal, which would be directly affected (if not supplanted) by the proposed Supreme Court.

E. A Brief Outline of the United Kingdom’s High Courts

Two courts presently divide the functions of the highest court in the UK. The Appellate Committee of the House of Lords hears appeals from the courts of England, Wales, and Northern Ireland, as well as civil cases in Scotland. The Judicial Committee of the Privy Council considers questions involving the devolved powers to the Scottish Parliament, the National Assembly for Wales, and the Northern Ireland Assembly.

1. The Appellate Committee of the House of Lords

The Lords of Appeal in Ordinary ("Law Lords") are members of the House of Lords and sit on both the Appellate and Judicial Committees. Currently, twelve Law Lords have been specifically appointed under the Appellate Jurisdiction Act of 1876. In addition, retired judges who are otherwise members of the House of Lords are eligible to sit on both committees. All Law Lords are full members of the House and hold lifetime peerages.

Historically, the role of the House of Lords in the judiciary developed from Parliament and the courts of early medieval monarchs. Attempts to formally abolish appellate jurisdiction and

165. Supreme Court, supra note 4, ¶ 2. For a general discussion, see Rodney Brazier, Constitutional Practice 265-300 (3d ed. 1999).
166. Supreme Court, supra note 4, ¶ 2.
167. Id.
168. Id. ¶ 3.
169. Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59, sched. 6, 25 (Eng.), reprinted in Sources of English Constitutional History: A Selection of Documents From A.D. 600 to the Present, at 753 (Carl Stephenson & Frederick Marcham eds., 1937); Supreme Court, supra note 4, ¶ 9.
170. Supreme Court, supra note 4, ¶¶ 8-9 ("[A]ny holder of high judicial office who is a member of the House under the age of 75 is also eligible to sit."). There are fourteen Lords who currently fit this requirement, bringing the total number of judges allowed to sit on an appeal to the House of Lords to 26. Id. ¶ 8.
171. Id. ¶ 9.
172. Id. ¶ 10. Early advisors to the King formed a Court of Parliament which included judges and the "lords spiritual and temporal." Id. Around the fourteenth century, the Lords took control of appellate jurisdiction. Id. The practice fell into disuse in the sixteenth century but was revived during the seventeenth century as Parliament asserted its authority against the Crown. Id. The judicial work of the Lords was so poor that by the mid-nineteenth century, the Crown began to appoint "life peers judges" to improve the judicial functions of the House. Id. The Appellate Jurisdiction Act 1876 confirmed the Lords' jurisdiction and allowed the appointment of judicial life peers. Id. The right to appeal from the Court of Session to the Scottish Parliament in civil cases was added in 1707. Id. The House of Lords' judicial role
set up a separate court of appeal during the 1870s achieved some limited success. The Act was passed in 1873, but was never put into effect.

The appellate jurisdiction of the Appellate Committee reaches most of the UK. That jurisdiction is generally discretionary. Each case is heard by a panel of five Law Lords. Judgments are delivered in the Chamber of the House and are reported from the Committee to the House. The Law Lords have taken steps to remove themselves from apparent conflict by limiting their activities in the House of Lords.

2. The Judicial Committee of the Privy Council

The Privy Council Appeals Act of 1833180 established the Judicial Committee of the Privy Council. The Judicial Committee retains the right to receive appeals from within the commonwealth. The membership of the Judicial Committee is wider than the Appellate Committee. Besides the Law Lords and all other members of the Appellate Committee, the Judicial Committee includes other Privy

remains largely unchanged. Id. See generally Stevens, Law and Politics, supra note 48.
173. See Supreme Court, supra note 4, ¶ 10.
174. Id.
175. Id. ¶ 11. The Law Lords hear appeals from: the Courts of Appeal in England and Wales and Northern Ireland (both civil and criminal); the Court of Session in Scotland (civil); the High Court in England and Wales and the High Court in Northern Ireland (criminal); the Courts-Martial Appeal Court; and, in rare cases, certain civil cases from the High Courts in England and Wales and Northern Ireland. Id.
176. Id. ¶ 12. Almost all appeals require either the permission of the court below or of the House before a party can make an appeal. Id.
177. Id. ¶ 13.
178. Id.
179. On June 22, 2000, Lord Bingham of Cornhill announced the principles guiding the Law Lords' participation in the House:
As full members of the House of Lords the Lords of Appeal in Ordinary have a right to participate in the business of the House. However, mindful of their judicial role they consider themselves bound by two general principles when deciding whether to participate in a particular matter, or to vote: first, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.
614 Parl. Deb., H.L. (5th Ser.) (1999-2000) 419; see also Supreme Court, supra note 4, ¶ 13.
180. Privy Council Appeals Act, 1833, 3 & 4 Will., c. 41 (Eng.), reprinted in Sources of English Constitutional History: A Selection of Documents From A.D. 600 to the Present, at 725 (Carl Stephenson & Frederick Marcham eds., 1937).
181. Supreme Court, supra note 4, ¶ 15. Originally, the Judicial Committee heard appeals to the sovereign in foreign and domestic cases but the judicial powers of the Privy Council in England and Wales were abolished in 1641. Id.
182. Id. ¶ 16.
Counsellors who have been or are senior judges of courts with the UK.\textsuperscript{183}

The Judicial Committee has three main functions. First, it is the final court of appeal for many Commonwealth jurisdictions and Crown Dependencies.\textsuperscript{184} Second, the Committee hears devolution cases.\textsuperscript{185} Third, the Committee has technical jurisdictions, such as appeals against pastoral schemes in the Church of England.\textsuperscript{186} The Judicial Committee is not affected by the proposed Supreme Court beyond the cases concerning devolution.\textsuperscript{187} The future of this court structure is now the subject of prospective reform because of the passage of the HRA, an Act of Parliament that grants the positive individual right to a trial before an independent and impartial tribunal.

F. The Impact of the Human Rights Act

The passage of the HRA delivered on the campaign promises that swept the New Labour party into power. Following May 1997 elections, the New Labour government rose to power.\textsuperscript{188} As part of its platform, New Labour promised to reform the House of Lords, to consider proportional representation in the House of Commons, to devolve power to Scotland and Wales, and to incorporate the ECHR into British domestic law.\textsuperscript{189} This last promise became a reality with the HRA.

Before the adoption of the HRA, British citizens could only seek redress for human rights violations from the Strasbourg Court.\textsuperscript{190} The court in Strasbourg questioned the independence of the British judiciary in a series of cases.\textsuperscript{191} These cases focused attention on the growing separation of powers in the UK.\textsuperscript{192}

\begin{itemize}
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id. \textsuperscript{17.} The Crown Dependencies include Jersey, Guernsey, and the Isle of Man. Id.
\item \textsuperscript{185} Id. Devolution cases come “from the courts in Scotland, Northern Ireland or England and Wales or directly by the UK Government or one or other of the devolved administrations.” Id. The Committee determines issues of legal competence of the devolved organizations regarding the relevant devolution legislation. Id. For a general discussion on devolution, see Picker, supra note 22, at 22-52 (discussing devolution in general and devolution in Scotland specifically).
\item \textsuperscript{186} Id. Supreme Court, supra note 4, \textsuperscript{17.}
\item \textsuperscript{187} See Supreme Court, supra note 4, \textsuperscript{21, 28.}
\item \textsuperscript{188} See Stevens, supra note 83, at 368.
\item \textsuperscript{189} See id.
\item \textsuperscript{190} See id.
\item \textsuperscript{192} Stevens, supra note 6, at 104.
\end{itemize}
In *McGonnell v. United Kingdom*., the Strasbourg court found that there was a lack of separation of powers that violated Article 6(1) of the ECHR. This line of reasoning directly questioned the separation of powers in much of the British judiciary: The Lord Chancellor had executive, legislative, and judicial duties while the Lords of Appeal in Ordinary had judicial and legislative duties.

The muddled state of the UK’s judiciary appeared prominently in *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1)*. In October 1998, the former dictator of Chile, General Pinochet, was arrested in the UK while receiving medical attention. The arrest warrant was challenged on the grounds that the arresting magistrate had not met the provisions of the Extradition Act 1989 and the sovereign immunity protected the general. The Appellate Committee panel read the requirements of the Act broadly and held that the violation of international human rights took precedence over the strict requirements of English law. In response to these cases and political pressure, Parliament passed the Human Rights Act of 1998, which incorporated much of the ECHR and allowed international law to apply directly to British domestic law.

After the adoption of the HRA, defendants could argue that the reasoning in *McGonnell* meant that the British judiciary failed the independent and impartial requirements of Article 6(1) without traveling to the Strasbourg Court. A few judges have agreed with

---

194. See id. The European court found that the courts of Guernsey did not meet the standards of Article 6. *Id.* at 309. The court stated:

The principal judicial officer who sat on the case, the Bailiff, was not only a senior member of the judiciary of the Island, but was also a senior member of the legislature—as President of the States of Deliberation—and, in addition, a senior member of the executive—as titular head of the administration presiding over a number of important committees. It is true, as the Government points out, that the Bailiff’s other functions did not directly impinge on his judicial duties in the case and that the Bailiff spends most of his time in judicial functions, but the Commission considers that it is incompatible with the requisite appearance of independence and impartiality for a judge to have legislative and executive functions as substantial as those in the present case.

*Id.* at 300-01.
195. Stevens, *supra* note 6, at 105.
196. 1 A.C. 61 (H.L. 1998). For a further discussion of a related case regarding the definition of judicial impartiality, see *supra* notes 120-25 and accompanying text.
198. See *id*.
199. See *id*.
them. Most of the Article 6(1) violations have been of two varieties: either an executive official acts as a judge and violates the independence requirement, or a judge is found in violation of the impartiality requirement. While the case law impact of the Human Rights Act has been minimized, “much of the impact of the Human Rights Act has been psychological.” Rather than judges actively declaring their dependence and partiality, political momentum led to the government’s calling for a clearer separation of powers and new Supreme Court.

In an effort to reduce the perception of dependence, the Law Lords have decided to refrain from legislation that they may later be called on to adjudicate. Law Lords speak rarely to avoid the risk of challenges in the Appellate Committee. The Law Lords have acted affirmatively to maintain the appearance of impartiality and independence, but the current system still allows for the Law Lords to take an active role in the legislative process. It is that potential and apparent conflict which the Supreme Court proposal addresses.

II. CREATING AN INDEPENDENT AND IMPARTIAL HIGH COURT

The proposed Supreme Court focuses on the issues of the distribution of governing powers and the proper judicial role. To analyze the impact of the proposal for a Supreme Court, this part presents the current proposal and then formulates answers to two related questions. First, does judicial independence require a separate branch of government? Second, if judicial independence does require a separate branch, does that separate court need the power to review and overturn legislation?

202. Regina (Alconbury Developments Ltd.) v. Sec’y of State for the Env’t, 2 A.C. 295 (H.L. 2003) (holding the Department of the Environment, Transport and the Regions was not “independent and impartial” under Article 6); see also supra notes 116-50 and accompanying text.

203. See Grosz, supra note 201, at 240-41.

204. Stevens, supra note 6, at 114.

205. See generally Lord Steyn, supra note 7.

206. Supreme Court, supra note 4, ¶ 3.

207. See Lord Steyn, supra note 7, at 383. Over the last three years, Law Lords have spoken in the House of Lords on only a handful of occasions:

In 2000 a Scottish Law Lord spoke three times. No other Lord of Appeal in Ordinary spoke in that year. In 2001 the same Scottish Law Lord spoke twice, both on debates on reports of the European Union Committee which he had chaired. In 2001 a [sic] English Law Lord made a maiden speech which enabled him to speak to the Hunting Bill.

Id. at 383-84.

208. Id. at 384.

209. This question and the following one are footnoted for ease of reference. Part II.B will answer no to this question, while Parts II.C and III will respond affirmatively.

210. This question only follows an affirmative answer to the first question. Thus, Part II.B does not reach the question of judicial review. Part II.C will answer no to
This part outlines commentators' alternative answers to these questions. Part II.B answers no to the first question and finds that a Supreme Court is unnecessary because the current judiciary is already functionally independent. In Part II.C, commentators replied that judicial independence does require a Supreme Court and contend that the government’s proposal succeeds in creating an independent and impartial judiciary without an additional grant of enhanced judicial review. Before exploring these questions and alternative answers, this Comment presents the government's proposal.

A. The Supreme Court Proposal

Part II.A outlines the government’s Supreme Court proposal, which incorporates the topics discussed in Part I and sets the stage for the analysis in Parts II.B, II.C, and III. This part traces the impetus for reform and describes the government’s proposal to separate the legislative and judicial functions in the House of Lords.

1. Political Action

The constitutional reforms initiated by the Labour government largely moot the question of whether Britain's judiciary is independent of Parliament. On June 12, 2003, the Labour Party announced its intention to establish a Supreme Court. The government also announced the abolition of the Lord Chancellor's position and the creation of the Department of Constitutional Affairs. The announcements were met with both confusion and surprise.
The government has recently reasserted its desire to proceed with the court reforms. In his December 8, 2003 speech, Lord Falconer reaffirmed the government's commitment to strengthening judicial independence. This Comment attempts to tease out the reasons for a Supreme Court and its impact on the UK judiciary.

2. The Proposed Supreme Court

The government proposes to terminate the judicial functions of the House of Lords and create a new high court for the UK. In its proposal for a new Supreme Court, the government declared: "[We] will legislate to abolish the jurisdiction of the House of Lords within the UK's judicial system. . . .[All appellate functions] will be vested instead in a new Supreme Court, quite separate from Parliament." The announcement signaled an intention to more clearly delineate the separation of powers in the UK. Lord Falconer recently outlined the importance of judicial independence when describing the need for a Supreme Court.

The proposal attempts to centralize the judicial system while maintaining the supremacy of Parliament. The proposal clearly
retains the concept of parliamentary sovereignty and refuses to grant the power to overturn legislation. The new Court would not affect the jurisdiction of the Judicial Committee regarding overseas claims. Regarding the membership of the Court, the government proposed transferring the current twelve Law Lords as the initial members of the new Court.

The relationship with the House of Lords would be severed. Some commentators argued that the Law Lords benefit from listening to first hand accounts of deliberations in Parliament. However, the government wants "to sever completely any connection between the Court and the House of Lords." The proposal considers whether the new Court members should have the same responsibilities as they did when they were Law Lords. The government also proposes that the administration of the new Court should come under the Department of Constitutional Affairs.

The government proposes two broad methods of selecting future members of the Court. First, membership to the Court would be made as an appointment by the Queen on the advice of her ministers. The second option suggests a new transparent process of identifying names by an Appointments Commission with ultimate approval by the Prime Minister. The proposal leaves open for

issues can be considered.... A Supreme Court along the United States model, or a Constitutional Court on the lines of some other European countries would be a departure from the UK's constitutional traditions. Paragraph 23 distinguishes the English proposal from the American Supreme Court by stating that the English Court would not have the power "to strike down and annul congressional legislation." Id. ¶ 23 "In our democracy, Parliament is supreme. There is no separate body of constitutional law which takes precedence over all other law." Id.

Supreme Court, supra note 4, ¶¶ 20, 23. Paragraph 23 distinguishes the English proposal from the American Supreme Court by stating that the English Court would not have the power "to strike down and annul congressional legislation." Id. ¶ 23 "In our democracy, Parliament is supreme. There is no separate body of constitutional law which takes precedence over all other law." Id.

See id. at Executive Summary, ¶¶ 20, 23.

See id. ¶ 28.

However, the current practice of the Law Lords meeting as a panel of five is up for discussion as is the ultimate number of judges necessary for the high court. Id. ¶ 31.

See id. ¶ 34 ("The primary objective of the new arrangements is to establish the Court as a body separate from Parliament.").

See id. ¶ 35.

See id. ¶ 36.

See id. ¶ 57 (finding that the "[t]he Government does not see any need to make special arrangements to preserve any interest of the Law Lords in [their House of Lords committee responsibilities]").

Id. ¶ 64. This apparent shift of administration to the executive branch seems fraught with the same separation powers as before and further seems to directly contradict the definition of independence from the European Court of Human Rights. This issue will be discussed at length in Part III.A.

One obvious impact of this is the Prime Minister appointing judges, which parallels the executive nomination found in the United States. But involving the Queen goes against the clear separation of powers sought in the proposal's preamble.

This option is aimed at incorporating the methods discussed in the proposal for nominating judges. See A New Way of Appointing Judges, supra note 17.
discussion the qualifications, tenure, and criteria for selection of future justices.233 The government has also left open for discussion the operation of the Supreme Court, preferring instead to seek public comment on general structure and appearance concerns.234

Much of the proposal concerns issues of appearance and practical concern. The proposal discusses possible titles for the new judges on the Court.235 The new court will not usurp the power devolved to certain jurisdictions.236 As in the segregated account for the Law Lords, the current proposal calls for the funding to come from a general Parliament account.237 The proposal concludes by addressing the administrative needs of the new court.238 While the Appellate Committees' administrative tasks are provided by the House of Lords,239 the proposal suggests shifting the administration and budget for the Supreme Court to the Department of Constitutional Affairs.240

Having outlined the Supreme Court proposal, this Comment details commentators' alternative answers to the questions concerning the necessity of the court and what powers it should have. Scholars in Part II.B questioned whether the proposal and separation are necessary. Advocates cited in Part II.C find that the proposal is necessary under the increased separation of powers, but they do not conclude that the Court needs additional powers of review and overturning legislation.

B. The Judiciary Is Already Functionally Independent

Although political action has effectively decided that reform must take place to remove "anything which might undermine the independence or impartiality of a judicial tribunal,"241 the future of British constitutional reform is always uncertain.242 Some scholars contend that the British judiciary is already independent.243 This

233. See Supreme Court, supra note 4, ¶ 44-49.
234. See id. ¶ 50-56 (discussing alternatives such as discretionary review, sitting en banc or in a panel, and questioning how cases should be appealed to the high court).
235. See id. ¶ 58-59.
236. See id. ¶ 61. The jurisdictions affected include: the Lord Chief Justice of England and Wales, the Lord President of the Court of Session in Scotland, and the Lord Chief Justice of Northern Ireland. Id. ¶ 61 & n.4.
237. See id. ¶ 63.
238. See id. ¶ 63-67.
239. See id. ¶ 63.
240. Id. ¶ 64.
241. Id. ¶ 3.
242. See, e.g., Russell, supra note 43, at 339 ("It is easier to get a constitutional [change] ... on the political agenda than it is to win. The predominant pattern is one of frustrated demands." (citation omitted)); A Lost Opportunity for the Government to Regain its Momentum [hereinafter Lost Opportunity], The Independent (London), Nov. 27, 2003, at 20.
243. See, e.g., Stevens, supra note 6, at 79-82 (finding that individual judges rarely face questions of independence); Barendt, supra note 86, at 615 (observing that the judicial branch is independent from Parliament and the executive with some
argument focuses on the independence of individual judges and the balance of powers doctrine. While the same criteria for evaluating independence apply to lower courts, Part II.B focuses on the independence of the Law Lords.

1. Independence of Individual Judges

Many commentators believe that the British judiciary has maintained independence and impartiality. Particularly in the case of individual judges' ability to decide a given case, British judges enjoy functional independence. Robert Stevens, in his 2001 book on the English judiciary, outlined this argument of functional independence. He noted that the "hallmarks" of judicial independence are "security of tenure, fiscal independence... and freedom from executive pressure." By applying these standards to the Law Lords, proponents conclude that the individual judges are functionally independent. First, the Law Lords have security of tenure. As members of the House of Lords, the Law Lords have membership for life. The financial independence of Law Lords is a second criterion for judicial independence. A financially independent judiciary will not "be prone to temptation" so the government takes care to provide for "an adequate, if not opulent, salary." The Supreme Court proposal includes the current funding of the Law Lords and makes provisions for similar support, although the funds and administrative support would come from a Cabinet department rather than Parliament. Thus, the commitment to providing a financially secure judiciary runs throughout English tradition and is continued in the Supreme Court proposal.

The third of Stevens's "hallmarks of independence," freedom from political pressure, presented the greatest challenge to the perception of judicial independence. The standard procedure for removal of a Law Lord requires an impeachment process from both Houses of Parliament. Despite that requirement, Stevens observed that

exceptions).

244. Stevens, supra note 6, at 85-88.
245. See supra note 243 and accompanying text.
246. See Stevens, supra note 6, at 79-82.
247. Id. at 79.
248. See Brazier, supra note 36, at 237-38; Russell, supra note 43, at 10; Supreme Court, supra note 4, ¶ 9. In fact, even Lords who have been criminally convicted are able to return to the House of Lords after serving their time.
249. See Stevens, supra note 6, at 81.
250. See id.
251. Supreme Court, supra note 4, ¶¶ 63-64.
252. See Stevens, supra note 6, at 80 ("Judicial protection from politicians and political winds is, however, significantly by tradition.").
253. See Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.), reprinted in Sources of
"[j]udges have been eased out from time to time." Two Law Lords were forced out by the Lord Chancellor in the last two decades, largely due to pressure from the executive. But generally the safeguards of the Act of Settlement have provided for remarkable security. This security demonstrates that the moderate actions of the balance of powers can adequately adjust to preserve judicial independence.

Eric Barendt, in a 1995 article, observed that the judiciary is already functionally separate from the executive and legislative powers. He finds that the Act of Settlement prevents judges from sitting in the House of Commons—the effective seat of parliamentary power. In addition, lay peers are prevented from participating in judicial proceedings in the House of Lords. Barendt also noted that the Law Lords have the freedom to participate in legislative debates, but he concludes that this contravention of an independent judiciary is "moderate[] and perhaps acceptabl[e]." The scope of judicial independence is also affected by the related concepts of parliamentary sovereignty and the balance of powers.

Parliamentary power limits the judicial role and allows for a lesser judicial independence without the right to overturn legislation. The rise of parliamentary supremacy under George I and George II decreased the role of the judiciary. Parliamentary sovereignty, by reducing the judiciary to a less controversial role, protected the perception of judicial independence. The consolidation of governing power in the House of Commons after 1832 further reduced the role of the judiciary. Since the judiciary is inferior to Parliament, the democratic process will adjust to protect individual freedoms. This concept of parliamentary sovereignty and the belief that the balance of powers works to protect individual rights prevents the creation of a separate judicial branch.

---

English Constitutional History: A Selection of Documents From A.D. 600 to the Present, at 610 (Carl Stephenson & Frederick Marcham eds., 1937).
254. Stevens, supra note 6, at 80 (internal quotation marks omitted).
255. Id. (Lord Chief Justice Widgery and Lord Denning were forced out by the Lord Chancellor under Edward Heath and Margaret Thatcher).
256. See id. at 79-80.
257. See infra Part II.A.2; see also supra Part I.B.2.
258. Barendt, supra note 86, at 615.
259. Id. Note, however, that this emphasis on the House of Commons would not function as well to maintain judicial independence if the House of Lords reforms are carried out. See Russell, supra note 43, at 260-92; HOL's Next Step, supra note 17.
260. Barendt, supra note 86, at 615.
261. Id. It is these latter freedoms that the Supreme Court proposal views as impermissible. See Supreme Court, supra note 4, ¶ 1.
262. See Stevens, supra note 6, at 79.
263. See id.
264. See id.
265. Vick, supra note 60, at 341.
266. See Stevens, Loss of Innocence, supra note 83, at 392 & n.125.
The doctrines of parliamentary sovereignty and the balance of powers have dominated the conception of the British government. Rather than formally specifying and separating the functional powers of government, the UK favors a benign state that is wholly derived from the Houses of Parliament. The balance of powers doctrine rests on the premise that the British Government works without a strict separation of legislative, executive, and judicial powers. The Prime Minister serves as both the functional head of the executive and as the leader of the dominant party in Parliament. Similarly, the Law Lords serve as the head of the judiciary in the Appellate Committee in Ordinary and as legislative members of the House of Lords. Despite this apparent conflict between legislative and judicial powers, the British judiciary in general, and the Law Lords in particular, have taken steps to ensure independence and impartiality. This incremental change is more in line with traditional constitutional development and the doctrine of balance of powers.

The balance of powers does not prevent judicial independence and activism. Despite their presence in the House of Lords, the Law Lords have held that British legislation was unenforceable—a moderate step towards overturning legislation. For example, in Regina v. Secretary of State for Employment, ex parte Equal Opportunities Commission, the House of Lords held that British legislation relating to part-time employees violated European Directives and was therefore unenforceable. The public response was swift with The Times writing that “Britain may now have, for the first time in its history, a constitutional court.” Indeed, the power of judges to interpret legislation in line with the HRA gives more judicial discretion and the proposed Supreme Court would not meaningfully change judicial power. Notably, all of this growth has

267. See Stevens, supra note 6, at 89-99; Vick, supra note 60, at 351 (noting the governments’ reluctance to “deviat[e] from traditional Diceyan conceptions of parliamentary sovereignty”).
268. See Stevens, supra note 6, at 79.
269. Id. at 85.
270. Vick, supra note 60, at 342 & n.94.
271. See id. at n.97; see also Supreme Court, supra note 4, ¶ 2.
272. See, e.g., Lord Steyn, supra note 7, at 383; Supreme Court, supra note 4, ¶ 3.
273. See VICK, supra note 60, at 342 (describing most British constitutional change as incremental); Russell, supra note 43, at 339 (noting the difficulty in reforming the House of Lords due to political pressure).
274. 1 A.C. 1 (H.L. 1995).
275. STEVENS, LOSS OF INNOCENCE, supra note 83, at 395.
276. Id. (citing Profound Judgment: How the Law Lords Tipped Britain’s Constitutional Balance, The Times (London), Mar. 5, 1994 (quotations omitted)).
278. See Supreme Court, supra note 4, ¶¶ 22-23 (stating that “[a]part from this, the
occurred within the balance of powers paradigm of the shared democratic process.279

Traditionally, parliamentary sovereignty ensured the protection of individual freedoms through "self-correcting democracy, according to which the protection of individuals' rights was effected by the political mechanisms of ministerial responsibility and parliamentary scrutiny."280 This reliance on the democratic process represents a contrast to positive protection of rights as in the U.S. Bill of Rights, but "Parliament has not betrayed this trust."281

The HRA may present a direct challenge to parliamentary sovereignty regarding the recognition of individual rights.282 Until the Labour reforms of 1997, it was fairly settled that the English judges were not a separate branch of government and did not share power equally with the executive or Parliament.283 Stevens noted that the doctrine of parliamentary sovereignty effectively ensured that separate branches of government did not exist.284 This emphasis on individual rights and particularly the right to an independent and impartial tribunal have created concerns regarding the appearance of judicial independence.285 Because of these concerns, the government answers286 that the highest court of appeal should be separated from Parliament, and Part II.C discusses that answer.287

C. The Government's Modest Proposal for Structural Independence

While Part II.B considered that there may be no need to reform the current judicial system, Part II.C.1 explores the government's decision to establish a Supreme Court separate from Parliament.288 The government's proposal suggests that a separation of the judiciary from Parliament is necessary.289 Part II.C.2 outlines the government's negative answer290 to the second question of judicial review291 and

Government does not propose any further changes in the role of the new Supreme Court" and does not authorize the power to overturn legislation).

279. See Vick, supra note 60, at 365-67. However, Vick concludes that this growth results from a compromise between the balance of powers and a recognition of individual rights more in line with the separation of powers. Id. at 372.

280. Lord Irvine of Lairg, supra note 38, at 16; see also supra Part I.B.

281. See Vick, supra note 60, at 341 & nn.84-85 ("We have entrusted our most fundamental liberties to the will of a sovereign Parliament and, taken all in all, Parliament has not betrayed this trust." (quoting Lord Hoffmann, Human Rights and the House of Lords, 62 Mod. L. Rev. 159, 161 (1999))).

282. See Vick, supra note 60, at 341-42; see also infra Part III.C.2.

283. See Stevens, supra note 6, at 89.

284. See id.

285. See supra Part II.A.

286. See supra notes 209-10 and accompanying text.

287. See infra Part II.C.

288. See supra note 209 and accompanying text.

289. See infra Part II.C.1.

290. See infra Part II.C.2.

291. See supra note 210 and accompanying text.
finds that the Supreme Court does not need the power to overturn legislation based on the longstanding principle of parliamentary sovereignty.292

Despite confidence in the present system, the Supreme Court proposal notes serious concerns over the appearance of judicial independence do exist.293 An article in The Times quoted the Chairman of the Bar Council as saying, “It is very difficult to understand why our Supreme Court (the law lords) should be a committee of the second house of Parliament.”294 Lord Johan Steyn has argued that an independent and impartial judiciary needs a Supreme Court separate from Parliament.295 His article found two problems with judicial independence in the Appellate Committee: first, allowing the Lord Chancellor to hold executive, legislative, and judicial powers, and second, “that serving Law Lords may speak and vote on legislative business in the House of Lords.”296 Lord Steyn’s article focused its strong invective on the former concern, and the government has agreed and has acted to remove the position of the Lord Chancellor. The Supreme Court proposal addresses Lord Steyn’s latter concern.297

1. The Government Believes that the Judiciary Should Be Separate from the Legislature

To the first guiding question on whether securing judicial independence requires a separate branch of government, the government answers that the judicial functions of the House of Lords should be separated from Parliament. Lord Steyn’s second obstacle, the Law Lords’ potential legislative powers, has led to the proposed establishment of a Supreme Court.298 With its Supreme Court proposal, the government has made a strong statement concerning a strict separation of powers in the UK: “[T]he time has come to

292. See infra Part II.C.2.
293. Supreme Court, supra note 4, ¶¶ 2-3.
294. Supreme Court, supra note 4, ¶ 1.
295. See Lord Steyn, supra note 7.
296. Id. The article focuses mostly on the role of the Lord Chancellor: “The major obstacle to creating a Supreme Court is the privilege of the Lord Chancellor of sitting in the Appellate Committee of the House of Lords.” Id. at 383.
297. See Supreme Court, supra note 4, ¶ 1. The first problem was handled by abolishing the position of Lord Chancellor. However, the ‘abolition’ of the Lord Chancellorship has proven more difficult than first thought. Currently, Lord Falconer as head of the Department of Constitutional Affairs maintains all powers previously granted to the Lord Chancellor. Because this issue is largely outside the scope of the Supreme Court proposal and this Comment, for further reading see Lord Steyn, supra note 7; Reforming the Office of the Lord Chancellor, supra note 17.
298. See Supreme Court, supra note 4, at Foreword; Lord Steyn, supra note 7, at 383, 396.
establish a new court regulated by statute as a body separate from Parliament. "

While, in practice, the British judiciary may function independently and impartially, it still appears structurally dependent—the Law Lords sit in the House of Lords. The Law Lords have acknowledged the problem and limited their involvement in matters of purely legislative importance. But Law Lords retain their peerages in the House of Lords, occasionally sit in on legislative hearings, and have no official bar to further escalating their legislative activities. It is this dependent appearance that the Supreme Court proposal seeks to rectify.

Because the government believes that the problem lies only in the appearance of independence, the proposal offers only cosmetic remedies. For the government, the doctrine of parliamentary sovereignty can coexist with the expanded separation of powers doctrine found in the current reforms. This coexistence is premised upon a judiciary without the power of judicial review. The Supreme Court proposal explicitly retains the doctrine of parliamentary sovereignty by granting the sole power to amend legislation to Parliament. The government views the Appellate Committee as functionally independent and believes that solidifying its structural separation from Parliament will enhance the perception of judicial independence.

299. Supreme Court, supra note 4, at Foreword.
300. Supreme Court, supra note 4, ¶ 3.

Paragraph three states:

It is not always understood that the decisions of the 'House of Lords' are in practice decisions of the Appellate Committee and that non-judicial members of the House never take part in the judgments. Nor is [their restraint] from getting involved in political issues . . . which they might later have to adjudicate always appreciated.

Id. This misunderstanding "add[s] to the perception that [the Law Lords'] independence might be compromised by the arrangements." Id.

301. Lord Steyn argues that while the privilege of Law Lords to take part in legislative business is "no longer defensible," it has "wither[ed] away" naturally. Lord Steyn, supra note 7, at 383-84. But see Stevens, supra note 6, at 93-94 (noting the Law Lords' tendency to speak on political matters in the House of Lords).

302. See Lord Steyn, supra note 7, at 383; see also Supreme Court, supra note 4, at Executive Summary (addressing this very concern: "The [Law Lords] would cease, while members of the Court, to be able to sit and vote in the House of Lords").

303. Supreme Court, supra note 4, at Foreword.
304. See supra Part II.A.
305. See Goldsworthy, supra note 39, at 277-78.
306. Supreme Court, supra note 4, ¶ 23. Paragraph twenty-three states:

In our democracy, Parliament is supreme. There is no separate body of constitutional law which takes precedence over all other law. The constitution is made up of the whole body of the laws and settled practice and convention [subject to the whim of a reforming Prime Minister], all of which can be amended or repealed by Parliament.

Id.

307. Supreme Court, supra note 4, at Foreword, ¶ 23.
The structural changes offered by the government focus on removing any perception of judicial dependence on Parliament. The government proposal argues that by severing the remaining ties of the Law Lords with the House of Lords, the new Supreme Court will satisfy the independent and impartial requirement of the HRA. The proposed Supreme Court will end the association of the highest court with the House of Lords. The Supreme Court judges will no longer sit in on legislative hearings. The Supreme Court proposal ends the judiciary’s relationship with Parliament because of perceptions that the Appellate Committee is not independent of Parliament.

The government thus answers that the judicial functions of the House of Lords should be separated from Parliament; however, since the government wants to maintain the doctrine of parliamentary sovereignty, Part II.C.2 finds that the Supreme Court does not need vigorous judicial review.

2. But the Government Says No to Judicial Review

While the current proposal finds that the Supreme Court is necessary to ensure the appearance of judicial independence, the government firmly rejects the idea of the judicial power to overturn Acts of Parliament. The current proposal for the Supreme Court separates the structure but does not expand the powers of the Appellate Committee. The proposal seeks to create a court separate from the executive and legislative branches of government. The Law Lords act as the court of last appeal, but they do not have the power to overturn legislation. Rather, the Law Lords have the power to recommend that Parliament remove the legislation. The new court would not gain any powers not held by the Law Lords.

The passage of the HRA and the constitutional reforms instituted by the Labour Party have signaled a move towards a separation of powers. But even the rush of reform instituted by New Labour will
not reinvent the rate of British constitutional growth. In his article looking at the growth of a separation of powers and its effect on the judiciary, Robert Stevens concluded: “Despite the new political responsibilities and irrespective of the need, Britain will not suddenly embrace three clear branches of government. The growth will be organic and will constantly be delayed by the tradition of parliamentary sovereignty.” And the HRA itself remains in force only with the approval of Parliament. Without recognizing the HRA as a constitutional document beyond the reach of an altered Parliament, the legislation could simply be removed and the positive recognition of individual rights would return to the background.

Scholars noted that even without the power to invalidate legislation, courts have significant power under the HRA. In his article discussing the HRA’s impact on the British Constitution, Professor Douglas Vick found that the courts’ power to review legislation was expanded by the HRA. This shift in how courts interpret legislation moves the judicial system “much closer” to the Constitutional inquiries made by the constitutional courts of continental Europe and the U.S. Supreme Court. Vick also found that the powers of British courts will be increased by introducing the principle of proportionality into the judicial review of executive actions. Such organic change represented a compromise between allowing courts to enforce individual rights and maintaining parliamentary sovereignty.

Part III argues that the viewpoint explained in Part II.C is correct in asserting the need for a Supreme Court, but for the wrong reasons. Part III.A agrees with the government that the judiciary should be separate from Parliament but highlights the weaknesses in the government’s argument. Part III.B shows that the government has
CREATING A UK SUPREME COURT

taken affirmative steps towards adopting a separation of powers. Finally, Part III.C argues that the new court must have the power of judicial review to ensure judicial independence and prevent an imbalance in governing powers.

III. A UNIQUE OPPORTUNITY TO STRENGTHEN THE FOUNDATIONS OF THE UK GOVERNMENT

To frame the discussion, Part II asked whether judicial independence requires a court separate from Parliament and, if so, whether that court needed the power to review and overturn legislation. Part III argues that the answers given in Parts II.A and II.B do not adequately address the constitutional problems that the HRA exposes and that a powerful Supreme Court could remedy. While the proposed Supreme Court represents a modest proposal to separate the UK's highest court from the rest of government, effective and meaningful separation requires a careful balancing of Parliament's power.

This part agrees with the government that judicial independence does require a separate branch of government. However, this Comment reaches the same answer through differing reasoning: Rather than solving merely the appearance of independence, removing the Law Lords from the House of Lords maintains actual judicial independence. This part moves beyond the government's proposal and suggests that judicial review is necessary to protect individual rights.

329. See infra Part III.B.
330. See infra Part III.C.
331. See supra note 209 and accompanying text.
332. See supra note 210 and accompanying text.
333. Supreme Court, supra note 4, ¶¶ 1, 7 (describing the Supreme Court as part of packaged reforms to “put the relationship between the executive, the legislature and the judiciary on a modern footing”). The proposed judicial changes aim to eliminate the appearance of independence of the Law Lords as judges and potential legislators. See id. ¶ 3. The modesty of the court proposal seemingly conflicts with the sweeping changes envisioned in the government's reforms. This conflict is particularly evident in the degree of change necessary to make the House of Lords into an elected, bicameral legislative house on much more equal footing with the House of Commons. Russell, supra note 43, at 107-92 (outlining the dramatic changes necessary to create a functional upper chamber of Parliament); see also Robert Hazell, Reforming the House of Lords: A Step by Step Guide, in Constitutional Reform in the United Kingdom: Practice and Principles 129, 138-39 (Univ. of Cambridge Centre for Public Law 1998).
334. See supra note 209 and accompanying text; supra Part II.B.
335. See infra Parts III.A-B.
A. An Opportunity to Separate Governmental Powers

This part first agrees that the judiciary should be separated from Parliament. Then, Part III.A.2 argues that mere separation of structure would wreck the balance of powers. In an effort to fulfill campaign promises and secure its legacy, the New Labour government has sought to separate the judicial functions of the Law Lords from the rest of the House of Lords.\(^3\) This attempt had the modest aim of structural reform by removing the appearance of dependence on Parliament.\(^3\) The reform process, however, has highlighted a deeper structural problem with the UK Government, i.e., that parliamentary sovereignty effectively precludes the judiciary from balancing the executive and legislative powers.\(^3\) But before addressing this structural fault, this Comment agrees with the government proposal that ending the judicial functions of the House of Lords is the correct first step to strengthen the British constitutional framework.\(^3\)

1. A Supreme Court Separate From Parliament

The government has proposed the separation of the UK’s highest court from the legislature.\(^3\) The government argues that the judiciary must be separate from the House of Lords to ensure the appearance of independence.\(^3\) While separation would help with the appearance of independence, there are more serious problems with judicial independence than can be resolved by simply removing the Law Lords from the House of Lords.

First, the HRA, representing an increased concern in positively recognizing individual rights, requires an independent and impartial tribunal.\(^3\) The Strasbourg Court required that a court must be independent of the executive.\(^3\) The Supreme Court proposal maintains that parliamentary sovereignty remains the guiding principle for the UK, i.e., no body of law and governmental or judicial action can explicitly overrule an Act of Parliament.\(^3\) Under parliamentary sovereignty and the related doctrine of balance of powers, there is no formal separation of the executive and legislature; the Prime Minister is, first, a Member of Parliament and, second, an

---

336. See Supreme Court, supra note 4, ¶ 1; see also supra Part II.A.
337. See Supreme Court, supra note 4, ¶¶ 2-3.
338. See infra Part III.B.
339. See infra Parts III.A.1-2.
340. See Supreme Court, supra note 4, ¶ 7; see also supra Part II.C.
341. See supra Part II.C.1.
343. See text accompanying note 141.
344. Supreme Court, supra note 4, ¶ 23.
increasingly presidential executive.\textsuperscript{345} One could logically conclude that leaving the high court within the House of Lords would explicitly conflict with the requirements of the HRA.\textsuperscript{346} A Supreme Court outside of the House of Lords thus could alleviate this threat to judicial independence.

But the government proposal ineffectively addresses this concern because it may contain a facial violation of independence from the executive requirement.\textsuperscript{347} In paragraph sixty-four of the Supreme Court proposal, the government proposes that the administration of the court should be shifted from the House of Lords to the Department of Constitutional Affairs.\textsuperscript{348} Even if the government rightly believes that the balance of powers allows for a sufficiently independent judiciary, paragraph sixty-four would place the Supreme Court in direct contact with the executive power.\textsuperscript{349}

In addition to violating the specific provisions of the HRA, the Paragraph Sixty-Four actions would violate Robert Stevens's traditional hallmarks of judicial independence.\textsuperscript{350} The funding and administrative support of the high court would allow for direct influence by the executive, who arguably could curtail the activities of the Supreme Court.\textsuperscript{351} This sort of executive involvement closely resembles the administrative action that has repeatedly failed the Article 6(1) independence requirements.\textsuperscript{352} The role of the executive in Parliament and its relation to the judiciary must be carefully balanced if judicial independence and individual rights are to be preserved.

\textsuperscript{345.} See Barendt, \textit{supra} note 86, at 614-15; \textit{see also supra} notes 62-70 and accompanying text.

\textsuperscript{346.} That is to say, the HRA does not specifically require judicial independence from the legislature. But because the legislature and executive are interwoven in the UK system, a judicial role in Parliament is not necessarily independent of the Prime Minister. This conflict may be muted now because of the appointed nature and limited role of the House of Lords, but the conflict would increase greatly as the proposed reforms continue and the House of Lords becomes an elected chamber.

\textsuperscript{347.} The HRA specifically requires independence from the executive. Gordon & Ward, \textit{supra} note 116, at 185-86. Recall the discussion of judicial independence in Part I.D where this Comment noted the importance of judicial independence from the executive. \textit{See supra} Part I.D.

\textsuperscript{348.} Supreme Court, \textit{supra} note 4, § 64.

\textsuperscript{349.} Not only would the administration of the Supreme Court be the responsibility of a Cabinet office, the salary for the judges would be paid from Department of Constitutional Affairs accounts. \textit{Id.} § 66.

\textsuperscript{350.} Stevens, \textit{supra} note 6, at 79; \textit{see text accompanying notes} 151-56.

\textsuperscript{351.} \textit{Cf.} Supreme Court, \textit{supra} note 4, §§ 64-65 (transferring the administrative tasks of the court from the House of Lords to the Department of Constitutional Affairs). Theoretically, if the executive disapproved of a Supreme Court action, it could punitively sanction the Court by removing administrative support. This Comment finds that the issue is not the likelihood that such coercive actions would actually occur; rather, it is the lack of institutional safeguards to prevent these acts.

\textsuperscript{352.} \textit{See supra} notes 146-50 and accompanying text.
2. The Current Proposal Would Unbalance the Powers

The separation of the Law Lords and the creation of the Supreme Court would answer the concerns of apparent judicial independence raised by the HRA. However, the government must also take steps to ensure the continued relevance of the judiciary and its high court. This Comment argues that a more formal separation of powers with no judicial functions in the House of Lords and a Supreme Court with the power to review and annul legislation are the proper heirs of the previous regime centered on a unitary Parliament and a balance of powers.

The primacy of Parliament and the informal distribution of power are the central elements of the balance of powers.\textsuperscript{353} To preserve the balance of powers, the emergence of a strong executive position in the Prime Minister must be balanced by the judiciary as well as the legislature.\textsuperscript{354} However, if the executive and the legislature are not formally separated, and the executive is functionally separate, then “the Executive will have carte blanche power to act as it so desires.”\textsuperscript{355} And separating the judiciary from the executive in Parliament would only lessen the informal interaction among the branches, which frustrates the proper balance of powers.

The proposed Supreme Court provides an example of this unbalanced executive power. The Prime Minister and his inner circle of advisors acted unilaterally with little input from outside advisors in proposing the Supreme Court.\textsuperscript{356} The immediate reaction to the proposed reforms was generally one of confusion.\textsuperscript{357} Although the proposal for the new Supreme Court was published on June 14, 2003, the public still remains unsure of the status of Blair’s constitutional reforms in general and the promised Supreme Court in particular.\textsuperscript{358} The surprise of the sweeping reform announcements was not limited to the public—members of the Cabinet were not previously told of the sweeping changes.\textsuperscript{359} In current practice, the executive may set the agenda for reform checked only by the imprecise political process of Parliament and periodic elections.

Indeed, commentators argue that Blair’s constitutional reform platform suffered from the autocratic power of an unchecked

\textsuperscript{353} See supra Part I.B.2.
\textsuperscript{354} See Barendt, supra note 86, at 614-15.
\textsuperscript{355} Id. at 615.
\textsuperscript{356} In fact, the announcement took many members of Blair’s cabinet by surprise. See Andrew Le Sueur, New Labour’s Next (Surprisingly Quick) Steps in Constitutional Reform, Comment, 2003 Pub. L. 368 (citing Kamal Ahmed, Cabinet Ignored Over Historical Legal Reforms, Observer (London), June 15, 2003.)
\textsuperscript{357} See supra note 215 and accompanying text.
\textsuperscript{358} See, e.g., Lost Opportunity, supra note 242, at 20.
\textsuperscript{359} See Le Sueur, supra note 356, at 368.
executive. The Supreme Court proposal, for instance, appears to directly contradict recent statements of longstanding governing principles. If the government is able to abolish the Lord Chancellor and create a new Supreme Court, then major constitutional reforms are left to the whim of the political majority. Particularly troubling is the inconsistency in the government's position. For example, in the November 2001 White Paper that proposed reforming the House of Lords into a more functional second chamber, the government stated that it is “committed to maintaining judicial membership within the House of Lords.” Now, without a change in party control, the government has reversed its position and aims to remove the Law Lords from the upper chamber of Parliament. Such dramatic shifts in government policy emphasize this Comment's concern that the executive power would only be heightened by removing the Law Lords without increasing their powers to interact with the other governing powers.

It should be emphasized that the proposed reforms remain in an uncertain status. Since the Prime Minister acted unilaterally to create a cabinet position with the authority to establish a Supreme Court, the future of the new court remains largely at the discretion of the executive. After no government action on the issue for six months, the head of the Department of Constitutional Affairs, Lord Falconer, recently reaffirmed the government's interest in judicial

360. See Two Cheers for Modernising Government, But Presidential and Crony Politics is Bad News, The Sunday Herald (Glasgow), June 15, 2003, at 8 [hereinafter Two Cheers for Modernising Government] (“[W]ith General Blair in charge... [t]here is no consultation. Instead we have diktats and orders that must be obeyed.”).

361. See Le Sueur, supra note 356, at 370. As recently as April 2003, the Lord Chancellor told MPs that: ‘It is a central organising principle of our existing system of justice that the Lord Chancellor is head of the judiciary and it works in a whole range of examples quite beyond that of the traditional function of upholding the independence of the judiciary.' It is not clear how or why the Government’s ‘strong belief' in a 'central organising principle' came to be replaced with a commitment to abolish the office of Lord Chancellor and establish a new Supreme Court.

Id.

362. See Russell, supra note 43, at 339-41 (observing the political and fragile nature of constitutional reform); Vick, supra note 60, at 330-31 (noting that HRA could be removed by Parliament).

363. Le Sueur, supra note 356, at 370-71. There has been a dramatic change in the government's reasoning. Compare id. (“The Government agrees with the Royal Commission that there is no need arising from the present reform for the judicial functions of the House of Lords to be removed.”), with Supreme Court, supra note 4, ¶ 18 (“The Government will legislate to abolish the jurisdiction of the House of Lords within the UK's judicial system.”).

364. Supreme Court, supra note 4, ¶ 7.

365. See Russell, supra note 43, at 339-41; Lost Opportunity, supra note 242, at 20; supra notes 242-43 and accompanying text.

366. For example, while the proposal was issued in June 2003, commentators worried that the government would not follow through with the reforms when its silence stretched into November. Lost Opportunity, supra note 242, at 20.
reform.\textsuperscript{367} Without a formal system for sharing powers, the UK Government remains prone to political pressure.\textsuperscript{368}

Moreover, without a formal check on executive power, the government may institute reforms subject only to the withering, but imprecise, process of parliamentary debate and political pressures.\textsuperscript{369} The reaction of the press to the proposed reforms demonstrated the uncertain nature of the political will to reform. For example, a \textit{Sunday Herald} editorial charged that “Blair is now overly concerned with his legacy and therefore willing to play dictator to get where he thinks he should be.”\textsuperscript{370} The \textit{Independent} criticized the poor implementation of the reform of the House of Lords, which left “the UK with the only legislature boasting a wholly-appointed chamber in the world.”\textsuperscript{371} The government has abolished hereditary peers, but replaced them with appointed, not elected, members.\textsuperscript{372} The \textit{Independent} worried that similar political machinations would lead to the downfall of the proposed Supreme Court.\textsuperscript{373} Under such a regime, the UK is left with a political process that operates without transparency and without the bright-line rules of a system with a more formal separation of powers.\textsuperscript{374} Formalizing the separation of powers and meaningfully implementing it would remedy this structural weakness.

Because of the structural weaknesses of a unitary Parliament, the cosmetic changes offered in the Supreme Court proposal—i.e., removing the judicial functions of Parliament without augmenting the powers of the new court—would fail to strengthen the judiciary and could result in an unbalanced government dominated by the Prime Minister.\textsuperscript{375} Such a result contradicts the spirit of the proposed reforms, which aim to create an effective, bicameral legislature and an

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{367} Compare id. (observing the government’s silence and speculating on its political fate), with Falconer, supra note 6.
\item \textsuperscript{368} See generally Russell, supra note 43, at 339-41 (observing the precarious nature of constitutional reform).
\item \textsuperscript{369} See Lost Opportunity, supra note 242, at 20 (describing Blair’s pattern as “[h]igh, ambitious, rhetoric about change [that] will be followed by a much more cautious approach in legislation which in turn will be further watered down through a process of parliamentary attrition”).
\item \textsuperscript{370} See Two Cheers for Modernising Government, supra note 360, at 8.
\item \textsuperscript{371} See Lost Opportunity, supra note 242, at 20.
\item \textsuperscript{372} See Russell, supra note 43, at 260-94 (discussing the transformation of the House of Lords); supra notes 49-54 and accompanying text (discussing same). See generally HOL’s Next Step, supra note 17 (discussing government’s proposal for further reforms).
\item \textsuperscript{373} See Lost Opportunity, supra note 242, at 20 ("We must hope that the new Supreme Court is not as botched as some of the Government’s constitutional tinkerings.").
\item \textsuperscript{374} See supra Part I.B.3.
\item \textsuperscript{375} Indeed, the continued relevance of the high court in protecting individual rights would be tenuous as the legislation that recognizes individual rights would exist and be enforced only at the leisure of Parliament.
\end{enumerate}
\end{footnotesize}
independent Supreme Court. The judiciary should have a greater role in shaping the reforms of the governmental structure.\(^{376}\) This enhanced role requires greater power for the judiciary—powers not currently given to the proposed Supreme Court.\(^{377}\) This emphasis on structural checks on governmental powers is in keeping with the "modern footing" of separation of powers.

**B. Recognizing the Separation of Powers**

The proposed Supreme Court reflects a step towards the separation of powers but currently relies too much on the balance of powers to protect individual rights. A mixture of the two concepts of distributing power can result in unbalanced power.\(^{378}\) If formally separated, as in the United States, the governing powers can be checked within the system.\(^{379}\) Similarly, under a balance of powers regime, the powers can in practice be shared evenly.\(^{380}\)

By adopting separation of powers, the Labour government has begun a paradigm shift away from the balance of powers doctrine and parliamentary sovereignty. By passing the HRA to recognize individual rights, by reforming Parliament into a functional bicameral legislature, and by creating a Supreme Court independent from both legislative and executive powers, the government has laid the framework for a proper enforcement of individual rights and a modern relationship between the governing powers.\(^{381}\) The Supreme Court proposal represents a move towards separation of powers in practice if not in theory.\(^{382}\) This Comment suggests that to effectively protect individual rights the government should embrace the doctrinal shift and then ensure the relevance of the new Supreme Court by granting the power to overturn legislation incompatible with the HRA.\(^{383}\)

---

\(^{376}\) See Stevens, *supra* note 6, at 148 ("With so much constitutional change and so little sense of what New Labour's goals for the Constitution are, with the power of the House of Commons in decline, ... some greater role for the judiciary is probably inevitable.").

\(^{377}\) Supreme Court, *supra* note 4, Executive Summary ("There is no proposal to create a Supreme Court on the US model with the power to overturn legislation."). *But see infra* Part III.C for a discussion of why the explicit separation of powers needs a Supreme Court with judicial review.

\(^{378}\) Cf. Stevens, *supra* note 6, at 86 ("In a system of responsible government, the different branches of Government[pt] interact constantly."). It logically follows that if they fail to interact, then one branch could abuse its powers.

\(^{379}\) See Picker, *supra* note 22, at 20.

\(^{380}\) See *supra* notes 77-81 and accompanying text.

\(^{381}\) See *A New Way of Appointing Judges, supra* note 17; HOL's Next Step, *supra* note 17; Reforming the Office of the Lord Chancellor, *supra* note 17; Supreme Court, *supra* note 4; *see also supra* note 17 and accompanying text.

\(^{382}\) Supreme Court, *supra* note 4, ¶¶ 1, 7.

\(^{383}\) *See infra* Part III.C.
Despite contrary statements reaffirming the balance of powers and parliamentary sovereignty, government action suggests that they are adopting a more rigorous separation of powers. As part of the recent moves to reform the House of Lords and create a legislature based on proportional representation, the Supreme Court represents an explicit step towards separation of powers. The government reforms envision a functional, bicameral Parliament with no judicial responsibilities and a powerful executive in the office of the Prime Minister. Formally recognizing the separation of powers would ensure the relevance of the Supreme Court because the Court could check the actions of Parliament and the Prime Minister.

Thus, the UK should adopt an explicit separation of powers doctrine. The Supreme Court proposal recognizes the benefits of a judiciary structurally separate from the legislature. Moreover, the language of the proposal indicates a desire to move away from the balance of powers. The government should formally recognize the separation of powers to secure the recent recognition of positive individual rights and to check the growth of Prime Ministerial power.

Although the balance of powers may work in practice, the renewed emphasis on recognizing individual rights calls for securing those individual protections. The HRA marked a turning point in British domestic law as it officially recognized positive individual rights. And by preserving the balance of powers and parliamentary legislative supremacy, the Supreme Court proposal fails to explicitly satisfy the requirements of the HRA and undermines the Act's influence. The continued existence of the HRA and the positive individual rights that it protects now resides solely in the hands of Parliament. The doctrine of parliamentary sovereignty, by severely limiting the judicial review of legislation, prevents the effective separation of powers. The recognition and protection of individual

384. See Supreme Court, supra note 4, ¶ 7; Falconer, supra note 6 ("I believe that judicial independence is so important, so vital to this country, that it now needs to be enshrined in law. That is what I announced last week [in the Queen's Speech]. That is what will be in the legislation which we will bring forward.").
385. See Picker, supra note 22, at 9-12 (describing the "[t]ransformation of the House of Lords").
386. See id. at 12 & nn.40-41.
387. See supra Part II.C.1.
388. See Supreme Court, supra note 4, ¶ 1; Falconer, supra note 6; see also supra note 6 and accompanying text.
389. See supra Part I.C.
390. See Vick, supra note 60, at 372.
391. See id. at 351.
392. See Supreme Court, supra note 4, at Executive Summary, ¶ 23; see also supra Parts I.B.1-2 (noting the relationship between parliamentary sovereignty and the balance of powers).
394. See Stevens, supra note 6, at 79 (finding that parliamentary sovereignty
rights should not be left to the slim (and judicially unenforceable) guarantee of action provided by parliamentary enforcement of HRA declarations of incompatibility; these rights also exist for individuals in the political minority who might not receive effective support in Parliament. By replacing a balance of powers with a more rigorous separation of powers, the government could secure the future of individual rights through the judicial opposition to majority pressure.395

The government seeks to distinguish the Supreme Court proposal from the American model.396 But the growth of the Prime Minister’s power during the last thirty years and the proposed functional bicameral legislature indicate that the British Government is already adopting a similar structure save for the expansive power of the judiciary.397 The system of checks and balances crafted by the U.S. Constitution did not prevent the mixing of governmental powers.398 Instead, the American separation of powers calls for the structural isolation of these powers into branches with a practical mixture of responsibilities to check the other branches including the ability to overturn legislation.399 Regarding the Supreme Court proposal, the mixing of governmental power is not in question; rather, the danger here is the isolation of the Supreme Court without an effective check on the actions of Parliament and the executive. The government should adopt a more formal separation of powers to secure judicial independence.400

To properly put the governing powers “on a modern footing,”401 Part III.C argues that the Supreme Court needs the power to overturn legislation to provide a proper check on legislative and executive actions.

C. An Independent Supreme Court Needs the Power of Judicial Review

The separation of Parliament from its judicial role is needed, but without augmenting the review powers of the new court, the court would effectively be isolated and would not have the constant

---

395. Barendt, supra note 86, at 599 (arguing that the effective separation of powers preserves individual liberty).
396. Supreme Court, supra note 4, ¶ 23. Paragraph twenty-three distinguishes the English proposal from the American Supreme Court by stating that the English Court would not have the “power to strike down and annul congressional legislation.” Id. “In our democracy, Parliament is supreme.” Id.
397. See Russell, supra note 43, at 260-94; supra notes 44-54 and accompanying text.
398. See Chongwe, Judicial Review of Executive Action, supra note 82, at 105.
399. Vick, supra note 60, at 351-52.
400. See, e.g., Stevens, supra note 6, at 141 (describing the potential “Americanisation of the separation of powers”).
401. Supreme Court, supra note 4, ¶ 1.
interaction required under the doctrine of balance of powers. This section argues that the Supreme Court proposal requires a clear statement of the power of judicial review. If the British courts already have the power to review legislation and compel compliance, then including the concept of judicial review is a simple, yet important, formality. To create an effective high court, the UK must expand the review powers of the Supreme Court. While the language of the current proposal does not expand judicial powers, the power to review and overturn legislation incompatible with the HRA is necessary to maintain a proper judicial role for a Supreme Court separate from Parliament and charged with protecting individual rights.

1. Judicial Review of Legislation

For the new reforms to have proper effect, the UK Supreme Court should have a meaningful power of judicial review. The ability to strike down unconstitutional legislation would vest the judiciary with sufficient power to balance the Prime Minister and Parliament. As illustrated in Part III.A, in a system lacking formal powers to review legislation, the Supreme Court would have no power to compel parliamentary or executive action. If the majority of the people and, through popular election, Parliament, agree with the Prime Minister, then there is no check on executive actions. A Supreme Court, with judicial review, offers a strong mechanism to counter swings of the political majority and reinforce the rule of law.

Vesting the Supreme Court with the power of judicial review would protect individual rights as recognized by the HRA. For example, if an Act of Parliament violates the HRA, the judiciary can only issue an advisory opinion and leaves the responsibility for overturning the offending legislation with Parliament. If Parliament disagrees with the judicial ruling, it may ignore the holding. The HRA would then

402. Stevens, supra note 6, at 86; see infra Part III.C.1.
403. See infra note 428 and accompanying text. This modified form of judicial review stems from the European courts’ recognition of human rights claims. This doctrine of judicial review grew substantially following the passage of the HRA because UK courts were allowed to issue declarations of incompatibility. Vick, supra note 60, at 330-31.
404. Supreme Court, supra note 4, at Executive Summary, ¶ 23.
405. See infra Part III.C.2. The power to review and strike down legislation would give the courts power inconsistent with the fundamental basis of the British constitutional system, parliamentary sovereignty.
406. See supra Part III.A.2.
407. See supra Part I.C.
409. See Human Rights Act, 1998, c. 42, § 3 (Eng.) (stating that incompatible acts
only protect individual rights when it is convenient for Parliament to enforce them.\footnote{Cf. Vick, supra note 60, at 330-31.} Parliament, in practice, may rigorously enforce the judicial decrees as when the balance of powers functions properly; however, Parliament is not compelled to do so.\footnote{See supra Part I.B.2.} By giving the Supreme Court the power to overturn legislation that violates the individual rights protected in the HRA, the government would provide a more efficient check on Parliament’s powers.\footnote{See Barber, supra note 86, at 59 (arguing that the separation of powers improves governmental efficiency).}

Without recognizing the power of judicial review, the government could push the judiciary and the Supreme Court into even greater irrelevance.\footnote{In the UK, Parliament is supreme. Supreme Court, supra note 4, ¶ 23. And since the proposal aims to maintain that supremacy and remove the judiciary from Parliament, it follows that the UK judiciary would be inferior to, and dominated by, the desires of Parliament.} The balance of powers works only if the judicial, legislative, and executive powers of government share power and interact informally throughout Parliament.\footnote{See supra Parts I.B.2, II.B.2.} If the government removes the judicial functions of the House of Lords without increasing the powers of the Supreme Court, then the judiciary cannot effectively balance the other two powers.\footnote{As Justice Brandeis wrote in dissent, “The doctrine of the separation of powers ... [aims] not to promote efficiency but to preclude the exercise of arbitrary power.” Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). A formal separation of powers encourages friction among governmental powers “to save the people from autocracy.” Id.} Such a Supreme Court would appear structurally independent of the House of Lords, and thus satisfy the appearance requirements of the HRA.\footnote{See supra Part II.C.1.} But a cosmetically independent Supreme Court operating without judicial review would not “put the relationship between the executive, the legislature and the judiciary on a modern footing”;\footnote{Supreme Court, supra note 4, ¶ 1.} instead, it would simply remove the judiciary from any meaningful power in governing.\footnote{Cf. supra Part I.B.2 (emphasizing the importance of interaction between the branches of government).}

The American Supreme Court provides an example of the power of judicial review to protect individual rights of the political minority. The Court was founded on the principles of separation of powers.\footnote{The U.S. Constitution separates the government into three branches. Article I are still valid until Parliament acts to remove them), available at http://www.legislation.hmso.gov.uk/acts/acts1998/80042-d.htm.}
However, the initial court was not explicitly granted the power to overturn legislation. In *Marbury v. Madison*, Justice Marshall announced the doctrine of judicial review, which gave judges the power to enforce fundamental rights. By securing the power to review legislation, Justice Marshall greatly expanded the power of the American Supreme Court. Without the fundamental power to review and annul legislation, the American Supreme Court would lack the force to properly check the President and Congress.

Many countries have followed the American model. In his book examining human rights in the UK, Rabinder Singh discussed the impact of judicial review on enforcing positive human rights. He found that many commonwealth countries including Canada, India, and New Zealand allow their judges to enforce positive rights. Most of the members of the European Union have adopted a Bill of Rights or incorporated the ECHR and the new democracies in Eastern Europe and South Africa have followed a similar model. Singh found that no country in modern times had based their Constitution on the UK's model of an unlimited legislature.

Despite protestations to the contrary, the UK has taken steps toward allowing judges to review and enforce claims of individual rights. As previously discussed, the HRA incorporated the ECHR and recognized positive human rights in British domestic law. British courts, including the Appellate Committee, have some power to review legislation and claims of individual rights. Before the

vests the legislative power in Congress. U.S. Const. art. I. Article II creates the executive. *Id.* at art. II. And Article III creates the Supreme Court and authorizes the creation of other federal courts. *Id.* at art. III.

420. 5 U.S. (1 Cranch) 137 (1803).

421. *See* Rabinder Singh, The Future of Human Rights in the United Kingdom: Essays on Law and Practice 45 (1997). In discussing the impact of *Marbury*, this Comment focuses on the English interpretation of the case. This represents an effort to overcome the American-system familiarity and bias that the author undoubtedly possesses. For a comprehensive review of the impact of *Marbury* on judicial review in America, see Marbury Versus Madison: Documents and Commentary (Mark A. Graber & Michael Perhac eds., 2002).

422. *See* Singh, *supra* note 421, at 44-45. The potential power was so great that President Jefferson observed: "The constitution, [under a judiciary with the power to overturn Acts of Congress], is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." *Id.* at 45 (citation omitted).


424. *See* id. at 46.

425. *See* id.


427. *See supra Part I.F.

CREATING A UK SUPREME COURT

HRA, the UK had accepted the right of an individual to appeal to the European Commission on Human Rights.\textsuperscript{429} Therefore, expanding and formalizing judicial review on issues of individual rights arising out of the HRA would represent an important, but not a drastic, change.

In a determined effort to retain the supremacy of Parliament, the proposed Supreme Court would lack the ability to overturn unconstitutional legislation.\textsuperscript{430} Presumably, it would retain the power of incompatibility declarations that the Appellate Committee currently exercises under authorization from the HRA. But by retaining the traditional definition of parliamentary sovereignty, the Supreme Court would have only an advisory role that was always subject to change by parliamentary action.\textsuperscript{431}

2. Redefining Parliamentary Sovereignty

By preserving parliamentary sovereignty, the government proposal distorts the separation of the Law Lords from Parliament. By retaining the concept of parliamentary sovereignty and restricting the powers of the new court, the government would leave intact the balance of powers.\textsuperscript{432}

The traditional conception of parliamentary supremacy is no longer consistent with the recent emphasis on recognizing individual rights through the HRA.\textsuperscript{433} But instead of casting aside one of the most accepted and foundational concepts of UK constitutional theory, the doctrinal conflict can be resolved by redefining the parliamentary sovereignty. The HRA and the Supreme Court proposal, along with the larger constitutional reforms, effectively redefine the concept of parliamentary sovereignty. This redefinition allows for the judicial enforcement of individual rights through overturning Acts of Parliament that are incompatible with the HRA.

Historically, and as used by the government in its Supreme Court proposal, parliamentary sovereignty means that no one but Parliament can directly amend or overturn an Act of Parliament.\textsuperscript{434} As Robert Stevens noted, parliamentary sovereignty "meant a diminishing—and therefore less controversial—role for the judges."\textsuperscript{435} The new proposal aims to retain parliamentary sovereignty by reforming only the appearance of independence.\textsuperscript{436} According to the

\begin{itemize}
\item \textsuperscript{429} See Singh, supra note 421, at 46.
\item \textsuperscript{430} See Supreme Court, supra note 4, at Executive Summary, \#\# 20, 23; see also supra note 428.
\item \textsuperscript{431} See supra notes 110-14 and accompanying text.
\item \textsuperscript{432} See Supreme Court, supra note 4, \# 23; supra Part I.B.2.
\item \textsuperscript{433} See Part I.F.
\item \textsuperscript{434} See supra note 65; supra notes 60-70 and accompanying text.
\item \textsuperscript{435} See Stevens, supra note 6, at 79.
\item \textsuperscript{436} See Falconer, supra note 6 (describing the reasons for proposing a new court
proposal, the Supreme Court would not have the “power to strike down and annul congressional legislation” to preserve parliamentary sovereignty.\footnote{437}

Retaining the government’s definition leaves the protection of individual rights dependent on Parliament’s willingness to comply with judicial declarations of incompatibility.\footnote{438} Vick concluded that the positive rights recognized by the HRA represented a shift in the government’s approach to protecting rights.\footnote{439} Indeed, he observed that the HRA contemplates a judicial role far beyond the traditional notions of parliamentary sovereignty.\footnote{440} The constitutional reforms will reshape the distribution of governing power in the UK.\footnote{441} Already, these changes have led to an increased role for the courts; to return to the government’s outdated conception of the parliamentary sovereignty would cast doubt on any judicial role in protecting individual rights.

Parliamentary sovereignty has been effectively redefined and this new definition can coexist with the judicial ability to overturn legislation. As Vick observed, the modernization of parliamentary sovereignty began in earnest with the development of the European Community.\footnote{442} This redefinition retained parliamentary sovereignty as the bedrock of the constitutional system, but Parliament no longer retains legislative supremacy in areas preempted by EC law.\footnote{443} Vick predicted that the HRA would act to extend this devolution of legislative supremacy.\footnote{444} The logical next step is to allow the Supreme Court to overturn legislation incompatible with rights guaranteed by the HRA as an exception to parliamentary sovereignty.

CONCLUSION

The UK has embarked on an unusual program of reform that could completely remake the relationship between its governing powers.

\footnote{437}{Supreme Court, \textit{supra} note 4, ¶ 23.}
\footnote{438}{See Vick, \textit{supra} note 60, at 372 & n.334.}
\footnote{439}{See \textit{id.} at 372 (“While the Act preserves the theoretical model of parliamentary sovereignty articulated by Dicey, it clearly contemplates an expanded judicial role in the protection of basic human rights . . . .”).}
\footnote{440}{See \textit{id.}}
\footnote{441}{See \textit{id.} at 350 (describing the recent reforms as one of the greatest constitutional upheavals in UK history).}
\footnote{442}{\textit{Id.} at 370.}
\footnote{443}{See \textit{id.} (“[I]t has become clear that in practice (if not in theory) Parliament no longer enjoys legislative supremacy in areas governed by EC law.”).}
\footnote{444}{See \textit{id}.}
The government continues to press the reforms and has recently posted responses to its initial proposal. However, the question of judicial review for the new court was specifically dismissed in the original proposal and the government did not ask for public comments on that issue.

Through the creation of an independent Supreme Court and a functional bicameral legislature, the government has practiced a more formal separation of powers than is traditionally associated with a unitary Parliament structure. If it adopts a formal separation of powers doctrine and provides the judiciary with the ability to review and overturn legislation, the government could secure the distribution of power and ensure the protection of individual rights. Providing the new Supreme Court with judicial review would ensure that the court does not lose the power to balance the executive and Parliament.

The historical definition of parliamentary sovereignty is outdated in a UK with a balanced Parliament, a powerful Prime Minister, and an independent Supreme Court. The power of historical precedent should not be overturned lightly. As Jeffrey Goldsworthy rightly concluded: “[J]udges cannot justify [repudiating parliamentary sovereignty] on the ground that it would revive a venerable tradition of English law, a golden age of constitutionalism, in which the judiciary enforced limits to the authority of Parliament imposed by common law or natural law. There never was such an age.” History has not provided such an age, but maybe now is the time to change.

445. Department for Constitutional Affairs, Summary of Responses to the Consultation Paper: Constitutional Reform: A Supreme Court for the United Kingdom, at http://www.dca.gov.uk/consult/supremecourt/scresp.htm (Jan. 2004). The government concluded the summary of responses by restating: The Supreme Court is part of the Government's programme to modernise the constitution and these responses have informed the development of this important and wide ranging reform. In due course the Government will announce its finalised proposals, and intends to introduce to Parliament a Bill to enable the proposed changes to be made.

446. Goldsworthy, supra note 39, at 235.
Notes & Observations