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Strategic Judging: Lessons from the Reid Era of Judicial Decision-Making

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I. Introduction

A liberal constitution is in part reliant upon an institutional separation of powers, but the exact demarcation of the boundary lines and dynamics of the relationships that result are heavily contested.[1] Using Lord Reid's tenure as a judge in the House of Lords as a case study, this chapter explores one aspect of those dynamics by charting the various moves in decision-making that judges are able to deploy in order to pursue wider strategic inter-institutional goals.

Our main explanatory aims are concentrated on using an institutional approach to add a piece to the puzzle of explaining the nature of the purported *shift* in judicial decision-making practice that began during the Reid era (and which we shall henceforth call 'the Reid shift'). The results of this shift, it is often claimed, has been to expand the reach of the judiciary when reviewing exercises of public power. To comprehend how this shift occurred, we deploy the concept of indeterminacy in the law to explain the room for manoeuvre built into the common law method and the consequent potential for judges to shift the parameters of the law either towards, or away, from enhanced scrutiny of executive action. This indeterminacy grants the judiciary a degree of power to realign institutional relationships between the judiciary and the political branches of the state by developing suitably revised interpretations of the law. The judiciary's power to realign, however, is heavily constrained by factors both internal and external to the law. The strength of such constraints leads us to sketch an institutional theory of judicial decision-making, which formulates a number of moves that a rational judiciary can take to intensify judicial challenges to the political branches. Applying this approach to the Reid era, we hypothesise that these moves explain why the House of Lords chose the specific doctrinal forms that it did to engineer a shift in judicial decision-making patterns in the 1960s.

[1] Multiple examples of such contestation could be cited; see eg TA Fairclough, '*Evans v Attorney General*: The Underlying Normativity of Constitutional Disagreement' in S Juss and M Sunkin (eds), *Landmark Cases in Public Law* (Oxford, Hart, 2017); M Loughlin, *The Case of Prorogation* (London, Policy Exchange, 2019).

To make this argument, the chapter begins by briefly laying out the context of the Reid era, one in which it is widely accepted that the judiciary were motivated to increase forms and doctrines of review of administrative action. We then apply a relatively novel methodological approach in UK legal scholarship, namely, systematic content analysis,[2] to evidence that the changed pattern in judicial decision-making in the House of Lords cannot easily be attributed to a straightforward shift in doctrinal form – even if this was the eventual outcome. Hence, in the final section we suggest that institutional theory provides a stronger grounding for explaining how the Reid shift occurred.

The analysis in this chapter only supplies the beginnings of the evidence needed to provide a full explanation of the Reid shift. More broadly, however, we claim that this approach offers a more useful tool through which to understand the work that the senior judiciary are involved in than tired debates about judicial activism. Further, we claim that this approach provides clues as to how the judiciary could engineer any future shifts in its relationship with the legislature and the executive, and if extended, focuses our attention on considering the appropriate dialogical responses of the political branch and lower court judges to such shifts.

II. The Reid Era as an Instance of Behavioural Change

A. The Legal Context

The story of the evolving nature of judicial power in the post war-period provides a classic case study in how judges can adjust their decision-making patterns. As we intimated above, most studies of the Reid era concur that a shift in judicial decision-making behaviour occurred, and that this equipped the judiciary with a more extended set of conceptual tools with which to scrutinise the legality of exercises of executive power.[3] This process went well beyond individual cases and eventually led to modern judicial review.

[2] R Kirkham and E O'Loughlin, 'A Content Analysis of Judicial Decision-Making' in N Creutzfeldt, M Mason and K McConnachie (eds), *Routledge Handbook on Socio-Legal Theory and Method* (Abingdon, Routledge, 2019).

[3] eg L Blom-Cooper and G Drewry, 'Towards a System of Administrative Law: The Reid and Wilberforce Era, 1945–82' in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords: 1876–2009* (Oxford, Oxford University Press, 2009).

The Reid shift challenged the late-nineteenth-century and early-twentieth-century settlement between the judiciary and the political branches. This former settlement had facilitated a specific way of using public power, emanating from a more or less centralised and unchallenged government/parliament nexus. As a consequence of its faith in the abilities of the civil service to deliver public goods efficiently,[4] the judiciary, with a few expressions of concern aside,[5] largely relegated itself to a passive role vis-à-vis the political branches. For defenders of the Reid shift, this so-called period of the 'long sleep' marked a disjunction with the foundations of British public law as laid down in the seventeenth-century battle between Crown and Parliament,[6] and then, later, in its oversight of municipal government.[7] Set against this context, the post-war growth in administrative law was seen, from a normative point of view, as a necessary 'checks and balances' corrective to the centralisation of public power the judiciary had acquiesced in, as well as a reflective response to novel societal demands.[8]

This ex-post narrative, however, makes the Reid shift appear more inevitable than perhaps it was in reality. Not all of the indicators of the day pointed towards the 1960s as a pivotal moment in judicial attitudes. For instance, despite appearances, it is not entirely clear and beyond doubt that the legal process was working systematically against claimants at the time, or that a shift was necessary.[9] Nor was there unanimous approval for increased judicial intervention, particularly from the left who offered the critique that the judiciary pursued a conservative agenda and were selectively destructive of progressive legislation.[10] Above all, Whitehall administration was still in a very strong position to control the agenda of reform in

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[4] See S Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (Michigan, University of Michigan Press, 1997) 31–42; S Sedley, 'The Sound of Silence: Constitutional Law Without a Constitution' (1994) 110 *LQR* 271.

[5] eg Lord Hewart, *The New Despotism* (London, Ernest Benn, 1929).

[6] For an account of the long history of English administrative law, see P Craig, 'English Administrative Law History: Perception and Reality' in S Jhaveri and M Ramsden (eds), *Judicial Review of Administrative Action: Origins and Adaptations Across the Common Law World* (Cambridge, CUP, 2020).

[7] eg S Sedley, 'The Long Sleep' in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford, OUP, 2009).

[8] Blom-Cooper and Drewry), *The Judicial House of Lords* (2009) 230–31.

[9] Sterret's study of the period showed that claimants succeeded in applications granted at rates higher than 50%, a success rate that declined to around 40% only from the mid-1960s onwards: Sterrett, *Creating Constitutionalism?* (1997) 50.

[10] H Laski, *Parliamentary Government in England* (New York, Viking, 1938) 454; I Jennings, 'Courts and Administrative Law: The Experience of English Housing Legislation' (1936) 49 *Harvard Law Review* 426–56.

administrative justice[11] and either 'veto'[12] or water down those reforms that did make it through to Parliament.[13]

B. Changing Judicial Culture

Notwithstanding the obstacles to a judiciary seeking to increase its leverage, the period represented an exceptionally favourable moment for a shift to occur. First, there was a growing political and cultural acceptance, one which spread far beyond the judiciary, of the necessity for reimagining the relationships between the state and citizenry and for revising schemes for providing redress for wrongs committed by administration.[14] Indeed, the Reid shift appeared to tap into a wider political and cultural moment, in which deference towards administrative authority declined and attention became more focused on what was understood to be the issue of perceived unaccountability of public administration[15] and the insufficiency of existing options for the redress.[16] This was a trend that the public law community of the day[17] and the Bar[18] picked up on, as fed by ideas transposed from abroad.[19] In this period there were calls for a radical overhaul of the process for considering administrative law disputes and the establishment of a Royal Commission to examine the matter.[20] Above all, not only did the Government-commissioned Franks Report[21] result in the Tribunals and Inquiries Act 1958, but the Parliamentary statements that supported that legislation provided a powerful symbolic message in favour of administrative justice. Set against this background, it can be claimed that

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[11] Sterett (n 4) 79.

[12] K Shepsle and B Weingast, 'The Institutional Foundations of Committee Power' (1987) 81 *American Political Science Review* 85–105.

[13] TT Arvind and L Stirton, 'The curious origins of judicial review' (2017) 133 *LQR* 91.

[14] ibid 93–102; see also ch 3 section VII in this volume (Thomas).

[15] Sedley, 'The Long Sleep' (2009) 78–80.

[16] See IF Nicholson, *The Mystery of Crichel Down* (Oxford, Clarendon Press, 1986).

[17] eg J Whyatt, *The Citizen and the Administration: The Redress of Grievances* (London, Justice, 1961). For a broader discussion, see Sterret (n 4) 69–89.

[18] A Paterson, *The Law Lords* (London, MacMillan, 1982) ch 3.

[19] Such as the US Administrative Procedure Act 1946, see R Heuston, 'Book Review of Bernard Schwartz, *American Administrative Law*' (1952) 68 *LQR* 250; Paterson *The Law Lords* (1982) chs 2 and 3; JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford, OUP, 1996).

[20] Law Commission, Exploratory Working Paper on Administrative Law, Law Com PWP No 13, 1967.

[21] Franks Committee, Administrative Tribunals and Enquiries, Cm 218 (1957).

the Reid shift followed, rather than led or worked against, public opinion and legislative policy.[22]

Alan Paterson's study of the Law Lords from 1957 to 1973 offers further possible clues as to why the shift occurred when it did. Judges are driven by the need to provide reasoned arguments to justify their decisions, and these must appear convincing to those to whom they are addressed. Importantly, a significant part of the audience of judges is composed by lawyers who form a distinctive kind of epistemic community charged with providing arguments concerned with applying the law in the future. Consequently, the reasons adduced by judges will derive at least in part from the kinds of considerations and standards that are deemed acceptable within the wider scholarly community in which the judges operate:

> Such understandings are in no small way the product of a common socialisation pattern, a traditional training with a received body of knowledge and learning. Indeed it has been argued that such traditional practices and ideas, nurtured by a legal caste, are the very essence of the common law.[23]

Here it is significant that in the 1950s and 1960s the communal nature of judging was being fed by a new and much expanded diet of academic writing on administrative law,[24] actively championing the evolution of the law and encouraging judges to enhance their scrutiny of public authority. Moreover, at this moment the workload in the House of Lords gradually increased from a prior period of inactivity.[25] Perhaps most important of all, during the short period between 1959 and 1962 seven of the 12 Law Lords were replaced,[26] joining three other judges who had already shown a propensity to adopt a subtly different perspective on the judicial role than their colleagues.[27] This new body of judges was led by Lord Reid, a man willing to make use of the opportunity.

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[22] Ch 3 in this volume (Thomas). See also W Wade, *Constitutional Fundamentals* (London, Stevens, 1980) 78.

[23] Paterson (n 18) 122.

[24] See SA de Smith, *Judicial Review of Administrative Action* (London, Stevens, 1959).

[25] R Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800–1976* (London, Weidenfield and Nicholson, 1978) 415.

[26] Lords Morton, Somervell, Cohen, Keith, Tucker and Simonds retired, and Denning became Master of the Rolls. They were replaced by Lords Jenkins, Morris, Hodson, Guest, Devlin, Evershed and Pearce.

[27] Lords Reid, Radcliffe, Denning and MacDermott. Paterson (n 18) 173 makes this claim on the basis of interviews that he conducted and published lectures, of the 19 Law Lords that served between 1967 and 1973.

III. Evidencing the Shift in Behavioural Decision-Making during the Reid Era

A. The Underdeterminacy of Law as an Opportunity for Strategic Action

The question we pursue here is how to get from the general contextual parameters just mentioned to a more fine-grained explanation of the forms of intensification of judicial review of administrative action that were operative during the Reid era. One possible answer is to explain the shift by reference to the common law method of resolving disputes.

Our starting point is that shifts in the law, and different decision-making strategies, are possible because there is a certain degree of inherent indeterminacy contained in the legal enterprise. This indeterminacy is allowed for within the common law method, which favours the incremental development of law and provides an arena within which different judicial approaches might productively manifest themselves. Judicial decision-making, therefore, especially at the level of appellate courts, is seldom fully constrained by the 'law', by which we specifically mean legal materials and the accepted rules of legal interpretation. 'Not fully constrained' here means that the law does not require *a unique acceptable solution* to a given dispute. 'Legal materials' should be understood as a term of art that comprises all the canonical texts that enter as inputs into judicial reasoning (statutes, subordinate legislation, case law and so on) and provide the grounds on which judges base their formulation of the legal norms that should govern the dispute. By 'rules of interpretation' we refer to established legitimate forms of argument about how to attribute meaning to legal materials or make proper inferences from them. These are accepted and diffused by a given scholarly community at a given point in time.

Now, we do not claim, as some radical critical legal scholars have done in the past, that the law is indeterminate in the sense that *any* solution might be inferred from legal materials.[28] All that we contend is that the law, in cases that are argued at the appellate level, frequently *underdetermines* purported outcomes, to wit, that at least two outcomes and perhaps more than two can be rationally justified by reference to applicable legal materials and the established rules of interpretation. We thus fully accept that legal materials and established rules of

[28] JW Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1. Nor do we claim, as some political scientists do, that judges only care about policy in the strict sense of promotion of political preferences: on such a view, see J Segal and H Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York, CUP, 2002) 111.

interpretation can constrain outcomes. Indeed, this is an important reason why the underdeterminacy thesis holds, if at all, mainly at the appellate level where it is often, and perhaps almost always, the case that at least two incompatible and rationally compelling ways of arguing in favour of a given outcome can be formulated.[29] At the senior appellate level there are also fewer binding precedents, particularly in administrative law.

Moreover, the underdeterminacy thesis is general; it applies irrespective of whether given legal actors make claims about how 'formalist' approaches could supposedly resolve the issue at hand without any need to interpret the law, ie by recourse to the 'plain meaning' of the applicable text, at least if by 'law' we understand, as above, applicable legal materials and established rules of interpretation. In fact, whenever the law in the sense defined above underdetermines outcomes, 'formalism' can be understood as just one possible way to resolve an interpretive dispute among others,[30] perhaps by placing emphasis on literal rather than, say, purposive interpretation. Besides, even 'formalism' as an interpretive approach comes in degrees. Thus, insofar as judges at the appellate level typically have a choice between more and less 'formalist' and non-formalist types of solutions to disputes, any explanation of their behaviour which rests on 'formalism' understood as the supposed absence of interpretive choice is, from our point of view, question-begging. In particular, when it comes to explaining the evolution of the interpretive methods used by the House of Lords in the area of public law in the 1960s, which is the object of our study, it will not do to try to explain the previous reluctance to intensify the scrutiny of administrative decisions solely by the prevalence of 'formalism': this prevalence itself has to be somehow explained, since other interpretive approaches are almost always typically available to judges.

This brings us to our third point. If the law (in the rather strict and technical sense specified above) underdetermines outcomes in most appellate cases, then these must be determined by 'non-legal' factors. Likewise, the justification of the outcomes that were ultimately reached must also rely, at least to the extent that these are unconstrained, on non-legal reasons.[31] As a result, the explanation of judicial behaviour at the appellate level calls for a systematic study of the causal mechanisms that determine decision-making where these mechanisms do not just include the causal impact of legal reasons. Of course, we are well aware

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[29] B Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 *Ethics* 278.

[30] JA King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *OJLS* 409–41.

[31] See B Leiter, 'Legal Indeterminacy' (1995) 1 *Legal Theory* 481.

that the burgeoning literature on judicial behaviour, especially of US provenance, offers many such approaches.[32] Our ambitions in the present chapter, however, are more limited and focus on one particular explanatory dimension – institutional strategy – as suggested further below.

One final point of clarification is in order. We appreciate that there are deeper jurisprudential debates about the nature of law and that different ways of understanding 'law' would lead to a different classification of legal and non-legal reasons and support a different take on underdeterminacy. We have two responses to such an objection. First, we emphatically do not claim that 'the law' *as such* underdetermines outcomes at the level of appellate courts. In fact, were we to make such a claim, we would have to argue that the very rough definition of what we mean by 'law' outlined above (legal materials and established rules of interpretation) is the best definition of law on offer. Given the current state of play in legal theory, such a claim would not be just wrong but clearly preposterous. Indeed, whether the 'law' underdetermines judicial outcomes or not plainly depends on what one means by 'law'.

Second, and accordingly, in the text we only make a minimal claim about 'law' on the basis of common lawyerly sense, remaining entirely neutral as to the question of the nature of law (and hence the best theory of law). We thus assume that the minimal definition of 'law' our project depends on captures at least the core pre-theoretical commitments of competent lawyers and judges engaging in the law's argumentative practice. From that point of view, and whatever the merits of different comprehensive theories of the deep nature of law, they are orthogonal to our project. In fact, since our aim is merely to lay out the foundations of a description of the decision situation faced by appellate judges in a way best suited to formulate hypotheses about the explanation of their behaviour, we have tried to provide a very rough and pre-theoretical definition of 'law' that stays close to what we take the common sense of legal actors themselves to be. This kind of approach seems particularly well suited for purposes of sociological explanation. We thus make no claim to the effect that what we take the 'law' to be for the purposes of the present research is *indeed* the law from the point of view of the best theory about the nature of law.

B. Evidencing the Received Explanation

[32] For a UK example, see TT Arvind and L Stirton, 'Legal ideology, legal doctrine and the UK's top judges' [2016] *PL* 418.

The above account suggests that a permanent indeterminacy in decision-making is an inevitable facet of judging. In common law systems, this creates a dynamic tension in which judicial decision-making is confined by the law and established legal doctrine, but the parameters of that confinement are unavoidably adjustable.[33] This makes the judicial role fluid and potentially influenced by the prevalent context within which the judiciary operates, as well as existing law.

Even though law underdetermines outcomes, however, judges can adopt consistent positions in their application of the law. Moreover, there are good reasons for the judiciary to strive for consistency, as embodied in the doctrine of *stare decisis*.[34] In particular, to firm up the constitutional status of the rule of law it is in the interest of the judiciary to legitimate and channel its decision-making through prospective legal doctrine. Legal doctrine, by focusing on some factors and ruling out others, strives for a consistently adhered-to underpinning approach to judicial decision-making.[35] This demand for a consistent underpinning to legal doctrine makes shifts in that underpinning appear even more spectacular once they occur.

In the field of public law, the judicial search for a consistent position is driven by competing judicial goals, in particular of 'restraint' or 'deference' (namely, a reluctance to intervene in the sphere of political decision-making) and 'vigilance' (namely a concern to test the legal accountability of that decision-making and firm up legal principles).[36] In a recent study of judicial review in several commonwealth common law countries, Knight tested for four separate principled approaches towards the management of decision-making, and design of legal doctrine, in judicial review which capture well the possibilities available: scope; grounds; intensity; and context.[37] These approaches are of interest here as they indicate different viable positions on the restraint/vigilance continuum.

'Scope' describes an attempt to build in bright-line boundaries around the judicial role, with a heavy reliance placed on: precedent rather than general principle; ultra vires; the classification of administrative functions as either in or outside of the jurisdiction of the court;

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[33] E Posner and A Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York, OUP, 2011) ch 3.

[34] Even though, we hasten to add, precedent as a constraining or legitimising factor is much less important when it comes to apex courts, such as the House of Lords during the period under study here.

[35] JD Heydon, 'Limits to the powers of ultimate appellate courts' (2006) 122 *LQR* 399, 403–05.

[36] D Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge, CUP, 2018) 252, 272–79.

[37] ibid ch 1.

and procedurally restricting remedies. Collectively, therefore, 'scope' describes a highly restrained approach towards judicial review. A focus on 'grounds' by contrast describes an approach that channels judicial decision-making through a series of principled doctrinal tests, largely derived from the common law, which delineate the circumstances in which the courts can intervene regardless of the administrative power or function under scrutiny.[38] This approach goes beyond the simple interpretation of statute or prerogative power and allows for a wider range of opportunities for legal accountability to be enforced. Finally, 'intensity' and 'context' are much more fact-specific approaches towards judicial review, and charge the judiciary with providing reasons to rationalise the scale of judicial intervention depending on the institutional and factual context. Cumulatively, these judicial approaches interrogate more the substance of administrative decision-making and thereby anticipates the most vigilant approach towards judicial review.

The relevance of this typology to this study is that a focus on the legitimate 'scope' of judicial-decision making matches the concept of 'substantive formalism', which was the oft-claimed dominant doctrinal approach adopted by the House of Lords in the immediate post-war period.[39] According to the standard narrative, however, by the time that Lord Reid became the senior Law Lord in 1962, alternative approaches to 'substantive formalism'/ 'scope' were being considered and the collective propensity for the House of Lords to innovate had seeped into the judicial mindset.[40] To evidence whether this innovative spirit did indeed lead to a shift in the doctrinal approaches deployed, we conducted a content analysis of the Reid era to test the nature and degree of any changes to decision-making patterns.

Content analysis involves systematically coding a discrete sample of cases according to pre-determined criteria.[41] To gain a more detailed understanding of judicial decision-making during the Lord Reid era, we coded all public law cases heard in the House of Lords across three periods: 13 cases decided during each of the periods 1953–62 (ie before Lord Reid became the senior Law Lord), 1963–69 (the 'Quartet' period), and 1970–74 (post-Quartet until Reid's retirement). Amongst other measures, we recorded for each individual judgment the legal argument(s), broadly conceived, upon which each Law Lord based their decision. The

[38] ibid 75, and more generally chs 2 and 3.

[39] eg see Paterson (n 18) 132 and Stevens, *Law and Politics* (1978) 320.

[40] ibid/

[41] Kirkham and O'Loughlin, 'Content Analysis' (2019).

key finding is that over the period there is very little evidence of any profound shift in the legal arguments being considered during the period, at least as practised in the House of Lords. Table 18.1 shows that in all periods most cases were resolved on matters of statutory ultra vires and jurisdiction (ie scope). By contrast, there was a much smaller selection of judgments that considered grounds of law based on the common law (ie grounds), or the substance of the decision itself (ie intensity/context). Further, if only judgments found *against* a public body are considered, throughout the entire period no cases were formally resolved on the substance of the public body's decision[42] and in only two cases was the ratio based on purely common law grounds.[43]

Table 18.1 Legal grounds considered within House of Lords judgments in public law cases (1953–74).

	Scope		**Common law grounds**	**Substance**
	Ultra vires	**Jurisdiction**		
1953–62	25	38	5	5
1963–69	20	49	15	15
1970–74	15	50	10	5

Assuming that the dominant narrative on the Reid shift is correct, therefore, the evidence is weak that change was achieved by systematically introducing different legal grounds in order to alter overtly the underpinning doctrinal approach towards judicial review. Instead, our study suggests that the techniques deployed by the judiciary in the Reid era to achieve change were more subtle.

[42] It might be argued that *R v Minister of Agriculture and Fisheries ex p Padfield* [1968] AC 997 hinged on the court's finding that the 'substantive' decision of the Minister did not match the purposes of the relevant legislation, but here the case is recorded as ultra vires.

[43] *Ridge v Baldwin* [1964] AC 40 (right to be heard); *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 (right to be heard).

IV. A Sketch of Institutional Relationships

A. Explaining Judicial Behaviour through Strategies not Law

The snapshot of cultural changes at the time of the Reid era outlined earlier provides much evidence that the judiciary *desired* to change the law and its attitudes vis-à-vis the political branches. Such a narrative cannot explain, however, why the House of Lords changed the law to intensify the review of administrative decisions *using the specific doctrinal forms it did*. To address this question, we take here a speculative – but otherwise well-trodden in the relevant literature – explanatory tack. It involves placing the Reid shift within an explanatory framework that seeks to account for judicial choices in terms of strategic institutional relationships between the judiciary and the political branches. More specifically, we formulate the hypothesis that the pattern of case law that we study could perhaps be explained by, among other things, reference to institutional dynamics involving the House of Lords and the government/parliament nexus. These dynamics can be analysed in terms of *strategic interaction*. Such interaction occurs whenever the outcome of a decision that an actor takes partly depends on the action, and thus the decision, of another actor – and both actors know this. At the level of formal theorising, such interactions are part of game theory.[44] The approach has been used to explain the behaviour of judges of the US Supreme Court[45] and is known as the 'strategic model' of judicial behaviour. It can provide interesting insights, since in most developed legal systems the ultimate success of the endeavours of a given actor typically depends on the reaction of some other actor.

Recall at this point that we begin on the assumption that the 'law' (on our definition), insofar as it is underdetermined, does not provide the definitive requisite explanation of the Reid shift. Nor, as demonstrated in the previous section, does the decision-making behaviour of the judges in the period evidence an overt shift in the underpinning legal approach deployed. Accordingly, in order to explain the forms that the Reid shift took, it is crucial to show how the desire of House of Lords judges for change translated itself into specific choices that were constrained by their (perceived) opportunity set. Whilst we do not claim to provide a complete account within the confines of the present chapter, we set out a number of hypotheses for

[44] See, generally, A Dixit, S Skeath and D Reiley Jr, *Games of Strategy*, 4th edn (New York, WW Norton & Co, 2014).

[45] See L Epstein and J Knight, *The Choices Justices Make* (Washington, CQ Press, 1997).

further exploration. Our objective is at the very least to provide an explanatory blueprint from the point of view of a strategic approach.

B. Practical Restrictions on Judicial Power

Our approach assumes that judicial desires for change in the law remained constant during the period, queries the forms of judicial intervention chosen, and proposes explanations of these forms by reference to a specific subset of their Lordships' strategic institutional opportunities. In so doing, we aim to articulate conjectures about whether the legal means used by the House of Lords, and supposing that their Lordships were rational in an ordinary sense, were constrained by such institutional opportunities. Our core assumption is that where judges interpret and apply the law 'to further the accomplishment of [a] broad policy objective',[46] they do so in anticipation of the likely reaction of the actors they are intended to influence. Of course, judges are not always certain that their choices will be resisted and, even if they are, they are not certain about the final outcome of such resistance. Be that as it may, it seems to us that a brief typology of possible abstract judicial moves can be established, which we sketch further below.

Two further points within this approach should be noted. First, insofar as our topic of analysis is a senior court, we assume that judges are able to 'define the limits of [their] own jurisdiction'.[47] Second, however, we also recognise that the senior judiciary operate within a series of powerful technical and institutional constraints to their action. Perhaps the most powerful constraint is that judges can only advance the law through the cases that are brought before them. At the top of the judicial hierarchy this is likely to create thin pickings. This was certainly the situation during the Reid era when there was on average only one or two public law cases per annum, which allowed Lord Reid to sit on almost all of them.[48] This compares to a rate of five per annum by the mid-1980s, whereas during the first five years of the Supreme Court the Human Rights Act 1998 alone accounted for one-third of the caseload.[49]

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[46] W Murphy, *Elements of Judicial Strategy* (Chicago, University of Chicago Press 1964) 11.

[47] *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 UKHL 41, [2005] AC 680 [69] (Lord Hope).

[48] According to our selection, Lord Reid sat on 88% of public law cases post-1962.

[49] B Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford, OUP, 2013) 14, fn 72.

Another constraint is that the vast bulk of judicial work is carried out in the lower courts. This is significant because when it comes to implementing the full range of judicial innovation developed by senior courts, the lower courts are likely to possess sufficient autonomy to work around precedents. As already noted in this chapter, senior judges are limited in what they can do by the culture of both the judicial and legal community that they work within.[50]

A further constraint on judges is that they are tasked with maintaining the confidence of both the public and the political branches, and this encourages them to self-regulate their decision-making.[51] Whilst active denial of judicial decision-making would be an extreme response, there is a range of other possibilities that are open to the political branches to 'strike back' and 'clamp down' on judicial decision-making.[52] Such responses might come by way of 'correcting' legislation to address particular decisions, constructing deliberate restrictions on jurisdiction and grounds available, altering the judicial appointments process,[53] or through the imposition of resource restrictions on judicial activity.[54] Typically in Westminster-type systems, because governments and parliaments are ordinarily highly aligned, the possibility of such forms of retaliation acts as a real constraint on the judiciary.[55] This close bond also creates little residual room for the court to play the separate interests of rival veto players against each other.[56]

V. A Brief Typology of Judicial Moves

[50] For a discussion of these practical limitations, see JD Heydon, 'Limits to the powers of ultimate appellate courts' (2006) 122 *LQR* 399.

[51] J Ferejohn and L Kramer, 'Judicial Independence in a Democracy: Institutionalizing Judicial Restraint' in J Drobak (ed), *Norms and the Law* (New York, CUP, 2006) 163.

[52] For a discussion, see C Harlow and R Rawlings, '"Striking Back" and "Clamping Down": An Alternative Perspective on Judicial Review' in J Bell, M Elliott, J Varuhas and P Murray (eds), *Public Law Adjudication in Common Law Systems Process and Substance* (Oxford, Hart, 2016).

[53] eg R Ekins, *Protecting the Constitution: Why and how Parliament should limit judicial power* (London, Policy Exchange, 2019).

[54] M Stephenson, '"When the devil turns …" the Political Foundations of Independent Judicial Review' (2002) 36 *Legal Studies* 59.

[55] For this point see MD McCubbins and DB Rodriguez, 'The Judiciary and the Role of Law' in DA Wittman and BR Weingast (eds), *The Oxford Handbook of Political Economy* (Oxford, OUP, 2008); P Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge, CUP, 2016).

[56] E Ip, 'The judicial review of legislation in the United Kingdom: a public choice analysis' (2014) 37 *European Journal of Law Economics* 221, 232–33.

In the normal case, the practical constraints on the judiciary work to create an in-built dynamic of self-restraint in decision-making, one designed to prevent political backlash. Although these factors may incentivise judicial 'under-activity', they also suggest that a judiciary desiring to adjust the parameters of the law is more likely to pursue certain strategies than others. Adopting this form of logic, we frame our explanatory hypothesis in the following way: *if* a given legal actor (in our case, the House of Lords under Lord Reid) wishes to successfully upset a tradition of acquiescence to the decisions of the political branches *and* that actor is rational in the ordinary sense, *then* the actor, given the possibility of reprisals by the political branches, will probably come to the conclusion that it ought to pick and choose very carefully the cases that upset the general pattern of acquiescence. We propose here a number of options as moves that the judiciary may be tempted to play, and then test for evidence of the deployment of these options both within the Reid shift and the periods immediately either side of it.

A. Ordinary Prudence

i. Short-Term Non-Acquiescence

From an abstract point of view, each individual case might be considered to represent an opportunity. Accordingly, an obvious move that a judge can play to shift the boundaries between the courts and the executive is to find more often against public authority in all cases brought before them, and thereby create more space to adjust legal doctrine. It would be surprising, however, if there were any long-term strategic advantage in judges finding against public authorities more frequently than had previously been accepted. Indeed, there is a strong incentive to avoid this outcome, as such an approach would likely attract negative attention from aligned political branches and thus encourage some form of backlash. As a result, one would expect, particularly in Westminster-type systems, that the general pattern will favour judicial deference, with less acquiescent decision-making being a carefully selected and defended residual judicial phenomenon.

However, although a sustained strategy of anti-majoritarian judging may be unwise in the long term, a short-term burst may successfully cash in on previously secured reputational authority and goodwill. The Reid era is interesting in this respect. We broke the era down into three evenly spread periods of 13 public law cases. Between 1953 and 1962 (all cases heard before *Ridge v Baldwin*) 45 per cent of House of Lords judgments found against public bodies, a rate which rose to 67 per cent between 1963 and 1969 (a period which included the Quartet

and *Burmah Oil*), before falling to 29 per cent[57] between 1970 and 1974 (see Table 18.2). The relatively accidental manner through which cases travel to the senior court and the low numbers in the sample mean that multiple alternative explanations for this pattern exist. This pattern tantalisingly hints, however, that briefly during the 1960s the judiciary might have chosen to take a more robust approach against public bodies before strategically withdrawing.

ii. Pick your Opponents

Backlash against judicial decisions is more likely to occur where the public body concerned has the power to veto the decision or remove resources from the courts. With this in mind, a move that an 'innovatory' court might take is to develop the law in those cases in which the constitutional status of the impacted body is relatively weak. Thus shifts in the law might occur in cases against public bodies and local authorities rather than central government. The evidence in Table 18.2 suggests that, coincidentally or not, this was the pattern during the entire Reid era, with non-ministerial bodies more likely to be ruled against than central government departments.

Table 18.2 Outcomes of House of Lords judgments in public law cases (1953–74)

	Rate of judgments found against public body		
	All judgments	**Secretary of State**	**Non-central government public bodies**
1953–62	45%	33%	49%
1963–69	67%	54%	67%
1970–74	29%	8%	41%

[57] This figure excludes the cases of *Ealing LBC v Race Relations Board* (HL) [1972] AC 342 and *Lord Advocate v Glasgow Corporation (No 1)* 1973 SC (HL) 1 as in both cases both parties were public bodies.

Total	49%	31%	51%

An example of this move for the period under consideration would be *Ridge v Baldwin*, in which Lord Reid took care to distinguish the Secretary of State's role, and to make it clear that the body against which the House of Lords found was 'merely' the watch committee.[58]

iii. Pick your Moments and Compensatory Judgments

In some instances, opportunities to shift behaviour may only be exercisable against central government and there is a reputational loss to be incurred if the court is too deferential to the state. Alternatively, judges might deem it necessary to rule against the executive because the issue goes to the very heart of the constitutional claim that underpins the value of the rule of law and the court.[59] In other words, not acting would materially weaken the position of the courts in the long term, even if the short-term popular and political backlash may be damaging. Viewed from the perspective of the Law Lord in the 1960s who is culturally minded to reclaim the legal ground conceded by the earlier generations of judges, the underlying issues at stake in *Ridge* (the reach of natural justice), *Anisminic* (jurisdiction), *Conway* (the justiciability of crown privilege) and *Padfield* (that public authorities must not only act within their powers, but for the purpose for which the powers have been conferred) can all be claimed to be of high rule of law import worthy of taking a stance.

To compensate for the frustration caused to the political branch by such moments of judicial radicalism, judges may manifest acquiescence in other kinds of cases. For instance, the relatively timid approach of the majority of Law Lords towards interpreting the Race Relations Act in four cases in the later period of the Reid era may reflect a recognition that Parliament itself had returned to the issue on more than one occasion in recent times.[60] It may also represent, however, an unwillingness to push the boundaries of the law so soon after the Quartet, particularly on such a sensitive issue. Similarly, the ruling in *British Oxygen v Minister*

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[58] *Ridge* (n 43).

[59] DS Law, 'A Theory of Judicial Power and Judicial Review' (2009) 97 *Georgetown Law Journal* 723.

[60] In three of the four cases the House of Lords did not uphold the preferred statutory interpretation of the Race Relations Board. The frustration with the Lords' minimalist reading of the Race Relations Act 1968 can be seen in the judgments of Lord Kilbrandon in *Ealing LBC v Race Relations Board* (HL) [1972] AC 342 and *Dockers Labour Club and Institute v Race Relations Board* (HL) [1976] AC 285. See also *Charter v Race Relations Board* (HL) [1973] AC 868 and *Applin v Race Relations Board* [1975] AC 259.

of Technology[61] in 1970 could be viewed as a timely pragmatic readjustment of the fettering discretion principle in favour of public administration.[62]

B. Finessing the Moves

The above moves are all opportunistic in nature, insofar as they rely heavily upon the case and the parties being brought to court. In order to secure shifts in the law for the long term, however, judges also need to consider carefully the manner in which decisions are framed so that they can be usefully applied in the future and do not attract an immediate political rebuttal. We suggest here some framing tactics that were adopted to embed the Reid shift.

i. Framing Decisions as Non-Threatening

Ordinarily, following an unfavourable decision, the political branches will have a number of options available to them to retrieve full control of its intended discretionary power, but not every option will nullify the full weight of the judicial authority. Knowing this, judicial politics scholars have long noted that judges often find ways to compensate losses on powerful actors in order to prevent outright rejection of judgments. Such a move lowers the costs of acquiescence for the political branches, but still allows the judicial actor to articulate a holding with far-reaching consequences. For best results, judgments need to be carefully framed so that affected groups can see the compensations made available to them.[63]

This move is one way to explain the holding in *Padfield*, where in quashing the Minister's decision the House of Lords both secured its reputation and confirmed an important principle of law, in the full knowledge that the government Minister ultimately retained the power not to provide redress for the complaint at the heart of the case.[64] Likewise, the principles

[61] *British Oxygen v Minister of Technology* [1971] AC 610.

[62] Arguably, *McEldowney v Forde* [1971] AC 632, in which a regulation on Northern Ireland security was upheld, could be placed in the same bracket, but this was a narrow 3:2 decision and could easily have been decided differently had the Panel been different: Blom-Cooper and Drewy (n 3) 267.

[63] E Gonzalez-Ocantos and E Dinas, 'Compensation and Compliance: Sources of Public Acceptance of the UK Supreme Court's Brexit Decision' (2019) 53 *Law & Society* 889, 892.

[64] See ch 4 in this volume (Sunkin).

of law outlined in *Burmah Oil v Lord Advocate* have subsequently proved influential, even though the decision itself was overridden by the War Damages Act 1965.[65]

ii. Signal a Ruling of Mutual Advantage

It is to the judiciary's advantage if the political branches, in all or in part, can be persuaded that it is in their interests for the court to pursue a certain course of action or role. Examples may include exercising its discretion with the grain of dominant government policy or operating in areas where the legislature only has rare opportunities to legislate. Such a stance is aided where the likelihood of conflict is low.[66] Although ultimately an unsuccessful move for the dispute being litigated,[67] an example may be *Burmah Oil* in which the case centred on whether compensation was payable. Lords Reid and Pearce not only declared on the point of law but provided guidance to the effect that the pursuers' claim was weak, and thereby signalled to the political branches that the costs of the judgment would be minor.

Similarly, there may be cases where judicial actors might exploit the non-alignment of Government and Parliament on a specific issue in order to further their power in ways that avoid subsequent potential retaliation by the political branches. Such potential non-alignment crucially depends on the specific moment chosen to challenge the political branches (or some of them). This, for example, could be one way to interpret *Anisminic*, in the sense that Government and Parliament were much less aligned than normally on the issue of 'ouster clauses',[68] and thus the possibility of statutory override was somewhat less likely. Likewise, Sunkin has made the argument that in *Padfield* the judges were supporting Parliament in its relationship with the executive in order to secure effective political accountability, thus gaining support for its work by signalling to Parliament that the decision was of mutual advantage.[69]

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[65] *Burmah Oil v Lord Advocate* [1965] AC 75. For an account see C Harlow and R Rawlings, *Law and Administration*, 2nd edn (London, Butterworths, 1997) 48–44.

[66] M McCubbins and D Rodriguez, 'The judiciary and the role of law' in B Weingast and D Wittman (eds), *The Oxford Handbook of Political Economy* (New York, OUP, 2006).

[67] Harlow and Rawlings, *Law and Administration* (1997).

[68] In fact, as Arvind and Stirton underline, the Government subsequently failed to pass an amendment in a new Foreign Compensation Bill that would clearly reverse *Anisminic* due mainly to the resistance of the House of Lords and the Bar. See TT Arvind and L Stirton, 'Why the Judicial Power Project Is Wrong about *Anisminic*' *UK Constitutional Law Blog* (20 May 2016), available at www.ukconstitutionallaw.org/2016/05/20/tt-arvind-and-lindsay-stirton-why-the-judicial-power-project-is-wrong-about-anisminic.

[69] See ch 4 section I in this volume (Sunkin).

iii. Incrementalism

A key concern for a senior judge wishing to adjust the law is the need to be confident that the lower courts will follow his or her lead. Further, if there are too many radical adjustments in the law that are not followed up and adopted by the lower courts, then the reputation of the court might be undermined.[70] The senior courts, therefore, are incentivised to work with the prevalent legal culture as far as possible, and avoid controversial shifts in legal thinking too far removed from mainstream thinking. Thus, achieving change whilst simultaneously retaining loyalty to the norms of deeply ingrained legal techniques, is a more attractive option than overturning previous decisions or overt judicial creativity. This in-built push towards incrementalism was very much evident in the Reid era, as illustrated in Table 18.3, which details the approach of the House of Lords towards two key legal techniques, precedent and statutory interpretation.

Table 18.3 Legal techniques deployed in judicial decision-making during the Lord Reid era: House of Lords judgments in all public law cases (1953–74)

	Loyalty to precedent				**Mode of statutory intepretation**		
	Confirm case law	**Distinguish**	**Reject or reverse**		**Literal**	**Textual**	**Purposive**
1953–62	33	15	5[71]		25	21	6
1963–69	46	14	5[72]		17	26	14
1970–74	52	2	0		29	40	3

On the face of it, the results evidence that judges showed no enhanced tendency to veer away from precedent in the later years of the Reid era than in the earlier period. This preliminary analysis, however, conceals the strategic subtlety of judicial decision-making in

[70] McCubbins and Rodriguez, 'The judiciary' (2016).

[71] *Marshall v Scottish Milk Marketing Board* 1956 SC (HL) 37.

[72] *Conway v Rimmer* [1968] AC 910.

the common law method, particularly as practised by the House of Lords between 1962 and 1969.[73] In his study of the Law Lords, Paterson claimed that the Reid shift was orchestrated through techniques of 'dissimulation' and, in order to address outdated legal rules, over the same period this pattern occurred simultaneously in private, as well as public, law cases.[74] Potentially radical adaptations of the law were thereby deliberately camouflaged under the façade of a common law evolution of the law as it had always been, rather than the outright confrontation of policy choices. In particular, to achieve reinterpretations of the law, during the 1960s the House of Lords, and most noticeably Lord Reid himself, regularly drew upon older case law to offset the need to feel bound by more recent legal understandings.[75] By contrast, this 'dissimulation' technique is less evident in the earlier period[76] and from 1970 to 1974 largely disappears. The decline of dissimulation techniques Paterson attributed to the adoption of a bolder judicial attitude towards dealing with outdated rules through the 1966 Practice Statement which allowed the overruling of precedent.[77]

Table 18.3 also charts the use of different forms of statutory interpretation, broadly recorded as either literal (clause-specific), textual (attempts to ascertain 'Parliamentary intention' from a broader reading of the text) or purposive (explorations of the purpose of the power concerned).[78] As with the use of precedent, although there is a small shift over time away from overtly literal techniques of statutory interpretation towards more open-ended examinations of the purpose behind legislation, the trail is not as strong as is sometimes claimed.[79] Pre-1962 the judiciary did extrapolate meaning of statute through a broader textual

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[73] For a discussion of the options open to a judge seeking to evade precedent, see G Dworkin, 'Stare Decisis in the House of Lords' (1962) 25 *MLR* 163.

[74] Paterson (n 18) 140–46 accredits Lord Radcliffe as being the intellectual driver behind this approach: Lord Radcliffe, *The Law and Its Compass* (London, Faber and Faber, 1961) 39.

[75] See for instance, *Attorney General v Nissan* [1970] AC 179; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Burmah Oil* (n 65); *Ridge v Baldwin* [1964] AC 40.

[76] Arguably *Pyx Granite Co Ltd v Ministry of Housing and Local Government* (HL) [1960] AC 260 fits this category.

[77] The small number of House of Lords public law cases where the Practice Statement was considered (*Conway* (applied), *Anisminic* (not applied)) sits alongside a larger body of private law cases where its Practice Statement was much more noticeable, see Paterson (n 18) 146–63.

[78] This threefold typology captures familiar themes in statutory interpretation; see M Favale, M Kretschmer and PC Torremans, 'Is there an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2016) 79 *MLR* 31.

[79] A point made by J Beatson. 'The role of statute in the development of common law doctrine' (2001) 117 *LQR* 247, 260.

reading on occasion,[80] ordinarily for the underlying need to resolve ambiguity.[81] Otherwise though, the broader interpretative approaches were generally contained in dissenting judgments, with the restrictive majority judgment in *Smith v East Elloe Rural DC*[82] noted as the 'high water mark of judicial timidity'.[83] Likewise, in the 1970s when confronted by the ambiguity of the Race Relations Act 1968, the Law Lords, especially Lord Reid, were highly conservative in their interpretation, with once again it being left to the dissenting judges to explore the potential of broader interpretative approaches.[84] But dig deeper, and the impact of non-literal approaches towards statutory interpretation was particularly powerful in the 1963–69 period. *Anisminic* is the strongest example of this, but there were others,[85] and *Padfield* relied upon placing a significant emphasis on an inferred statutory objective. Here, there is evidence to support interview-based findings in Paterson's Law Lords study of the period that the 1960s judges were willing to 'adapt the law according to social conditions'.[86]

Such patterns indicate that the Reid shift did not come about as a uniform change in approach towards judging, but occurred instead through targeted uses of contextual approaches to statutory interpretation, resort to older case law to establish precedential authority, and occasional creativity towards discrete features of the prevalent legal doctrine. In other words, the judiciary in the Reid era were more willing to take selective advantage of the incremental devices which are always open to the court given the loosely defined parameters of the common law method. As Barak-Erez argues in relation to the equivalent development of legal doctrine in Israel, 'the potential for realizing these developments was embedded in the English system' long before Lord Reid became a judge.[87] Further, as separate studies by Paterson and Blom-Cooper and Drewy have demonstrated, this enhanced willingness to adapt the common law was being practised just as much in private law cases as it was in the field of public law.

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[80] See *Belfast Corp v OD Cars* (HL) [1960] AC 490, 522–25 (per Lord Radcliffe) and *Marshall* (n 71).

[81] Drewy and Blom-Copper (n 3) suggest that *Preston and Area Rent Tribunal v Pickavance* (HL) [1953] AC 562 is an example where the court subtly used a broader textual approach to avoid the harsh outcome of an excessive faith on literalism.

[82] [1956] AC 736

[83] Drewry and Blom-Cooper (n 3) 260.

[84] See cases discussed at n 60.

[85] eg *Pfizer Corp v Ministry of Health* (HL) [1965] AC 512.

[86] Paterson (n 18) 143.

[87] Ch 13 in this volume (Barak-Erez).

iv. Create more Opportunities for Judicial Intervention

To maximise the judiciary's impact on public sector decision-making, senior judges are incentivised to facilitate and encourage lower court intervention, as that is where the bulk of judicial activity occurs. Two routes for doing this are most obviously available. First, the senior courts can alter the technical rules of entry into the judicial system, either to facilitate more cases or to provide a broader suite of cases to choose from. Second, the senior courts can 'clear the decks' and/or serve 'to break down' pre-existing barriers to the development of the law.

During the Reid era the latter is the move which is most evident, including, despite its reputation for substantive formalism, the House of Lords in the 1950s. During this earlier Reid period, the power of the court to make declaratory judgments was confirmed,[88] claims to immunity from legal actions treated with scepticism,[89] the rule on unlawful sub-delegation developed in the lower courts was confirmed,[90] and prerogative powers were reviewed.[91] Interestingly, no obvious similar examples exist in the later period of the Reid era, but it is in the Quartet of cases that this move is most evident, all of which to a greater or lesser extent loosened pre-existing orthodoxies that had inhibited the development of the law.

In a similar vein, judgments can free up space for the future by publicly rejecting government lines of argument that restrict judicial review of public authority decision-making. As Bailey has noted, this may have been one of the strongest legacies of the Quartet.[92]

v. Creating Room for Manoeuvre

Shifts in the relationship do not need to be won or realised immediately. In other words, decisions may be taken that have in the short-term only a minimal impact on public authority, or might even be favourable towards them, but the effect of the decision may be to create the space for lines of reasoning to be pursued that were previously blocked. In the context of the relationship between the judiciary and the political branch, the true import of the shift might not be appreciated or even spotted until multiple cases later.

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[88] *Pyx Granite Co Ltd v Ministry of Housing and Local Government* (HL) [1960] AC 260.

[89] *Marshall v Scottish Milk Marketing Board* 1956 SC (HL) 37; *Glasgow Corp v Central Land Board* 1956 SC (HL) 1.

[90] *Vine v National Dock Labour Board* (HL) [1957] AC 488.

[91] *Smith v East Elloe Rural DC* (HL) [1956] AC 736.

[92] Ch 16 in this volume (Bailey).

It is important to note that such development of the law may happen not necessarily as a result of what the chosen doctrines 'really mean', but simply by virtue of the *perception* of what they mean on the part of lower courts. Indeed, senior judges may formulate their opinions in ways that make a number of different interpretations possible, thus arming those lower judges that are willing to choose one rather than the other and treat it as binding precedent. To take again a characteristic example, there has been a decades-long scholarly discussion on whether *Anisminic* should be understood in the sense of recognising a ground for review for any mistake in law. From our point of view, the point is not so much whether that is 'really' the case but, rather, that even the *perception* by lower courts that *Anisminic*, in its ambiguity, had these implications created more opportunities for judicial intervention. Likewise, the reasoning in *Padfield* opened up opportunities for the future around the purposes pursued in administrative decision-making and the need for reasons provided to be sound.

An even more subtle move might be for the court to lay the foundations of new principles of law in obiter statements 'like a squirrel storing nuts to be pulled out at some later time'.[93] This is a harder move to evidence, but by way of example, in *Smith v East Elloe Rural DC*[94] Lord Reid laid down legal logic that looks highly reminiscent of what 40 years later became the legality test:

> So, general words by themselves do not bind the Crown, they are limited so as not to conflict with international law, they are commonly read so as to avoid retrospective infringement of rights, and it appears to me that they can equally well be read so as not to deprive the court of jurisdiction where bad faith is involved.[95]

vi. Building on Pre-Prepared Foundations

Even where shifts are pursued, there may be an advantage to piggy-backing on existing 'advanced parties of knowledge'. The hard work of shifting understandings of the law does not, therefore, rest on the judiciary but on a wider community and pre-existing legal thought. This is, for example, what Lord Reid appears to have done in *Burmah Oil*, citing a range of classical international lawyers (Grotius and Vattel) as well as US case law and John Locke.[96]

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[93] Murphy, *Elements* (1964) 203, citing an undated memorandum by Herbert Wechsler, Law Clerk file, Harlan Fiske Stone Papers, Library of Congress.

[94] *Smith v East Elloe Rural DC* (n 91).

[95] ibid 765.

[96] *Burmah Oil* (n 65) 107–12. Ironically, in the same case both Viscount Radcliffe and Lord Hodson adopted a similar approach in their dissenting judgments.

Likewise, the decision in *Conway v Rimmer*[97] was able to use the separate legal position under Scottish law as a comparator.[98] The overall goal is to attempt to show that the chosen solution is not arbitrary, nor an act of will on the part of the judge, but simply a development from an already existing doctrinal foundation.

Across the Reid era this does not appear a commonly used move, but in a later period when more academic writing exists and international law is more readily available, we hypothesise that this becomes a more regularly used technique to support shifts in the law.

VI. Conclusion

Writing in 1993 following a lengthy analysis of judicial decision-making from the 1920s onwards, John Griffith concluded 'that the judicial system has lost much respect and much authority'.[99] Griffith's thesis is a familiar one, founded on the narrative that too much judicial decision-making is based on opaque discretionary activity that facilitates a form of judicial interventionism which thinly disguises political activity. Griffith went on to make a plea for 'the attitudes of the senior judiciary to the powers of public authorities [to] become more principled and more consistent'.[100] Contrary to this vision, the thesis explored in this chapter has been that the inherent indeterminacy in law's design entails that the judiciary will always possess a certain degree of discretion allowing it to shift the parameters of the law according to the context. Further, we hypothesise that because of this indeterminacy, an endemic feature of the judicial mission is periodic shifts between judicial approaches that advance vigilance and those that encourage restraint, as well as shifts that attempt to provide a sounder basis for the judicial function.[101] Such shifts are hard to predict and manage as they will depend upon opportunity and the inputs of numerous judges with different perspectives on the appropriate and stable balance of power between the judiciary and the political branches.

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[97] [1968] AC 910

[98] *Glasgow Corporation v. Central Land Board*, 1956 SC (HL) 1.

[99] JAG Griffith, *The Politics of the Judiciary*, 5th edn (London, HarperCollins, 1997) 20.

[100] ibid.

[101] Which is what Paterson concluded in his study of judicial decision-making in the senior court, A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford, Hart, 2013) 266–74, 320.

In understanding this dynamic aspect of the law, our focus has been on evidencing and rationalising the manner in which such shifts occur, using the Reid shift as a powerful lesson in how the judiciary can deploy a range of moves to alter patterns of decision-making. We have used the lens of institutional strategy to provide a framework through which to analyse the opportunities and the most efficient moves that the judiciary might focus on to advance that agenda. The overall picture that arises seems a much more mixed and mitigated one than Griffith's narrative would allow. Despite some spectacular cases, especially the famous Quartet on which the present volume focuses, the House of Lords under Lord Reid seems to have displayed a keen sense of the limits that any project of reform of administrative law must respect. As a consequence, the Reid shift was less a fundamental restructuring of the principles of public law and more a subtle loosening of legal norms sufficient to allow future evolution, with judgments selectively deployed to avoid outright rejection by the political branches. All of this work was conducted firmly within the standard, albeit malleable, boundaries of the common law method.

We have recognised that, to a large extent, this sense of limits within the Reid shift is attributable to structural factors, in particular the full knowledge that the political branch is capable of resetting its institutional relationship with the judiciary. Thus, our more specific aim was to propose hypotheses for 'judicial moves' on the basis of the recognition of a dimension of strategic interaction between the House of Lords and the political branches. For instance, we have shown that the Reid court deployed a number of moves aimed at assuring the political branches that the reform sought would not take the form of a radical questioning of those branches' power. Accordingly, our framework sets forth the hypothesis that the judiciary will use strategic moves selectively both to secure an appropriate intellectual coherence to the law, and to retain the long-term legitimacy of their constitutional position. We further suggest that ours is a useful model by which to explain the strategic choices made by judges in other periods of judicial history.