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Judicial review and embarrassment

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Judicial review possesses a significant and remarkable potential to embarrass. Just within the past decade, visions of totalitarianism, clandestine untruths told to the monarch, and incompetence in relation to knowledge of basic constitutional architecture have been expressed from senior judges within the United Kingdom about the elected branches. Although it may be unsurprising this is happening, the implications of embarrassment occurring through judicial review could be significant.

In a pioneering article published as judicial review was accelerating in the UK in the 1990s, Sunkin and Le Sueur highlighted 'the power of judicial review to disrupt government action and to cause political embarrassment'.[1] In another major review of the topic around the same period, James complemented this language, noting that, 'losing [a] case will attract great publicity: newspaper headlines, questions in Parliament and so on, to the embarrassment of the minister and of the officials who advised him'.[2] Today the potential to disrupt government action and cause embarrassment remains genuine, and frequently occurs.

Of course, it should be acknowledged that some type of moderate form of embarrassment is built into the judicial review process. The courts sit in a unique position, being able to check the actions of other constitutional actors. In a decision going against government embarrassment will fall on someone, if not on the government as a whole.[3] Although the potential for significant embarrassment was recognised close to three decades ago, the topic appears to have been largely ignored as judicial review developed and other matters took priority.[4] Indeed, scholars have endlessly explored the constitutional functions of judicial review. For instance, those examining the practice often focus on its merits or pathologies, debate how it operates or should operate, and attempt to justify some of its major outcomes on the operation of government (e.g., improved decision-making or procedural robustness).[5] These are important topics and their discussion is certainly warranted. However, even more socio-legal investigations of judicial review have failed to provide any sustained focus on its interaction with embarrassment.[6]

The relationship between embarrassment and judicial review is also relevant because judiciaries in many jurisdictions—including the UK—have undoubtedly gained increased power and recognition as major constitutional actors, and in some cases may be considered the most important or powerful players in relation to issues on rights or constitutionalism. Given these developments, how the courts portray the elected branches is of much significance. After

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[1] M Sunkin & AP Le Sueur, 'Can Government Control Judicial Review?' (1991) *Current Legal Problems* 161.
[2] S James, 'The Political and Administrative Consequences of Judicial Review' (1996) 74 *Public Administration* 613, 619.
[3] Ibid, p 619.
[4] Embarrassment has sometimes arisen in relation to foreign affairs. See, FW Scarf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75(4) *Yale Law Journal* 517, 582 (The Court will 'exercise restraint in situations where its decision might frustrate or embarrass the government's conduct of foreign affairs'.); Lord Mance, 'Justiciability' (2018) 67(4) *International & Comparative Law Quarterly* 739, 750.
[5] For a recent example, see: TT Arvind, R Kirkham, D Mac Sithigh & L Stirton, *Executive Decision-Making and the Courts: Revisiting the Origins of Modern Judicial Review* (2021).
[6] A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (2013); A Paterson, *The Law Lords* (1982).

all, psychologists have found that intentional embarrassment can be used not just to negatively sanction someone's behaviour, but also to establish or maintain power.[7] Decisions going against government can and should happen, and are inevitable in any constitutional democracy. But judgments that needlessly chastise the political branches or attempt to paint them as disreputable or incompetent are unhelpful and should be avoided. Ultimately, how courts portray the elected branches is remarkably important, and has implications for how the public view the elected branches.

Some may take issue with embarrassment being an outcome of judicial review. After all, if judicial review is undertaken to expose wrongdoing or correct mistakes, then perhaps it should be associated with different emotions, such as shame or guilt. But there is good reason for focusing on embarrassment as an outcome of the judicial review process. Embarrassment requires a public element that is not essential to shame or guilt. Indeed, it often occurs because of 'undesirable social attention',[8] which judicial review can certainly provide. While shame and guilt are complementary self-conscious emotions that may or may not involve public elements, embarrassment is exclusively linked to public situations.[9] This has led some researchers to categorise shame, guilt, and embarrassment into different classifications, with embarrassment being separated from the former emotions.[10]

However shame and embarrassment do overlap. Studies have shown that many elements of shame and embarrassment share commonalities, and while embarrassment does attract distinct responses, people may sometimes experience similar responses under both. Indeed, it is certainly possible that judicial review may bring forward both emotions, as the public nature of review will provide an embarrassment component, and the Minister responsible for the decision may feel ashamed if their conduct is found to be problematic. It is even possible that courts may engage in shaming strategies. Perhaps this occurred with the prisoner voting cases in relation to the UK, which was kicked off by *Hirst* in 2005,[11] and followed up by *Greens and MT v United Kingdom*[12] and then *Scoppola v Italy (No 3)*.[13] The latter two judgments may have had a shaming and embarrassing function.

But this paper is more concerned with embarrassment and its potential portrayals of the elected branches. Here I am primarily concerned with constitutional and administrative matters, and use examples from the UK and other common law jurisdictions to help articulate how embarrassment may occur. Ultimately, I argue that although judicial review may have an in-built embarrassment component, in some instances judiciaries have transitioned from unintentionally to intentionally embarrassing the elected branches.

Portrayal of the elected branches

The ability to embarrass is pronounced because of how courts can portray the elected branches in relation to their understanding of the constitution or major constitutional principles. Indeed,

[7] WF Sharkey, MS Kim & RC Diggs, 'Intentional embarrassment: a look at embarrassors' and targets' perspectives' (2001) 31 *Personality and Individual Differences* 1261, 1262-63.
[8] D Keltner & BN Buswell, 'Embarrassment: Its Distinct Form and Appeasement Functions' (1997) 122(3) *Psychological Bulletin* 250, 252.
[9] JL Tracey & RW Robins, 'Putting the Self Into Self-Conscious Emotions: A Theoretical Model' (2004) 15(2) *Psychological Inquiry* 103, 116.
[10] Ibid, p 115.
[11] *Hirst v United Kingdom* (No.2) (2006) 42 EHRR 41.
[12] (2011) 53 EHRR 21.
[13] (2013) 56 EHRR 19.

the prospects of court embarrassment mean that judicial review can go beyond government disruption and could have wider consequences for constitutional democracies.

Below I articulate three different types of portrayals that judicial review employs in relation to the elected branches: constitutional newbies, constitutional fools, and constitutional villains. Each connects to the significant and remarkable potential of judicial review to embarrass.

Table 1.

Type of Portrayal	Description	Example(s)
Constitutional Newbies	constitutional actors possess inferior or undeveloped understandings of what is constitutional or what such behaviour entails	House of Lords decision in *Factortame* (1991), which said it 'has always been clear' that Community law overrides national law; aspects of the 2017 *Miller I* High Court judgment
Constitutional Fools	constitutional actors did not fully consider the implications of their actions, and are foolish for not having done so	House of Lords *Belmarsh* decision (2004), which states that the 'real' threat to the life of the nation is not terrorism, but Parliamentary over-reach; 2016 *Christian Institute* judgment (UK)
Constitutional Villains	constitutional actors actively pushed the boundaries of constitutionality or sought to undermine constitutional norms	Supreme Court treatment of the elected branches during the Lochner era (US); UK prorogation case (2019)

Constitutional Newbies

This description implies that some constitutional actors possess inferior understandings of the constitution compared to others, suggesting that those engaging in constitutional activity possess an undeveloped understanding of what is constitutional or what such behaviour entails.

One method of employing this portrayal is simply asserting that other constitutional actors lack the necessary power or expertise to determine constitutionality, making any claims automatically subservient to the views of a more 'authoritative' body. Apex courts commonly engage in this language, making it look as if a highly contentious issue is so settled that the answer is basic, even elementary.[14] In the United States John Marshall began this tradition in *Marbury*, pointing to the simple notion that 'the constitution is written'.[15] But the tradition continues. In asserting its dominance over state courts, SCOTUS said, 'no power is *more clearly* conferred by the Constitution'.[16] In declaring its general authority over constitutional matters, SCOTUS said it was a '*basic principle* that the federal judiciary is supreme in the

[14] BC Jones, *Constitutional Idolatry and Democracy: Challenging the Infatuation with Writtenness* (2020), pp 148-153.
[15] *Marbury v Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).
[16] *Ableman v Booth*, 62 U.S. 506, 525 (1859). My emphasis.

exposition of the law of the Constitution'.[17] And in crowning itself 'ultimate interpreter of the Constitution', SCOTUS said that all one has to do verify this is 'analyze representative cases' and connect this to the proper 'analytical threads'.[18] What was abundantly clear to the Court in these instances was certainly less clear to others.[19] Nevertheless, the Court's cavalier language in these matters suggests competing views are inferior.

Another method of asserting constitutional newbie status is portraying non-judicial actors as not understanding the 'rules of the game'. This portrayal was on full display in *Factortame (No. 2)*. Here Lord Bridge stated that any concerns about Community Law's impact on parliamentary sovereignty were 'based on a misconception',[20] as 'it has *always been clear* that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law'.[21] But what may have been seen as entirely 'clear' to the courts in the early 1990s may not have been so clear to other constitutional actors. As Nicol highlights regarding the enactment of the ECA 1972, these significant constitutional effects were certainly not always clear to Parliament. In fact, parliamentary debates demonstrated little discussion about how EU membership affected parliamentary sovereignty, and what was discussed suggested that this fundamental principle would not be affected.[22] Lord Bridge's characterisations that the effects of EU membership 'have always been clear' depict the elected branches as incompetent and confused regarding fundamental aspects of EU membership. But if this was abundantly clear to the judiciary at the time of enactment of the ECA 1972, then why were judicial voices at the time so silent when it came to such potential effects; should the judiciary not have made it crystal clear just how the EEC treaties or European Court of Justice case law may have impacted long-standing constitutional principles?

This portrayal also came about in relation to the Divisional Court decision in the first major Brexit case, *Miller I*.[23] The Court considered the Government's case 'flawed' at even a 'basic level'.[24] As Elliott notes, when reading the decision 'one might be forgiven for thinking that the Government had advanced a heterodox argument of outlandish proportions'.[25] The judgment's 'confident certainty…obscures almost entirely the complexity and contestability of the questions to which it gives rise'.[26] Indeed, larger points can be gleaned from Elliott's analysis: overly definitive court language can make reasonable arguments look outlandish, and may conceal rather than illuminate the complexity of various issues, both of which could carry significant implications for how the elected branches are perceived by citizens.

Far from being straightforward applications of the law, these examples represent something akin to the shifting of goalposts, which is quite common in the common law. As the Lord President of Scotland's Inner House of the Court of Session recently acknowledged, 'the law

[17] *Cooper v Aaron*, 358 U.S. 1, 18 (1958). My emphasis.
[18] *Baker v Carr*, 369 US 186, 211 (1962).
[19] WF Murphy, 'Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter' (1986) *The Review of Politics* 401.
[20] *R v Secretary of State for Transport (No. 2)*, [1991] 1 AC 603.
[21] Ibid (my emphasis).
[22] D Nicol, *EC Membership and the Judicialization of British Politics* (2001), pp 252-258.
[23] *R (Miller) v Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin).
[24] Ibid, para 85.
[25] M Elliott, 'The High Court's judgment in Miller: A brief comment' Public Law for Everyone (4 November 2016), https://publiclawforeveryone.com/2016/11/04/the-high-courts-judgment-in-miller-a-brief-comment/.
[26] Ibid.

is always developing and, in certain areas, it can do so quickly and dramatically'.[27] Of course, there is nothing wrong with the law developing. But when only the judiciary knows the direction of travel, it is not difficult to make other constitutional actors look inferior. And if constitutional compromise and effective state operation depends upon 'a sense of restraint' between judges and parliamentarians,[28] then judgments should shy away from presenting other actors as constitutional newbies—either not fully grasping the law or having a flawed understanding of it. Doing so may come with costs to the elected branches and may also hinder healthy discussion and debate on important matters.

Constitutional Fools

The Cambridge English Dictionary defines 'fool' as 'a person who behaves in a silly way without thinking'.[29] Undoubtedly, the elected branches are sometimes portrayed as not having fully considered the implications of their actions. This particular depiction is a step above the constitutional newbie portrayal, but does not necessarily cross the bounds into portraying actors as constitutional villains. Often a lack of foresight regarding the implications of decisions is focused on by the courts. Three examples, two from the UK and one from Canada, are presented below.

The House of Lords 2004 Belmarsh decision has arguably been the most significant judgment since the enactment of the Human Rights Act 1998.[30] Responding to the events of 9/11, Parliament passed the Anti-Terrorism, Crime and Security Act 2001. The measure contained controversial provisions relating to detaining terrorism suspects, and eventually nine individuals detained under the law challenged its legality. In a 'scathing' judgement,[31] the Law Lords used their powers under the HRA to issue a declaration of incompatibility, holding that certain provisions violated the UK's human rights obligations. Departing from the lead judgment's delicate tone, Lord Hoffmann, who dissented in the case but who would have allowed the appeals, 'went so far' as to say that Parliamentary legislation was a bigger threat than terrorism,[32] noting:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.[33]

These words were repeated far and wide: they even made the *New York Times* quote of the day on 17 December 2004,[34] and multiple UK newspapers reported that the judgment sparked a 'constitutional crisis'.[35] Three years after the law's enactment, when the shock of 9/11 had

[27] *Wightman v Advocate General* [2018] CSIH 18, para 30.
[28] V Bogdanor, *The New British Constitution* (2009), p 69.
[29] Cambridge English Dictionary, 'Fool', https://dictionary.cambridge.org/dictionary/english/fool.
[30] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[31] C Dyer, M White & A Travis, 'Judges' verdict on terror laws provokes constitutional crisis', *Guardian* (17 December 2004), https://www.theguardian.com/uk/2004/dec/17/terrorism.humanrights3.
[32] R. Verkaik, 'Belmarsh suspects to be freed after Clarke gives in to pressure', *The Independent* (26 January 2005), https://www.independent.co.uk/news/uk/crime/belmarsh-suspects-to-be-freed-after-clarke-gives-in-to-pressure-488286.html.
[33] Ibid, para 97.
[34] 'Quotation of the Day' *New York Times* (17 December 2004), https://www.nytimes.com/2004/12/17/nyregion/quotation-of-the-day.html.
[35] See n 31 and n 32 above.

waned, Lord Hoffmann's statement bitterly stung—and no doubt embarrassed—not just the Government but also Parliament.

Looking back, it is difficult to suggest that the declaration issued in Belmarsh was unfounded. But the comments by Lord Hoffman go beyond the expert independent adjudication expected from the judiciary. Lord Bingham's lead judgment was intentionally careful, even tediously so.[36] The same cannot be said for Lord Hoffmann's prose, which chastises Parliament for its lack of foresight and disregard for traditional legal and political values. Ultimately, Lord Hoffmann's comments make Parliament appear not just unwise, but foolish.

Unfortunate language in prominent judgments does not end there, however. A more recent example of the UK's highest court presenting the elected branches as fools came in the *Christian Institute* case. Here, Lady Hale said the following:

> Individual differences are the product of the interplay between the individual person and his upbringing and environment. Different upbringings produce different people. The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way.[37]

The implication was not that the Scottish Government was totalitarian, but that they had not fully thought through their actions. But the nod to totalitarianism did not go unnoticed. Organisations such as Christian Institute and Big Brother Watch touted Lady Hale's unfortunate language in press releases, attempting to use the reference to embarrass the government.[38] Ultimately, Lady Hale's larger point, that within limits families should be able to raise children in their own way, could have easily been made without the totalitarian language.

Examples from other jurisdictions share similar perspectives on the foolishness of the elected branches. In a divisive 2002 Canadian case over prisoner voting rights, the Supreme Court rebuked the government's views, stating that 'denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values'.[39] This admonishment is similar to Lord Hoffmann's above, suggesting that the government is doing more to damage Canadian democracy in this case by not taking action on prisoner voting. In the Court's view, the government is acting foolishly. The Court then chides other 'self-proclaimed' democracies for not adhering to this vision of 'inclusiveness' when it comes to prisoner voting, noting that within the Canadian context this position is 'incompatible with the basic tenets of participatory democracy'.[40] The idea that the Government does not understand the 'basic tenets of participatory democracy' aligns with the constitutional newbie depiction above, demonstrating that these portrayals are often not mutually exclusive.

Instead of suggesting that the elected branches are inferior in their understanding of constitutional questions, the constitutional fool portrayal makes it appear as if the actors in

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[36] A Paterson, *Final Judgment*, pp 295-96.
[37] *The Christian Institute and Others v Lord Advocate*, [2016] UKSC 51, [73].
[38] E.g., Big Brother Watch, 'Privacy Wins as Supreme Court Knock Down Scotland's Totalitarian Named Person Scheme' (28 July 2016), https://bigbrotherwatch.org.uk/2016/07/privacy-wins-as-supreme-court-knock-down-scotlands-totalitarian-named-person-scheme/.
[39] *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519, para 41.
[40] Ibid.

question have acted foolishly without considering the ramifications of their behaviour: perhaps their actions will undermine wider respect for law and democracy or indeed are the real threats to the life and vitality of the state. And if the actions of parliaments and governments are needlessly presented as foolish and as the *real* threats to the state, this depiction could affect public trust and confidence in the elected branches.

Constitutional Villains

In addition to portraying legislatures or governments as inferior or foolishly mistaken on constitutional issues, courts can portray the elected branches as constitutional villains, deliberately pushing the boundaries of constitutionality or seeking to undermine constitutional norms. This depiction is the most serious of the three.

The US Supreme Court has a history of portraying the elected branches in this manner. Perhaps the most notable period came during the Lochner era (1890-1937). During this time both Government and Congressional positions were variously accused of doing 'violence to the letter and spirit of the constitution'[41]; 'break[ing] down all constitutional limitation of the powers of Congress and completely wip[ing] out the sovereignty of the states'[42]; using 'naked, arbitrary exercise[s] of power'[43] and 'naked appropriation[s] of private property'[44]; and engaging in 'delegation running riot'[45]. The New Deal Court struck down signature pieces of legislation, many of which came in 5-4 decisions that occurred within two years of the statutes being enacted, a timeframe unheard of in the Court's history.[46] President Roosevelt even noted that although he expects defeats in the courts, the 'language of the licking' matters.[47] Unanimous decisions also played a role in humiliating the government, and this was especially true in the 1935 'Black Monday' decisions, where three prominent unanimous decisions went against government.[48] But the elected branches eventually had enough: President Roosevelt's 1937 court reform proposals, which included a (failed) 'court-packing' scheme, contributed to ending the period of heightened scrutiny.

SCOTUS may also have gotten bolder when accusing Congress of ill intent. The Burger Court (1969-86), for instance, often found distinctions among different groups of Americans 'reasonable rather than ill intentioned'.[49] Contrast this with recent opinions, such as *US v Windsor*.[50] Although there were compelling reasons for reconsidering the 1996 Defense of Marriage Act (DOMA), the Court's majority judgment strongly indicated that the Act's principal purpose was the codification of malice. The judgment said that the 'avowed purpose and practical effect of the law here in question are to impose…a stigma upon all who enter into same-sex marriages',[51] that its 'principal purpose is to impose inequality',[52] and also, that its 'principal purpose and the necessary effect…are to demean those persons who are in a lawful

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[41] *Callan v Wilson*, 127 U.S. 540, 549 (1898).
[42] *Bailey v Drexel Furniture Co.*, 259 U.S. 20, 38 (1922).
[43] *Adkins v Children's Hospital of the District of Columbia*, 261 U.S. 525, 559 (1923).
[44] *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 350 (1935).
[45] *ALA Schechter Poultry Corp. v United States*, 295 U.S. 495, 553 (1935).
[46] K Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (2019), p 192.
[47] WE Leuchtenburg, 'The Origins of Franklin D. Roosevelt's "Court-Packing" Plan' (1966) *Supreme Court Review* 347, 363.
[48] Ibid, p 356.
[49] Whittington, n 46 above, p 246.
[50] *United States v Windsor*, 570 U.S. 744 (2013).
[51] Ibid, 746.
[52] Ibid, 772.

same-sex marriage'.[53] While positive and encouraging societal changes in relation to the recognition of same-sex marriage had occurred which led to this reconsideration, to 'tar the political branches with the brush of bigotry' went beyond what was necessary.[54] But examples of the constitutional villain portrayal do not just come from America.

Court language suggesting that constitutional boundaries were deliberately being pushed arose in the recent Scottish UNCRC Incorporation Bill referral case. The UK Supreme Court said the following in relation to the Scottish Parliament's proposed legislation:

> 'The apparent implication is that the legislation has been drafted in terms which deliberately exceed the legislative competence of the Scottish Parliament, with reliance being placed on the courts to impose corrective limitations in individual cases'.[55]

This language aligns with the 'constitutional villain' category, acknowledging that a devolved legislature intentionally drafted legislation exceeding its authority, therefore forcing the courts into corrective action. Indeed, it sounds similar to Lord Hoffman's statements in the *Factortame (No. 4)* case, which noted that the UK Parliament, in passing the Merchant Shipping Act 1988, 'knew that there was, to put the matter at its lowest, doubt over whether the legislation contravened fundamental principles of Community law'.[56] He went onto say that the 'U.K. government knew that the effect of the legislation would be to cause substantial losses to the owners of boats which they could no longer use for fishing under the British flag'.[57] These comments suggests that Parliament willingly, perhaps recklessly, pushed the boundaries of constitutionality in relation to Community Law, just as the Scottish Parliament's recent UNCRC Bill deliberately pushed the boundaries of the devolution settlement.

The UK's spectacular episode regarding the prorogation of Parliament also contains elements that fit well under this depiction. In the summer of 2019 newly implemented Prime Minister Boris Johnson prorogued Parliament for five weeks. The move caused an uproar because of an upcoming Brexit deadline, as the chances of leaving the EU without a negotiated deal increased if Parliament did not meet that deadline. However before Parliament was prorogued it passed the Benn Act,[58] which essentially prevented a no deal scenario during the prorogation and tied the PM's hands in asking for an extension. Although significant questions arose regarding whether prorogation was a matter for court consideration, legal cases against the prorogation ended up moving forward in multiple jurisdictions within the UK.

In Scotland's Outer House of the Court of Session, Lord Doherty ruled that issues of prorogation were matters of 'high policy and political judgment' and therefore not justiciable.[59] Yet on appeal Scotland's Inner House unanimously found the prorogation unlawful.[60] The Inner House went further than other UK courts in their boldness. Overtly portraying the PM as constitutional villain, it found that the Prime Minister used an 'improper motive' in requesting the prorogation. Not only that, the judgment asserted that the PM acted in 'a clandestine

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[53] Ibid, 774.
[54] Ibid, 776. Roberts J, dissenting.
[55] REFERENCE *by Attorney General and Advocate General - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill*, [2021] UKSC 42, 60.
[56] *R v Secretary of State for Transport, ex parte Factortame* [1999] UKHL 44 (Hoffmann, J).
[57] Ibid.
[58] European (Withdrawal) (No. 2) Act 2019.
[59] *Cherry v Prime Minister*, [2019] CSOH 7, [26].
[60] *Cherry v Prime Minister*, [2019] CSIH 49.

manner'.[61] And the court said all this without any direct evidence that the PM's decision was formulated to derail Brexit talks. For this language to emanate from Scotland's highest court was spectacular. Conversely, the England & Wales Divisional Court unanimously ruled that the matter was 'inherently political', stating that there 'are no legal standards against which to judge' the legitimacy of the PM's prorogation decision.[62] Notably, the Divisional Court panel included three very senior judges: the Lord Chief Justice of England and Wales, the Master of the Rolls and the President of the Queen's Bench Division. Suffice it to say there were major divisions in UK courts, and especially amongst senior judges, over the issues involved. Eventually, these cases reached the Supreme Court.

The circumstances surrounding the Supreme Court judgment bring up questions as to whether the constitutional villain portrayal can happen through the actions, rather than the language, of the court. In a surprising decision a unanimous Supreme Court (11-0) decided that the prorogation was unlawful and quashed the decision, thus recalling Parliament.[63] Although the Court dropped the 'improper motive' ground and 'clandestine manner' language supplied by Scotland's Court of Session, its unanimity—despite deep divisions in the Scottish, English, and Northern Irish courts—suggested that it was responding to a constitutional threat. One prominent commentator called the decision 'damning', and the 'strongest possible condemnation' of the Government's decision to prorogue Parliament.[64] The unanimous nature of the decision and the complete nullification of the prorogation (thus recalling Parliament) provided significant embarrassment to the Prime Minister, who was undoubtedly the episode's constitutional villain.[65] Baroness Hale, the former President of the UK Supreme Court and author of the prorogation judgment, acknowledges it as her top 'desert island' judgment.[66]

Of course, the constitutional villain strategy in this instance may have also considerably backfired. In the December 2019 general election the Conservative Party went onto win an 80-seat majority, running on an 'elites versus the people' platform. The *Miller II* judgment added considerable fuel to this campaign, and the UK courts faced subsequent reviews into the workings of the Human Rights Act 1998 and the operation of judicial review. As this and the US examples above demonstrate, employing the constitutional villain portrayal comes with serious risks. Courts must be wary of travelling down this road, especially if they spectacularly misjudge the mood of the electorate.

From unintentional to intentional embarrassment?

[61] Ibid, [54].
[62] *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB), [51].
[63] *R (on the application of Miller) v Prime Minister* [2019] UKSC 41; *Cherry & Others v Advocate General for Scotland* [2019] UKSC 41.
[64] M Russell, 'The Supreme Court ruling in Cherry/Miller (No.2), and the power of parliament' Constitution Unit Blog (27 September 2019), https://constitution-unit.com/2019/09/27/the-supreme-court-ruling-in-cherry-miller-no-2-and-the-power-of-parliament/.
[65] The Court's unanimity was curious. As Poole notes, 'It is common to see a number of separate opinions, especially in a case like this where even bringing it broke new ground' (T Poole, 'Understanding what makes "Miller & Cherry" the most significant judicial statement on the constitution in over 200 years' *Prospect* (25 September 2019), https://www.prospectmagazine.co.uk/politics/understanding-what-makes-miller-2-the-most-significant-judicial-statement-on-the-constitution-in-over-200-years).
[66] S Hattenstone, 'Lady Hale: "My Desert Island Judgments? Number one would probably be the prorogation case"' *The Guardian* (11 January 2020), https://www.theguardian.com/law/2020/jan/11/lady-hale-desert-island-judgments-prorogation-case-simon-hattenstone.

Judicial review contains positive outcomes that can improve state operation, but it can also possess unfortunate downsides. The examples presented above demonstrate that judgments in some prominent cases have intentionally embarrassed the elected branches through unnecessary and avoidable rhetoric. Indeed, courts may be using embarrassment similarly to how ordinary people use it: to establish or maintain power over others (in this case, other institutions).

Although some form of embarrassment is built into the judicial review process given that cases will and should go against the government, courts must exercise restraint in their judgments. Embarrassment of the elected branches through the portrayals noted above carries more significant risk than short-term embarrassment or political retaliation: citizens may come to devalue or disrespect the elected branches. Indeed, given the lack of confidence citizens around the world already possess in their elected legislatures, judicial review should strive to avoid contributing to this problem.

Any judicial transition to intentional embarrassment—however infrequent—would be most unfortunate. If judicial review becomes more about making statements or sending messages, asserting power over or attempting to subordinate the other branches, or needlessly rubbing salt into the already deeply troubled wounds of the political realm, then the idea and practice of judicial review becomes significantly diminished. It turns from an honourable method of upholding constitutional principles, protecting rights, and holding the government to account, into an extravagant rhetorical sanction. Employed as a tool to embarrass, the majesty and integrity of judicial review crumbles.

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