Question: 'In a country with a constitution, the Supreme Court (as in the US) or the Constitutional Court (as in Germany) can, indeed must, strike down legislation which has been enacted by the democratically elected Parliament if the court concludes that the legislation does not comply with the Constitution. … In a country like the UK (which is almost unique in this respect), a democracy without a constitution, we have parliamentary sovereignty …' (LORD NEUBERGER, 'The UK Constitutional Settlement and the Role of the UK Supreme Court' (2015) *The UK Supreme Court Annual Review* 13, 18).

Is it part of the nature of a constitution that it grounds a power to strike down primary legislation?

Introduction

This essay explores the claim that it is part of the nature of a constitution that it grounds a power to strike down primary legislation ('**the Claim**'). The Claim must be clarified.

First, this essay understands 'constitution' thinly as the rules that specify the major institutions and officials of *municipal legal systems*. Constitutions of other juridical persons – in municipal law or international law – will not be considered.

Second, in conceptual jurisprudence, the 'nature' of things is understood as features without which they would not be things of those kinds.[1] 'Necessary feature' is used when understanding 'nature' this way. But are there necessary features about decidedly contingent human artefacts like laws and constitutions? Part 2 assumes yes. Jeremy Waldron belabours the difficulty in distinguishing necessary from contingent truths and chides proponents of conceptual jurisprudence for not providing a convincing analysis of this distinction.[2] Part 3 proposes alternative understandings of 'nature'.

Third, 'striking down' a primary legislation is understood as declaring it to be legally invalid *ab initio*, subject to a nuance explored in Part 2C.

Fourth, within the phrase 'power to strike down primary legislation' ('**PSPL**'), the Claim assumes two separate institutions exist: the judiciary wielding PSPL and the legislature that enacted the primary legislation.[3] This assumption is significant. The *separate* existence of

[1] See e.g. John Gardner, 'Fifteen Themes from Law as a Leap of Faith' (2015) 6 Jurisprudence 601, 602.
[2] 'The Concept, the Rule, and the Essence of Law', lecture at St Edmund Hall, Oxford, 28 April 2014.
[3] The judiciary and the legislature are roughly understood as the law-applying and law-making institutions respectively. This does not imply the existence of a third executive branch or where (if at all) such powers might vest.

these two institutions is not a necessary feature of constitutions.[4] There are two possible responses. The first is to consider this assumption as *fatal* to the Claim: grounding PSPL cannot be a necessary feature if the institutions required to ground this power are not necessary features. The second is to restrict 'constitutions' in the Claim to *only* those that have separate law-making and law-applying institutions ('**Constitutions***'), and not constitutions generally. The second response is preferred, if for no other reason than that it avoids defeating the Claim on a technicality. This compels us to depart from general jurisprudence, but only slightly.

1. *Irrelevance and Irreverence*

With all due respect, Lord Neuberger's characterization of the UK as lacking a constitution goes against academic consensus.[5] He subsequently described the UK as having 'no written (or coherent) constitution',[6] arguably retracting his earlier characterization. Reading the excerpt in context, he considers the 'supreme-constitution model' à la Germany and the US, whose features include a codified constitution and PSPL, as paradigmatic – possibly even exhaustive – of the concept of constitution. While he is entitled to adopt a thick concept,[7] he does so carelessly, without discussing the nature of constitutions (or Constitutions*). Thus, the remainder of his essay can be safely ignored in exploring the Claim.

To dispel any lingering confusion caused by the excerpt, it should be noted that a codified constitution and PSPL are often thought as corollary of each other, probably because of the US Constitution's paradigmatic status in constitutionalist discourse. But this is unwarranted. A codified constitution need not give judges US-style PSPL and US-style PSPL need not be founded on a codified constitution. Part 3 explores such issues. Conversely, Part 2 shows a notional PSPL might be a necessary feature of Constitutions*, which are not necessarily codified.

2. *A Necessary Feature of Constitution*?*

Part 2 explores two attempts to ground PSPL as a necessary feature of Constitution*.

[4] John Gardner, *Law as a Leap of Faith* (OUP 2012), 289-291. This is even if one (wrongly) insists on a 'written constitution'; see e.g. the *Kongeloven* of Denmark-Norway.
[5] See Mark Elliott's low-level rebuttal in the foreword of the same publication. Also, see Gardner's conceptual argument at (n 4) 89.
[6] See his speech dated 18 August 2016 at <https://www.supremecourt.uk/docs/speech-160818-01.pdf>.
[7] Cf Joseph Raz, who carefully distinguishes 'thick' from 'thin constitutions' and disclaims that its criteria are 'vague in application' and 'not meant to draw borderlines', in *Between Authority and Interpretation* (OUP 2009), 323-329.

A. Interpreting Primary Legislation

Consider judicial interpretation of primary legislation.

Under Constitution*, judges have the power to interpret the law enacted by primary legislation, thereby changing it. The legislation is law upon enactment. However, lawsuits concerning the meaning of legislative provisions arise, which can only be resolved by judges authoritatively 'investing in the provisions a more determinate meaning'. With time, 'judge-made law tends to predominate' and 'one knows an ever-smaller proportion of the law' simply by reading the primary legislation's text.[8]

Is this power a necessary feature of Constitution*? Two conceptual claims about law will be stipulated. Firstly, law-applying institutions are a necessary feature of constitutions and, secondly, judges necessarily have authority to declare what the law is.[9] But another claim must be true: lawsuits requiring judges to ascribe more determinate meaning to legislative provisions must arise as a conceptual and not merely practical necessity.[10]

Is semantics necessarily imperfect or is it possible to write legislation in an infinitely sophisticated language that provides for every contingency? What about a society of non-litigious angels who prefer alternative dispute resolution?[11] Conversely, one might argue judges necessarily claim the authority to this power, even if it is not actually exercised.[12] It is unclear which is more plausible or better motivated.

But even if this power is a necessary feature, it nonetheless differs from PSPL in one important way. As clarified in the Introduction, PSPL strikes directly at legal validity. Changing the law enacted by primary legislation by interpretation – however absurd or radical in effect – accepts the legislation's validity.

8 Gardner refers to a written constitution, but this applies equally to primary legislation: (n 4) 118-119. See also Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009), 88.
9 Raz (n 8) 88, 191-192, and 201-202.
10 HLA Hart thinks '[i]t is clear [these disputes] must arise in any system': *The Concept of Law* (3rd edn, OUP 2012), 153.
11 This parallels the society-of-angels thought-experiment: coercion is argued to be contingent to legal systems even if the circumstances leading to its obsolescence are unrealistic. See John Gardner, 'Law's Aims in Law's Empire', in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2005) 208-209.
12 This parallels Grant Lamond's argument that even an angelic legal system necessarily claims authority to deploy coercion should the need arise. See 'The Coerciveness of Law' (2000) 20 OJLS 39; 'Coercion and the Nature of Law' (2001) 7 Legal Theory 35.

B. Applying the Ultimate Rules of Recognition

Consider the judiciary's role vis-à-vis the ultimate rules of recognition ('**RoRs**').[13] RoRs are customary rules that impose a duty on officials to recognize laws based on certain criteria. This bears elaboration.

Firstly, beyond accepting the duty is genuine, Part 2 does not provide a full account of *how* it is grounded and whether it is *legal*. Hart thought officials must have 'an attitude of acceptance, which is consistent with moral disapproval',[14] which Gardner dismissed as 'fruitless'; to him, officials 'must make a moral claim on behalf of the law, but they need not believe it and it need not reflect their own attitudes to law'.[15] Fully resolving this disagreement is unnecessary for Part 2's purposes.

Secondly, Part 2 follows Jeffrey Goldsworthy's reading of Hart: RoRs are 'necessarily constituted by a general consensus among the most senior officials' ('**recognitional community**'), not just judges alone. Under Constitution*, they include senior legislators.[16] But it is submitted that the following can be adapted to competing understandings of recognitional community.

RoRs have been characterized as 'inherently indeterminate and evolving',[17] or, non-conceptually, as 'indeterminate in numerous respects' in every actual manifestation.[18] But at a given point in time, RoRs must have a sufficiently determinate meaning to guide officials.

Under Constitution*, what if a 'primary legislation' was 'enacted' in violation of this determinate meaning of the RoRs?[19] RoRs would impose a duty on the recognitional community to treat the 'primary legislation' as legally invalid. If a lawsuit turning on this

[13] This formulation is intended to avoid errors concerning the structure of the (ultimate) rule(s) of recognition: Gardner (n 4) 101-102 and fn 28.
[14] Hart (n 11) 57, 113. Mikołaj Barczentewicz argues that customary rules like RoRs are 'metaphysically grounded in mental states of belief-independent acceptance exhibited by a sufficiently significant number of the members of the community' in 'Metaphysics of the Rule of Recognition and the Illuminati Problem' (2016) (manuscript).
[15] Gardner (n 4) 138 and Raz (n 8) 155.
[16] *The Sovereignty of Parliament* (OUP 2001) 256. Goldsworthy's recognitional community is suited for Constitutions* because it assumes non-law-applying officials exist. This is supposedly not true of law in general: Gardner (n 4).
[17] Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' 31(1) OJLS 61, 75.
[18] Gardner (n 4) 117.
[19] In quotation marks because *ex hypothesi* its violation of the determinate meaning of the RoRs renders it legally invalid.

'primary legislation' is brought, judges to that lawsuit would have the legal authority to strike down the 'primary legislation'; indeed, the RoRs obligates them to do so, and other senior officials to support them. Voilà! This is PSPL.

This sequence of events need not actually occur for this PSPL to do work. Senior legislators are *ex hypothesi* bound by the RoRs-imposed duty and wary of contravening the 'consensus' that makes 'a viable legal system' possible.[20] Thus, they would not enact such 'legislations' and would ensure (probably successfully) junior legislators (if any) do the same. As such, *actual* efforts to prevent a *hypothetical* sequence of events culminating in PSPL can *sustain* Constitutions*.

Part 2A has shown that a necessary feature of Constitution* is ambiguous between (1) one that necessarily manifests in Constitution*; or (2) one to which judges in Constitution* necessarily claim authority. This ambiguity afflicts us here too. On (1), it is logically possible – probable, even – that PSPL is never exercised in a Constitution*. The RoRs could be 'perfectly conformed-to' such that even its hypothetical exercise is not contemplated.[21] On (2), arguably judges necessarily claim authority to exercise PSPL in every Constitution*. As such, this point will be left open.

We can thus conclude: PSPL that violates the determinate meaning of the RoRs might be a necessary feature of Constitutions*.

C. Central Case of PSPL

This PSPL should be distinguished from the PSPL with which judges purport to strike down primary legislation that does *not* violate the RoRs' determinate meaning ('**PSPL**').

Unlike previously, judges are initiating a change in the RoRs,[22] without necessarily having authority to do so. They may do so only if other officials 'do not disagree too strongly with the judges' decision' and are 'willing to accept that it has resolved the constitutional disagreement, thereby retrospectively vindicating the judges' presumption of authority to resolve it'.[23] As such, the judges' 'authority' is contingent on the supererogatory behaviour of other officials and thus a contingent feature of Constitutions*. It is this 'authority' which

[20] Goldsworthy (n 16).
[21] Tucker (n 17) fn 24.
[22] Either by purporting to invest a more determinate in the RoRs or disavowing their previously determinate meaning.
[23] Goldsworthy (n 16) 241-242.

German and American judges have received, but not UK ones. PSPL is the PSPL described in the excerpt.

Notice the imagery in the phrase 'striking down': it suggests the primary legislation was standing (i.e. valid in some sense) until the point it was 'struck down' by judges. Vis-à-vis the former, this imagery is senseless. The recognitional community *ex hypothesi* finds the 'primary legislation' invalid. Vis-à-vis PSPL, it becomes coherent. The latter is exercised when judges disagree with legislators on the primary legislation's legal validity, but the judges have some 'authority' to prefer its own view. Such legislation is presumably valid until it is struck down by judges. In other words, PSPL is the central case of PSPL.

Given that PSPL is necessarily founded on a recognitional community's disagreement over the RoRs *at a given point in time*, this explains why PSPL's nature and scope is *inherently* controversial, even in Constitutions* where its existence is settled.

3. *Constitution and Constitutionalism*

The determination of 'necessary features' was left open in Parts 2A and 2B, echoing Waldron's agnosticism in Part 1. Frederick Schauer says law either has no necessary features – a view taken by *inter alia* Nicola Lacey, Brian Leiter, and Dan Priel – or if it does, they 'can only be described at such a high level of abstraction' that it 'tells us almost nothing' about law's nature in the ordinary sense.[24]

It is for the reader to decide whether Part 2 told us almost nothing about the nature of Constitutions*. To understand the nature of Constitution* in the ordinary sense, Part 3 shall apply Ronald Dworkin's and John Finnis' central insight – that jurisprudence requires 'some sense of why law should be thought to be important' by the people engaging in it[25] – to PSPL.

The Claim is thus reconstructed: firstly, how do people under Constitution* understand the importance (or lack thereof) of PSPL? ('**Importance Question**'); secondly, does this understanding support the claim that PSPL is part of the nature of Constitution*? ('**Nature Question**') This is subject to two caveats.

Firstly, the perceived importance of PSPL is specific to each Constitution*, with reference to its unique history, legal norms and political culture. To retain the generality of the

[24] 'On the Nature of the Nature of Law' (2012) 98 Archiv für Rechts-und Sozialphilosophie 457.
[25] Jeremy Waldron, 'Can There Be a Democratic Jurisprudence?' (2009) 58 Emory LJ 675.

Claim, answers to each Question will refer cursorily to various Constitutions*. Admittedly, constitutional understandings cross-pollinate across Constitutions*; Lord Neuberger's ruminations are clearly influenced by foreign constitutional norms. Some abstractly formulated norms might even be universally accepted. But they must find expression through officials of a particular legal system whose understandings are of primary concern. In practice, they are usually shared among the intelligentsia and other elites, and in principle, they can extend to the average citizen. After all, the unity of a community's legal system is grounded by the community.[26]

Secondly, within a given Constitution*, even the most widely shared understanding contain indeterminacies concealed by incompletely theorised agreements[27] and even the most sophisticated official does not have a fully articulated political morality. These normative commitments will only be described; Part 3 is not directly evaluative of any given PSPL.

Henceforth, we begin our foray into descriptive constitutionalism.

A. The Importance Question

Firstly, at a high level of abstraction, constitutional arrangements are justified holistically. Thus, an answer to the Importance Question of a given Constitution* must relate to its justification for law in general and its justification for separating its law-making and law-applying institutions. For instance, it is difficult to see how PSPL might be grounded in a Constitution* which regards the judiciary merely as a practically necessary instrument of an absolute sovereign. The importance of PSPL thus turns on assessing the relative fallibility and legitimacy of the judiciary vis-à-vis the legislature, which will in turn inform the nature and scope of PSPL.

Empirically, Constitutions* which ground PSPL tend to commit to a basic democratic norm: governance by officials elected by a political majority is desirable.[28] This is borne out by the literature, whose objects of study tend to be states professing to be democracies and whose emphasis on the counter-majoritarian difficulty relies on this norm.[29] Even the occasional author who writes about authoritarian states uses this norm to evaluate the

[26] John Finnis, *Philosophy of Law: Collected Essays Volume IV* (OUP 2011) 428-434.
[27] Cass Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (2007) 74 Social Research 1.
[28] This formulation intentionally leaves much unspecified. To be fair, the list of governments today that do not even *claim* to be democratic is short and dwindling.
[29] The preceding claims are impressionistic, but can probably be supported statistically.

phenomena.[30] The norm's thinness is illustrated by the Iranian constitution: its Guardian Council of the Constitution exercises PSPL to veto laws passed by the popularly elected Majlis inconsistent with Islamic values, which are taken to justify laws in general. This is nonetheless a significant observation about the Importance Question, given that wholly undemocratic constitutions 'have been the norm for most of human history'.[31]

Secondly, the US Constitution has a paradigmatic status in the history of constitutionalism. Its two 'most important innovations' – 'written constitutionalism' and 'judicial review of primary legislation' ('**JRPL**') – are hugely influential: 'almost 90% of all countries possess written constitutional documents backed by some kind of judicial enforcement.'[32] As such, US constitutional history informs (and possibly distorts) other countries' answers to the Importance Question, as the following list non-exhaustively and contestably illustrates:

1. That PSPL was originally and quite controversially established by the US Supreme Court[33] – rather than in the Constitution's text – has led other constitutional documents to explicitly incorporate or forbid this power. See Article 93 of the German *Grundgesetz* and Article 120 of the Dutch constitution respectively.
2. PSPL can used for both wicked and noble ends, with far-reaching consequences. One indirectly led to the American Civil War,[34] whereas another 'spearhead[ed] the attack on segregation and other racist laws'.[35]
3. This tumultuous history affirms that judges cannot unilaterally empower themselves with PSPL as a matter of course and illustrates the broad support required to ground a controversial exercise of PSPL.[36]
4. Whereas PSPL is arguably well-suited to the US Supreme Court's structural role in upholding principles of separation of powers and federalism, the same is not necessarily true of protecting individual rights, as the twentieth-century emergence of weak-form

[30] Eric Ip, 'The democratic foundations of judicial review under authoritarianism' (2014) 12(2) Int J Constitutional Law 330, fn 6.
[31] ibid 331.
[32] David Law and Mila Versteeg, 'The Declining Influence of the United States Constitution' (2012) 87 NYU L Rev 762, 766.
[33] *Marbury v. Madison* 5 US 137 (1803).
[34] *Dred Scott v. Sandford* 60 US 393 (1857).
[35] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346, 1350, on *Brown v. Board of Education* 347 US 483 (1954).
[36] A point seemingly underappreciated by Lord Steyn in *Jackson v A-G* [2005] UKHL 56, [102].

JRPL in other jurisdictions illustrates.[37] PSPL is but one possible method of JRPL, which in turn is but one possible method of protecting individual rights. The centrality of PSPL to Lord Neuberger's concept of constitution is arguably evidence that the US paradigm looms too large.

The preceding gives us a flavour of the normative issues surrounding the Importance Question and the room for reasonable disagreement on the importance of PSPL.

B. The Nature Question

An ordinary understanding of 'nature' can be specified in at least two way.[38]

If PSPL's impact on a particular Constitution* exceeds a certain threshold, PSPL is part of the nature of Constitution*. Obviously, where PSPL is completely rejected as unimportant, its impact is nil. In contrast, the extensive impact of PSPL on the US constitutional landscape plausibly renders it a part of the US Constitution's nature. Between these two, there exist many intermediates[39] and whether they attain the threshold is an open-textured judgment.

Alas, by passing an appropriately-worded constitutional amendment, PSPL in the US can theoretically be abolished. To rule out this possibility, a more stringent understanding of 'nature' might be preferred. Indeed, some Constitutions* contain eternity clauses, though to my knowledge, none entrenches PSPL. There is a judicial alternative: the Indian Supreme Court's basic structure doctrine in *Kesavananda Bharathi*[40] gives judges the power to strike down constitutional amendments that modified the 'basic structure' of the Constitution*, which arguably include those that abolish PSPL. This doctrine has since been adopted in Bangladesh, Belize, and Pakistan. On this understanding, PSPL is part of the nature of very few Constitutions*.

Without more (directly or indirectly) normative commitments, we cannot narrow this conceptual choice nor specify each option further. But the preceding has shown that alternative understandings of the 'nature' of Constitutions* are intelligible and, thus, the 'necessary feature' understanding cannot be taken for granted.

[37] Waldron (n 35) 1354-1358.
[38] See n 49 and accompanying text.
[39] Notably, the judicial threat to disapply primary legislation have led the UK government to remove an ouster clause from a Bill in 2003.
[40] 4 SCC 225 (1973).

4. Conclusion: General Jurisprudence Revisited

I believe it is ultimately misguided to ask whether PSPL is a necessary feature of constitutions, without more. Whether to adopt a thin or thick constitution is a mere presupposition to another, more substantive inquiry.[41] The original inquiry was artificially resuscitated, firstly by adopting Constitution* – an intermediately thick concept conjured for *this* purpose – and secondly by contriving an artificial PSPL deviating sharply from its central case. This yielded difficult-to-draw conceptual distinctions[42] and conclusions of dubious explanatory value in Part 2.

I believe this is a symptom of the more fundamental problems with conceptual jurisprudence, as highlighted by Dan Priel.[43] It is with great trepidation that I admit this. I am aware the Course Convenor and many leading positivists are unmoved by similar criticisms in the past (possibly with the exception of Joseph Raz[44]). There is no space to reprise this methodological debate. But I am unaware of any point-by-point rebuttal to Priel's arguments, which run deeper than merely alleging conceptual jurisprudence is 'boring' or 'irrelevant', or proposing a non-mutually exclusive 'sociological jurisprudence'.[45] Rather, conceptual jurisprudence is confused and false because it inherently *fails to deliver on what it purports to do*.

Part 3 is intended to showcase, in Priel's words, a 'revived pre-Hartian jurisprudence' without the Procrustean constraint of conceptual jurisprudence, and 'borrow[ing] freely from history, sociology, legal doctrine, politics, as well as philosophy'.[46] One might object that Part 3, even if accurate, is not sufficiently *abstract* or *analytical* or *pre-sociological* to *be* general

[41] See e.g. Raz (n 7).
[42] Goldsworthy (n 16) and Tucker (n 17) apply the Hartian framework to reach contradictory conclusions concerning UK parliamentary sovereignty. In light of legal positivism's self-professed normative inertness, the upshot of such endeavours is unclear, beyond the satisfaction of calling out their opponent's alleged 'conceptual error'.
[43] 'The Misguided Search for the Nature of Law' Osgoode Legal Studies Research Paper No. 34/2015. His blog offers a different take on the issues, e.g. 'The Argument Against Conceptual Jurisprudence, Part 2: The A Priori Version' at <http://juristhoughts.blogspot.com/2015/10/the-argument-against-conceptual_20.html>.
[44] Even then, Raz's shift towards 'our' concept of law (e.g. (n 7) 94-95) does not go far enough. See Priel (n 43) 27-30.
[45] Leslie Green, 'Jurisprudence: stop that right now!' at <https://ljmgreen.com/2015/08/14/hello-world/>.
[46] Priel (n 43) 51. He further argues the narrow view of conceptual jurisprudence only became fashionable in the last sixty-or-so years and goes against the spirit and substance of Hart's legacy in 'The High Church of Jurisprudence: An Essay for Oxford' (2016) Section V (manuscript).

jurisprudence. But this is precisely the assumption refuted by Priel and labelled by Finnis as 'a philosophical mistake, induced or at least made apparently plausible by (…) surface grammar'.[47] Indeed, its methodology was largely stipulated to minimize any departure from two orthodox positivist tenets, i.e. the sources thesis and comprehensive normative inertness.[48]

If these critics are right (and I think they are), beyond adopting a 'more consciously normative approach', jurisprudents committed to universalism and naturalism could turn to 'scientific findings on human nature' to ask what they 'entail (if anything at all) about the shape legal systems are likely to take'.[49] To my knowledge, examples of the former include Priel's reconstruction of Lon Fuller's and Ronald Dworkin's works[50] and Frederick Schauer's wide-ranging book on coercion.[51] Not only are these writings properly a part of law in general, they also happen to be, in my opinion, interesting and relevant.

We need only eschew the 'necessary feature' understanding of nature.

[47] Finnis (n 26) 58; see also 39-41.
[48] Gardner (n 4) 19 and 24.
[49] Dan Priel, 'Is There One Right Answer to the Question of the Nature of Law?' in Wil Waluchow and Stefan Sciaraffa (eds) *Philosophical Foundations of the Nature of Law* (OUP 2013) 344-346.
[50] E.g. 'Lon Fuller's Political Jurisprudence of Freedom' (2014) 10 Jerusalem Review of Legal Studies 18.
[51] *The Force of Law* (Harvard 2015).