Some Ousters Are More Equal Than Others: Rethinking Section 2 of the Judicial Review and Courts Act 2022

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Abstract—Section 2 of the Judicial Review and Courts Act 2022 introduces a partial ouster of the High Court's supervisory jurisdiction, legislatively reversing the Supreme Court's decision in *Cart v Upper Tribunal*. The prevailing framework for evaluating ouster clauses focuses on their nature: the extent to which judicial oversight is preserved. This article contends that such an assessment, while valuable, is incomplete. A comprehensive evaluation must consider two further dimensions: the origin of the restriction (whether internal or external to the judicial infrastructure) and its changeability (whether it is dynamic or static). Section I maps the evolution of a spectrum of ouster clauses through *Anisminic v Foreign Compensation Commission*, *Cart v Upper Tribunal*, and *Privacy International v Investigatory Powers Tribunal*,

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demonstrating the courts' increasing sensitivity to varied restrictions on oversight. Section II examines the judicial acceptance of s 2, arguing that, assessed through the lens of nature alone, it constitutes a doctrinal continuation of the preceding case law. Section III applies the novel tripartite framework in full, contending that the statutory origin and fixed character of the ouster render it ill-suited to the institutional and rights context of Cart, where the courts were better placed than Parliament to calibrate the appropriate level of restriction.

I. Introduction

By introducing a new partial ouster of the High Court's supervision of the Upper Tribunal, s 2 of the Judicial Review and Courts Act 2022 (JRCA 2022) legislatively reverses the Supreme Court's decision in *Cart v Upper Tribunal*.[1] The courts' acceptance of s 2 reignites a simmering debate within the case law and literature: how should we evaluate the appropriateness of restrictions on judicial oversight, and which constitutional actor is best placed to make that determination?

This article contends that the prevailing framework for assessing ouster clauses—which focuses on the 'nature' of the restriction—while invaluable, is on its own incomplete. Comprehensive evaluation must consider three factors: the *nature* of the ouster, its *origin*, and its *changeability*. Crucially, this tripartite framework is not exclusively addressed to the courts. It provides a workable tool for all those engaged in constitutional debate—including Parliament, the executive, academics, and broader civil society—to scrutinise restrictions on judicial oversight.

Applying this framework to s 2 reveals a critical tension. While the nature of the ouster is consistent with the principles of judicial oversight established in prior case law, its statutory origin and fixed character render it ill-suited to the specific context of *Cart*. It is not contended that Parliament lacked the authority to legislate in this area. Rather, this article advances a more precise claim: in the *Cart* jurisdiction, where the rights at stake were acute and the High Court had developed a finely calibrated working relationship with the Upper Tribunal, the courts were better

[1] *Cart v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 ('Cart').

placed than Parliament to determine the appropriate level of restriction on oversight. The risk of losses in rights protections is felt most directly in asylum and immigration cases, as *Ali v Upper Tribunal*[2] illustrates.

The article proceeds as follows. Section I outlines the gradual judicial recognition that ousters exist across a spectrum, based on the nature and extent of restriction on oversight, most clearly displayed through three landmark cases: *Anisminic v Foreign Compensation Commission*,[3] *Cart v Upper Tribunal*, and *Privacy International v Investigatory Powers Tribunal*[4]. Having mapped the preceding case law, Section II then introduces the JRCA 2022 ouster clause. The courts' assessment of the clear statutory language, the partial nature of the ouster, and the competence of the Upper Tribunal displays a doctrinal continuation, rather than a reversal, of previous judicial reasoning. The article therefore acknowledges that the 'nature' of the ouster supports its enforcement. Section III applies the novel tripartite framework to s 2 JRCA 2022 in full, assessing its statutory origin and fixed character against the specific institutional and rights context of *Cart*.

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[2] [2024] EWCA Civ 372, [2024] 1 WLR 5097.
[3] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL) ('Anisminic').
[4] *Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491 ('Privacy International').

II. The Evolution of a Spectrum of Ouster Clauses

Anisminic, *Cart*, and *Privacy International* capture the courts' increasing sensitivity to varied restrictions on court oversight, from scepticism towards tribunals to nuanced apportionment of judicial workload. This evolution has been illuminatingly synthesised by Hooper,[5] who identifies four considerations relevant to assessing the nature of ousters: the clarity of statutory language, the extent of the restriction on oversight, the character of the institution to which oversight is reallocated, and the impact on legality through risks to fundamental rights or the development of local law. Hooper's framework is certainly compelling; however, it captures only one dimension of a fully adequate assessment of ousters. The nature of an ouster cannot be assessed in isolation from its origin and changeability; it is the introduction of these two additional axes that this article advances in Section III.

A. *Anisminic*: Taming the Unruly Child

Anisminic serves as the symbolic starting point in understanding how courts engage with restrictions on oversight. Although conventionally read as drawing a firm line against ousting judicial review despite Parliament's intent, deeper analysis reveals the beginnings of a more nuanced consideration of statutory context, the competence of the Foreign Compensation Commission, and the rule of law interest in maintaining judicial oversight. The

[5] Hayley J Hooper, 'No Superior Form of Law? R. (Oceana) v Upper Tribunal' [2024] PL 1-11.

Court's engagement with this mosaic of factors anticipates a more sophisticated judicial appreciation of ousters that resists a binary conflict between judicial oversight and executive decision-making which subsequent case law would develop more explicitly.

Anisminic has been described as a '[rebellion] against Parliament'[6] to uphold the rule of law despite clear legislative intention to oust oversight. This tension is certainly apparent in the Court's approach to statutory interpretation. The Foreign Compensation Act 1950 contained a provision that any determination of the Foreign Compensation Commission 'shall not be called in question in any court of law.' The Court found that, as a matter of construction, the ouster did not preclude judicial inquiry into whether an order of the Commission constituted a nullity. Although appearing to disregard Parliament's intent to oust oversight, the better view is that the Court's reasoning provided the foundations for identifying which factors point towards an effective ouster clause. Lord Reid emphasised that if 'Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry'.[7] much more specific language would be expected. Considering the following case law, Lord Reid's remarks should not be viewed as a textual bar against ousters. Rather, they reflect a deeper judicial proposition that the clarity of statutory language is itself an indicator of the strength and seriousness of parliamentary intent to oust review and is a factor determining the nature of the ouster itself. As explored further in the discussion of s 2, demonstrating

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[6] Forsyth CF and Ghosh J, Wade & Forsyth's Administrative Law (12th edn, OUP 2022) 589.
[7] Anisminic, 170.

respect for legislative competence can provide constitutional weight behind giving effect to the ouster.

The engagement with parliamentary intent in *Anisminic* extends beyond textualism; an often-underappreciated factor of the ruling is that the purpose of the underlying statutory framework equally shaped the level of judicial supervision required. Lord Wilberforce observed that the Commission's interpretation effectively excluded Anisminic from compensation, despite the company's inclusion in Annex E of the Order, which listed entities eligible for compensation.[8] Its misinterpretation thwarted the legislative intent of providing compensation to those who had suffered loss in Egypt. His Lordship found that 'the solution [is] in the thickets of subsidiary legislation',[9] rather than the technical terms of 'jurisdiction' or 'nullity'. The approach to judicial oversight involved evaluation of the Commission's efficacy in performing its adjudicative role in the context of the specific statutory purpose, rather than an attempt to establish a general principle against ousters.

The relevance of the Commission's competence is also visible through the Court's analysis of its *institutional* features. The House of Lords acknowledged the Commission's 'predominantly judicial' functions.[10] Yet the crux of the judgment is that, while judicial in substance, the Commission is executive in form. The reference in the ruling to the Commission 'asking the wrong question'[11] implies a degree of institutional paternalism from the Court; that despite their judicial function, tribunals cannot reliably

[8] Anisminic, 214.
[9] Anisminic, 206.
[10] Anisminic, 207.
[11] Anisminic, 154.

identify the limits of their own power. Consequently, the substantive evaluation of the Commission demonstrates an appeal to the rule of law interest in ensuring effective judicial accountability. This point is crucial; it provides a stark contrast to the collaborative relationship identified between the Upper Tribunal and the High Court in the following cases, a development that bears directly on this article's argument that the modern judicial landscape relevant to the *Cart* context favoured a judicially managed restriction on oversight.

Interestingly, however, this rule of law argument is implicitly made elsewhere in the judgment through an appeal to parliamentary sovereignty. Lord Wilberforce captured this most precisely, observing that it would be a 'contradiction in terms'[12] for Parliament to define limits to the Commission's power while simultaneously allowing for such limits to be 'safely passed.'[13] As a necessary counterpart of the Commission's autonomy, the courts must ensure those limits are observed.[14] Therefore, the Court's adherence to parliamentary sovereignty extends to enforcing Parliament's intention by policing the Commission's exercise of its mandate. Although the argument that recourse to an authoritative judicial source is 'not a denial of legislative sovereignty, but an affirmation of it' is most notably associated with Laws L.J.'s remarks in the High Court in *Cart,*[15] I suggest that its roots originate earlier. The Court's analysis demonstrates that judicial supervision cannot be reasoned as purely an act of

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[12] Anisminic, 209.
[13] Anisminic, 207.
[14] *Anisminic*, 208. This is echoed elsewhere in the judgments; Lord Pearce approvingly cited the comments of Farwell L.J. in *Rex v. Shoreditch Assessment Committee, Ex parte Morgan [1910] 2 K.B. 859* that a tribunal that determined the limits of its own powers would be 'autocratic, not limited' at 197.
[15] *Cart v Upper Tribunal* [2009] EWHC 3052, 2009 WL 4113756 at [38].

resistance to parliamentary sovereignty; upholding oversight was a principled enforcement of parliamentary sovereignty itself by enforcing the Commission's bounded discretion.

Anisminic therefore reflects an early model of judicial oversight that is more sophisticated than its reputation as an act of defiance suggests. To some extent, there is an evident conflict between statutory language and the Court's interpretation of jurisdiction and nullity. However, beneath the surface of textual interpretation lies a contextual assessment of four interlocking factors: Parliament's clarity in ousting review, the purpose of the underlying statutory framework, the institutional characteristics of the Commission, and the rule of law interest in maintaining independent oversight. The subtleties of the House of Lords' reasoning in *Anisminic* are noteworthy; the four factors, corresponding to Hooper's framework, sowed the seeds for judicial appreciation of a spectrum of ousters in *Cart* and *Privacy International.*

B. *Cart*: Institutional Trust and Proportionate Justice

Cart builds upon the latent factors for assessing ousters proposed by *Anisminic*. What is particularly noteworthy, however, is that beyond merely considering the four factors, *Cart* signals an implicit move towards using them as a criterion for differentiating acceptable from disproportionate restrictions on judicial oversight, therefore recognising a 'spectrum' of ousters.

The Tribunal, Courts and Enforcement Act 2007 (TCEA) included a provision that 'the Upper Tribunal is to be a

superior court of record.'[16] The Divisional Court, Court of Appeal, and the Supreme Court in *Cart* unanimously agreed that the section did not fully oust judicial review.[17] The debate, however, lay in the *extent* of restriction. The Divisional Court and the Court of Appeal agreed that limiting review to 'exceptional circumstances'[18] was preferable. However, the Supreme Court found that the 'second appeals test',[19] requiring a case to have a reasonable prospect of success and either raise an important point of principle or practice, or for there to be some other compelling reason to hear it, provided a more proportionate safeguard against fossilisation of serious legal errors within the tribunal system.

The Supreme Court ruling echoes Lord Reid's signal in *Anisminic* that clear and explicit statutory language is required to oust review, reinforcing the fact that statutory language is itself an indicator of the strength of parliamentary intent to restrict oversight. However, the judgment explicitly highlights the historic role of the High Court in providing judicial accountability. The fact that the High Court's supervisory jurisdiction may only be ousted by 'the most clear and explicit words'[20] is bolstered by a description of the Court as an 'artefact of the common law.'[21] The emphasis placed on the Court's well-established position is noteworthy; it anchors an interpretative presumption in protecting the High Court's jurisdiction in

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[16] *Cart*, [24].
[17] *Cart*, [34].
[18] *Cart*, [34].
[19] *Cart*, [57].
[20] *Cart*, [30].
[21] *Cart*, [32]. Indeed, all three courts note the well-established history of the High Court, notably through Laws L.J.'s in-depth scholarly account of its link to the Curia Regis of William I in *Cart v Upper Tribunal* [2009] EWHC 3052, 2009 WL 4113756 at [28].

constitutional language. Here, the reading of legislative intent is not purely textual; it develops *Anisminic* and is informed by the constitutional value of judicial oversight.

Moreover, *Cart* steers clear of framing ousters as a binary conflict between tribunals and the courts. Importantly, the judgments from all three courts are characterised by extensive engagement with the statutory framework and policy foundations of the tribunal system. Laws L.J described the Upper Tribunal as the 'alter ego'[22] of the High Court since it sits at the apex of a comprehensive structure and exercises a cognate judicial review jurisdiction. In the Court of Appeal, the focus shifted to the TCEA as a 'newly coherent and comprehensive'[23] judicialisation of tribunals, while Lady Hale's judgment in the Supreme Court devotes significant space to the 'comprehensive' overhaul[24] instigated by the Act. A parallel can clearly be drawn with Lord Wilberforce's discussion of the compensation statutory framework in *Anisminic*, suggesting that purposive engagement with the institutional features of tribunals against their legislative frameworks is a consistent feature of judicial reasoning of ousters. Here, however, the dicta point towards an appreciation for the judicial expertise of the tribunals.

In addition to the judicial nature of tribunals, Lord Phillips stressed the institutional 'partnership'[25] between Parliament and the judiciary in managing resource constraints.[26]

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[22] *Cart*, [94].
[23] *Cart v Upper Tribunal* [2010] EWCA Civ 859, 2010 WL 2832927, [42].
[24] *Cart*, [54].
[25] *Cart*, [89].
[26] For a rich discussion of how the approach in Cart of 'taking legislation seriously' is not novel, *see* Bell J, 'Rethinking the Story of Cart v Upper Tribunal and Its Implications for Administrative Law' (2018) 39 Oxford

The adjudicative competence of the tribunal system and recognition of institutional collaboration therefore point in favour of redistributing some level of supervisory oversight to the tribunal. In light of the expertise and policy reasoning for the ouster, the Supreme Court adopted the second appeals test as a compromise, which has been compellingly described as 'proportionate dispute resolution'[27] reasoning between safeguarding against the fossilisation of bad law and resource concerns.

At first glance, the approach may appear to sideline rule of law concerns. In particular, it may appear to compromise the individual's right to access the courts. Such a reading, however, is incomplete: the rule of law may be *furthered* by addressing resource constraints. Lord Brown captures this tension; the rule of law is weakened if significant resources are devoted to 'finding a very occasional grain of wheat on a threshing floor full of chaff.'[28] It can hardly be said that a right to access the courts is protected if individuals *en masse* are effectively denied any form of legal redress due to a disproportionate expenditure of resources, while other claimants are reviewed by both the Upper Tribunal and the High Court. This interpretation of the rule of law can be termed the 'collective rule of law approach'. The orthodox individual

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Journal of Legal Studies 74. To illustrate, Bell draws attention to the fact that judicial reasoning in seminal cases, such as *Puhlhofer*, can be explained by the courts' approach of taking the empowering legislation - in that case, the Housing (Homeless) Act 1977- as the starting point of analysis. Such a doctrinal approach fosters sensitive engagement with the policy goals Parliament intended to achieve, rather than focusing on applying strict doctrinal categories in outlining administrative jurisdiction.

[27] Mark Elliott and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) CLJ 71(2), 297.

[28] *Cart*, [100].

approach focuses on protecting one's right to access the courts and personal freedom from arbitrary decision-making. Contrastingly, the collective approach analyses rule of law concerns through a systemic lens. It is crucial to recognise both limbs of the rule of law in the ouster context; restrictions on judicial oversight often provoke discussion of a false dichotomy between the rule of law, understood as protection of individuals, and good governance. On a closer look, the Manichaean approach flattens the rule of law interests both for and against upholding ousters.

The rejection of binary framing, the purposive reading of legislative intent, and the calibration of oversight to institutional context together refine the 'nature' assessment initiated in *Anisminic* into something more explicit and workable. *Privacy International* would develop this reasoning a step further.

C. *Privacy International*: Restriction or Redistribution of Oversight?

The final case preceding s 2 that this article considers is *Privacy International*. By a majority of 4-3, the Supreme Court held that s 67(8) of the Regulation of Investigatory Powers Act 2000, which stated that decisions of the Investigatory Powers Tribunal '(including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court,' did not oust the High Court's supervisory jurisdiction. The judgments draw together three strands of reasoning visible in the previous caselaw: the necessity of clear language as an indicator of parliamentary intent to restrict review, the interaction between institutional competence and the collective and individual

requirements of the rule of law, and, crucially, increasingly explicit recognition of a spectrum of ousters.

Firstly, the majority reaffirmed the 'fundamental presumption'[29] against ousting the High Court's supervisory jurisdiction. To successfully exclude judicial review, Parliament must 'squarely confront what it is doing'[30] by using the most clear and explicit words. Building on *Cart*, the constitutional importance of judicial oversight places presumptive weight against ousters, signalling to Parliament that the clarity threshold remains demanding and the primary indicator of the legislature's seriousness in restricting oversight.

Notably, all the judgments in the case pay close attention to the statutory framework and judicial character of the tribunal, though the majority and dissenting judgments draw different conclusions regarding the rule of law implications. Despite finding that the provision did not completely oust review, the Court stated that it is highly artificial, and somewhat insulting, to describe a reasoned tribunal judgment as a 'nullity' merely because of disagreement over a point of law.[31] Lord Sumption's dissent also critiques the conceptualisation of the ouster clause as a 'putative turf war'[32] between the High Court and tribunals. The tenor of the dicta points towards collegiality between courts and tribunals and judicial respect for tribunal competence. Lord Sumption's judgment stresses that, because of this competence, the judicial character of the Tribunal 'sufficiently vindicate[s]'[33]

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[29] Privacy International, [99].
[30] Privacy International, [100].
[31] Privacy International, [82].
[32] Privacy International, [199].
[33] Privacy International, [172].

the rule of law, which also incorporates legal certainty and Parliament's freedom to allocate determinative 'finality' to a specific body. Contrastingly, Lord Lloyd-Jones and Lord Carnwath echoed *Anisminic*'s fears of unbounded executive discretion, describing judicial oversight as a 'necessary corollary of the sovereignty of Parliament'.[34] What unites the various judgments is the shared appreciation that ousters do not necessarily provide a binary choice between judicial paternalism and permitting executive bodies to operate in legal black holes. Rather, tribunals provide a certain type of oversight. The majority and dissenting judgments reach different conclusions on the permissible extent of the ouster in light of their differing interpretations of the rule of law. However, both are rooted in a collaborative, rather than adversarial, approach to the partnership between courts and tribunals. Consequently, as visible in the division between an 'individual' and a 'collective' reading of the rule of law, it is difficult to reduce the issue of ousters to a flat conflict between the rule of law and legislative intent.

Particularly significant for our evaluation of s 2 JRCA 2022 is the discussion in *Privacy International* of varying degrees of intrusion into judicial oversight. The case reiterates that ousters are not inherently a zero-sum game between judicial protection and parliamentary sovereignty. Lord Carnwath argued that there is a 'strong case'[35] for holding that the rule of law precludes a clause that wholly excludes the High Court's supervisory jurisdiction. Importantly, what is stressed is the exhaustive nature of this hypothetical ouster. On the facts, the Court *did* find that the ouster was of some effect: five of the seven Justices concluded

[34] Privacy International, [160].
[35] Privacy International, [144].

that the clause was sufficiently clear to preclude review of jurisdictional errors of fact. Lord Carnwath's judgment continues to differentiate between restriction and reallocation of review. The separation of powers dictates that administrative bodies should not determine the legal questions that frame their own decision-making process. However, 'a different constitutional analysis may be required,'[36] when an ouster empowers a 'judicial body of like standing and authority'[37] to provide oversight. The questions of which grounds are restricted and whether oversight is redistributed to another body are crucial in identifying the efficacy of ousting review.

Taken together, the three cases depict the courts as sensitive evaluators of tribunal competence, legislative intent, and the requirements of the rule of law, echoing the factors outlined by Hooper. Critically for the following analysis of s 2, the cases demonstrate a growing appreciation for a spectrum of restraints on judicial oversight, from full judicial review at one end, to various partial restrictions and reallocations of review, and then complete exclusion of oversight.

II. Reversing *Cart*: Doctrinal Continuation

Replacing the ruling's second-tier appeals criteria known as Cart judicial review (Cart JR), s 2 JRCA 2022 inserts a partial ouster of review of Upper Tribunal decisions into the Tribunal, Courts and Enforcement Act 2007. The Upper Tribunal's decisions to refuse permission to appeal are now to be 'final, and not liable to be

[36] Privacy International, [40].
[37] Privacy International, [252].

questioned or set aside in any other court'.[38] The strict wording that 'the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision'[39] reflects a deliberate attempt to by Parliament to meet the clarity threshold outlined in the preceding case law. Four narrow exceptions remain under s 11A (4): (a) the lack of a valid application, (b) the tribunal being improperly constituted, (c) bad faith, or (d) a fundamental breach of natural justice. Interestingly, the section therefore mirrors the 'exceptional circumstances' test adopted by the lower courts in *Cart*, which limited review to 'outright' excesses of jurisdiction or a fundamental denial of procedural justice. One can therefore place the ouster in the centre of the spectrum identified in Section I; it provides a more restrictive approach than the *Cart* second appeals test yet maintains a safety valve through judicial review of exceptional cases and reallocates oversight to a competent and judicial body, the Upper Tribunal.

At first glance, it may seem that judicial acceptance of s 2 departs from the nuanced approach to ousters in the previous case law in favour of upholding parliamentary sovereignty. Indeed, the Independent Review of Administrative Law (IRAL) expressly stressed that Parliament should not be considered supine;[40] emphasising that parliamentary sovereignty was a clear incentive for reform. Appeal to parliamentary sovereignty is particularly visible in *R (on the application of Oceana) v Upper*

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[38] Tribunals, Courts and Enforcement Act 2007, s 11A (2).
[39] Tribunals, Courts and Enforcement Act 2007, s 11(A)(3)(a).
[40] *Independent Review of Administrative Law. (2021). The Independent Review of Administrative Law: Report.* London: Ministry of Justice. Available at: https://assets.publishing.service.gov.uk/media/6053383dd3bf7f0454647fc4/IRAL-report.pdf (Accessed: 11 October 2024), 25.

Tribunal,[41] the first case upholding the ouster. Saini J asserted that, besides some obiter comments and academic critiques, the most fundamental rule of our constitutional law is that Parliament is sovereign and, therefore, courts must give effect to the ouster.[42] Appeal to parliamentary sovereignty in form and language in response to the explicit s 11A ouster should not be mistaken, however, for a substantive step back; it is preferable to consider the clarity of language as a more prominent factor influencing judicial acceptance of the ouster.

Alongside recognition of parliamentary sovereignty, the case law demonstrates engaged analysis of tribunal competence and resources, reminiscent of *Anisminic*, *Cart*, and *Privacy International*. Three features of the s 2 ouster can be extracted. First, the judgments display a sensitive evaluation of fairness in the context of the modern tribunal framework and parliamentary intent. That is to say, a fair system is not necessarily a strictly court-centred one. In *Oceana*, Saini J found that the 'natural justice' exception imposes a 'substantial hurdle',[43] as only an error 'so grave as to rob the process of any legitimacy'[44] would meet the threshold. The high jurisdictional gateway was justified because of the Upper Tribunal's 'necessary skill and independence'[45] and the overarching aim of the legislation. Saini J stated that 'principles of fairness are not to be applied by rote identically in every situation.'[46] More specifically, what is required by natural justice is shaped by the legal and administrative context

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[41] R *(on the application of Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin), [2023] 4 WLUK 19 ('Oceana').
[42] Oceana, [52].
[43] Oceana, [31].
[44] Oceana, [33].
[45] Oceana, [39].
[46] Oceana, [32].

and not be given a meaning which frustrates the purpose of the statutory framework. Consequently, in light of the Upper Tribunal's competence and the clear legislative intention to reallocate workload to the tribunal system, Saini J interpreted the ouster exceptions restrictively so as not to undermine the statutory purpose or respect for tribunal competence. This approach is not novel; *LA (Albania) v Upper Tribunal*[47] acknowledges that a margin of legal error is accepted in *Cart's* second appeals test itself and the acknowledgement that Parliament is entitled to allocate determinative finality is reminiscent of Lord Sumption's comments in *Privacy International.* Here, the needs of fairness are coloured by tribunal competence and the administrative purpose of the ouster, a combination of respecting legislative intent and tribunal function.

The second feature is that the ouster is not absolute; exceptions remain for bad faith and in the interests of natural justice. The spectrum of ousters established in the preceding case law contains five identifiable points: full judicial review at one end; total exclusion at the other; and between them, in increasingly restrictive order, the exclusion of jurisdictional errors of fact from *Privacy International*, the second appeals test from the Supreme Court in *Cart*, and the exceptional circumstances test from the lower courts in *Cart.* Placing the ouster on the proposed spectrum visible in the caselaw, it remains close to the 'exceptional circumstances' stage. This is crucial; the reform does not pose a binary choice between parliamentary intent and judicial oversight. Nor does the ouster amount to the constitutional showdown envisaged in previous cases, such as *R (Jackson) v*

[47] *R (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337, [2024] 1 WLR 1673, [34] ('LA(Albania)').

Attorney General and *AXA General Insurance v Lord Advocate*, by completely frustrating legal accountability.[48] Instead of rejecting the possibility that the rule of law could preclude ousters, the cases demonstrate that, on the facts, the rule of law does not need to.[49] The Court of Appeal in *LA (Albania)* distinguished s 11A from the hypothetical 'total ouster'[50] criticised by Lord Carnwath in *Privacy International*. Thus, the court held that the rule of law is sufficiently vindicated because review remains available for egregious, pre-*Anisminic* jurisdictional errors. In *Singh v Secretary of State for the Home Department,*[51] the Court briefly addressed that Parliament may indeed not be supreme in the 'extreme examples'[52] but that the established rule in practice is that the legislature is sovereign, building on the spectrum of restraints of judicial oversight offered in *Cart* and *Privacy International*.

The third limb is the partnership approach to legislation, echoing Lord Phillips' comments in *Cart*; the reasoning is structurally underpinned by respect for the legislature's

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[48] See, for example, *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262, [101]-[102] and *AXA General Insurance v Lord Advocate* [2011] UKSC 46, [2012] 1 A.C. 868, [51]. The cases operated against different factual backgrounds: *Jackson* concerned the validity of the Parliament Act 1949 and the Hunting Act 2004, while *AXA Insurance* centred on the whether the Damages (Asbestos-related Conditions) (Scotland) Act 2009 was outside the competence of the Scottish Parliament. The wider importance of the cases lies in the obiter comments that the courts would potentially not give effect to legislation that completed ousted judicial scrutiny, suggesting that parliamentary sovereignty may indeed be limited.

[49] For more detailed warnings against pitting the rule of law and parliamentary sovereignty against each other, *see* Murray, P. (2024) 'Cart revisited: ouster clauses and the Upper Tribunal', CLJ 83(1) 8.

[50] LA (Albania), [31].

[51] Singh v Secretary of State for the Home Department (Ragbir Singh) [2025] CSIH 4, 2025 SLT 146.

[52] *Singh*, 6.

competence. The semantics of the case law are intriguing; 'Parliament has now addressed'[53] the issue raised by Lord Hope in *Eba v Advocate General for Scotland* and has engaged with the judicial remarks on case workload. As noted, the Government Response to the IRAL evidences a clear intention overcome the complications of the post-*Anisminic* language of nullity and jurisdiction. Dingemans L.J. in *LA (Albania)* noted that by using this language, Parliament had tackled the issue of nullity 'head on',[54] leaving the courts no room for a restrictive *Anisminic* interpretation of jurisdiction. Consequently, the judicial reception suggests self-restraint and respect for legislative capacity in the face of deliberate intent to meet the judicial standard of textual clarity.

The prima facie impression that the provision concretely cements parliamentary sovereignty as the sole *superior* constitutional principle is therefore somewhat misguided; the courts do not, and consistently have not, unquestioningly deferred to legislative intent. Rather, the policy aim of the legislation is an influential factor to be read alongside the nature of the ouster itself and the competence of the tribunals. As established in Section I, Hooper's four factors – clarity of language, extent of restriction, institutional character, and legality impact – provide the analytical framework within which the judicial reception of s 2 operates. Ouster interpretation remains a contextual and sensitive interpretative exercise rather than submission to parliamentary sovereignty. It reflects a ripened appreciation that resource concerns, institutional partnership, and

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[53] Lord Hope's comments in Eba were cited in *Sooy v Secretary of State for the Home Department* [2023] CSOH 93, [2024] SLT 1 at [78].
[54] LA(Albania), [35].

the efficacy of judicial oversight offered by the tribunals do not require a terse reading of statute that characterised the *Anisminic* era. What the 'nature' assessment of ousters cannot alone resolve, however, is whether the origin and fixed character of s 2 are equally well-suited to the institutional and rights context of *Cart*. It is to those two remaining axes of the tripartite framework that this article now turns.

III. Reversing *Cart*: Static/Dynamic Changeability and Internal/External Origin of Ousters

This article contends that the decision to implement the ouster through legislation was the wrong one in the specific context of *Cart*. Sections I and II have examined that the nature of the s 2 ouster, assessed through Hooper's four factors of clarity of language, extent of restriction, institutional character, and legality impact, support its judicial acceptance. It is contended, however, that a closer look at the features of restrictions on judicial review is required.

There are two often neglected characteristics of ouster clauses: the origin of the restriction and its temporal changeability. While ousters are mostly associated with legislative provisions, the courts have historically developed their own internal restrictions on review.[55] Ousters from courts and

[55] For example, referencing Lord Diplock in *R v IRC, ex parte National Federation of the Self-Employed*, the Court of Appeal in *Cart* accepted that the rules of standing in judicial review were judge-made and capable of development to preserve the integrity of the rule of law in light of changing social and governmental structures. What this demonstrates is that the courts

Parliament can be differentiated: judicial restrictions are often more dynamic, as they can be gradually developed through the case law in comparison to 'static' legislative provisions. Furthermore, they are internal: the restrictions originate from within the judicial oversight infrastructure and can operate as informal workload arrangements between courts and tribunals, an insight the legislature lacks due to sitting externally to judicial oversight mechanisms. By 'external' to the judicial process, I refer to Parliament's lack of contact with the granular development of case law and public law principles, and its distance from the closed feedback loop between tribunals and courts in developing judicial practices. It is not contended that static or external restrictions are never appropriate; as Laws L.J. noted in *Cart*, Parliament is free to adapt procedures of judicial review.[56] However, in the specific context of Cart JR and the serious legal issues in question, an internal and dynamic ouster – such as the second appeals test espoused by the Supreme Court – is preferable and Parliament operates at an epistemic disadvantage. Dynamic, internally generated restrictions permit incremental recalibration in response to evolving resource pressures, tribunal performance, and rights sensitivity, whereas statutory change freezes a particular empirical and institutional snapshot into law.

The Court of Appeal and the Supreme Court in *Cart* analysed how judicial restrictions have functioned in practice. The judgments draw attention to three illustrative examples*: R (Sivasubramaniam) v Wandsworth County Court,*[57] *R (Wiles) v Social*

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have an inherent power to shape the requirements for access to judicial review based on the shifting needs of judicial oversight.

[56] Cart v Upper Tribunal EWHC, [40].

[57] *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, ('Sivasubramaniam').

Security Commissioner;[58] and *Gregory v Turner*.[59] In *Sivasubramaniam*, judicial review applied in principle to judges of the county court. However, the case held that permission to apply for it would not be granted where a satisfactory alternative recourse existed, whether or not it had been exhausted. Notably, in exceptional cases such as asylum claims, this restriction might not be enforced. Importantly, there was no statutory ouster; the Court outlined for itself an internal restriction scheme which provided 'fair, adequate and proportionate protection against the risk' of jurisdictional error while also preserving the statutory framework.[60] In *Gregory v Turner*, despite having grounds to show the lower court had fallen into error, the Court followed *Sivasubramaniam*, stating that 'every system contains a percentage of error; and if by slightly increasing the percentage of error, we can substantially reduce the percentage of cost, it is only the idealist who will revolt'[61] echoing the proportionality analysis in *Sivasubramaniam*. In *Wiles*, judicial review remained available on 'orthodox' public law grounds because this had been the established practice for 30 years. However, the judgment confirmed a common practice of 'judicial restraint' or 'appropriate caution', where reviewing courts should not be 'astute to find error'[62] but should instead presume that expert tribunals are likely to have correctly applied complex, technical legislation. Such limitations are not formally labelled ousters; however, in substance, they constitute precisely the type of

[58] R (Wiles) v Social Security Commissioner [2010] EWCA Civ 258, ('Wiles').
[59] *Gregory v Turner* [2003] EWCA Civ 183.
[60] *Cart*, [34].
[61] *Cart*, [80].
[62] Cart, [49].

organic reallocation of workload that the tripartite framework identifies as dynamic and internal to judicial infrastructure.

Having analysed dynamic and internal ousters of review, there is a stronger conceptual basis to contrast s 2 with the second appeals test in *Cart*. Firstly, the second appeals test is internal in the sense that it is founded upon lived experience from figures within the judicial system. In justifying the test, the judges drew on their professional expertise. Lord Phillips agreed on the need for continued supervision of the Tribunal, 'having considered the judgment of Lady Hale, who has great experience in this field.'[63] Lord Clarke also reflected that his 'experience as Master of the Rolls was that such a test worked well for second appeals.'[64] However, the internal nature of the ouster is not solely based on individual expertise. The vantage point of the courts permits consideration of the on-the-ground working relationship between courts and tribunals. This is particularly pertinent in the context of the Upper Tribunal and High Court, where there is a necessity to ensure legal consistency between the bodies and avoid the development of local law. As Lady Hale noted, the courts have established a principle of judicial restraint when considering decisions of expert tribunals.[65] Lord Dyson developed this point, stating that 'if this principle towards decisions of the UT is respected, then judicial review of unappealable decisions provides a system of justice which is proportionate and appropriate to protect the rule of law. Further restrictions on the scope of judicial review are unnecessary.'[66] The last two comments neatly capture how 'internal' restraints on judicial oversight can

[63] *Cart*, [92].
[64] *Cart*, [104].
[65] *Cart*, [49].
[66] *Cart*, [113].

instinctively develop through professional comity within the closed feedback loop between courts and tribunals. Through awareness of judicial respect and common practice towards tribunals, the judges can conduct a more precise proportionality assessment of restrictions that achieves restraint without requiring excessive legislative intervention.

The internal/external distinction is sharpened further by the courts' sustained institutional familiarity with rights balancing. Through the adjudication of common law rights and proportionality assessments under the European Convention framework and EU law, the courts have developed a sustained familiarity with balancing public interests against individual rights. This is especially pertinent in relation to Cart JR. Cart JR claims frequently arose in the context of asylum and immigration law, where claimants are particularly vulnerable to severe legal outcomes, including removal and infringements of Convention rights. As the Court observed in *Sivasubramaniam*, in asylum cases 'the most anxious scrutiny of individual cases is called for...and review by a High Court judge is a reasonable, if not an essential, ingredient in that scrutiny.'[67] Assessment of how far review can be ousted in this context therefore requires an intimate understanding of rights language that cannot be reduced to good governance calculations alone. This institutional limitation of Parliament's external perspective is compounded by the static nature of the legislative intervention, which demanded a robust empirical foundation at the moment of enactment, precisely because, unlike a dynamic judicial restriction, it cannot self-correct as the evidence develops.

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[67] *Cart*, [79].

Parliament is well placed to make macro-political assessments of resource allocation; however, rights analysis does not always lend itself to neat calculations. The empirical record of Cart JR exemplifies this challenge. Firstly, as the Government Response to the IRAL acknowledges,[68] success is notoriously difficult to measure in judicial reviews. Both academic literature and submissions to the Government raised serious concerns about the accuracy of the Panel's calculation that the Cart JR success rate was 0.22%.[69] The Ministry of Justice undertook a fresh analysis of the data following the criticisms, finding a success rate of 3%.[70] Moreover, it is important, however, to note the inherent disparity between Cart JRs and non-Cart JRs. As highlighted by Barczentewicz's study,[71] direct comparison cannot capture the fact that the Cart JR test already contains a threshold filter, nor can it quantify claims' importance. Defining success purely through a numerical lens neglects the fact that there is significant value in certain claims—such as issues of general importance or acute rights issues—receiving additional oversight. The concern is not that Parliament lacked authority to legislate under conditions of empirical uncertainty or in areas affecting rights. Rather, the displacement of a judicially developed, rights-sensitive threshold demands robust evidential grounding. By

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[68] Ministry of Justice (2021) Judicial Review Reform Consultation: The Government Response, Annex E.

[69] IRAL, 3.46. For detailed discussion of the concerns with the IRAL's assessment, *see* Joe Tomlinson and Alison Pickup, 'Putting the Cart Before the Horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews', (UK Const. L. Blog, 29 March 2021) < https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/>.

[70] Ministry of Justice, 35.

[71] Mikołaj Barczentewicz, 'Cart Challenges, Empirical Methods, and Effectiveness of Judicial Review' (2021) 84 MLR 1360.

committing to a fixed position based on a contested empirical assessment, Parliament foreclosed precisely the kind of incremental adjustment that the courts, operating within the closed feedback loop of judicial oversight, were better placed to provide. It can certainly be contended that Parliament maintains the competence to legislate regardless of this empirical uncertainty. While that may be true, the central point here is that the courts possess the superior vantage point from within the judicial framework. Parliament's institutional disadvantage is compounded by a democratic one; the legislature's superior democratic credentials over the courts are arguably weakened when the restriction risks compromising the rights of those outside the political community, such as migrants and asylum seekers.[72]

The practical implications of narrowing review are illustrated by *Ali*. The claimant was refused entry clearance after losing their documents abroad. The First-tier Tribunal misapplied precedent on re-entry, and the Upper Tribunal refused permission to appeal on the basis that the claim was 'not arguable.'[73] The Court of Appeal ultimately held that the refusal of re-entry could engage Article 8 of the ECHR and remitted the case for a proportionality assessment; the Court's finding was only possible because the refusal pre-dated the coming into force of the JRCA ouster. The human consequences were stark; the

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[72] Space precludes further examination of the role of democracy in assessing ousters. However, I propose that an institution's democratic credentials are a valuable aspect of an ouster's 'origin'. There is a further substantial, on-going discussion to be considered regarding the role of courts in upholding rights protections in a functioning democracy, see, for example, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1999); *cf* Jeremy Waldron, *Law and Disagreement* (OUP 1999).

[73] Ali v Upper Tribunal, [7].

claimant had well-established family ties in the UK, having moved as a young child with his mother and siblings to join his father. He had already been separated from his family for six and a half years prior to being able to apply for returning resident entry clearance due to financial constraints and lack of assistance from the British Embassy.[74]

The complications of s 2's external perspective are exacerbated by the intrinsically fixed nature of legislation. Lord Phillips in *Cart* was 'persuaded that there is, at least until we have experience of how the new tribunal system is working in practice, the need for some overall judicial supervision of the decisions of the Upper Tribunal.'[75] The striking point of this comment is that it acknowledges that oversight is necessary 'at least until' the courts have a better understanding of tribunal workings. The restriction is therefore regarded as dynamic and subject to review. Its enforcement is conditional on its necessity in light of the practical working relationship between the courts and tribunals. Contrastingly, the legislative ouster ossifies the judiciary's ability to develop the application of these principles. Of course, Parliament would be free to legislate again and implement a new ouster clause, perhaps more along the lines of the original Cart JR test, if it found that s 2 was overly restrictive. However, the drivers for change at the judicial and legislative levels are different. Statutory amendment is macropolitical and episodic, reliant on another wave of political interest in judicial review. Contrastingly, informal internal ousters through the case law can develop incrementally and incorporate new exceptions when needed. This is particularly relevant in the context of Cart JR, which, as noted,

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[74] *Ali*, [23].
[75] *Cart*, [92].

largely featured asylum and immigration cases. Adopting an external, static ouster in this context risks calcifying a system which cannot proactively adapt to mitigate unfairness and, at best, can only react after the harm has been disproportionately felt by individual cases that fall through its gaps.

The analysis of origin and changeability does not suggest that Parliament is never empowered to oust review. The crucial issue is that, in the specific context of Cart JR, the close partnership between the Upper Tribunal and the High Court and the potential rights complications favour a restriction that originates from within the judicial framework and maintains flexibility.

IV. Conclusion

The judicial reception of the ouster clause in s 2 JRCA 2022 constitutes a doctrinal continuation of the preceding case law in a novel constitutional register. The courts' acceptance of the provision reflects an established pattern in which parliamentary sovereignty, expressed through legislative intent, is assessed alongside substantive considerations of how the rule of law operates in practice, particularly within a system of increasingly specialised and competent tribunals. This reasoning, demonstrated by *Oceana*, *LA (Albania)*, and *Ragbir Singh*, is structurally comparable to *Anisminic*, *Privacy International*, and *Cart* itself.

Despite the doctrinal continuity, the parameters of judicial review of the Upper Tribunal should have remained set by the courts. The case law and literature demonstrate an appreciation for a spectrum of restrictions, from total oversight,

the second appeals test, exceptional circumstances, and complete ousting of review. However, in addition to this one-dimensional assessment of the level of judicial oversight preserved by ousters, it is contended that the origin and the changeability of restrictions should be evaluated as well. Considering the close working relationship between tribunals and courts and the potentially high stakes of Cart JR claims, any ouster on review should be both dynamic, as in subject to revision, as well as internal, developed by judicial bodies themselves.