Adrian Vermeule’s lecture on the ‘Publius Paradox’ raises awkward questions for constitutional lawyers, as much in the United Kingdom as elsewhere.

In his Chorley Lecture on what he calls ‘the Publius Paradox’, Adrian Vermeule notes that he will not be so ‘incautious’ as to seek to illustrate his point with examples from history of the British constitutional order. This — of course — effectively operates as an invitation to a UK constitutional lawyer to assess his thesis, however tentatively it is expressed, against not only that history but also the modern British position.

In this brief response to his lecture, I begin to do just that. I first consider the Paradox described by Vermeule. I then offer some critical reflections upon the general thrust of his lecture and the specific manner in which he advances his argument. Though there is reason to welcome this sort of focus on the necessity of the executive being able to act — not least as a corrective to the incessant desire to stop it from doing so — there are nevertheless aspects of the specific argument made here against which we might wish to push back.

I. The Publius Paradox

‘Rome was obliged to create dictators.’ This claim by Alexander Hamilton represents the core of Vermeule’s lecture. In exploring it, Vermeule is suggesting a basic but potentially crucial paradox of the modern constitutionalist project: that if the state is denied the power to do what is necessary in order to survive, it will be forced to push past the boundaries that the law imposes — either by changing the law to meet the demands of new and unforeseen situations or, in extremis, by throwing off the restraints of law altogether. And so, the logic of the argument goes, attempts to restrain the state generally and the executive in particular risk being not merely futile — the limitations will not in practice limit — but counter-productive: the project of
limiting results, over time, in an executive that is more powerful than one that was originally permitted greater freedom of (legal) action. The result is that the future of the constitutionalist project itself may be brought into question by such attempts.

One aspect of this core claim is worth drawing out immediately: it is an argument whose logic speaks to those who are concerned with imposing such limitations — those who we can call, loosely, liberal constitutionalists — and which in effect invites them to recognise the outer limit of their project, the point beyond which they should not push the project of fettering Leviathan. It speaks less directly — if at all — to those who do not already accept some variant of the logic of liberal constitutionalism. The same thing which renders the Paradox paradoxical therefore sets a limit on the potential of the argument. To put the point another way: being obliged to create dictators is not a problem if one regards dictatorship as desirable. We should not, I think, overlook the fact that an increasing number of people across the world would seem to do exactly that.

That point made, it is worthwhile identifying a persistent but important ambiguity in Vermeule’s account: what exactly brings the Paradox into play? What it is that we cannot foresee that means we will, when the unforeseen unfolds, find ourselves obliged to create dictators? Early in his lecture, Vermeule refers to ‘natural circumstances’, a phrase which might be read narrowly — to encompass, say, natural disasters, perhaps famine — or slightly more widely, to encompass war or other events to which human nature might seem to contribute more or less directly. These are, or at least can be, things that happen to the state. It will have no choice but to respond and so the absence of sufficient executive authority is likely to be remedied very shortly or simply overridden and addressed retrospectively if at all. (Though the contested place of war in the modern British constitution — and, I would hazard, also the American one — seems to me to be a function of the fact that this is not now usually the case; that the wars in question are, or are widely believed to be, wars of choice and so the constitution is not faced to confront its own mortality.) But many expansive interpretations of executive authority, including some of those with which Vermeule illustrates his general thesis in the American context, do not fall into this category. Some are only examples of ‘natural circumstances’ if we give that formulation the widest possible sense; others cannot plausibly be included therein regardless of how it is defined. We must therefore be careful. If the impossibility of foreseeing ‘natural circumstances’ which might arise causes us to hesitate in our pre-commitment, it nevertheless serves to have a clear sense of what that category includes.

Moreover, what is striking about many of the examples with which Vermeule illustrates his point — the Jerusalem Passports case; the challenge to Trump’s travel ban — is that there appears to have been no relevant change in the material context within which the law operates; no relevant natural circumstances at all, whether unforeseen or unforeseeable, no matter how broadly that original formulation is understood. Nothing has happened, in the United States or elsewhere, which shows the limits on the executive to be unworkable and therefore demand their abandonment. Rather, in one case ambiguous limits have been clarified in favour of the executive, while in the other an existing rule has been restated in broader terms. Though in both cases, therefore, it seems correct to suggest that the specific litigation was counter-productive, neither case would seem to demonstrate that limits upon the executive are futile, never mind themselves counter-productive. And so even if the basic logic of the Paradox holds good, it seems crucial to limit its invocation to those contexts in which either the underlying logic is compelling or relevant empirical evidence is available. Otherwise, the invocation of the Paradox risks becoming little more than a statement of the idea that the executive should be
subject to minimal limits, with the concern for the well-being and persistence of the polity more broadly which underpins it either obscured or abandoned altogether.

This concern of the constitutional scholar for the well-being of the polity — we would not want to see it bind itself unnecessarily and so risk destruction when trying to respond to unforeseen circumstances with inadequate powers — is an external statement of what Vermeule describes as the ‘impulse for self-preservation’: the instinctive desire on the part of the polity to survive which sees it ignore or overthrow those same limitations. This point, however, highlights the speed with which the Paradox escapes the logical framework in which it is constructed. Often, a polity will wish, for reasons of short-term convenience or similar, that it — or more specifically the wielder of its executive power — possessed greater legal powers that it does. But only infrequently will the absence of those powers pose any sort of danger to the polity overall. Rarer still will be the occasions on which its continued existence is genuinely in doubt. And so we must — again — be careful not to elide the question of self-preservation with that of (often short-term) convenience, for if the Paradox is considered to encompass the latter, it soon ceases to be a paradox, but rather the (somewhat banal) claim that political actors wish to be subject to fewer limits than they are subject to, and will make exaggerated arguments for the necessity of new or broader powers.

Another feature of the Paradox as outlined by Vermeule is the inevitable expansion of its scope. What starts as an argument against excessive limitation of (executive) power (because one can’t foresee what circumstances might arise) appears to become — or at least hint at becoming — an argument for not limiting such power at all. That is, even if those who construct the legal-constitutional framework are aware of this Paradox and seek to pre-empt it by taking care as to what limits they impose on the bodies thus constituted, they will fail: the very nature of unforeseeability means that there will always be circumstances they have not foreseen. And so it may be that the ultimate logical implication of the Paradox is in fact not that constitutionalism should be a ‘loose-fitting garment’ but that constitutionalism — again, at least in its dominant liberal form — is a mistake. Not only was Rome obliged to create dictators, but all (liberal) constitutional orders will (on this variation of the Paradox’s logic) tend ultimately towards dictatorship. Though this seems a perfectly respectable — and increasingly plausible — claim, it is of a rather different nature than that from which we began.

The quote from JF Stephen with which Vermeule closes his lecture is intriguing, in part because (as is acknowledged by Vermeule) it does not represent a direct restatement of the key idea, but rather a parallel argument for ‘constitutionalism as a loose-fitting garment’. This is striking, because — leaving aside the substance of the two claims — this is the way in which the discourse is constructed in the United Kingdom also, with arguments for greater executive power often (though not always) made indirectly. Rather than saying that we should have a strong executive, we say that we should not seek to limit the executive in an excessive fashion or, even less directly, that we should be suspicious of claims to or exercises of judicial power which would work to limit the powers of the executive. The Judicial Power Project, for example, has been criticised in part because what is framed as a discussion about the appropriate role of judges often makes as much, if not more, sense when understood as an argument about the need for a strong executive. (And indeed, this — along with its political bent — is what distinguishes it from older political constitutionalist arguments, in which the focus was upon the power of the legislature.) Though these framings are related, they are distinct, and Vermeule’s arguments here therefore offer a welcome opportunity to consider the implications of the preference for adopting one rather than the other. Only occasionally in the United
The ‘Publius Paradox’ and the United Kingdom

Kingdom — as, for example, in some of the work of Timothy Endicott — do we find a more direct, more positive, argument for executive power, and there is little to compare with the arguments made by Vermeule elsewhere in his work, in which not only the inevitability but also, and crucially, the necessity of a strong executive is clearly argued for. This makes a consideration of the application of the Paradox to the UK a potentially fruitful endeavour.

II. The Publius Paradox in the UK

Any attempt to apply this injunction to the United Kingdom must, I think, start at the general level, encompassing the basic pattern of attempts to limit the power of the executive. Here, of course, the picture looks very different from those states in which a codified Constitution seeks to both establish the powers of the state and defined the limits within which those powers must be deployed. Historically, the key form of executive power in the United Kingdom was the prerogative, which resulted not from some constitutive act of the people (or anybody else), and which was limited not in advance — at some moment of constitution — but rather at the point at which it was accepted by the courts as existing in the form of some specific power or other, and then by later legislative and sometimes judicial intervention. Certainly, there is no logical reason that a limitation imposed at time x might not prove, at time y, to be subject to exactly the same paradox identified by Vermeule: having limited, say, the prerogative to regulate immigration, we might find at some future time that the executive — confronted with the exigencies of whatever unforeseen situation has arisen — feels compelled to act beyond its powers. But the progressive limitation of the prerogative is usually accompanied by the creation of a set of equivalent (statutory) powers, and the executive can and will seek from Parliament new powers to meet the exigencies of the situation.

So, for example, the executive has significant powers to deal with emergencies under the Civil Contingencies Act 2004. If those prove insufficient, it is welcome to request more powers from Parliament, which has a record of providing them swiftly and with little resistance in circumstances in which it accepts that circumstances require them — that is, where a shortfall remains, it is usually for political, rather than directly legal, reasons. And, if all else fails, the sovereignty of Parliament permits martial law in the Diceyan sense, where the doing of unlawful acts is retrospectively made lawful by an act of indemnity or similar. It is not immediately clear to me that those limits which exist upon the executive in the United Kingdom are excessive, or counter-productive, nor that we might find ourselves in a situation in which they put the existence of the state at threat. Whether the same can be said of, say, the seventeenth century in which the state’s ability to raise funds without the consent of Parliament was a central point of contestation is for historians to discuss, but it is possible that even if the short run of events in the seventeenth century is consistent with Vermeule’s thesis, the longer run of events, and in particular the taming of the prerogative by the Bill of Rights 1689, complicates it.

Only relatively recently has the enactment of the Human Rights Act 1998 created the sort of general and all-encompassing limitation upon the executive that seems liable to bring the paradox into play. And so it is worth asking, whether the United Kingdom may — in the era of the Human Rights Act — find itself obliged to create dictators? The answer must be no, and for much the same reason: if the executive wants powers — including powers to act incompatibly with the Convention rights — Parliament may still choose to give it such powers. But all of these points, though they might be seen in the first instance as a refutation of Vermeule’s thesis, may in fact turn out to be an affirmation of it. That is, if the Paradox is not visible in the (modern) operation of the United Kingdom’s constitution, it may be that is only because, considered in the round, the United Kingdom is exactly the sort of legally
unlimited state towards which the Paradox pushes. Though the executive is tightly limited by law, the law is at the mercy of a sovereign Parliament which might loosen, or effectively dispense with altogether, the bounds of law. Could it be that we have not needed to create dictators precisely because our constitutional order already provides for them?

III. Some Concerns
I have noted above the apparent slippage in the understanding of the ‘natural circumstances’ which we cannot foresee, but whose arrival requires a response from the state, possibly both causing the executive to throw off the shackles placed on it and justifying its doing so. But there is, even in this expansion, an important continuity. By implication, the threat to which the executive must respond derives in Vermeule’s telling from some ‘other’. That ‘other’ may be the material world or, in the expanded version, people or things outside of the polity which is forced to respond to them, and in the archetype, perhaps, another polity, one whose executive may not be subject to the well-meaning but ultimately misguided limitations which liberal constitutionalism attempts to impose upon ‘our’ executive. Though this of course captures an important aspect of the space in which the executive is generally afforded the broadest powers and the greatest deference in its use of them — foreign relations, national security, military action, treaty-making, etc — it is not clear that we should assume this to be an appropriate starting point in the modern world. Maybe, that is, what the state needs to do, where it must act, urgently and without excessive restriction, is as likely to relate to the internal domain as to the external. And maybe such a shift in perspective would allow us to see beyond the sorts of threats to state security which dominate in discussions about the powers of the executive. So, to take an example far removed from Vermeule’s, we might plausibly (more plausibly?) say that the state should have greater power to intervene in the distribution of property within modern states, in which the dominance of liberal constitutionalism has often worked to cement a pattern of distribution that, in the long term, may pose as much a threat to the survival of the constitutional state as does any external threat. And if we think that the instinct for self-preservation that sees us make dictators when the threat is external is not activated by such internal threats, we should reflect on why that might be: what is being preserved, and for whose benefit?

And, as with many of these discussions, it becomes difficult to separate the abstract propositions about the powers that the executive should have from one’s view as to the merits of particular powers. This, of course, is exactly the point that one might make about the generalised and often unreflective rights talk of which Vermeule is (implicitly, but reasonably) critical: it involves an assumption that limitation of the executive (as of the state more generally) is good, and the more restrictions that exist the better, often in such a way that the task of justifying a specific right (or the way in which that right is applied by a court in particular cases) is treated as intellectually trivial; an exercise for the reader. An approach which seeks to challenge, and perhaps to reverse, the presumptions of liberal constitutionalism must not replicate this failing, and yet an approach which addresses the question at a general level seems to risk doing so. The combination of this feature — considering executive power in the abstract — and the negative orientation of the argument (that it is not an argument for expansive executive power, but rather one against excessive limitation thereof) should lead us to hesitate before seeking to act so as to pre-empt the Paradox.

Moreover, these two points may — I venture to suggest — be in fact be one and the same. The same default and occasionally unreflective approach to rights which has in the past seen limitation as a general and catch-all good (and against which Vermeule weighs not only the ‘Publius Paradox’ but a more general — and attractive
— intuition that the government must be able to govern) is in many cases migrating from the traditional liberal conception of rights to a much thicker suite of social and economic rights, in which the alleged separation of the right from the good can no longer be sustained. In doing so, it is likely to find itself increasingly sympathetic to Vermeule’s core claim, if not to the circumstances in which he deploys it. And if, as seems to have happened here, the ‘natural circumstances’ from which Vermeule began can quickly expand to encompass more prosaic scenarios, in which no threat to the existence of the state is perceptible, why could we not equally say — for example — that the executive must have the power to redistribute property so as to secure the future of a society which material inequality threatens to tear asunder? If the example seems farfetched, or contrary to the spirit of Paradox, this seems to me only to confirm, first, the point that these discussions should — as far as possible — be made in relation to specific powers (or specific limits on powers) and, second, the need to marry arguments against certain constitutional arrangements with arguments for their converse.