***UK Parliamentary Sovereignty in an Age of Constitutional Flux:***

***Challenge, Centrality and Complacency***

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We are experiencing a period of the most intense constitutional activity in the UK. Since 2015 in particular, the UK appears to be in an age of constitutional flux – there have been major developments in UK constitutional law and politics in the three years following the election of David Cameron’s majority Conservative government, on a manifesto promising (among other things) a national referendum on membership of the European Union (EU). The decision taken to withdraw from the EU has been at the centre of the ensuing (and ongoing) period of constitutional change. Yet in addition to deconstructing (while almost immediately reconstructing) our complex relationship with the EU, the constitutional maelstrom unleashed by ‘Brexit’ has prompted challenging questions concerning the status of devolution to Scotland, Wales and Northern Ireland, the scope of executive power, the role of the domestic courts, and the place of democratic decision-making (direct or representative) within the UK political system. It is in this sense that the UK constitution is in an age of flux – flowing from Brexit or otherwise, we see many of the core tenets of the UK’s constitutional order subject to challenge. And crucially, these challenges are overlapping and interacting, prompting ever more complex questions about the state of our political system.

The idea of parliamentary sovereignty has been at the core of many of these often heated and very public legal and political debates. The constitutional status of the doctrine, its centrality, its functions, its legitimacy, and its legal scope have all been matters of significant and high-profile argument. In some ways, however, we might be forgiven for wondering whether this is anything especially new. Parliamentary sovereignty has been a doctrine subject to a range of challenges – some critical, some less so – for many years. From the questions raised by membership of supranational associations such as the EU and the Council of Europe, to the issues posed by internal redistribution of power through the devolution arrangements, to the scepticism evident in some parts of an increasingly empowered judiciary, parliamentary sovereignty has been a constitutional principle defined by doubts. Indeed, discussion of whether parliamentary sovereignty is being diminished, displaced, diluted or redefined has been perhaps the dominant narrative of modern constitutional law in the UK.

Even before the modern period of active experimentation with the parameters of parliamentary sovereignty – resulting in EU membership, devolution, statutory recognition of human rights, and more besides – the meaning and implications of this constitutional doctrine were contested. In Dicey’s classic account, the UK Parliament’s sovereignty was defined as ‘the right to make or unmake any law whatever’, and that ‘no person or body is recognised... as having a right to override or set aside the legislation of Parliament’.[[1]](#footnote-1) These core, related propositions clearly identify parliamentary sovereignty as being concerned with legal authority, with Parliament only unlimited as a matter of law, and still subject to an array of political, practical, democratic, economic, social and moral constraints, shaping and informing its legislative activity. Yet even accepting these basic starting points, such an account of legally unlimited legislative power left many matters open to debate. In the 20th century, the vital question of how the legally sovereign Parliament could respond appropriately to moves to independence by states previously under British rule, extinguishing any previous claim to sovereign legal authority, demanded clear and effective answers from constitutional lawyers.[[2]](#footnote-2) And the extent to which a sovereign Parliament could ‘bind its successors’ was the subject of intense academic debate, with many scholars departing from Dicey’s orthodoxy in arguing that parliamentary sovereignty could be viewed in more flexible ways than his absolute rejection of any change to the future law-making process (beyond the total abdication of power by Parliament) would suggest.[[3]](#footnote-3)

These debates continue today. Yet there have also been some broader shifts in the nature of the present challenges to the idea of parliamentary sovereignty. First, we have arguably seen a shift from understanding parliamentary sovereignty as a doctrine which is to be used (or sometimes worked around) for other constitutional change to be achieved, to understanding parliamentary sovereignty as an animating idea for which certain kinds of constitutional change must be delivered. This change in understanding may be from viewing parliamentary sovereignty as primarily a constitutional instrument, to viewing parliamentary sovereignty as primarily a constitutional stimulus. Of course, as will be discussed further below, a complex constitutional concept like parliamentary sovereignty will never simply be either constitutional instrument or constitutional stimulus, but a decisive shift from the former to the latter appears to have occurred in our public discourse, and this has significant consequences for the position of the doctrine within the contemporary UK constitution. Second, the nature of the constitutional stimulus that the idea of parliamentary sovereignty has been providing in the period since 2015 has been, in many ways, a reaction to the very kinds of constitutional change which parliamentary sovereignty, understood as an instrument, had previously been exploited to achieve. Parliamentary sovereignty has been deployed as an argument for constitutional retrenchment, and the reversal (or the diminution) of many aspects of the architecture of the modern political system which had been deliberately established in ways that preserved the status of this fundamental doctrine. Again, we should not jump to simple conclusions too readily, and of course, in this present period of constitutional flux, parliamentary sovereignty has also been deployed as a justification for resisting such constitutional retrenchment – particularly in many of the claims presented in, and about, the *Miller[[4]](#footnote-4)* litigation. Nonetheless, it is notable that in a short period of time we have gone from discussing why Parliament is sovereign, and why it still matters,[[5]](#footnote-5) to being certain that it matters, but unsure what it means.

Against this backdrop, the purpose of this paper is to review recent developments, and try to assess the broader implications for parliamentary sovereignty in this period of frenzied constitutional debate, and into the future. The paper will explore constitutional developments relating to parliamentary sovereignty in three specific fields: (i) political; (ii) judicial; and (iii) legislative. This division is adopted in recognition of the multifaceted character of parliamentary sovereignty, which has implications in all of these different spheres of activity, as will be explained at the beginning of each section. First, the discussion of political developments will focus on the role of the notion of parliamentary sovereignty in the EU referendum campaign and its influence on the decisions taken in its aftermath. The second section will focus on judicial developments, both in the seminal case of *Miller*[[6]](#footnote-6) – widely understood to represent a vindication of parliamentary sovereignty[[7]](#footnote-7) – and in other recent cases which serve to complicate any such conclusion. In the third section, a range of legislative developments with implications for parliamentary sovereignty will be considered: including the permanence clauses and recognition of the Sewel convention now contained in devolution legislation, the legislation providing for the UK’s (transitional) exit from the EU, and the potential repurposing of the EU referendum locks created by Parliament in 2011.

The paper aims to demonstrate that parliamentary sovereignty is subject to a range of significant – yet also changing – legal and political challenges in the contemporary UK constitution. In political terms, we see the (confused) sloganisation of the doctrine, which risks its potential toxification through an association with the unfettered authority of a remote and unresponsive Westminster elite. In judicial terms, we see the doctrine reaffirmed, yet also susceptible to redefinition as the courts overtly constitutionalise the constitution. And in legislative terms, we see a pattern of innovation in the use of law-making power, with increasing experimentation with statutory provisions which have the potential to alter the process of legislating. This innovation may, however, introduce related risks that the creation of such statutory conditions, even where justified, could have unforeseen future consequences.

Yet as much as we see continued evidence of change in our understanding and use of parliamentary sovereignty, we also see a robust constitutional principle at the core of the UK’s political system, which still has considerable virtue in ensuring democratic government. Given the renewed awareness of the centrality of this doctrine, the paper will conclude by considering whether we need to move away from the seemingly self-perpetuating narrative of parliamentary sovereignty as being subject to accumulating constitutional challenges. However, the relationship between the constitutional centrality of the doctrine and its susceptibility to constitutional challenge may be more complex than is initially apparent. The centrality of parliamentary sovereignty may invite challenge, and consideration (and rejection) of those challenges may reinforce the sense of its enduring centrality. Complacency about the meaning and the potential of parliamentary sovereignty might now be a more important narrative to recognise and confront – although this, of course, is still a challenge to parliamentary sovereignty, albeit one of a different kind. Such a reorientation may be especially significant in the present age of constitutional flux, when, perhaps more than ever, the modern fundamentals of the UK constitution are up for grabs, as is the very idea of the constitution itself. For if the continuing existence of the doctrine of parliamentary sovereignty is seen as indisputable in the modern UK constitution then we may eventually have to respond to a new challenge. How we construct an attractive constitution through, around, and perhaps even (eventually) beyond the idea of parliamentary sovereignty may be the unavoidable focus of the coming years.

**Section 1 – Political Developments**

To understand the position of parliamentary sovereignty in the UK constitution, the crucial starting point is to recognise that this is a legal doctrine concerned with law-making power – and not a caricature of constitutional principle, which proclaims the real-world omnipotence of the UK’s legislature. This is a very well established observation – the account of parliamentary sovereignty popularised by Dicey was premised on the distinction between legal sovereignty, possessed by Parliament, and political sovereignty, possessed by the people.[[8]](#footnote-8) This distinction between two related ideas of sovereignty is important in both shaping our understanding of parliamentary sovereignty and providing its potential justification. The doctrine of parliamentary sovereignty does not suggest that the UK Parliament has unfettered authority; rather, that it has an authority to make law which is subject to political, practical, moral and democratic constraints, rather than limits captured in and enforced through law. These non-legal constraints should direct the use of legislative power, and so the legitimacy of a constitutional reliance on the legal doctrine of parliamentary sovereignty is conditional upon the democratic authority of the people who elect parliamentarians to represent their interests and deliver their preferences.

In this way, the place of parliamentary sovereignty in the UK constitution is both premised on a critical distinction between law and politics, and also on the necessary interaction between law and politics. As a result, while we must initially be clear that parliamentary sovereignty is a legal doctrine, it must also be understood in political context, and which has important constitutional implications. In operating as the fundamental norm of an uncodified constitution, parliamentary sovereignty performs key constitutional functions in the UK. It is a central organising principle, around which our hierarchy of constitutional norms is structured, and which conditions the powers of and interactions between the different institutions of government, especially the executive and the judiciary.[[9]](#footnote-9) It is a constitutional focal point, allowing citizens an initial way of beginning to access, to understand, and to navigate the architecture and rules of the political system.[[10]](#footnote-10) And it also projects an essential (and necessarily contestable) legitimacy claim, about the democratic foundations of the UK’s constitutional order, which opens up the space for crucial debate about how public power should be distributed and organised in our society.[[11]](#footnote-11)

Yet to recognise that parliamentary sovereignty also has important constitutional functions within the UK’s political system is not to accept that this legal doctrine can legitimately be emptied of content and turned into a throwaway catchphrase. The new prominence of the idea of parliamentary sovereignty in the EU referendum campaign and its aftermath might suggest that we have seen the politicisation of parliamentary sovereignty. Parliamentary sovereignty has been used as a justification for exiting the EU, a value to be restored, a principle under threat, a constitutional past to which we must revert. However, as parliamentary sovereignty has always been a constitutional principle with political underpinnings and consequences, the real objection here should not be to the politicisation of the doctrine, but the sloganisation of a complex concept. The next section explores the use and abuse of the idea of parliamentary sovereignty in the context of Brexit, and the potential consequences of the misrepresentation of the doctrine in our public discourse.

*The 2016 EU Referendum and the Sloganisation of Parliamentary Sovereignty*

The new public prominence of the doctrine of parliamentary sovereignty has been just one of many remarkable consequences of the UK’s 2016 referendum on membership of the EU. Claims about the desirability of restoring parliamentary sovereignty were a prominent component of ‘Leave’ campaigners’ arguments that the UK should exit the EU to ‘take back control’. High profile Leave campaigners such as Chris Grayling, then Leader of the House of Commons, argued that by remaining in the EU ‘[o]ur sovereignty will diminish’, and that we should become an ‘independent sovereign country’ and ‘take back control of our democracy’.[[12]](#footnote-12) Michael Gove suggested that ‘our membership of the European Union prevents us being able to change huge swathes of law and stops us being able to choose who makes critical decisions which affect all our lives’.[[13]](#footnote-13) And, in support of his arguments to exit the EU, Boris Johnson claimed ‘you cannot express the sovereignty of Parliament and accept the 1972 European Communities Act’.[[14]](#footnote-14)

It is not clear how far this parliamentary sovereignty narrative drove or influenced voter choices, given there were obviously a range of different reasons motivating those voting to leave the EU. To measure the significance of the political or constitutional arguments for exiting the EU is not straightforward, yet the analysis of political scientists suggests it was at least a significant factor. Polling conducted on exit day suggested that ‘the principle that decisions about the UK should be taken in the UK’ was the primary motivating factors among leave voters.[[15]](#footnote-15) Subsequent analysis suggests that concerns about ‘the social consequences of EU membership, most notably in respect of immigration’ were most strongly reflected in the referendum result.[[16]](#footnote-16) Yet sovereignty was still among the top three issues which were cited by voters as most important in deciding their position in the referendum, along with the economy and immigration,[[17]](#footnote-17) with leave voters in particular found to be ‘concerned primarily about sovereignty and immigration’.[[18]](#footnote-18)

This narrative that Brexit was intended (to a significant extent) to restore parliamentary sovereignty has very clearly been internalised by the government led by Prime Minister Theresa May, and is regularly offered as a justification, motivation or rationalisation for the decision to leave the EU, or for related policy choices. In her ‘Lancaster House’ speech, May noted that the UK had ‘political traditions’ which were ‘different’ from those in other European countries: ‘the principle of Parliamentary Sovereignty is the basis of our unwritten constitutional settlement’. Against this backdrop, the referendum was ‘a vote to restore, as we see it, our parliamentary democracy, national self-determination’ as well as (somehow) ‘to become even more global and internationalist in action and in spirit’.[[19]](#footnote-19) In her speech in Florence, the Prime Minister maintained that a new relationship with the EU would be formed on the basis of the UK ‘as a sovereign nation in which the British people are in control’.[[20]](#footnote-20) These assertions have been repeated in Parliament – ‘once [we have left the EU], it will be for this Parliament to decide, and to be sovereign in determining, those laws’[[21]](#footnote-21) – and in official government publications. David Davis, Secretary of State for Exiting the EU, introduced the government’s White Paper *Legislating for the United Kingdom’s withdrawal from the European Union* by claiming that ‘[a]t the heart of that historic decision [to leave the EU] was sovereignty…. The UK Parliament will unquestionably be sovereign again’.[[22]](#footnote-22) And most ludicrously, an earlier government White Paper from that same department, *The United Kingdom’s exit from and new partnership with the European Union*, suggested that ‘[w]hilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that’,[[23]](#footnote-23) an official claim almost unimaginably surreal in its imprecision.

It is impossible to know whether this simply provides a way to sanitise the referendum outcome, locating the decision in grand constitutional principles of longstanding authority, while, for example, avoiding confronting voter hostility in relation to immigration (from the EU and otherwise). But whether the government’s commitment to parliamentary sovereignty is authentic or expedient, the focus on the doctrine in framing official responses to the Brexit referendum means that it has become (and will surely remain) a concept at the heart of the most important process of political change in decades.

What are the implications of this for the doctrine of parliamentary sovereignty? On one hand, it provides unequivocal confirmation of the contemporary centrality of this constitutional principle. In the aftermath of the vote to exit the EU, and as the process of negotiating this withdrawal accelerates, we can clearly anticipate that profound constitutional change lies ahead in the UK. Yet this is likely to be change that occurs around, and through, the legislative sovereignty of Parliament, and not change which displaces this constitutional fundamental. The renewed public prominence of parliamentary sovereignty in the post-Brexit constitution offers, at the very least, significant flexibility in how we respond to withdrawal from the EU, in allocating to the UK Parliament a law-making authority which is unlimited by law, and therefore establishes a broad range of possibilities for recalibration of the constitutional architecture, and reform of the power relations, within the state. Previously in vogue arguments that parliamentary sovereignty had been pushed aside as the foundational concept of the UK constitution now seem more firmly removed from constitutional reality than ever.

On the other hand, however, it has also become very clear that this increased prominence has not engendered better understanding of the meaning and implications of parliamentary sovereignty. We have seen parliamentary sovereignty almost reduced to throwaway rhetoric, with a simplistic understanding of what it amounts to in constitutional reality. As we saw above, during the referendum campaign, there were regular claims that UK parliamentary sovereignty was incompatible with continued membership of the EU. Yet this fails to acknowledge that there was a significant and well established consensus in support of the contrary position among constitutional lawyers, and indeed the domestic judiciary. Indeed, since the decision of the House of Lords in *Factortame (No. 2)*,[[24]](#footnote-24) the key constitutional question was not whether parliamentary sovereignty could be reconciled with the domestic supremacy of EU law – for this had clearly been achieved – but how this change in constitutional practice could be explained, and how it affected our understanding of fundamental constitutional principles. How exactly Parliament had voluntarily and contingently established the priority of EU law over conflicting rules of national law, and how it might qualify or reverse that statutory realignment, became the focus of discussion. But these debates generally start from the idea that Parliament has retained sovereignty in some ultimate sense, such that what had been done through sovereign power could always be undone through sovereign power, and just as importantly, that the continuing location of fundamental power in national institutions was a key consideration which shaped the functioning of the EU itself. Yet these nuances were lost in simplistic invocations of sovereignty as an ill-defined trump card during the referendum campaign and subsequently. We have in this way seen the sloganisation of the idea of parliamentary sovereignty, through its conversion into a rather hollow (albeit evidently powerful) rallying call which exploited this doctrine’s constitutional cache, but departed from any sense of constitutional complexity.

The sloganisation of parliamentary sovereignty generates other risks. First, it creates the potential for toxification of the doctrine, if it becomes intrinsically associated with a particular political rhetoric, and particular political decisions taken (supposedly) to vindicate that rhetoric. Second, failures in constitutional understanding may be revealed as we exit the EU, and invite or exacerbate severe disappointment in our inability to revive an imagined constitutional order based on unconstrained power, which was a myth and not an archetype. The complex reality of a constitution based on parliamentary sovereignty may be a bitter pill to swallow for those who have been promised an unfettered national independence that could never have been delivered. Third, if the doctrine is emptied of substantial content, and simply becomes a catchphrase to deploy at convenient moments, this offers new opportunities for misrepresentation of the implications of parliamentary sovereignty. A notable example of this tendency has been in the appeals to parliamentary sovereignty by those wishing to resist Brexit after the referendum result – the doctrine has been held up by some as offering a way to circumvent the decision reached through direct democratic means.[[25]](#footnote-25) Yet that parliamentary sovereignty is the fundamental doctrine of the UK constitution does not mean the UK Parliament operates outside of any broader constitutional context. In the internal national constitution, Parliament can legitimately establish authoritative procedures by which substantive decision-making responsibility is conferred on other institutions or groups, and as with the referendum result, can, in effect, be politically or democratically compelled to accept the outcomes of the processes it has created. And from an external supranational perspective, the sovereignty of Parliament within the UK’s legal system does not provide it with any absolute authority to control the activities of actors in other constitutional systems, which is a profound constraint on the Article 50 withdrawal process in particular, given that is inevitably a multilateral endeavour.

The current political environment is therefore one in which parliamentary sovereignty is pivotal, but also confused. Perhaps the operation of the doctrine as a constitutional focal point, through which the constitution can be popularly understood and its legitimacy contested, invites the sloganisation of parliamentary sovereignty discussed above. Or maybe it is unsurprising that we fall back on familiar concepts in a time of great change. Regardless, inconsistent usage, reliance on simplified understandings, and the perpetuation of misconceptions in public debate all have the potential, if continued, to generate yet further confusion about what parliamentary sovereignty means and what this doctrine stands for. There is a danger that parliamentary sovereignty is everywhere but becomes empty, and this has important implications as we seek to structure a constitutional response to Brexit. Ultimately, we could end up losing the broad capacity for change offered by parliamentary sovereignty when understood as a constitutional instrument, if parliamentary sovereignty taken as a constitutional stimulus creates a runaway train of undeliverable expectations and undesirable national self-aggrandisement. But while the future is unpredictable, in the present we are left with a paradox – our certainty about parliamentary sovereignty’s centrality sits uneasily alongside our uncertainty about many of its central components. And this shifting, but still unsatisfactory, position is also evident in recent judicial engagement with the doctrine.

**Section 2 – Judicial Developments**

While the idea of parliamentary sovereignty has been caught at the centre of the most consequential political debate of the current period, more subtle developments may be occurring in the courts. Although parliamentary sovereignty must be understood in political context, and in light of its various constitutional functions – as was discussed in the previous section – those functions are determined by legal propositions about the scope and location of law-making power which combine to establish this fundamental doctrine. The legally unlimited scope of the substantive legislative power allocated to the UK Parliament, and the implications of this in light of some recent developments, will be discussed in the next section. Here, however, our focus will be on the legal prohibition which locates that legally unlimited legislative power in the institution of Parliament in particular. This is the notion that no other institution has the right to override or set aside Parliament’s primary legislation, which in turn means that (like any other person or body) UK courts cannot strike down or invalidate an Act of Parliament. The subordination of the courts to Parliament through the operation of the doctrine of parliamentary sovereignty can be seen to establish, in principle, the constitutional primacy of democratic decision making. The House of Commons is the only directly elected institution of UK central government, and within Parliament this chamber has primacy over the unelected House of Lords by convention and by law,[[26]](#footnote-26) with the royal assent of the monarch a mere formality signifying the conclusion of the law-making process.[[27]](#footnote-27) To justify the legally unlimited character of the legislative power exercised by the UK Parliament in this way is not to dismiss entirely legitimate concerns about the effective functioning of our political system, nor is it premised on (inevitably defeasible) claims as to the perfection of the democratic process. Rather, it is to make a claim about the relative legitimacy of political decision-making in a democratic, representative and accountable Parliament, as compared to judicial decision-making in the courts.

 While this legal position is as well established as any in the UK’s constitutional system, and recognised in case law spanning at least 170 years,[[28]](#footnote-28) in the modern period it has been the subject of some judicial uncertainty. In the seminal case of *Jackson* *v Attorney General*[[29]](#footnote-29)three members of the House of Lords (then the UK’s highest court) questioned, obiter dicta, but spectacularly and without precedent, whether (in the words of Lord Steyn) the ‘classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom*’*.[[30]](#footnote-30) For Lord Hope,‘parliamentary sovereignty is no longer, if it ever was, absolute’, while for Baroness Hale it had been ‘limited’ by Parliament, and ‘other qualifications could emerge in due course’, including those imposed by the courts in defence of the rule of law.[[31]](#footnote-31) Yet despite the fact that the unanimous result of the case was a vindication of parliamentary sovereignty (albeit on a somewhat modified understanding of the traditional orthodoxy[[32]](#footnote-32)), it is notable that *Jackson* is still mainly remembered for the speculative obiter dicta of a minority of judges. In that sense, the main legacy of the case has been to trigger a period in which attempts among the judiciary to reconsider parliamentary sovereignty have gone from fringe to mainstream, while setting a tone which invites ever more elaborate (but largely introspective) judicial reflection on the parameters of constitutional principle. In light of the renewed political salience of the idea of parliamentary sovereignty, explored in the previous section, there has also (arguably) been a counter reaction, with the doctrine reasserted in ‘eye-catching’ fashion by the decision of the Supreme Court in *Miller*.[[33]](#footnote-33) Where this leaves us is far from clear, yet as we shall see below, it presents something of a paradox, with parliamentary sovereignty both challenged (inadequately) and restated (ineffectually) in recent jurisprudence of the UK courts.

*Miller as an (Empty?) Reassertion of Parliamentary Sovereignty*

Parliamentary sovereignty featured prominently in the case of *R (Miller)* v *Secretary of State for Exiting the European Union*,[[34]](#footnote-34) the high-profile litigation concerning the domestic ‘constitutional requirements’ for the UK to provide notice of an intention to withdraw from the EU. This was required for the purposes of beginning withdrawal negotiations with the remaining 27 EU Members States in accordance with Article 50 of the Treaty on European Union (TEU). Crucially, Article 50 established a process for negotiated withdrawal by which, once notification was given, exit would occur automatically after a period of two years, in the absence of a withdrawal agreement or a time extension to the talks (the latter subject to the unanimous agreement of the European Council).[[35]](#footnote-35) Following the referendum, the UK government proposed, first, that it was entitled to provide notice of withdrawal to the European Council using its broad executive powers to conduct international relations and foreign affairs under the royal prerogative; and second, that it was entitled to do so without seeking the explicit consent of the devolved legislatures in Scotland, Wales and Northern Ireland.

On the first point, the applicants argued that, given the possibility of automatic withdrawal under Art 50, the very fact of issuing notification of withdrawal could potentially remove rights established by an Act of Parliament – the European Communities Act 1972 (ECA 1972), which supplied the framework through which EU law could have direct effect within the UK legal system.[[36]](#footnote-36) As such, only an Act of Parliament would be sufficient to authorise the government to issue a notification which could, without more, undercut statutory rights – the royal prerogative powers could not be used for this purpose, for to do so would pose an indirect challenge to primary legislation. On the second point, the applicants contended that if an Act of Parliament was required, it would be subject to the consent of the devolved legislatures, in accordance with the Sewel convention, which had recently been ‘recognised’ in statute,[[37]](#footnote-37) and was applicable to UK primary legislation which altered devolved competence.[[38]](#footnote-38) In this particular case, it was argued that the possibility of automatic withdrawal following the Article 50 notification would alter the powers of the EU institutions, and thereby indirectly impact on the devolved institutions, which were all prohibited by statute from acting contrary to EU law.[[39]](#footnote-39)

 The appeal to the Supreme Court was the result of two joined appeals. First, in the case of *Re McCord*,[[40]](#footnote-40) the High Court of Northern Ireland concluded that a new Act of Parliament was not required to authorise the Article 50 notice, for the royal prerogative power to provide this had not been displaced, and the notification would, in any event, have no immediate legal consequences on existing statutory rights.[[41]](#footnote-41) Maguire J further held that the consent of the devolved institutions would not be necessary as any Article 50 legislation would not relate to devolved matters – and, furthermore, even if consent requirements were engaged, it would only be as a matter of constitutional convention, and therefore not legally enforceable in the courts.[[42]](#footnote-42) Second, in *R (Miller) v Secretary of State for Exiting the EU*[[43]](#footnote-43)in the High Court of England and Wales, the Divisional Court reached a contrary conclusion on the first point, but was not asked to consider the second. The court held that executive powers to conduct international relations and foreign affairs under the royal prerogative were not sufficient to trigger Article 50, given the potential domestic impact of exiting the EU on domestic rights made effective by the ECA 1972. Instead, the judgment of the Lord Thomas LCJ, Sir Terence Etherton MR, and Sales LJ concluded that the ECA 1972 was to be interpreted as a ‘constitutional statute’, and against a background of constitutional principle which indicated that the royal prerogative could not be used to alter domestic law.[[44]](#footnote-44) From this perspective, it was ‘not plausible to suppose that [Parliament] intended that the Crown should be able by its own unilateral action under its prerogative powers’ to remove the direct effects of EU law from the UK legal system, and fresh primary legislative authorisation was required.[[45]](#footnote-45)

 The implications of the doctrine of parliamentary sovereignty were a central point of these appeals. Parliamentary sovereignty was discussed sparingly in *Re McCord* – while Maguire J adopted a formalistic approach to the interpretation of statutes (an interpretive approach traditionally associated with ensuring the literal intention of Parliament is found and legally applied), his judgment makes explicit reference to the doubts about the sovereignty of the UK Parliament expressed by senior judges in *Jackson* and elsewhere.[[46]](#footnote-46) Yet while acknowledging (and therefore potentially further legitimising) the existence of ‘differing views about the extent to which the doctrine may be reconciled with, in particular, the rule of law’ when considering whether the consent of the Northern Irish people was required to trigger Brexit under Article 50, Maguire J held that ‘this does not mean that a first level judge is free to disregard the doctrine or sweep it away. If that task is to be undertaken it will fall to the highest court to do so in an appropriate case’.[[47]](#footnote-47)

 The Divisional Court, in contrast, clothed its judgment quite overtly in the legitimacy afforded by the notion of parliamentary sovereignty. Any controversy about limitations on the power of the UK Parliament derived from the rule of law was avoided, with the court accepting without qualification that it was ‘common ground that the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign’.[[48]](#footnote-48) It was a principle which had been ‘recognised many times in leading cases of the highest authority’, with the court (perhaps tellingly) citing only the leading judgment of Lord Bingham in *Jackson*, which had been free of the doubts expressed by others in that case.[[49]](#footnote-49) And from the outset, the court noted that an ‘important aspect of the fundamental principle of Parliamentary sovereignty is that primary legislation is not subject to displacement by the Crown through the exercise of its prerogative powers’.[[50]](#footnote-50) Yet following this initial scene setting, the use of parliamentary sovereignty by the Divisional Court departed quite radically from constitutional orthodoxy. The court crafted yet another version of what it means for a statute to be ‘constitutional’ in nature, following the controversial and still not yet explicitly endorsed obiter dicta in *Thoburn*.[[51]](#footnote-51) For the Divisional Court in *Miller*, the designation of the ECA 1972 as a constitutional statute meant not only that it was immune to implied repeal (the contestable claim made in *Thoburn* itself), but that it was to be interpreted against a background of select constitutional principles, which ‘inform the inferences to be drawn as to what Parliament intended by legislating in the terms it did’.[[52]](#footnote-52)

Despite the orthodox window dressing, this approach led the Divisional Court into a double-edged conflict with parliamentary sovereignty. First, in identifying the ECA 1972 as a constitutional statute, the effects of which were deserving of some greater level of legal protection than an ordinary statute, despite the fact that Parliament itself – the sovereign legislator in the UK – has established no such legal distinction through its own legislative activity. And second, in moving beyond an assessment of the terms of the ECA 1972 (and subsequent legislation shaping the status of EU law within the UK legal system) in pursuit of an express limit on the prerogative power to issue a notice of intention to withdraw – a notification which would, in itself, have no immediate and direct effect on the continuing legal force of the legislation enacted by Parliament. Instead, the special constitutional significance of the 1972 Act shifted the focus of the court to the ‘wide and profound extent of the legal changes in domestic law created by the ECA 1972’, which made it ‘especially unlikely that Parliament intended to leave their continued existence in the hands of the Crown through the exercise of its prerogative powers’.[[53]](#footnote-53) Ultimately, the judicial designation of the ECA as a constitutional statute served to shift the balance of attention from whether the sovereign Parliament had or had not prohibited something, to what it should be taken to have intended in light of the constitutional context and consequences.

This pattern of formal reaffirmation of parliamentary sovereignty, accompanied by considerable selectivity about what the substantive implications of the doctrine should entail in practice, was continued on appeal to the Supreme Court. By eight justices to three, the Supreme Court reached the same conclusion as the Divisional Court on point one, albeit for subtly different reasons, and the same conclusion as the High Court of Northern Ireland on point two. On point one, the reasoning of the majority[[54]](#footnote-54) seemed to turn on the loose assertion that ‘[i]t would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone’.[[55]](#footnote-55) The majority suggested that the ECA 1972 had a ‘constitutional character’, although the precise meaning and implications of this alternative formulation were not explained.[[56]](#footnote-56) And, quite remarkably, the majority claimed – out of line with any prior precedent – that the result of the 1972 Act was that ‘it effectively constitutes EU law as an entirely new, independent and overriding source of domestic law’,[[57]](#footnote-57) with withdrawal from the EU treaties thus not simply an act with international legal consequences, but also direct domestic legal consequences.[[58]](#footnote-58) For the majority, the loss of a domestic source of law would be a ‘fundamental legal change’,[[59]](#footnote-59) and as such:

We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.

 This overtly ‘constitutional’ reasoning was supported, the majority argued, by the principle of parliamentary sovereignty. The majority recognised that parliamentary sovereignty ‘is *a* fundamental principle of the UK constitution’, although in slightly less effusive terms than the Divisional Court, for which it was ‘*the* most fundamental rule’.[[60]](#footnote-60) Yet, as with the Divisional Court, the way the doctrine of parliamentary sovereignty was deployed is questionable. For the majority in the Supreme Court, it was most directly used to establish a hierarchy from which assumptions could be derived: ‘bearing in mind… the constitutional principle of parliamentary sovereignty’, by which ministers were ‘constitutionally the junior partner’ and Parliament ‘the constitutionally senior partner’, the majority argued that ‘it seems most improbable’ that the ‘graft’ of EU law onto the domestic legal system could be undone without ‘formal appropriate sanction’ from the sovereign legislature.[[61]](#footnote-61) This is not to say such a hierarchy does not exist in the UK constitution – instead what is questionable is whether parliamentary sovereignty simply amounts to the seniority of the legislature over government ministers, as opposed to the superiority of Parliament’s legislation over all other branches of government, including the courts.

Ultimately, it is far from clear that the doctrine of parliamentary sovereignty should have been taken to require a new Act of Parliament to provide the legal authority for the Prime Minister to give notice under Article 50.[[62]](#footnote-62) This is especially the case when, against the backdrop of constitutional assumptions set out above, the majority adopted an artificial approach to the statutory interpretation of the ECA 1972, (mis)informed by the ‘principle of legality’.[[63]](#footnote-63) Parliament *could* have authorised ministerial notification of a decision to withdraw from the EU in that Act, argued the majority, but it did not do so – with the principle of legality not therefore satisfied – because such a possibility was not ‘spelled out’ in the legislation.[[64]](#footnote-64) Yet this approach to statutory construction may give the impression that judicially invented requirements of legislative form were being imposed, after the fact, on the otherwise sovereign Parliament, because of nebulous, but legally irrelevant, concerns about the scale of the eventual constitutional consequences. Instead, full respect for parliamentary sovereignty would have been much better manifested in *Miller* through judicial decision-making based on a closer analysis of the language used and mechanisms adopted in the ECA 1972, an approach exhibited in the dissenting judgment of Lord Reed,[[65]](#footnote-65) who concluded that:

I entirely accept the importance in our constitutional law of the principle of Parliamentary supremacy over our domestic law…. That principle does not, however, require that Parliament must enact an Act of Parliament before the UK can leave the EU…. That is because the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK’s membership of the EU. The Act imposes no requirement, and manifests no intention, in respect of the UK’s membership of the EU.[[66]](#footnote-66)

Such an approach to the interpretation of the 1972 Act could have been enhanced if that statute were considered, first, in the context of subsequent legislation enacted by Parliament, and in particular the European Union Act 2011, which imposed extensive limits on the powers of ministers, preventing the use of the prerogative in relation to an absurdly vast range of specific decisions at EU level without prior statutory authorisation (and in some cases, prior authorisation at a national referendum), yet did not seek to impose any controls on a withdrawal notification under Article 50. And, second, an alternative understanding of the implications of issuing notice of withdrawal for the ECA 1972 (and the rights given direct effect under that statute) might have been reached by taking account of the respective, different, yet necessarily interactive, roles and powers of Parliament and the government as part of the broader constitutional and political process of exiting the EU. This was discussed by Lord Carnwath, who also dissented in *Miller*,[[67]](#footnote-67) and who rejected as ‘wrong’ a view of the case based on ‘a simple choice between Parliamentary sovereignty, exercised through legislation, and the “untrammelled” exercise of the prerogative by the Executive’.[[68]](#footnote-68) For Lord Carnwath the principle of parliamentary accountability was ‘[n]o less fundamental to our constitution’, and even if new legislation authorisation was not required, the government would still be ‘accountable to Parliament for its exercise of the prerogative, including its actions in international law’.[[69]](#footnote-69) In these ways, the majority might have avoided the fundamental difficulty with their judgment: it has the effect of artificially (and as it turned out, superficially) inserting Parliament into the notification process in the name of its sovereignty, rather than giving priority to the question of whether Parliament had, through the terms of its sovereign legislation, sought to displace standing executive powers, and establish this very specific role for itself in a broader constitutional process.

The constitutionally loaded approach followed by the majority in *Miller* also, however, had its limits. On the second point at issue in this case – the question of whether the consent of the devolved administrations in Scotland, Wales and Northern Ireland was required to the Act of Parliament authorising the Article 50 notice – the Supreme Court unanimously adopted a more straightforwardly formalist approach. Any consent requirements were matters of constitutional convention rather than legal obligation, and not for the courts to enforce: ‘judges… are neither the parents nor the guardians of political conventions; they are merely observers’. The courts ‘cannot give legal rulings’ on the ‘operation or scope’ of a convention ‘because those matters are determined within the political world’.[[70]](#footnote-70) As we shall see in the final section, there was a potential complication to this basic position – the conventional consent requirements have, through the Scotland Act 2016 and the Wales Act 2017, been ‘recognised’ in statute. The status of these provisions will be considered further below, yet the majority rightly concluded that in enacting these provisions, the intention of Parliament had not been to incorporate justiciable consent requirements into the legislative process, possible though that would have been. Ironically, however, the dissonance between the reasoning of the majority on the first point and the second point in *Miller* leaves space for the Supreme Court to be criticised as engaging selectively with considerations of ‘higher’ constitutional principle: the relatively safe outcome of writing the UK Parliament in to the withdrawal notification process could be achieved, given all indications were that the legislature would exercise its power to ensure the referendum result could be delivered, yet the much more unpredictable consequences of allowing intra-UK veto rights meant that such an outcome was sidestepped.

Regardless of whether *Miller* was rightly decided on either of its main points, we should be hesitant before accepting it as an unqualified vindication of parliamentary sovereignty. That formal reaffirmation is welcome insofar as it provides further clarity about the endurance of parliamentary sovereignty in the UK constitution. Yet it is also not enough. The legacy of *Miller* should be a lesson in the contemporary contestability of parliamentary sovereignty. The majority and the dissenters all accepted the constitutional centrality of parliamentary sovereignty,[[71]](#footnote-71) but exploited this principle in different ways, and to different ends. If we accept the approach of the majority in particular, we see parliamentary sovereignty not as a legal norm established and shaped by political context, but just one of a number of ‘constitutional’ principles for the courts to deploy and define. In many ways, *Miller* may ultimately offer a more subtle take on the dissenters in *Jackson*: parliamentary sovereignty may be on a path to become a common law notion in judicial practice, even though that idea is a nonsensical contradiction as a matter of constitutional theory. This may seem an unlikely message to take from a case which has become so publicly associated with the doctrine of parliamentary sovereignty, but it is a message reinforced by considered the Miller judgment in the context of other recent case law engaging with the legislative authority of Parliament in recent years.

*Judicial Repositioning of Parliamentary Sovereignty: Mainstreaming Doubts and Stabilising Exceptions*

Any judicial enthusiasm for parliamentary sovereignty – apparently, if only superficially, renewed in *Miller* – has not been consistent even since 2015. Indeed, developments in other cases have the potential to make even the formal reaffirmation of parliamentary sovereignty in *Miller* seem even more empty. This can be seen through three specifics trends. First, while absent from the judgment of the majority in *Miller*, many of the very same senior judges have, in other recent cases, seemed to endorse the idea that there could be common law limits on Parliament’s sovereign legislative authority. Second, we have seen further expansion of the principle of legality, to the point where, rather ironically, some senior judges have used this interpretive device to justify deviation from the otherwise abundantly clear legislative rules enacted by Parliament. Third, we see the judges make continued recourse to ever more elaborate frameworks rooted in selected constitutional principles and values, which directly or indirectly, have the potential to dislodge or displace the sovereignty of Parliament from its position as the UK legal system’s ultimate doctrine.

First, we have seen a number of occasions on which some judges have demonstrated some an openness to withdrawing their commitment to parliamentary sovereignty in a quite basic sense. Contemporary doubts about whether the judiciary would have a power at common law to reject a statute which violated fundamental constitutional norms – often imagined as a legislative attempt to limit the jurisdiction of the courts, as in the notable obiter dicta in the *Jackson*[[72]](#footnote-72)case, and subsequently in *Axa*[[73]](#footnote-73) – have attracted further support. Indeed, speculation about the existence of such an exceptional power have been far from exceptional – instead, repetition has now seen fundamentally flawed claims redeemed, and manufactured into an ongoing ‘matter for debate’, according to Lord Hodge, giving the leading judgment for a majority of the Supreme Court in *Moohan* v *Lord Advocate*.[[74]](#footnote-74) These doubts – seemingly now mainstream, rather than on the fringes of judicial thinking, as when initially floated in *Jackson* – were further stabilised in the Supreme Court’s unanimous judgment in *R (Public Law Project)* v *Lord Chancellor*.[[75]](#footnote-75) In this case, even where ‘parliamentary supremacy’ was explicitly affirmed, the existence of potential exceptions was mentioned, and further normalised. For Lord Neuberger, with whom six other Supreme Court Justices agreed:

‘In our system of parliamentary supremacy (subject to arguable extreme exceptions, which I hope and expect will never have to be tested in practice), it is not open to a court to challenge or refuse to apply a statute, save to the extent that Parliament authorises or requires a court to do so.’[[76]](#footnote-76)

That these exceptional limitations are now seemingly part of a standard judicial definition of parliamentary sovereignty, even if in parentheses, and laced with qualifications, indicates that where once there was controversy, consensus may be growing in the Supreme Court. Regardless of whether this judicial posture is ever actualised – which would seem intensely unlikely – the ease with which this abstract idea is now floated might be contributing to the cultivation of an environment in which we are witnessing the development of an expanded constitutional role by the judiciary, for the judiciary. And in that context, just as what once were fringe views can become almost mainstream, it is not difficult to see how what may originally be conceived as exceptional limitations could potentially become somewhat more expansive.

Second, we have seen further expansion of the principle of legality, developing it beyond an entirely reasonable constraint applicable in the context of legislative grants of broad delegated powers to the executive. Just as the court in *Miller* used reasoning based on the idea that the sovereign Parliament can do anything it likes, subject to the caveat that the legislature must be clear about it to the satisfaction of the judges, there have been other examples of the highly selective deployment of this principle of statutory interpretation. An even more stark example of the use of reasoning modelled on the principle of legality to undermine the intention of Parliament, as expressed in legislation, can be seen in *R (Evans)* v *Attorney General*.[[77]](#footnote-77) In *Evans,* a majority of the Supreme Court held as unlawful the exercise of ministerial powers clearly set out in section 53 of the Freedom of Information Act 2000, preventing an executive veto of an earlier judicial decision ordering the disclosure of certain letters written by the heir to the throne, Prince Charles, to various government departments. The leading judgment of Lord Neuberger accepted that a power of veto could be created, but remarkably, given the palpably clear language of the statute indicating that Parliament had intended to do exactly that, it was decided that this was not ‘crystal clear’.[[78]](#footnote-78) As Lord Wilson observed in dissent, this ‘re-wrote’ rather than interpreted the statute,[[79]](#footnote-79) ultimately leading to the rules of law enacted by Parliament being disregarded in a bid to preserve a very particular conception of the rule of law, according to which judicial decisions were to be afforded a near unassailable sanctity. Parliamentary sovereignty faded conveniently into the background in this case, quite literally so in the judgment of Lord Neuberger, for whom it was a ‘given’, relegated to a parenthetical mention,[[80]](#footnote-80) as compared to a ‘most precious’ principle, ‘emblematic of our democracy’, for Lord Wilson.[[81]](#footnote-81)

 The third trend is the growing emphasis on explicitly ‘constitutional’ principles in judicial decision-making. We see intensive, overt reliance on constitutional principles and ideas in both *Miller* and *Evans*, reinforcing a pattern which had previously reached its high point in the *HS2* case, in which Lords Neuberger and Mance went so far as to devise a framework comprising ‘constitutional instruments’ and common law principles which were ‘fundamental to the rule of law’.[[82]](#footnote-82) This trend was also very apparent in the case of *R (UNISON)* v *Lord Chancellor*,[[83]](#footnote-83) in which the Supreme Court held that the fees imposed by the government on litigants seeking to bring claims in employment tribunals were so excessive as to constitute an interference with access to justice, and which had not been lawfully authorised by the broad delegated powers to prescribe fees under section 42(1) of the Tribunals, Courts and Enforcement Act 2007. The result of the case does not present a challenge to parliamentary sovereignty, as it represents a relatively predictable enforcement of an implied limitation on an expansive delegated power, in light of a manifestly unreasonable exercise of the power, in line with established case law and practices of statutory interpretation.[[84]](#footnote-84) Yet a challenge may nevertheless lurk within the reasoning of the court, which shows a shifting focus to constitutional principles to resolve public law dilemmas. According to the leading judgment of Lord Reed, the ‘constitutional right of access to the courts is inherent in the rule of law’, which was of considerable importance because ‘[w]ithout such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other’.[[85]](#footnote-85) Such dramatic framing has the very obvious effect of increasing the grandeur of constitutional adjudication, and constructing principles with the potential – whether or not realised in the instant case – to compete with the doctrine of parliamentary sovereignty, when the necessity of so doing is far from clear when performing the core judicial task of establishing the existence of reasonable limits on the scope of broad delegated law-making powers. The doctrine of parliamentary sovereignty seems to become unduly precarious when the courts place greater and greater emphasis on arguments that the text of legislation must be interpreted not simply in light of what Parliament has (and has not) clearly intended, but also ‘the constitutional principles which underlie the text’. And this is especially the case when it is suggested, as by Lord Reed in *UNISON*, that the ‘principles of statutory interpretation’ exist to ‘give effect’ to those vague constitutional principles, rather to the intention of Parliament captured in the terms of its legislation.[[86]](#footnote-86) The UK Supreme Court’s constitutionalising tendency may lay the ground for more elaborate interference with parliamentary sovereignty in the future.

These attention grabbing claims may be contrasted with more subtle questions about the relationship between the sovereignty of Parliament and other constitutional principles raised in *R (Pham)* v *Secretary of State for the Home Department*.[[87]](#footnote-87) In this case, concerning the relationship between domestic and EU citizenship, we see ostensible recognition of the significance of parliamentary sovereignty, and reiteration of the fact that the domestic force of EU law has been contingent on its authorisation by Parliament.[[88]](#footnote-88) There is also, however, continued – but not concluded – discussion of whether the courts could read implied limitations into the apparently unqualified authorisation given to EU norms by the European Communities Act 1972. In *Pham*, the substantive question concerned whether possession of EU citizenship could be a constraint on the operation of national rules regulating the withdrawal of domestic citizenship, given the EU treaties, interpreted literally, seemed to leave control of citizenship in the competence of member states.[[89]](#footnote-89) As in the case of *HS2*,[[90]](#footnote-90) the Supreme Court in *Pham* raised questions about the interpretation of EU law adopted by the Court of Justice of the European Union, and sought to speculate about whether domestic courts were bound to accept any judicial overreach by the CJEU, especially where to do so would challenge significance domestic constitutional norms or prerogatives. The Supreme Court adopted an explicit framework rooted in constitutionalism to suggest in *Pham* that national competence over citizenship might not give way even if confronted with ostensibly supreme EU law, just as in *HS2* it had suggested that constitutionally fundamental domestic rules protecting parliamentary privilege might be resistant to contrary EU norms. Yet while seemingly prioritising domestic constitutional principles over the supremacy of EU law, the (never implemented, and so ultimately hypothetical) approach of the Supreme Court in *Pham* and *HS2* could actually result in prioritising other domestic constitutional principles at the expense of parliamentary sovereignty. For the ECA 1972 does not establish any explicit constitutional limits on the domestic supremacy it affords to EU law, and if such limits (general or particular) are to be established, they should surely be imposed by the sovereign Parliament through specific legislation, following wider political scrutiny, rather than being unilaterally imposed by the judiciary. While the UK’s impending exit from the EU will resolve this specific dilemma, the potential willingness of the courts to read legislation in such a way as to protect chosen fundamental principles in this context reinforces the broader trend of the judiciary moving towards a more contestable style of constitutional common law reasoning, which stands in marked contrast with the judicial minimalism evident in earlier cases recognising that Parliament was responsible for decisions about the domestic status of EU law.[[91]](#footnote-91)

Ultimately, we can see these trends as interlocking – increased speculation about exceptions to power which is legally unlimited is reinforced by reading more elaborate implied limits into parliamentary legislation, and justified by reliance on more refined competing constitutional principles. And while there are some notable exceptions to this pattern – found in cases where a more formalistic approach to statutory interpretation is evident,[[92]](#footnote-92) or where expansive constitutionalist arguments which depart from the usual implications of parliamentary sovereignty do not attract majority support[[93]](#footnote-93) – the overall trajectory of this changing judicial approach is clear. It is in this broader context that our assessment of the implications *Miller* must be located. To do so reveals the tension between formal reaffirmation of the principle of parliamentary sovereignty, and respect for its implications in practice. That parliamentary sovereignty is contestable idea means that – while of real importance – we must look beyond potentially superficial judicial support for the principle, and also explore whether the ideas underpinning the doctrine are delivered in practice. For parliamentary sovereignty can be challenged at exactly the moment it is reaffirmed – indeed, depending on the manner of that reaffirmation, parliamentary sovereignty may even be challenged through that very act. Against a backdrop of complex, often contradictory, recent judicial engagement with this doctrine, the approach of Parliament to its own sovereignty becomes even more crucial to explore.

**Section 3 – Legislative Developments**

In the UK constitution, legislative sovereignty is located in the UK Parliament, and the scope of that power is legally unlimited: the doctrine of parliamentary sovereignty means that Parliament can make or unmake any law. But the precise implications of this account of the scope of Parliament’s power are, in some respects, open to further reflection, especially when we think about the distinction between substantive and procedural issues. That Parliament can legislate on any substantive issue, matter, topic or subject must be clear – but can Parliament also use its legally unlimited legislative power to alter the process by which future Parliaments must enact new substantive legal rules? Given the idea of the ‘Queen-in-Parliament’ is itself a legal construct, established through and acting pursuant to legal and conventional norms, it is impossible to provide an answer to this conceptual conundrum through abstract logical reflection on whether a supreme entity can ‘bind its successors’.[[94]](#footnote-94) For this superficial mantra is a trite and excessively sweeping claim about the potential scope of sovereign law-making authority, which could serve to limit Parliament's legislative capacity, as well as to entrench our current law-making arrangements as legally unalterable, and subject to change only through some (vaguely defined) judicially sanctioned revolution.[[95]](#footnote-95) As a result, to understand the potential extent of the UK Parliament’s legislative power, we need to ask much more discriminating questions about what kinds of 'binding' may or may not be possible, and consider how different kind of legislative limits or conditions might impact on parliamentary sovereignty.

 Alternative theoretical understandings of parliamentary sovereignty provide a competing approach to that which is offered by Dicey’s prohibition of Parliament binding its successors. The ‘manner and form’ theory of legislative power, outlined by Jennings as part of a broader challenge to Dicey’s orthodoxy, provides an account of parliamentary sovereignty which would permit the legislature to make legally effective changes to the future law-making process. Jennings recognised this to be a legitimate use of sovereign law-making power by distinguishing such change to procedural legislative requirements – or the archaically named ‘manner and form’ according to which future law-making would need to be completed – from the imposition of an absolute substantive limit on successor Parliaments, which was still impermissible. Parliament’s power was legally unlimited, and on Jennings’ interpretation, ‘its power to change the law includes the power to change the law affecting itself’.[[96]](#footnote-96) On the manner and form approach, then, we can see the idea of Parliament making binding statutory change to the future law-making process as both constitutionally permissible, and a manifestation, rather than a rejection, of the idea of parliamentary sovereignty.

 There has been considerable debate about whether the Diceyan or the ‘manner and form’ approach to parliamentary sovereignty provides the correct interpretation of the power of the UK Parliament. For many years, this debate remained largely academic, as the UK Parliament did little through its legislative activity to offer a challenge to the established orthodoxy. Membership of the EU, and the consequent domestic obligations to legislate to give EU norms direct effect in the UK’s legal system, and supremacy over conflicting national law, represented a modern starting point for increased experimentation – through legislation – with the uses which could be made of legislative sovereignty, and the ways in which power could be distributed to new institutions, and organised according to new (but ultimately provisional) legal hierarchies. In this changing environment, questions about the boundaries of legally unlimited legislative power have acquired fresh impetus, and we see new examples of Parliament using its law-making authority in ways which test the parameters of the old orthodoxy. This changing practice in the use of legislation is something which we must take seriously, because it shows us the sovereign Parliament’s changing understanding of its own sovereignty. In this section, we consider four examples of recent legislation (or proposed legislation) which prompts questions about the way in which Parliament defines the parameters of its sovereignty: first, the devolution permanence clauses and statutory recognition of the Sewel convention; second, the European Union (Withdrawal) Bill 2017-18; third, the Withdrawal Agreement and Implementation Bill; and fourth, the implications of the European Union Act 2011.

*Embedding Devolution: Statutory Permanence Clauses and Recognition of the Sewel Convention*

The most recent round of change to the UK’s dynamic devolution settlement has introduced legislative provisions presenting a potentially radical challenge to parliamentary sovereignty. In particular, by the Scotland Act 2016, the Scotland Act 1998 has been amended, first, to incorporate a commitment to the permanence of the Scottish Parliament and government, accompanied by a declaration that these institutions are removable only with the approval of the people of Scotland at a referendum.[[97]](#footnote-97) Second, the 1998 Act has been altered to include statutory recognition of the operation of the Sewel convention, by which ‘the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament’.[[98]](#footnote-98) Identical provisions have been included in the Wales Act 2017, which have similarly amended the Government of Wales Act 2006.[[99]](#footnote-99) The legal effects of these provisions are very much open to debate, especially given they are built around deliberately tentative phrases such as ‘it is recognised’, ‘it is declared’ and ‘to signify the commitment’. The key issues are, first, whether Parliament can enact legally effective provisions which purport to change the nature of the law-making process. And second, whether Parliament did through these particular provisions intend to change the future law-making process.

The two devolution clauses present subtly different issues - the ‘permanence clause’ appears to be a hybrid of substantive limitation and procedural constraint. This is significant, because a mere declaration as to the permanence of the Scottish institutions would – while symbolically potent – be legally ineffective alone, as an unenforceable absolute limitation on the power of future sovereign UK Parliaments, which would simply be repealed by implication on the enactment of any subsequent contradictory statute.[[100]](#footnote-100) Yet if we accept the manner and form theory of parliamentary sovereignty, the procedural component – making abolition of these devolution institutions conditional on approval at a Scottish referendum – becomes necessary to give the clause actual force, turning a powerful, but legally defeasible claim about the substantive use of legislative power into an authoritative – and, unless repealed, binding – change to the future legal rules governing the legislative process. In enacting such a procedural condition, we should not see Parliament as unconstitutionally ‘binding its successors’ and diminishing future sovereignty. Instead, on the manner and form approach, the contemporary Parliament has changed the way in which future Parliaments must exercise their still substantively unlimited legislative power. If the unimaginable step of abolishing Scottish or Welsh devolution is ever even considered, the UK Parliament would either need to repeal the referendum requirement by which it is presently bound, or – accepting the fundamental democratic imperative underpinning this new statutory provision – legislate subject to the condition that it was approved in a referendum of the people of Scotland or Wales. In this way, the manner and form theory of parliamentary sovereignty allows us to see these provisions as establishing an alignment between statute law and democratic reality.

In comparison with the complex, hybrid nature of the permanence clause, the statutory recognition of the Sewel convention can be seen as more basic in its ambitions. While it would have been open to the UK Parliament to try to incorporate consent requirements into the law-making process, the framing of this provision makes it difficult to believe that this was the legislature’s intention. The convention is merely 'recognised', it is said only to operate 'normally', the vagueness of which makes these norms politically fluid but legally unworkable. There is no real attempt to define or institutionalise the operation of a process which – unlike the distant prospect of a referendum on disestablishing the devolved institutions – has been and would continue to be frequently used.[[101]](#footnote-101)

The effects of this provision were quickly tested in the *Miller* case, in which, as noted above,[[102]](#footnote-102) the Supreme Court unanimously held that the courts could not enforce a political convention of this kind, and the consent of the devolved institutions was not therefore legally required before Article 50 could be triggered.[[103]](#footnote-103) The statutory recognition of the Sewel convention did not alter this position: the court held that it ‘would have expected [the] UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts’,[[104]](#footnote-104) and the provision was instead intended ‘to entrench it as a convention’.[[105]](#footnote-105) Crucially, the judicial analysis here is (rightly) focused on what Parliament intended in enacting these provisions, rather than the prior question of whether it is even constitutionally permissible for the legislature to impose procedural limits on its law-making power to begin with. The courts did not fall back on the Diceyan dogma that the legislature is prohibited from binding its successors to dismiss any idea that an effective statutory requirement of devolved consent could be created. Instead, the approach taken by the Supreme Court in *Miller* is premised on the idea that such a statutory condition could have been created, but this had not been achieved in this specific case.[[106]](#footnote-106) To do so is not to undercut the importance of this statutory recognition of the Sewel convention, or even to undermine the sovereignty of the Parliament enacting this provision.[[107]](#footnote-107) For there is no inherent contradiction in the idea of legislative enactments being intended to have political rather than legally enforceable effects. Indeed, this can be an important constitutional tool, allowing the sovereign Parliament to express an authoritative view as to the significance of key elements of the political constitution. Whether such symbolic legislation has positive, negative or mixed effects will largely be determined by the norm or principle that Parliament is attempting formally to recognise and consequently to reinforce.[[108]](#footnote-108) Yet while still certainly relevant to our understanding of the background legal context, any impact will be felt primarily in the political realm, where the implications of such legislative signals should be assessed and exploited.

Ultimately, while a potentially radical use of statutory power, parliamentary sovereignty is made evident through these provisions. The permanence clause shows engagement with manner and form reasoning in the use of a procedural condition to give legal force to a substantive aspiration. The recognition of the Sewel convention has been drafted in such a way as to have primarily political impact, rather than to make devolved consent requirements legally enforceable. Yet both provisions demonstrate that the idea of legally unlimited legislative power gives the UK Parliament much greater law-making flexibility than was suggested by the old, unrefined orthodoxy that a sovereign legislature could never bind its successors.

*Legislating for Brexit Part 1: the EU Withdrawal Bill*

The legislative challenge of delivering withdrawal from the EU will be the primary task occupying the UK Parliament for many years. Such was the extensive integration of EU law into the UK legal system, vast quantities of substantive legal norms will need to be reauthorised or reformulated, along with the replacement of the framework by which EU rules had direct effect and supremacy within the UK. Ironically enough, simplistic emphasis on restoring parliamentary sovereignty in the referendum campaign may foster false expectations as to what can legitimately be expected from Parliament when competence is returned from the EU institutions. The initial step to prepare the UK’s legal system for Brexit is to remove the ECA 1972, and replace the legal framework which it established, through the EU (Withdrawal) Bill 2017-18. This has already proved to be an unsurprisingly complex and time-consuming task, and has potential implications for parliamentary sovereignty in a number of respects.[[109]](#footnote-109) Four main points are worth highlighting, relating to the delegation of law-making authority, the supremacy of retained EU law, the powers of the judiciary, and the implications for the powers of the devolved legislatures.

First, the EU (Withdrawal) Bill will establish an incredibly extensive scheme of delegated legislative powers, to allow the executive to make relevant changes in such fields as environmental, consumer and employment law, as necessitated by removing the domestic authority of rules derived from EU law. For some, such extensive delegated powers represent Parliament abdicating its sovereignty.[[110]](#footnote-110) For others, only a specific kind of delegated power, so-called ‘Henry VIII’ provisions which allow the executive even to change the terms of primary legislation (and which are a prominent feature of the EU (Withdrawal) Bill), will be a violation of parliamentary sovereignty.[[111]](#footnote-111) Yet while there are many good reasons to be concerned about excessive grants of delegated power, and the possibility of their misuse subject to limited scrutiny, there is no reason in principle that a sovereign Parliament should not be able to establish a revocable power for the executive to enact even legislation which alters the terms of primary statute law, if it chooses to do so. In a period when much legal change might be required in a short period of time, those executive powers which are to be established need to be for clearly defined purposes and subject to appropriate constraints, with Parliament exercising new and existing scrutiny functions to ensure that the powers are not used to pursue illegitimate goals, or make controversial decisions without being subject to challenge.[[112]](#footnote-112) But there is also a need for clarity about the distinction between parliamentary sovereignty and parliamentary capacity. Parliament’s ultimate legislative authority is not violated when more elaborate decision-making schemes are established in recognition of the fact that the legislature does not have the time or resources to decide on every specific issue. Indeed, the operation of a complex welfare state would be impossible without schemes of administrative decision-making, especially given Parliament has other constitutional responsibilities to fulfil in addition to law-making, including constituting and holding a government to account, and representing the people. The significance of Parliament’s legislative sovereignty does not mean we should imagine that the UK legislature is the exclusive law-maker, or exclusively a law-maker,[[113]](#footnote-113) and consequently misunderstand its multifaceted constitutional role in general, or its role in the Brexit process in particular.

 Second, the arrangements relating to the status of ‘retained EU law’ – those norms derived from EU law which will continue to be a part of the UK legal system after withdrawal – will also have implications concerning parliamentary sovereignty. The proposal in the EU (Withdrawal) Bill to provide a residual supremacy for retained EU law attracted criticism from the House of Lords Committee on the Constitution, which argued that this was inconsistent with domestic constitutional principle, as to give priority to a particular category of norms would no longer be required by the external principle of the supremacy of EU law over contradictory national law. According to the Committee, ‘[t]he “supremacy principle” is alien to the UK constitutional system: not only did it originate outside that system, it also sits uncomfortably with established constitutional principles, most notably the doctrine of parliamentary sovereignty’.[[114]](#footnote-114) Yet the retention of supremacy for retained EU law, with that status both removable and contingent on domestic legislation, would not be unconstitutional in some vague sense, but required to satisfy the demands of certainty and continuity. For those retained EU norms have taken priority over even subsequent, inconsistent national rules during the UK’s membership of the EU, and the instant removal of that priority at the moment of withdrawal would alter current hierarchies of rules within the domestic legal system.

As the Committee recognises, this continuity could perhaps be achieved in other ways, and there is unhelpful ambiguity about the circumstances in which the supremacy principle would no longer attach to any retained EU law which had been modified. Yet to present the difference between various ways of sustaining existing hierarchies of norms as being based on the compatibility or otherwise of these schemes with the doctrine of parliamentary sovereignty is unnecessary, and perpetuates the misleading notion that the supremacy of EU rules established by statute was an ‘alien’ device which was ‘fundamentally at odds’ with domestic ideas of parliamentary sovereignty.[[115]](#footnote-115) It was no doubt an innovation, but the legal force of the idea of the supremacy of EU law within the UK stemmed only from parliamentary legislation, rather than being founded on some autonomous external authority. It was for Parliament, in exercise of its sovereign legislative authority, to establish the national legal arrangements required by membership of the EU, and is no violation of that sovereignty for any domestic hierarchies of norms to be provisionally sustained. To suggest otherwise misrepresents the constitutional position which the UK now seeks to alter, and inappropriately holds up the idea of parliamentary sovereignty as a constraint on legislative decision-making in the future.

Third, the EU (Withdrawal) Bill will free the UK courts of the obligation to comply with judgments of the CJEU after exit day, but relevant pre-exit case law will be retained, and will continue to bind lower courts when making decisions concerning retained EU law.[[116]](#footnote-116) The UK courts ‘need not have regard’ to EU case law decided after Brexit, but Parliament will authorise the consideration of such material where the courts find it ‘appropriate to do so’.[[117]](#footnote-117) Moreover, the Supreme Court will be permitted to depart from even pre-exit retained EU case law, in the same circumstances that it can depart from its own prior precedents.[[118]](#footnote-118) This new scheme of judicial powers can be seen to leave significant discretion to the courts to determine when it is ‘appropriate’ for post-exit EU case law to be taken into account, and (for the Supreme Court) to determine when to depart from retained EU case law.[[119]](#footnote-119) There is clearly less guidance given here than, for example, in relation to the current position concerning CJEU decisions (which bind all UK courts[[120]](#footnote-120)) or under the Human Rights Act 1998, where domestic courts ‘must take into account’ the case law of the European Court of Human Rights.[[121]](#footnote-121) The existence of these broad discretionary powers may raise questions about whether Parliament is delegating excessive decision-making autonomy to the courts, subject to limited oversight, just as has been argued in relation to the extensive secondary legislative powers to be delegated to the executive. Yet in many ways, the major objections to these broad powers have been from their potential recipients, rather than those concerned about the uncontrolled delegation of significant decision-making. In particular, members of the senior judiciary have argued that Parliament should provide more specific guidance to structure the exercise of these discretionary powers, so that the courts do not get drawn into making politically controversial decisions about the future status of EU norms.[[122]](#footnote-122) From a sovereignty perspective, most interesting are these judicial calls for their powers to be more tightly defined by legislation, which perhaps stand in contrast to the growing emphasis on common law self-empowerment evident in the line of domestic case law discussed in Section 2.[[123]](#footnote-123) Whether this stems from a lack of depth of common law principle, or judicial awareness of the need for political self-preservation, it demonstrates that the courts recognise they will be subject to the legislative scheme established by Parliament. And whatever final scheme is created, whether more directive or more discretionary, it will inevitably provide the framework within which the courts must operate, as is illustrated by the judicial attempts to influence its formation by Parliament.

Fourth, in relation to the devolved institutions, the UK Parliament is proposing to replace the existing statutory limitations on devolved law-making competence which stem from EU law,[[124]](#footnote-124) with limitations based on retained EU law.[[125]](#footnote-125) Yet UK legislation prohibiting the Scottish Parliament, National Assembly for Wales, or Northern Ireland Assembly from legislating in any way which was incompatible with retained EU law would have a clear and unacceptable centralising effect, for it will be the UK institutions who will decide how EU law must be modified to make it appropriate for domestic retention.[[126]](#footnote-126) In that sense, the effect of this change may be that the UK Parliament and government will unilaterally acquire new powers over the competence of the devolved institutions, in a way which is incompatible with the spirit of the existing statutory devolution architecture. The question may therefore be whether the UK’s increasingly pluralistic territorial constitution can continue to function when that system is founded on the sovereignty of the UK Parliament.

This dilemma shows the importance of the UK institutions recognising a key difference between the endurance of parliamentary sovereignty and centralisation of decision-making competence. One does not, and should not, entail the other – the constitutional importance of the devolution arrangements which the UK Parliament established based on national democratic mandates exerts a strong political influence on how legislative power should be used, even if it does not establish any formal legal entrenchment of the distribution of powers. Parliamentary sovereignty is the UK’s ultimate constitutional norm, but it operates in a broader political constitutional context which, to a significant extent, Parliament has crafted, and which entirely legitimately shapes the way its legal authority should be exercised. The period of constitutional reform instigated by the New Labour government elected in 1997 clearly shows that parliamentary sovereignty is compatible with the extensive dispersal of power from the UK’s central political actors, the creation of influential competitor institutions, and – as discussed above – embedding the permanence of those institutions (subject to removal only following a referendum) in legislation. The doctrine of legislative sovereignty does not mean the centralisation of competence restored from the EU is required – instead, that was a specific (and unnecessary) choice made in early drafts of the EU (Withdrawal) Bill, which can, at the least, still now be mitigated by agreement between the UK and devolved governments as to where UK-wide frameworks will be necessary, replacing those previously operating as a matter of EU law, and where differentiation is possible.[[127]](#footnote-127) Parliamentary sovereignty may superficially appear to be a barrier to greater constitutional pluralism within the UK, but when understood as a doctrine offering unlimited legal possibilities, we can see that political choices, rather than constitutional principles, are the true obstacle to the devolved institutions obtaining expanded legislative competence after withdrawal from the EU.

When considering these four issues, we can see that the EU (Withdrawal) Bill provides a case study in how it is both over-inclusive and under-inclusive to analyse all constitutional problems in terms of parliamentary sovereignty. We draw too much within the terms of this fundamental doctrine if we stretch the term past breaking point, and risk mischaracterising and misunderstanding real constitutional problems, while overlooking other significant constitutional values which may be more directly relevant. While constitutional lawyers engaging with this norm tend to be preoccupied (understandably) with challenges that may diminish parliamentary sovereignty, the centrality of the doctrine therefore poses difficulties if not approached with precision, and understood as part of a broader political and legal framework. In large part, this is a consequence of the emptiness of the Brexit rhetoric about restoring domestic legislative control, which overlooks the constitutional reality that any ultimate legislator will have to make complex choices about how and when to delegate or retain powers, how to manage change and continuity, what can be avoided and what can be left to the discretion of other institutions. And as the EU (Withdrawal) Bill shows, many of these choices will be flawed, and impact on the role of Parliament and other institutions within the political system. Yet to have an impact on the role of Parliament within the constitution is not equivalent challenging its legislative sovereignty – it is clear that Parliament can use its law-making authority to retain or redistribute powers, and restructure legal hierarchies, in a variety of ways which are fully compatible with it remaining free of legal limitations. And the rhetorical device of presenting a constitutional problem as some threat to parliamentary sovereignty as a way of attaching weight to the concern should be avoided – this only has the potential to detract from confronting the questions of certainty, accountability, and collaboration that should be the focus of an appropriate parliamentary response to Brexit. After all, the EU (Withdrawal) Bill is simply one part of a broader legislative picture.

*Legislating for Brexit Part 2: the Withdrawal Agreement and Implementation Bill*

While the EU (Withdrawal) Bill may not ultimately present any fundamental challenge to the principle of parliamentary sovereignty, the legislative programme prompted by Brexit will raise other more direct issues for our understanding of this constitutional doctrine. In particular, the government has given a commitment to legislate to protect aspects of the transitional arrangements which have been provisionally agreed with the EU, and which will be set out in a Withdrawal Agreement. In a Joint Report of the EU and UK Negotiators agreed in December 2017, the UK government has undertaken to enact primary legislation to establish post-Brexit rights for EU citizens, which will be directly effective in domestic law, and have priority over any inconsistent national legal rules.[[128]](#footnote-128) This largely sustains the status quo relating to the position of EU legal norms within the UK legal system, yet the there is also an innovation in the terms of the Joint Report – the ‘Withdrawal Agreement and Implementation Bill’ which will be brought forward to deliver these commitments will ‘fully incorporate’ the citizens’ rights provisions of the Withdrawal Agreement into UK law, and establish an additional layer of legislative protection: ‘[o]nce this Bill has been adopted, the provisions of the citizens' rights Part will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future’.[[129]](#footnote-129) To make explicit statutory provision to this effect would be a move beyond the status quo, for while the implicit effect of the ECA 1972 is such that it would need to be expressly overridden by any subsequent legislation which was inconsistent with EU law, if that future law was nevertheless intended to have full legal effect, this position is not clearly stated in the terms of the 1972 Act. As such, the Withdrawal Agreement and Implementation Bill would make explicit what is presently implicit, and in so doing, potentially raise questions about whether Parliament is legally capable of enacting such a clause.

 The enactment of such a clause on the basis of the commitment in the December 2017 Joint Report would challenge the traditional Diceyan understanding of parliamentary sovereignty, in so far as it could be viewed as an illicit attempt by Parliament to bind its successors. This would not be an absolute limit, but a new, legally binding requirement of legislative form: the citizens’ rights elements of the Withdrawal Agreement and Implementation Bill would not be susceptible to implied repeal, nor perhaps even to partial repeal. Instead, the Joint Report suggests that Parliament would legislate to ensure that the relevant provisions of the Bill could only be repealed expressly, and in full. Such a commitment has obvious political significance, in that it seems designed to engender good faith between the UK and the EU in the challenging Brexit negotiations, and offer some degree of certainty for EU citizens during a period of transition. Yet must we reject such an undertaking by the government as constitutionally undeliverable, as the orthodox thinking of Dicey would indicate we should?

An alternative approach is to view this commitment as further evidence of a clear pattern of constitutional activity in the UK, away from the traditional approach of Dicey, and towards the manner and form theory of parliamentary sovereignty. Parliament has enacted a range of provisions which purport to rely on a manner and form understanding of its legislative sovereignty – an approach that sees legally unlimited law-making power as authorising change to the conditions of law-making themselves. As we have seen, the recent changes to the devolution arrangements, recognising the permanence of the Scottish and Welsh institutions, rely on a similar understanding of the meaning and implications of parliamentary sovereignty, as does the referendum requirement in the Northern Ireland Act 1998, which arguably provides the inspiration for the reforms of 2016 and 2017.[[130]](#footnote-130) Before these most recent changes, the European Union Act 2011, which established a series of legally binding ‘referendum locks’ applicable to an extensive range of future potential transfers of power or competence from the UK to the EU, offered evidence that Parliament understood its power to allow the creation of new requirements of manner and form. And while the Diceyan orthodoxy finds some support in the classic case law,[[131]](#footnote-131) a manner and form understanding of parliamentary sovereignty arguably underlies the decision of the House of Lords in *Jackson*, the leading modern authority on the legislative power of the UK Parliament, in which changes to the legislative process made in the Parliament Act 1949 were upheld as legally valid.[[132]](#footnote-132)

Most significantly, however, we do not simply see Parliament enacting these provisions – we also see Parliament adhering to the procedural requirements it has imposed on itself, and stating the fact of its compliance explicitly. This is most apparent in relation to the European Union Act 2011. While the radical ‘referendum locks’ established in the EU Act 2011 have never been triggered, this legislation also contained other procedural requirements to authorise certain kinds of decision-making at the EU level. This included requirements that certain categories of decision had to be authorised by an Act of Parliament. And on numerous occasions, where that procedural condition has been engaged, Parliament has both complied with the requirement, and stated the necessity of its compliance in express terms in the authorising statute. This sustained pattern is clear from the [European Union (Approval of Treaty Amendment Decision) Act 2012](http://www.legislation.gov.uk/ukpga/2012/15/contents), the [European Union (Croatian Accession and Irish Protocol) Act 2013](http://www.legislation.gov.uk/ukpga/2013/5/contents), the [European Union (Approvals) Act 2013](http://www.legislation.gov.uk/ukpga/2013/9/contents), the [European Union (Approvals) Act 201](http://www.legislation.gov.uk/ukpga/2013/9/contents)4, the European Union (Finance) Act 2015, and the[European Union (Approvals) Act 2015](http://www.legislation.gov.uk/ukpga/2015/37/contents), and the European Union (Approvals) Act 2017.

 On this basis, we can see that Parliament has interpreted its sovereignty as encompassing a power to make legally binding changes to the future legislative process, and complied with statutory law-making conditions when it has been required to do so. And this pattern of activity is of fundmental importance, because if we are to take the idea of parliamentary sovereignty seriously, we need to give full weight to Parliament’s own understanding of the scope of its legislative authority, and the legitimate ends for which that law-making power can be used. From this perspective, while doubtlessly a further constitutional innovation, we can view an express repeal requirement of the kind envisaged for inclusion in a Withdrawal Agreement and Implementation Bill as both consistent with a clear pattern of existing legislative activity, and additional confirmation of the shift in understanding of parliamentary sovereignty on which this pattern of behaviour is premised. Far from being constitutionally impermissible, or legally undeliverable, the enactment of an express repeal requirement in the planned Withdrawal Agreement and Implementation Bill offers new evidence of a shift in constitutional orthodoxy, away from Dicey, to a manner and form understanding of parliamentary sovereignty.

*European Union Act 2011: Referendum Locks and a Second EU Referendum*

If the Withdrawal Agreement and Implementation Bill provides further evidence of the shifting way in which political actors are interpreting the scope of Parliament’s legally unlimited legislative power, we can expect to encounter new questions about the legal effects of any procedural conditions which have been established by statute. As noted above, the European Union Act 2011 was the unprecedented constitutional experiment which firmly pushed questions about legislative use of manner and form clauses to the fore of contemporary debate in the UK constitution. Yet the Act does not just have a significant legacy in relation to the issue of whether Parliament can create procedural conditions applicable to the future use of legislative power – it has also generated debate about the implications of such provisions once established. An early example was the failed legal challenge which sought to extend the scope of the 2011 Act’s referendum locks to require a referendum on the UK decision to opt in to the European Arrest Warrant scheme.[[133]](#footnote-133) But more recently, we have also seen the rather curious rehabilitation of the EU Act 2011 by those in favour of a second referendum on Brexit.

 In light of its ambitions to obstruct UK engagement in even minor developments at EU level, the EU Act 2011 was a much-criticised statute, and is therefore a strange candidate to be converted into a means through which to leverage arguments for a second referendum to accept or reject the final terms of Brexit. As noted above, following its enactment the 2011 Act has had a quiet significance to this point – none of the headline-grabbing ‘referendum locks’, which were designed to limit transfers of further power or competence to the EU without a national vote, have been triggered. Yet more mundane statutory conditions have been legally engaged and complied, supporting the view that Parliament is legally required – and explicitly recognises that it is legally required – to comply with procedural requirements contained in prior legislation, where applicable and unless or until that prior legislation is repealed. Against this backdrop of legal efficacy, it has been argued that the referendum locks established by the EU Act can be understood to extend to cover a Withdrawal Agreement,[[134]](#footnote-134) on the basis that it would be ‘amending or replacing’ the EU treaties.[[135]](#footnote-135)

Establishing a legal requirement that an agreement for withdrawal from the EU would be subject to ratification only if approved by an Act of Parliament and a national referendum was clearly not the purpose of the 2011 Act. But whether it was the policy objective of the government promoting that legislation, or the purpose of the Parliament enacting, it is only part of the relevant context. The words enacted by the sovereign Parliament are key to establish whether – intentionally or otherwise – a relevant legal condition has been established. As such, the argument depends on whether the Withdrawal Agreement should be understood as a treaty replacing or amending the EU treaties. Yet the EU treaties will obviously continue to exist in their present form after the UK’s exit, which makes it strongly arguable that a Withdrawal Agreement is not caught by this test, unless ‘replacing or amending’ is understood to mean ‘replacing or amending in the totality of their application to the UK alone’. Yet such an interpretation seems to strain the language of the EU Act 2011 well beyond its literal terms, and that more speculative interpretation is not supported by the purpose of the statute. There may be some further complexity associated with any removal of references to the UK from the EU Treaties.[[136]](#footnote-136) But it is not clear that any such textual changes would either be directly carried out by a Withdrawal Agreement, as opposed to the eventual (and inevitable) consequence of the process of withdrawal established within the Treaties by Art 50, or ‘amendments’ of the EU Treaties in the relevant sense established by UK law. A Withdrawal Agreement that simply removes one member state from the EU legal order, which otherwise persists, seems to be fundamentally different in character to the kinds of treaties substantively re-making the EU legal order to which the 2011 Act was designed to apply.[[137]](#footnote-137)

In any event, the EU Withdrawal Bill indicates that the EU Act 2011 will be explicitly repealed,[[138]](#footnote-138) which means any prospect of arguing that its terms are applicable to a subsequent Withdrawal Agreement will be removed. It might be claimed that if a relevant referendum condition does currently exist (which as explained above, seems a problematic starting point) that this binding condition cannot be removed by a straightforward repeal.[[139]](#footnote-139) There is obiter dicta in *Jackson* which might be seen to provide some support for this approach, as a majority of judges considered that an explicit statutory limit on using the Parliament Acts to extend the life of Parliament beyond five years was subject to an implied protection which prevented the use of that accelerated legislative process to remove that constraint.[[140]](#footnote-140) The better view, however, is that adopted by Lord Bingham in *Jackson*.[[141]](#footnote-141) If the sovereign Parliament is going to establish legislative conditions constraining its successors, we need to take a strongly literalist approach to those terms, rather than read in any additional implied constraints. Moreover, the EU Act 2011 provides a very different context from the limitation at issue in *Jackson*, found in the Parliament Acts 1911 and 1949. That limitation on Parliament extending its life beyond five years through a law-making process which does not require the assent of the House of Lords captures a single principle crucial to UK parliamentary democracy – that regular elections must be held to select those in government. The EU Act 2011, in contrast, created a vast range of technical legislative restrictions which are not underpinned by a principle of the highest constitutional significance, but by a particular brand of political expediency. Given the complexity of this controversial scheme, it would be important to interpret the legislation – in the complete absence of explicit language to the contrary – as preserving the flexibility to change (or indeed remove entirely) this array of referendum locks, rather than attempting to read these provisions as implicitly entrenched. The manner and form theory allows us to see statutory referendum conditions as legally effective changes to the future law-making process, but parliamentary sovereignty requires that these provisions operate only in the ways that the legislature has intended.

This speculative challenge, which seems most unlikely to succeed, can nevertheless offer evidence of a changed understanding of the legal implications of statutory conditions altering the future law-making process: the EU Act 2011 seems to have been transformed from a politically objectionable curiosity to a significant source of potential legal obligations. The ‘referendum locks’ contained in the 2011 Act are unlikely to bite on the EU Withdrawal Agreement – but the idea that a statutory referendum lock with legal force could have existed is being taken as the constitutional starting point for debate about the scope of Parliament’s sovereign power, rather than viewed as a futile and forbidden exercise in attempting to ‘bind its successors’. This represents the normalisation of the manner and form theory of parliamentary sovereignty, and its position as the new orthodoxy of legislative power in the UK constitution.

When we look across all of the recent legislative developments considered in this section, we can see the shifting power and position of the UK Parliament in the constitution. There is increasing complexity evident in the range of constitutional questions raised in the modern UK constitution about the uses of legislative power, and issues of institutional interaction and alignment, hierarchies of norms, and dispersal of powers. This does not mean we are now in a post-parliamentary sovereignty age,[[142]](#footnote-142) but shows the possibilities available in a constitution structured around the idea of legally unlimited legislative authority. Our current constitutional environment is crucially shaped by the activity of the UK’s sovereign Parliament, through its substantive law-making and engagement with procedural change. Consideration of these issues also truly exposes the myth that Brexit will see the UK's constitutional reversion to a simple pre-1972 position in which Parliament was sovereign and could act as it liked. Such a vision fundamentally misrepresents the idea of parliamentary sovereignty. Even where legislative authority is unlimited by law, it must be exercised in a complicated context, recognising the positions of a diverse range of other legally, politically or democratically empowered actors and institutions, in a way which is informed by the principles which underpin that wider constitutional system. Parliamentary sovereignty remains at the core of our constitutional system, but it should be no surprise, given the doctrine is an instrument for achieving change through law, that the modern UK constitution has changed around and through the idea of parliamentary sovereignty. Such change will inevitably continue, because that is the nature of the UK's constitutional model.

**Conclusion**

This paper has analysed potentially significant challenges to parliamentary sovereignty arising from political, judicial and legislative developments since 2015. We have seen that these challenges are quite different in nature. There has been political misunderstanding and sloganisation of parliamentary sovereignty, with unpredictable future consequences. There appeared to be a formal reaffirmation of judicial commitment to the doctrine, but this has been broadly undermined in practice, as the courts continue to try to extend their constitutional authority. And there has been legislative experimentation with the parameters of Parliament’s legally unlimited authority, demonstrating the increasingly diverse environment, and the increasingly diverse ways, in which that law-making power can be used. The varying nature of the challenges contributes to the overall sense that parliamentary sovereignty is caught up in the wider changes which are occurring (or at least possible to anticipate) in this age of constitutional flux.

Yet the resilience of the doctrine of parliamentary sovereignty in the face of challenging political, judicial and legislative developments also demonstrates the continuing centrality of this doctrine in the constitution of the UK. The major constitutional debates of the present period affect, exploit and engage with the idea of Parliament as the sovereignty legislative body in the UK. Often this is with good reason, sometimes it is in error, but it is remarkable that this age of constitutional flux is also, in many respects, an age of parliamentary sovereignty. Indeed, it may well be the centrality and persistence of parliamentary sovereignty which invite challenge to the doctrine – with the paradoxical consequence that challenge can be, and has been, reinforcing of the sovereignty of Parliament. One legacy of this period may therefore be to demonstrate the need to shift, or at least alter, the dominant modern narrative of challenge to parliamentary sovereignty. The enduring centrality of parliamentary sovereignty as a central feature of these constitutional debates demonstrates the relative security of the doctrine as the fundamental concept of the UK constitution. Instead, in accepting this centrality, the debate should not be whether Parliament is or is not still sovereign, but how the meaning and implications of this central doctrine should be understood, and what it can facilitate in constitutional practice.

Yet if shifting the narrative of parliamentary sovereignty is arguably now required, we must be aware of the different ways of conceptualising challenge to parliamentary sovereignty. In one way, the idea of constitutional flux can refer to the state of affairs at a particularly febrile moment in time, in which political, judicial and legislative developments interact with one another to present ever greater and more complex questions. To analyse the varying constitutional challenges which result from such a period of change, and to reflect on the overarching implications, has been the primary focus of this paper. In another way, however, the age of constitutional flux may not simply be an especially momentous period of time in which our political system is recalibrated – it may also be an attitude to the constitution itself. If so, rather than placing emphasis simply on the scale and nature of the changes underway – the degree of flux – we might also need to focus on the way that change is being understood and responded to – in other words, its constitutional character. If the age of constitutional flux is not just about change to our political system in a specific (and still ongoing) period of time, but about a different attitude to what it means to have a changing constitution, then perhaps the future status of parliamentary sovereignty cannot so readily be taken for granted. For there is a variant of constitutional understanding which struggles to accommodate the doctrine of parliamentary sovereignty, without misrepresenting the very nature of the idea. Rather than viewing parliamentary sovereignty as giving absolute constitutional priority to democratic political decision-making, as filtered and expressed through the legally unlimited parliamentary legislative process, the doctrine can instead be absorbed, and diluted within a pluralist framework of constitutional principles. Rather than stand at the pinnacle of the legal system, shaping the constitutional law within the UK, parliamentary sovereignty can be taken to reflect the general importance of the legislature within our political system, which is not necessarily to accept that its legislation should be received and applied unconditionally when it pushes against other significant (but very much contestable) norms or values, like the rule of law, judicial independence, or limited government.

As a result, in seeking to reorient the narrative about parliamentary sovereignty in the contemporary UK constitution from one focused on challenges to the doctrine, to one focused on the implications of the established and enduring centrality of the doctrine, there is little room for complacency. While any imminent departure from the idea of parliamentary sovereignty is now difficult to imagine, a more radical reconfiguration within the parameters of the doctrine could nevertheless occur. The constitutionalisation of parliamentary sovereignty might appear to preserve the formal architecture of our political constitution, but in substance it could shift the status of legislation, the position of the courts, and destabilise the broader set of institutional arrangements which are organised by reference to the power allocated to Parliament. As a result, clarity about the meaning and implications of the UK constitution’s fundamental norm is required if this democratic doctrine is not to be reconstituted from the inside out.

There are other reasons to move on from existential debates about parliamentary sovereignty to focus on precise analysis of its meaning and implications. As the events which led to Brexit demonstrate, hesitancy about whether Parliament was still sovereign have arguably been a cause of major uncertainty with broader, unexpected social and political consequences. More than ever, we now need to understand the full instrumental capability of sovereign legislative power, rather than becoming preoccupied with a regression to the kind of constitution that more exceptionalist visions of UK parliamentary sovereignty seem designed to stimulate.  Some of the issues which may need attention, and which cut across political, judicial and legislative distinctions used in the main body of this paper, include: the ways in which substantively unlimited legislative power could be accommodated in a more formal federalist UK system; how the compatibility of parliamentary sovereignty with supranational systems could more clearly be established in national structures; how Parliament can effectively communicate its sovereignty to the courts, both in general, and in response to specific cases or judicial trends; and the changing relationship between parliamentary sovereignty and non-representative forms of democratic decision-making.

Yet perhaps one of the great problems of the current period of constitutional flux is that it is highlighting a range of inadequacies in our political architecture, while paradoxically depleting energy for deeper reform, and distracting from underlying (and undoubtedly complex) political disengagement. What might the constitutional solutions to this be? It is inherently difficult to say, but they must focus on expanding and enhancing democratic inputs across the UK’s political system, rather than constructing barriers which serve to entrench the institutional status quo. A shift in our constitutional attitude, focused on some grand realignment of the existing principles of the constitution as against parliamentary sovereignty, will do little, if anything, to respond to these difficulties. Rather than allowing an overtly constitutional process of rationalisation to gather pace, we should recognise that parliamentary sovereignty is the principle which can deliver a far-reaching programme of such substantial constitutional change, based on the reorganisation and redistribution of power. Parliamentary sovereignty may be emerging from a period of profound constitution challenge with its centrality as obvious as it has ever been. Yet there is no room for complacency about the UK’s constitutional future, or the relevance and potential of the doctrine of parliamentary sovereignty as that future is made.

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4. *R (Miller)* v *Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61. [↑](#footnote-ref-4)
5. See eg M Gordon, ‘The UK’s Fundamental Constitutional Principle: Why the UK Parliament Is Still Sovereign and Why It Still Matters’ (2015) 26 *King’s Law Journal* 229 [↑](#footnote-ref-5)
6. [2017] UKSC 5, [2018] AC 61. [↑](#footnote-ref-6)
7. See eg S Fredman, ‘Miller: A Vital Reaffirmation of Parliamentary Sovereignty’, *Oxford Human Rights Hub* (24January 2017): <http://ohrh.law.ox.ac.uk/miller-a-vital-reaffirmation-of-parliamentary-sovereignty/>. [↑](#footnote-ref-7)
8. Dicey (n 1), 70-71. [↑](#footnote-ref-8)
9. M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford, Hart Publishing, 2015), 23-25. [↑](#footnote-ref-9)
10. Ibid, 25-27. [↑](#footnote-ref-10)
11. Ibid, 27-28. [↑](#footnote-ref-11)
12. ##  C Grayling, ‘We must Vote Leave to protect our sovereignty and democracy from further EU integration’ (31 May 2016): <http://www.voteleavetakecontrol.org/chris_grayling_we_must_vote_leave_to_protect_our_sovereignty_and_democracy_from_further_eu_integration.html>.

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23. Department for Exiting the EU, *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417, February 2017), 13. [↑](#footnote-ref-23)
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26. Joint Committee on Conventions, *Conventions of the UK Parliament* (HL Paper 265-I, HC 1212-I, 3 November 2006), 14-15; Parliament Acts 1911 and 1949. [↑](#footnote-ref-26)
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28. See eg *Edinburgh and Dalkeith Railway Co* *v* *Wauchope* (1842) 8 Cl & F 710; *Lee* *v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576; *Mortensen v* *Peters* (1906) 8 F (J) 93; *Cheney* *v* *Conn* [1968] 1 WLR 242; *British Railways Board* *v* *Pickin* [1974] AC 765. [↑](#footnote-ref-28)
29. *R (Jackson)* *v* *Attorney General* [2005] UKHL 56, [2006] 1 AC 262. [↑](#footnote-ref-29)
30. Ibid, [102]. [↑](#footnote-ref-30)
31. Ibid [104], [159]. [↑](#footnote-ref-31)
32. For an overview of the arguments, see Gordon (n 9), ch 5. For differing accounts of the implications of *Jackson*, see eg AL Young, ‘Hunting Sovereignty: *Jackson v Her Majesty’s Attorney-General*’ [2006] *Public Law* 187; AL Young, ‘Parliamentary Sovereignty Re-defined’ in R Rawlings, P Leyland and AL Young (eds), *Sovereignty and the Law: Domestic, European, and International Perspectives* (Oxford, Oxford University Press, 2013); J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge, Cambridge University Press, 2010), 176-179; A Tucker, ‘Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty’ (2011) 31 *Oxford Journal of Legal Studies* 61; HR Zhou, ‘Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty’ (2013) 129 *Law Quarterly Review* 610; M Elliott, ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective’ in J Jowell, D Oliver and C O’Cinneide (eds), The Changing Constitution, 8th edn (Oxford, Oxford University Press, 2015). [↑](#footnote-ref-32)
33. KD Ewing, ‘Brexit and Parliamentary Sovereignty’ (2017) 80 *Modern Law Review* 711, 712. [↑](#footnote-ref-33)
34. [2017] UKSC 5, [2018] AC 61. [↑](#footnote-ref-34)
35. Art 50(3), Treaty on European Union. [↑](#footnote-ref-35)
36. See eg JDB Mitchell, ‘What Happened to the Constitution on 1st January 1973?’ (1980) 11 *Cambrian Law Review* 69. [↑](#footnote-ref-36)
37. See below Section 3. [↑](#footnote-ref-37)
38. *Devolution: Memorandum of Understanding and Supplementary Agreements* (October 2013), [14]; Department for Constitutional Affairs, ‘Devolution Guidance Note 10 – Post-Devolution Primary Legislation Affecting the Scottish Parliament’(November 2005), [4.3]. [↑](#footnote-ref-38)
39. At the time of the *Miller* litigation, this was pursuant to the Scotland Act 1998 s 29(2)(d); Northern Ireland Act 1998 s 6(2)(d); Government of Wales Act 2006 s 108(6)(c). [↑](#footnote-ref-39)
40. [2016] NIQB 85. [↑](#footnote-ref-40)
41. Ibid, [105]-[108]. [↑](#footnote-ref-41)
42. Ibid, [121]-[122]. [↑](#footnote-ref-42)
43. [2016] EWHC 2768 (Admin), [2017] 1 All ER 158. [↑](#footnote-ref-43)
44. Ibid, [82]-[94]. [↑](#footnote-ref-44)
45. Ibid, [87]. [↑](#footnote-ref-45)
46. [2016] NIQB 85, [149]. [↑](#footnote-ref-46)
47. Ibid, [156]. [↑](#footnote-ref-47)
48. [2016] EWHC 2768 (Admin), [2017] 1 All ER 158, [20]. [↑](#footnote-ref-48)
49. Ibid, [23]. For Lord Bingham’s subsequent critique of the obiter dicta doubts of the *Jackson* three, see Lord Bingham, ‘The Rule of Law and the Sovereignty of Parliament’, *King’s College London Commemoration Oration 2007* (31 October 2007), 22; T Bingham, *The Rule of Law* (London, Penguin, 2011), 166-168. [↑](#footnote-ref-49)
50. Ibid, [25]. See also [86], [95], [106]. [↑](#footnote-ref-50)
51. Ibid, [43]-[44]. See *Thoburn* *v* *Sunderland City Council* [2002] EWHC 195, [2003] QB 151, [58]-[70]. [↑](#footnote-ref-51)
52. Ibid, [82]. [↑](#footnote-ref-52)
53. Ibid, [87]. [↑](#footnote-ref-53)
54. Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge. [↑](#footnote-ref-54)
55. [2017] UKSC 5, [2018] AC 61, [81]. [↑](#footnote-ref-55)
56. Ibid, [67]. [↑](#footnote-ref-56)
57. Ibid, [65]. [↑](#footnote-ref-57)
58. Ibid [86]. [↑](#footnote-ref-58)
59. Ibid [83]. [↑](#footnote-ref-59)
60. Ibid [43]. See above n 48. Emphases added. [↑](#footnote-ref-60)
61. Ibid [90]. [↑](#footnote-ref-61)
62. ##  Moreover, even if parliamentary authorisation was understood to be required, on the basis that the prerogative power to make or unmake treaties could not be used to undermine the domestic effects of the ECA 1972, it is strongly arguable that formal legislative approval had already been given. This was through the enactment of the European Union (Amendment) Act 2008, which approved the changes to the EU treaties made by the Treaty of Lisbon, including the creation of the Article 50 withdrawal process; see Ewing (n 33), 720-721.

 [↑](#footnote-ref-62)
63. See eg *R* *v* *Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 575, 587, and especially Lord Hoffman in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131. [↑](#footnote-ref-63)
64. [2017] UKSC 5, [2018] AC 61, [87]. [↑](#footnote-ref-64)
65. Ibid, especially [179]-[204]. [↑](#footnote-ref-65)
66. Ibid, [177]. [↑](#footnote-ref-66)
67. Ibid, especially [248]-[249], [264], [274]. [↑](#footnote-ref-67)
68. Ibid, [249]. [↑](#footnote-ref-68)
69. Ibid, [249]. [↑](#footnote-ref-69)
70. Ibid, [146]. [↑](#footnote-ref-70)
71. Ibid, [43], [177], [183], [274]. [↑](#footnote-ref-71)
72. [2005] UKHL 56, [2006] 1 AC 262, [102] (Lord Steyn), [159] (Baroness Hale). [↑](#footnote-ref-72)
73. Axa General Insurance Ltd v Lord Advocate [2011] UKSC 46, [2012] 1 AC 868, [50]-[51] (Lord Hope). [↑](#footnote-ref-73)
74. [2014] UKSC 67, [2015] AC 901, [35]. [↑](#footnote-ref-74)
75. [2016] UKSC 39, [2016] AC 1531. [↑](#footnote-ref-75)
76. Ibid, [20]. [↑](#footnote-ref-76)
77. [2015] UKSC 21, [2015] AC 1787 [↑](#footnote-ref-77)
78. Ibid, [58]. [↑](#footnote-ref-78)
79. Ibid, [168]. [↑](#footnote-ref-79)
80. Ibid, [52]. [↑](#footnote-ref-80)
81. Ibid, [168]. [↑](#footnote-ref-81)
82. [2014] UKSC 3, [2014] 1 WLR 324, [207]. [↑](#footnote-ref-82)
83. [2017] UKSC 51, [2017] 3 WLR 409. [↑](#footnote-ref-83)
84. See eg *In re Boaler* [1915] 1 KB 21; *Chester* v *Bateson* [1920] 1 KB 829; *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198; *R v Lord Chancellor, Ex p Witham* [1998] QB 575; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115. [↑](#footnote-ref-84)
85. [2017] UKSC 51, [2017] 3 WLR 409, [68]. [↑](#footnote-ref-85)
86. Ibid, [65]. [↑](#footnote-ref-86)
87. [2015] UKSC 19, [2015] 1 WLR 1591. [↑](#footnote-ref-87)
88. Ibid, [80]. This position is potentially contradicted by the majority judgment in *Miller*, which quite remarkably identified ‘EU law as an entirely new, independent and overriding source of domestic law’; [2017] UKSC 5, [2017] 2 WLR 583, [80]. This controversial claim sits very uncomfortably alongside legislation which (re)asserts that the status of EU law is entirely contingent on its domestic statutory basis, as in the European Union Act 2011, s.18. [↑](#footnote-ref-88)
89. Art 9, Treaty on European Union; Art 20, Treaty on the Functioning of the European Union. [↑](#footnote-ref-89)
90. [2014] UKSC 3, [2014] 1 WLR 324. [↑](#footnote-ref-90)
91. See especially Lord Bridge in *Factortame (No. 2)* [1991] 1 AC 603, 658-659. [↑](#footnote-ref-91)
92. *R (Black)* v *Secretary of State for Justice* [2017] UKSC 81, [2018] 2 WLR 123. [↑](#footnote-ref-92)
93. See eg the dissent of Lord Kerr in *R (SG)* v *Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, especially [243]-[257]. [↑](#footnote-ref-93)
94. See Gordon (n 9), ch 2. [↑](#footnote-ref-94)
95. See HWR Wade, ‘The Basis of Legal Sovereignty’ (1955) 13 *Cambridge Law Journal* 172. [↑](#footnote-ref-95)
96. Jennings (n 2), 153. [↑](#footnote-ref-96)
97. Scotland Act 1998, s.63A, as amended by the Scotland Act 2016, s.1. [↑](#footnote-ref-97)
98. Scotland Act 1998, s.28(8), as amended by the Scotland Act 2016, s.2. [↑](#footnote-ref-98)
99. Government of Wales Act 2006, s.A1 and s.107(6), as amended by the Wales Act 2017, ss.1-2. [↑](#footnote-ref-99)
100. *Ellen Street Estates v Minister of Health* [1934] 1 KB 590. [↑](#footnote-ref-100)
101. See the data on the frequency of use collected by the Institute for Government; ‘Brexit and the Sewel (legislative consent) Convention’, *Institute for Government* (16 January 2018): <https://www.instituteforgovernment.org.uk/explainers/brexit-sewel-legislative-consent-convention>. [↑](#footnote-ref-101)
102. See above Section 2. [↑](#footnote-ref-102)
103. [2017] UKSC 5, [2017] 2 WLR 583, [141]-[146]. [↑](#footnote-ref-103)
104. Ibid, [148]. [↑](#footnote-ref-104)
105. Ibid, [149]. [↑](#footnote-ref-105)
106. Moreover, this is in line with the earlier approach of the Divisional Court in *Wheeler v The Office of the Prime Minister* [2014] EWHC 3815 (Admin), when deciding claims based on the enforceability of the referendum locks created in the European Union Act 2011. [↑](#footnote-ref-106)
107. For the contrary argument, see eg C McCrudden and D Halberstam, ‘Northern Ireland’s Supreme Court Brexit Problem (and the UK’s too)’, *UK Constitutional Law Association Blog* (21 November 2017): <https://ukconstitutionallaw.org/2017/11/21/christopher-mccrudden-and-daniel-halberstam-northern-irelands-supreme-court-brexit-problem-and-the-uks-too/>. [↑](#footnote-ref-107)
108. These devolution clauses are not unique; other examples of symbolic legislative provisions might include, for eg, the European Union Act 2011, s.18 (reasserting the domestic statutory basis for the authority of EU law within the UK), or the Constitutional Reform Act 2005, s.1 (confirming the continuing status of the rule of law). [↑](#footnote-ref-108)
109. See eg Dominic Grieve, ‘Brexit and the sovereignty of Parliament: a backbencher’s view’, *LSE Brexit Blog* (16 February 2018): <http://blogs.lse.ac.uk/brexit/2018/02/16/long-read-brexit-and-the-sovereignty-of-parliament-a-backbenchers-view/>. [↑](#footnote-ref-109)
110. See eg Lord Judge, ‘Ceding Power to the Executive; the Resurrection of Henry VIII’, Lecture at King’s College London (12 April 2016): <http://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>. [↑](#footnote-ref-110)
111. See eg A Tucker, ‘Parliamentary Scrutiny of Delegated Legislation’ in A Horne and G Drewry (eds), *Parliament and the Law*, 2nd ed (Oxford, Hart Publishing, 2018), 358-360. [↑](#footnote-ref-111)
112. For critical evaluation of the original proposals, see eg House of Commons Procedure Committee, *Scrutiny of Delegated Legislation under the European Union (Withdrawal) Bill: Interim Report* (HC 386, 6 November 2017). [↑](#footnote-ref-112)
113. See Tucker (n 110), 347. [↑](#footnote-ref-113)
114. House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill* (HL Paper 69, 29 January 2018), [91]. [↑](#footnote-ref-114)
115. Ibid, [96]. [↑](#footnote-ref-115)
116. European Union (Withdrawal) Bill, cl. 6(1)&(3). [↑](#footnote-ref-116)
117. Ibid, cl. 6(2). [↑](#footnote-ref-117)
118. Ibid, cl. 6(4)&(5). [↑](#footnote-ref-118)
119. See eg T Horsley, ‘In (Domestic) Courts We Trust: The European Union (Withdrawal) Bill and The Interpretation of Retained EU Law’, *UK Constitutional Law Association Blog* (27 November 2017): <https://ukconstitutionallaw.org/2017/11/27/thomas-horsley-in-domestic-courts-we-trust-the-european-union-withdrawal-bill-and-the-interpretation-of-retained-eu-law/>. [↑](#footnote-ref-119)
120. European Communities Act 1972, s. 3. [↑](#footnote-ref-120)
121. Human Rights Act 1998, s. 2. [↑](#footnote-ref-121)
122. See eg the widely reported comments of the former President of the Supreme Court; ‘UK judges need more clarity after Brexit – Lord Neuberger’, *BBC News* (8 August 2017): <http://www.bbc.co.uk/news/uk-40855526>. See also evidence to the House of Lords Constitution Committee of Baroness Hale and Lord Mance; ‘Uncorrected Oral Evidence: President and Deputy President of the Supreme Court’ (21 March 2018), 1-5: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/president-and-deputy-president-of-the-supreme-court/oral/80805.pdf>. [↑](#footnote-ref-122)
123. See above p.13-16. [↑](#footnote-ref-123)
124. See above n 39. [↑](#footnote-ref-124)
125. European Union (Withdrawal) Bill, cl. 11. [↑](#footnote-ref-125)
126. For criticism, see eg Scottish Parliament Finance and Constitution Committee, *European Union (Withdrawal) Bill Legislative Consent Motion – Interim Report* (SP Paper 255, 9 January 2018). [↑](#footnote-ref-126)
127. As of the end of April 2018, agreement has been reached between the UK and Welsh governments, but not (yet) with the Scottish government, as to the areas currently governed by EU law in which UK frameworks will be required, and where the limitations on devolved competence will therefore be in place for a time-limited period, with relevant regulations established at the UK level subject (with some exceptions) to the consent of the devolved legislatures. There is currently no Northern Irish Executive in office to opt-in to this agreement, though it is open to one to do so in future. See *Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks* (24 April 2018): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf>. [↑](#footnote-ref-127)
128. *Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations under Article 50 TEU on the United Kingdom’s Orderly Withdrawal from the European Union*, TF50 (2017) 19 – Commission to EU 27 (8 December 2017), [34]-[35]. [↑](#footnote-ref-128)
129. Ibid, [36]. [↑](#footnote-ref-129)
130. Northern Ireland Act 1998, s.1. [↑](#footnote-ref-130)
131. Most obviously the obiter dicta of Maugham LJ in *Ellen Street Estates v Minister of Health* [1934] 1 KB 590, 597. [↑](#footnote-ref-131)
132. [2005] UKHL 56, [2006] 1 AC 262. [↑](#footnote-ref-132)
133. *Wheeler v The Office of the Prime Minister* [2014] EWHC 3815 (Admin). [↑](#footnote-ref-133)
134. See eg P Eleftheriadis, ‘A New Referendum is a Constitutional Requirement’, *Oxford Business Law Blog* (4 July 2016): <https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/new-referendum-constitutional-requirement>. [↑](#footnote-ref-134)
135. EU Act 2011, s.2. [↑](#footnote-ref-135)
136. See eg D Coffey, ‘Does UK Law Require a Referendum on the EU Withdrawal Agreement?’, *European Futures* (14 February 2018): <http://www.europeanfutures.ed.ac.uk/article-6071>. [↑](#footnote-ref-136)
137. If this claim falls at the first stage, a secondary requirement under the EU Act 2011, s.4, that a relevant treaty would need to have one of a range of substantive effects, would become irrelevant. It seems likely that such a test would be met, in particular by satisfying one of the conditions in s.4(i) or (j), as the Withdrawal Agreement will surely confer on an EU institution a power to impose a requirement, obligation or sanction on the UK. [↑](#footnote-ref-137)
138. EU (W) Bill, cl. 17(7) & Schedule 9. [↑](#footnote-ref-138)
139. While not making this legal claim, Eleftheriadis (n 134) makes the related normative argument that to ‘retrospectively change these terms after the referendum has taken place in order to circumvent the legal obligation of a second referendum, will be rightly seen as constitutionally inappropriate’. [↑](#footnote-ref-139)
140. [2005] UKHL 56, [2006] 1 AC 262; see eg [59] (Lord Nicholls). This position was supported by Lords Steyn, Hope, Carswell, Brown and Baroness Hale. [↑](#footnote-ref-140)
141. Ibid, [32]. [↑](#footnote-ref-141)
142. For suggestions to the contrary, see eg NW Barber, ‘The Afterlife of Parliamentary Sovereignty’ (2011) *International Journal of Constitutional Law* 144; F Davis, ‘Brexit, the Statute of Westminster 1931 and Zombie Parliamentary Sovereignty’ (2016) *King’s Law Journal* 344. [↑](#footnote-ref-142)