**Abstract:**

This article responds to Jeffrey Goldsworthy’s review essay of *Parliamentary Sovereignty in the UK Constitution.* It defends the manner and form theory of parliamentary sovereignty against a number of challenges. It argues that the UK Parliament is a composite institution, and that theories of sovereignty must try to reconcile Parliament’s ongoing control over substantive decision-making with its control over the legislative process. It suggests that if we track UK constitutional practice, the manner and form theory provides a compelling way to reconcile these competing aspects of sovereignty. On this basis, the article argues, first, that statutory referendum requirements can lawfully be incorporated into the legislative process. Second, that the courts should play a limited role in enforcing manner and form limits, with wider discretion left to Parliament to decide when changes to legislative procedure are constitutionally justifiable. And third, while entrenchment is legally possible, it is generally undesirable, depending on the context – as a result, the article maintains that while the manner and form theory does not prohibit entrenchment as a matter of law, we can regard it as contrary to political principle, or even constitutional convention.

**Key words:** parliamentary sovereignty; manner and form theory; referendums; entrenchment; political constitution

**‘The Manner and Form Theory of Parliamentary Sovereignty: A Response to Jeffrey Goldsworthy’**

In his review essay of my book, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart, 2015), Jeffrey Goldsworthy sets out a number of powerful challenges to my defence of a ‘manner and form’ theory of parliamentary sovereignty. In this response, I want to focus on three connected issues raised by Goldsworthy. First, the compatibility of statutory referendum requirements with parliamentary sovereignty. Second, the role of the courts in enforcing manner and form limitations on legislative power. And third, perhaps the most difficult question which Goldsworthy raises: is a self-entrenched referendum legally binding in accordance with the manner and form theory of parliamentary sovereignty I defend?

These issues are important for two reasons. First, they most clearly exhibit the fault lines between the manner and form theory which I defend, and the ‘procedure and form’ theory defended by Goldsworthy. There are some significant points of difference between our positions on the compatibility of referendum constraints with parliamentary sovereignty, and these disagreements are arguably the consequence of (and so reveal) an underlying divergence in our approaches.

Second, they engage directly with some of the most challenging constitutional problems which now face theorists of parliamentary sovereignty in the UK. At one point it might have been arguable that debates about manner and form limits here were largely academic (although that is a position which is impossible to sustain in relation to the wider body of Commonwealth constitutional law, as Goldsworthy shows).[[1]](#footnote-1) However, in the modern era, cases such as *Jackson v Attorney General*,[[2]](#footnote-2)on the status of the Parliament Act 1949, and legislation such as the European Union Act 2011,[[3]](#footnote-3) creating statutory referendums locks conditioning transfers of competence to the EU, clearly show that the UK Parliament’s power to alter the legislative process has become a live issue. The examples continue to accumulate, as demonstrated by the ‘permanence clauses’ in the Scotland Act 2016[[4]](#footnote-4) and Wales Act 2017,[[5]](#footnote-5) which now sit alongside the longer established referendum requirement currently captured in the Northern Ireland Act 1998.[[6]](#footnote-6)

The question of the power of the UK Parliament to change the law-making process is far from settled, and it is not clear that the ‘traditional’ approach to parliamentary sovereignty, exemplified by the work of Dicey,[[7]](#footnote-7) has the answers. As Goldsworthy notes, and I agree, the differences between our theories of parliamentary sovereignty are not great, and we both defend accounts of this doctrine which go beyond the model classically associated with Dicey. In this sense, the terms of academic debate have to a considerable extent shifted off Dicey’s terrain, where the idea that ‘Parliament cannot bind its successors’ was accepted as a truism, to refocus on the detail of how and when the doctrine of parliamentary sovereignty permits change to the legislative process. Goldsworthy’s rich and highly influential work has been crucial in prompting this shift.[[8]](#footnote-8) We reach different answers to these questions, and my response aims to illuminate the basis of our disagreement while refining my position. But the fact these questions about the meaning and implications of parliamentary sovereignty have a new priority is arguably just as important as the distinctions between the competing answers we defend.

In what follows, I define parliamentary sovereignty as a legal doctrine which attributes legally unlimited legislative power to the UK Parliament. I take the ‘manner and form theory’ to be an understanding of sovereign legislative power. On this understanding, the UK Parliament is permitted to use its law-making authority to create new procedural conditions (or requirements to legislate in a particular ‘manner’ or following a specific ‘form’) which must be followed in future to enact valid laws.

1. Referendum Requirements and Parliamentary Sovereignty

Goldsworthy argues that when Parliament makes its decisions subject to approval by an external body, such as the electorate at a referendum, Parliament ‘by itself’ no longer possesses ‘comprehensive’ or ‘continuing’ legislative sovereignty.[[9]](#footnote-9) This is obviously a compelling position, although I will outline two difficulties with it.[[10]](#footnote-10)

First, Parliament ‘by itself’ is presented as a fixed institution. However, Parliament is arguably a composite institution, comprised (for most purposes) of Commons, Lords and Queen. While Goldsworthy and I agree that it is unhelpful to strain the settled meaning of ‘Parliament’ by arguing that it can be ‘redefined’ for particular decisions so as to include the electorate (or indeed any other body), in my view the composite nature of Parliament justifies a more flexible approach to the institutional combination(s) which take legislative decisions. When Parliament as we currently understand it is already based on a combination of institutions, the idea it might exercise its power to potentially incorporate other institutions into the law-making process seems consistent with the underlying constitutional flexibility offered by parliamentary sovereignty, and preferable to a more static conception of this doctrine.

This is especially so because we already accept that different alignments are possible for legislative purposes within the Commons, Lords and Queen formula. Under the Parliament Acts 1911 and 1949, Commons and Queen can exercise legislative power without the Lords – should we say that this endangers the sovereignty of Parliament acting ‘by itself’? The decision is made by some of the institutions that combine to establish the Queen-in-Parliament, but not all of them. Parliament ‘by itself’ is not making these decisions, only a subset of the core three institutions. But surely this does not mean Parliament ‘by itself’ has lost its sovereignty, which was used to establish the alternative process to begin with. It might be the case that the Queen-in-Parliament could legislate to reverse a decision of the Commons and Queen, but the opposite is also true – the Parliament Acts 1911-49 could be used to reverse a decision of the Queen-in-Parliament.

Second, this reveals a distinction between different ideas which might form part of an account of parliamentary sovereignty: on one hand, Parliament’s sovereignty as ongoing power to make substantive decisions at any particular moment in time, compared on the other hand with Parliament’s sovereignty to control the legislative process. Sometimes this is understood as a difference between continuing and self-embracing sovereignty, and Goldsworthy explicitly relies on the idea that Parliament’s sovereignty must be continuing (which he defines as ‘not substantively diminished’) in his challenge to the manner and form theory. I have argued that the distinction between continuing and self-embracing sovereignty is a problematic dichotomy (or at least, an incomplete menu of possibilities) which does not necessarily capture the nuances of the manner and form theory.[[11]](#footnote-11) For this approach does not inherently aim to establish a model of sovereignty which permits self-binding,[[12]](#footnote-12) but instead to reconcile tensions at the core of the idea of parliamentary sovereignty. Alternatively, to frame this in the language of the above distinction between ‘ongoing control over substantive decisions’ and ‘control over the legislative process’, the manner and form theory attempts to bridge the gap between these two dimensions of what it means for an institution to possess legally unlimited power.

In effect, Goldsworthy strikes a different balance between these two dimensions of parliamentary sovereignty – he does not tip the balance entirely in favour of ongoing control over substantive decisions, accepting that Parliament should have some control over the legislative process. Yet my argument is that he draws the boundaries of what is possible too narrowly, in allowing only procedural or formal changes to the legislative process, and, at least in principle, excluding referendum requirements from his account.[[13]](#footnote-13) Goldsworthy’s interpretation of parliamentary sovereignty is clearly a coherent and in many ways attractive reconciliation of these two dimensions of sovereignty – but it is also open to the challenge it unduly constrains Parliament’s sovereignty, in insisting that purportedly unlimited legislative authority cannot be used to bring new institutions into the law-making process.

It is difficult to establish at a purely conceptual level which of these accounts (or indeed some other, perhaps purely ‘continuing’ model of sovereignty) offers the definitively correct way to reconcile potentially competing ideas internal to the idea of unlimited authority. While it is interesting and important to debate which model strikes the best balance, to some extent this is unlikely to be decisively resolved, given the tensions are inherent in the idea of sovereignty. Instead, as I tried to argue in my book, we have another way of settling these issues – looking at constitutional practice to determine which of them best explains or maps onto the actions of our legal and political institutions.

When we consider that the UK Parliament has, in a number of instances, legislated to incorporate referendum requirements into the legislative process, that starts to tip the balance towards the manner and form understanding of sovereignty. For when there is legitimate uncertainty about how this doctrine is to be defined, and the implications which flow from it, we should take very seriously the view Parliament has of its own sovereignty, rather than impose conceptual constraints on what Parliament can do in the abstract.

Goldsworthy’s response to this might be that his theory is equally compatible with UK constitutional practice to this point, because all referendum requirements so far have been unentrenched, and therefore easily removable. Goldsworthy argues this makes them primarily limits of form, because they can be removed by a simple Act of Parliament, which therefore does not diminish Parliament’s substantive power.[[14]](#footnote-14) That may be true, but the issue here is also the impact that referendum requirements have on parliamentary sovereignty if they are not bypassed, and instead Parliament is legally required to comply with them. At this point, on Goldsworthy’s approach we have an external body which Parliament is (under the current law) legally obliged to include in certain decisions about law-making. If so, that seems to run into the objection he poses to my theory – that Parliament itself cannot legislate alone, and its sovereignty becomes contingent on whether the referendum requirement is bypassed, not whether it can be bypassed. As noted above, my preferred solution is that we accept Parliament’s sovereignty is not extinguished when it is used to alter the legislative process in this way. This allows us to take the referendum at face value, recognising the full constitutional significance and force of referring a decision to the people directly, rather than reframing it as a technical limit which can be easily worked around.

The distinction made above between sovereignty as ‘ongoing control over substantive decisions’ and sovereignty as ‘control over legislative process’ also allows me to respond to Goldsworthy’s important comparison with the Australian Constitution. Goldsworthy argues I am effectively committed to the position that the Australian Parliament is sovereign and ‘has full substantive power’ to amend the Australian Constitution, even though that is subject to approval at referendums.[[15]](#footnote-15)

In the UK, however, any manner and form limits come from an exercise of Parliament’s sovereignty, not from a codified constitutional text. It is significant and different that statutory conditions are self-imposed through an exercise of legislative sovereignty, rather than established by a Constitution and alterable according to a specified constitutional amendment process. Of course in a constitution where Parliament imposed a range of strongly entrenched alterations to the legislative process, the difference in practice between a system of UK parliamentary sovereignty and the Australian constitution would become less stark (which in itself reinforces the fluidity of the constitutional model of parliamentary sovereignty). I return to the distinctive challenges posed by entrenchment in section 3. But it is also important to note that extensive entrenchment of manner and form shifts is not the position we currently face in the UK – it is, at most, a hypothetical possibility rather than a present reality, and there is little sign of that changing. The UK Parliament has and retains control over the legislative process as a consequence of its sovereignty, and the authority of any changes to the law-making process flow from its power, rather than being imposed on it by an autonomous and independent constitutional text.

1. The Role of the Courts in Enforcing Manner and Form Limits

Goldsworthy also challenges my position on the role of the courts in the enforcement of manner and form limits, focusing in particular on the example of the imposition of super-majority decision making requirements. Consistently with his position that a limit of procedure or form must not substantively diminish the continuing power of Parliament to legislate, Goldsworthy argues that the courts should apply this test to determine the point at which a super-majority requirement becomes so onerous as to be unlawful. His conclusion is that any super-majority rule violates the test, and would be invalid. Yet it is the openness of the test which I find difficult to accept – a future court faced with a two-thirds majority requirement, for example, might agree with Goldsworthy’s application of that test, but equally that court might not. In such circumstances, the court acquires a great deal of discretion to decide where to draw the line between lawful and unlawful super-majority rules.

The alternative approach I defend, rooted in the manner and form theory, does not flow from any admiration of super-majority requirements – like Goldsworthy, I regard them as democratically problematic. Yet equally, if we accept a manner and form understanding of parliamentary sovereignty, it seems clear that they are changes to the legislative process which a Parliament could consider introducing, for they are procedural rather than substantive limitations on future decision-making. While I think this would be a matter for regret, if the manner and form theory provides Parliament with a more expansive power to control the legislative process, it becomes a matter for Parliament to decide whether to exercise its sovereignty in such ways.

I argued the manner and form solution to this problem, based on the distinction between procedural and substantive conditions, was ‘essentially objective’, while describing Goldsworthy’s test as requiring the courts to make ‘subjective’ judgments. But I accept his point that this terminology is not especially helpful. The key difference is not the existence or absence of discretion (as Goldsworthy rightly notes, my own solution had a subjective component, in so far as I argued that procedural changes which made future legislation ‘impossible’ would fall into the category of impermissible substantive constraints). Instead, the difference is where the (inevitable) discretion lies, and its extent. In my view Goldsworthy’s theory allocates very significant discretion to the courts, asking them to decide whether a procedure and form limit diminishes Parliament’s power in substance, whereas the manner and form approach allocates a wide discretion to Parliament to decide to introduce any changes which are procedural in nature. The manner and form approach cannot exclude the courts entirely, but it does indicate that the threshold they should apply if they become involved – that of ‘impossibility’ to legislate – is a much higher and therefore more limited one.

This leads to a broader objection which Goldsworthy makes to my account, which seeks to minimise the role of courts. He argues that my framing of the issues around judicial involvement is wrong: ‘the choice is not… whether the issue is best decided by judges, or by Parliament’ but ‘whether the judges should allow the will of the earlier Parliament, or of the more recent one, to prevail’.[[16]](#footnote-16) While it is a fair critique to say I underplay the importance of the ‘Parliament v Parliament’ dimension in my book, I am not sure either framing is exclusively accurate. Instead, both of these dynamics – ‘judicial v legislative discretion’ and ‘earlier v later legislative intention’ – are in play when we are assessing the role of the courts in enforcing potential manner and form conditions. How we reconcile these tensions in practice will be complex, but in a system based on parliamentary sovereignty, even where we are attempting to reconcile the competing intentions of two Parliaments, leaving too broad a choice to the judges is a problematic option. Instead, it is better to suggest that there is an obligation on all Parliaments, throughout time, to exercise their power over the legislative process in ways which do not create controversies which fall to the judges to settle. This should be dealt with primarily through political constitutional principles and legislative responsibility. Of course, that approach may well fail, but in a system based on parliamentary sovereignty, the onus is on Parliament to exercise its power in ways which allow debates about the scope of sovereignty to be resolved in Parliament, rather than in the courts.

1. Is a Self-Entrenched Referendum Legally Binding?

So far in the UK, legal disputes concerning the intentions of past and present Parliaments regarding the valid law-making process have been avoided. The clearer we can be about the political constitutional factors which shape the use of ‘manner and form’ powers the more likely that is to continue. Yet a final challenge made by Goldsworthy pushes me also to be more explicit about the legal consequences if such a dispute does arise. Goldsworthy focuses on the example of the legality of self-entrenched referendum requirements, which I consider here, aiming to provide a more direct response than in my book.

To some extent, this is a question I was keen to avoid. This is not because it raises difficult issues (although it does). Instead, it is because focusing on the entrenchment of referendums could have a distorting effect on the debate, for three reasons. First, entrenchment is designed to have a constraining effect on Parliament, whereas I have argued that the manner and form theory needs to be understood more broadly, recognising the possibilities it creates for reform of the legislative process beyond simply limiting what can currently be achieved by the Queen, Lords and Commons. Second, if the debate is to be led by UK constitutional practice, the manner and form conditions we have seen have not been entrenched. Third, by moving to the legality of entrenchment we risk missing the importance of understanding and developing the contours of the political constitutional environment.

Consequently, a self-entrenched referendum (or any other entrenched requirement) should not be viewed as the exemplar of a statutory manner and form condition. Equally, however, the fact that the UK has not yet had to deal with the problem of entrenched referendum requirements does not mean it will not have to, especially as further changes to manner and form are introduced. The example does therefore deserve attention.

The manner and form theory produces the opposite conclusions to Goldsworthy, who argues that self-entrenched referendums are ‘plainly inconsistent with comprehensive, continuing parliamentary sovereignty’ but are not necessarily undesirable.[[17]](#footnote-17) I argue that entrenched referendums could be lawfully enacted by a sovereign Parliament, but this is not constitutionally desirable. Goldsworthy in effect suggests that this makes the manner and form theory less compatible with majoritarian democracy than his procedure and form model. But in light of the discussion above, this depends on how we balance competing democratic imperatives. My defence of the manner and form theory places great weight on the operation of democratic politics to self-censor against entrenchment, while leaving maximum latitude to the elected Parliament to decide when the creation of statutory manner and form conditions can be justified.

Rather than prohibit certain categories of change to the future legislative process, I argued that we should reconceptualise the Diceyan mantra that ‘Parliament cannot bind its successors’ as a constitutional convention. In this way, rather than a legal norm to be policed by the courts, the presumption against entrenchment becomes a tool to shape the conduct of constitutional actors at a prior stage. Equally, this allows the political constitution to determine the degree to which any referendum requirement is ‘entrenched’ or embedded in constitutional practice. In essence, the choice is to leave these decisions in the democratic arena, ideally to encourage fresh thinking about the limitations of the current Queen-Lords-Commons legislative formula.[[18]](#footnote-18) This, in my view, is a better democratic response to the difficult issue of entrenchment.

There are two potential caveats. First, Goldsworthy’s procedure and form theory does not absolutely prohibit the creation of self-entrenched referendum requirements. Instead, he argues that to become legally valid, a shift in the underlying rule of recognition would be required, rooted in a wider political consensus. As he notes, I have been critical of this position, not because I reject Hart’s important idea that every legal system is underpinned by a rule of recognition, the authority of which depends on official acceptance and behaviour rather than any test of legal validity. Instead, I have democratic concerns about the way in which the rule of recognition can be deployed as a jurisprudential ‘get-out-of-jail-free card’ in constitutional debates, with the ultimate consequence that the courts become free to decide which fundamental norms to apply.

If faced with an entrenched referendum requirement, the courts should not consider themselves to be departing from past practice and recognising a new rule of recognition based on their own interpretation of official consensus. Instead, consistently with the idea that the UK Parliament is sovereign, they should be attempting to give effect to the understanding of parliamentary sovereignty which emerges from Parliament’s practice. While I remain reluctant for the courts to become the forum in which the status of manner and form conditions is decided, it would be consistent with this theory of parliamentary sovereignty for the courts to uphold the legality of an entrenched referendum requirement.

The second caveat is that, in practice, the context here is also relevant. The entrenchment of a referendum requirement to guarantee a widely respected constitutional value would be easier for the courts to uphold than if this device was used for spurious partisan political ends. For example, had the devolution permanence provisions – ensuring the Scottish and Welsh Parliaments cannot be abolished without approval of their respective peoples at referendums – been entrenched, it would be much easier to justify than, for example, entrenchment of the referendum locks in the EU Act 2011, preventing expansion of the UK’s relationship with the EU. This is not to say the courts would be creating a new rule of recognition, but simply that they would likely be influenced by the political atmosphere in which legislation exists, as was explicitly stated in *Jackson*.[[19]](#footnote-19)

Ultimately, it is hard to be certain about what the courts would do in such a situation, as compared with what the manner and form theory of parliamentary sovereignty would suggest they should do. It may be that, if ever faced with such a situation, the judges would take an alternative path, and such a shift in practice might itself require theories of parliamentary sovereignty to adapt. Yet in doing so, the courts would be embracing a narrower idea of parliamentary sovereignty, while also potentially writing the people out of the decision-making process. Both the manner and form theory and Goldsworthy’s rule of recognition shift would provide the courts with a way out of this dilemma. But on the manner and form theory, the choice would be attributed to Parliament, which to me seems most appropriate in a constitutional order based on parliamentary sovereignty.

1. See Goldsworthy’s discussion of *McCawley*, p.18, which he rightly notes was an omission from the discussion of Commonwealth case law in my book, p.65, 85-91. [↑](#footnote-ref-1)
2. [2005] UKHL 56. [↑](#footnote-ref-2)
3. Now repealed: EU Withdrawal Act 2018, s.23(8), Sch.9. [↑](#footnote-ref-3)
4. Scotland Act 2016, s.1, inserting s.63A into Scotland Act 1998. [↑](#footnote-ref-4)
5. Wales Act 2017, s.1, inserting into s.A1 into Governance of Wales Act 2006. [↑](#footnote-ref-5)
6. Northern Ireland Act 1998, s.1, which has origins in the Northern Ireland Constitution Act 1973 and the Ireland Act 1949. [↑](#footnote-ref-6)
7. AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th edn, 1915). [↑](#footnote-ref-7)
8. *The Sovereignty of Parliament: History and Philosophy* (OUP, 1999); *Parliamentary Sovereignty: Contemporary Debates* (CUP, 2010). [↑](#footnote-ref-8)
9. Goldsworthy, p.6. [↑](#footnote-ref-9)
10. I also doubt whether the electorate is best described as an external body, given the democratic legitimacy of the House of Commons depends on it; I discuss this at pp.271-273. [↑](#footnote-ref-10)
11. [2009] *Public Law* 519-543. [↑](#footnote-ref-11)
12. Although that is often a key consideration for some manner and form theorists; see eg RFV Heuston, *Essays in Constitutional Law* (Stevens, 2nd edn, 1964) ch 1. [↑](#footnote-ref-12)
13. I note Goldsworthy’s position has additional complexity – in some circumstances Goldsworthy views referendums as a purely formal constraint, and he does accept that entrenched referendums requirements could be imposed subject to a change in the rule of recognition. Both points are considered below. [↑](#footnote-ref-13)
14. Goldsworthy, pp.16-17. [↑](#footnote-ref-14)
15. Goldsworthy, p.7. [↑](#footnote-ref-15)
16. Goldsworthy, p.25. [↑](#footnote-ref-16)
17. Goldsworthy, p.27. [↑](#footnote-ref-17)
18. See further M Gordon, ‘Parliamentary Sovereignty and Constitutional Futures’ in A Bogg, J Rowbottom and AL Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Hart, 2020). [↑](#footnote-ref-18)
19. [2005] UKHL 56, [68](Lord Nicholls), [128](Lord Hope). [↑](#footnote-ref-19)