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Cover Page Footnote

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STEPHEN TIERNEY*

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INTRODUCTION

The United Kingdom's withdrawal from the European Union was a tortuous journey. Few who witnessed the victory for Leave in the early hours of June 24, 2016, would have imagined that the United Kingdom's formal independence from the European Union (E.U.) would not be secured until January 30, 2020, or that the country would still be beholden to E.U. law until December 31, 2020. Inevitably, the duration and complexity of this process have overwhelmed, frustrated, and often bored many citizens; indeed, the political machinations of those four years exhausted even the most avid followers of British parliamentary procedure. That said, the period was also illuminated from time to time by moments of high drama within the House of Commons. Westminster Hall, the ancient venue that has played host to so many vital moments in the nation's history, emerged once more as the epicentre of British political life, occasions of passionate rhetoric and sensational procedural twists reminding us that the heart of the United Kingdom's unwritten constitution rests in the customs and traditions of this very chamber.

In this article, I reflect upon how the role played by Parliament, in giving effect to the referendum vote, has cast a light upon the legislature itself, illuminating more clearly than any other issue in recent times the constitutional role and authority of Parliament today. The House of Commons has been the theatre in which the Brexit play has been performed, but it is also the case that the difficulties which Brexit has posed for the British body politic have called into question Parliament's claim to supremacy within this very system, and in particular, the very idea of "parliamentary sovereignty." Challenges have

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emerged from various sources. I reflect upon the following rivals to, or potential constraints upon, Parliament's ultimate constitutional authority: direct democracy, divisions within Parliament itself, the role of a Speaker of the House of Commons, an increasingly assertive Supreme Court, Her Majesty's Government, and, finally, the constitutionally assertive devolved territories of the United Kingdom (U.K.).

I. PARLIAMENT: SOVEREIGN OR SUPREME?

The terms "supremacy" and "sovereignty" are often used interchangeably in relation to Parliament. I begin by distinguishing these concepts and presenting my sense of the relationship between the two. In the absence of a codified constitution, such as that which the United States has enjoyed for over 230 years, 'parliamentary sovereignty' is typically presented as the cornerstone of the U.K. constitution. There have been many efforts to explain this idea, none more influential than that offered by Albert Venn Dicey, an English constitutional jurist whose main corpus of work appeared between the late nineteenth and early twentieth centuries, a period of intense constitutional debate surrounding the issues of Irish Home Rule and the balance of constitutional authority between the Lords and the Commons. Dicey brought to his study of the U.K.'s constitution that combination of political self-confidence and narrow positivism which came to characterise modern legal scholarship in the Whig tradition. His attempt to distil the essence of the U.K.'s arcane and ancient governing arrangements, captured in the *Introduction to the Study of the Law of the Constitution*,[1] often resonates more as revelation than explanation.

Dicey captured what he termed "parliamentary sovereignty" as the "keystone" of the constitution, or as the "the central principle" of the system, "on which all the rest depends."[2] This principle embodies two dimensions: "[T]hat Parliament… has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[3] This account, which barely changed from the first edition of his book published in 1885 to the eighth appearing in 1915, is almost theological in its methodology. Parliament is conceived of as both omnipotent and eternal. The only limitation upon its lawful power is imposed by logic, not by law: the incapacity of an all-powerful legislature to constrain its own competence. In short, Parliament can do anything but bind itself; any law made by Parliament can later be unmade by Parliament.

As an account of Parliament's authority within the U.K. system, Dicey's thesis is both attractively simple and rationally compelling, recognised as accurate on many occasions by the courts over the ensuing century.[4] The theory has, however, been criticised from several perspectives by academic

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[1] *See generally* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (Macmillan & Co., 8th ed. 1915).
[2] *Id*. at 68.
[3] *Id*. at 38.
[4] *See, e.g.*, Burmah Oil Company Ltd. v. Lord Advocate, [1965] AC 75. And recently endorsed in a major report by the HOUSE OF LORDS CONSTITUTION COMMITTEE, RESPECT AND CO-OPERATION: BUILDING A STRONGER UNION FOR THE 21ST CENTURY, 2021-22, HL 142, at 27-32.

commentators. One objection is empirical in nature, questioning whether there are in fact legal limitations on Parliament's authority;[5] a second is conceptual, contending that it is theoretically possible for Parliament to limit its own legislative competence;[6] while a third contestation is more moral-normative in form, not necessarily questioning the internal coherence of Dicey's account as a matter of legal fact or political logic, but raising ideological concerns with the very idea of unlimited legislative power.[7]

In another paper, written with Martin Loughlin, I pose a fourth criticism of Dicey's account, suggesting that the term "sovereignty" is misused in descriptions of Parliament's authority and that conceptual imprecision has resulted in damaging confusion about the role of Parliament within the U.K. state.[8] Dicey's account of Parliament's authority is concerned principally with the locus of ultimate constitutional authority. It is, in essence, a positivist account of legal supremacy, a search for the locus of the "last word" within the polity: an issue that has vexed legal theorists such as Austin, Kelsen, and Hart. In this way, legal *supremacy*, which focuses upon inter-institutional relationships, has been fused and hence confused with constitutional *sovereignty*, a significantly broader concept. Sovereignty encompasses the entire relationship between legal authority on the one hand, and the political capacity available to political institutions to exercise this authority on the other; in a modern state, this relationship hinges essentially upon both the legitimacy of that lawful authority, howsoever that legitimacy is calibrated within any particular constitutional system, and upon its efficacy in relation to other sources of authority, internal and external to the state.[9] In short, "sovereignty" embraces not only lawful authority but the political facts that give that lawful authority meaning within any modern democracy.

Dicey was correct in his assessment of the internal dimension of sovereignty. Parliament is indeed legislatively supreme. However, since he was concerned with the power of Parliament to make law within the U.K.'s constitutional system, his core doctrine is better expressed as "the legislative supremacy of Parliament" rather than the sovereignty of Parliament. Constitutional sovereignty in the United Kingdom is conditioned by certain political facts and legal commitments. The two which have most significantly served to condition Parliament's legislative supremacy in recent decades are the primacy of E.U. law (binding upon the U.K. for the period of its E.U. membership) on the one hand, and the creation of devolved systems of government for Scotland, Wales, and Northern Ireland on the other. The

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[5] For example, the diminution of Parliament's jurisdictional reach resulting from decolonisation. *See* PETER OLIVER, THE CONSTITUTION OF INDEPENDENCE (2015).

[6] Most clear in the "manner and form" debate. *See, e.g.*, T.R.S. ALLAN, THE SOVEREIGNTY OF LAW 135-36 (2013); *see also* MICHAEL GORDON, PARLIAMENTARY SOVEREIGNTY IN THE UK CONSTITUTION (2015) (especially Chapter 7).

[7] Lord Hope of Craighead, *Is the Rule of Law now the Sovereign Principle?*, *in* SOVEREIGNTY AND THE LAW 89-97 (Richard Rawlings, Peter Leyland & Alison Young eds., 2013).

[8] Martin Loughlin & Stephen Tierney, *The Shibboleth of Sovereignty*, 81 MODERN L. REV. 989-1016 (2018).

[9] I am concerned here with sovereignty only in its internal or constitutional dimension. In a broader sense, sovereignty is the core doctrine of modern state authority, possessed of two dimensions, internal constitutional authority and external or state sovereignty. The United Kingdom, like any state, is sovereign in relation to other states. The nature of its internal constitutional arrangements does not affect that fact. In discussing only internal or constitutional sovereignty, I am not concerned with external sovereignty except insofar as it has an impact upon constitutional sovereignty.

sovereignty of the U.K. as a constitutional state can only be understood by situating Parliament's law-making authority in both these contexts.

The interface between supremacy and sovereignty is not unique to an unwritten constitution. All constitutions operate within a broader political environment that conditions their operation and which over time can, in sometimes imperceptible ways, fundamentally change understandings of constitutional authority. Bruce Ackerman's work on the tectonic plate changes occurring beneath the formal text of the U.S. Constitution, occurring without recourse to, or at least strongly conditioning the exercise of, the Article V amendment procedure, is a case in point.[10] The nature of constitutional sovereignty in the U.K., as anywhere, needs to be understood in this wider context, and it is in light of the interaction between Parliament's supremacy, limited as it is to Parliament's law-making role, on the one hand, and of the various other institutions and political forces within the constitution which operate to condition the exercise of this supremacy on the other hand, that I address the role of Parliament in the Brexit process. I do not contest Parliament's ultimate law-making authority; I seek instead to assess the forces which increasingly condition the exercise of this authority, and which make the idea of constitutional sovereignty within the U.K. a much more complex beast than mere legal supremacy.

II. PARLIAMENT AND THE REFERENDUM: UNLEASHING POPULAR SOVEREIGNTY?

One important way in which Parliament's "sovereignty" has arguably been circumscribed is through self-constraint. The referendum has emerged in recent decades as a vehicle through which fundamental constitutional decisions are made, removing these decisions in whole or in part from the determining power of Parliament.

The U.K.'s relationship with the European Union, formerly the European Communities, has played a significant part in this story. Of the three national referendums held in the U.K., two have concerned Europe. The first was held in 1975. The U.K. joined the European Communities (EC) on January 1, 1973, and the incoming Labour government in February 1974 was committed to a referendum on whether or not the country should continue that membership. Sixty-seven percent voted that it should. The 1975 referendum contains obvious parallels to the referendum held in 2016, where the new Conservative government was beholden to a similar pre-election commitment to put the issue of European membership to the people. In each case recourse, to the referendum was more a matter of pragmatism than principle, inspired not by a commitment to popular democracy, but by the need to defuse an internal party dispute that threatened to split the government. The Labour Party in the early 1970s was divided by the question of Europe in a way similar to the Conservatives in later decades. Ironically, four decades ago, it was the left-wing of Labour that opposed EC membership, while opposition to the European Union in more

[10] BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991). *See also* GARY JEFFREY JACOBSOHN & YANIV ROZNAI, CONSTITUTIONAL REVOLUTION (2020) *and* REVOLUTIONARY CONSTITUTIONALISM: LAW, LEGITIMACY, POWER (Richard Albert ed., 2020).

recent times is often attributed (not always correctly) to the right-wing of the Conservative party.

The upshot was that the most significant constitutional issue of our times was effectively removed on two seminal occasions from the remit of Parliament, crucially, by Parliament itself which passed enabling legislation facilitating each referendum. And while it is true that a referendum in the U.K. is not technically binding, since Parliament can simply refuse to implement the outcome, such a refusal is unheard of in any modern democracy.[11] Within the U.K., the result of every referendum has been implemented, albeit only after a significant political struggle in relation to the 2016 vote. Given this political "automaticity," the resort to a referendum on the issue of Europe raises a clear question about Parliament's "sovereignty." The question must be asked: if Parliament has refused to take ownership of such a major decision, perhaps the most significant constitutional decision since Irish Home Rule, then while it may well be legislatively supreme, can it really be described as the sovereign authority in relation to such a vital issue?

In reflecting upon the EC/E.U. referendums of 1975 and 2016 and the place that direct democracy now plays in the constitution, it is useful to contrast the current approach with events over a century ago when direct democracy became a topic of debate in relation to the troubled issue of Ireland before the First World War. Dicey himself emerged in this period as a significant player, not only for his work as a jurist but as an ardent opponent of Home Rule. Dicey was a deeply complex figure, as recent archival work and subsequent intellectual and personal biographies bear out.[12] From one perspective, he was an analytical constitutionalist combining historical evidence with subtle legal methodology to expound a tightly construed account of legal rule. He was also, unlike many of his contemporaries (and indeed many later British constitutionalists), alive to the significance of the union or territorial dimension that is so key to understanding the U.K.'s constitutional evolution.[13] At the same time, he was also very much a politically engaged intellectual, and on no issue was he so exercised as the constitutional status of Ireland where his deep Unionism drew him into the political fray. Since Dicey's working life, principally in the four decades from 1880-1920, was also the period of intense turmoil in Ireland, as it passed through the bloody birth pangs to Free Statehood, his intellectual work must be read in the context of his political engagement.

Dicey resisted all moves to give Ireland even limited self-government. A line in the sand for him, should most of Ireland move to some degree of independence, was the protection of the political right of Ulstermen to remain British, even if that meant partition and the division of the island in two. But in his political activism, a deep paradox emerged. Dicey not only articulated

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[11] STEPHEN TIERNEY, CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION 1-18 (2012). Ironically, the European Union stands out in contrast to this approach. It has repeatedly refused to accept the outcome of referendums in which voters in Denmark, Ireland, France, and the Netherlands have rejected various initiatives promoting further integration. *Id.* at 154-67.

[12] A.V. DICEY, COMPARATIVE CONSTITUTIONALISM (J. W. F. Allison ed. 2019); MARK D. WALTERS, A.V. DICEY AND THE COMMON LAW CONSTITUTIONAL TRADITION: A LEGAL TURN OF MIND (2020); A. Jackson, *The Failure of British and Irish Federalism, c.1800-1950, in* THE UNITED KINGDOM AND THE FEDERAL IDEA (Robert Schütze & Stephen Tierney eds., 2018); Dylan Lino, *Albert Venn Dicey and the Constitutional Theory of Empire*, 36 OXFORD J. OF LEGAL STUD. 751, 751-80 (2016).

[13] A.V. DICEY & R.S. RAIT, THOUGHTS ON THE UNION BETWEEN ENGLAND & SCOTLAND (London: Macmillan, 1920).

Parliament's legislative supremacy as the keystone of the constitution, but he was also an ardent admirer of parliamentary authority as a flexible and successful alternative to constitutional codification. At the same time, however, he was also aware that through this very doctrine, Parliament could, by simple legislative act, dismember the U.K. and grant the island of Ireland independence, even in the face of strong popular opposition and even if this meant betraying, as he saw it, the loyal British subjects in the north.

Dicey's account of Parliament's supremacy was, as I have suggested, almost metaphysical in its range and scope: viewing it as both eternal and omnipotent. But beyond these two dimensions, the theological analogy runs dry. Dicey discovered, to his chagrin, that Parliament was not also omniscient and eternally good but rather capable of grave error. On the issue of Ireland, Parliament appeared in the years after 1885 to be embarked upon such a course. The Liberals in that year had fought a general election without any commitment to Irish Home Rule. After winning the election, however, Gladstone adopted Home Rule as a policy. The problem for Dicey was that a narrow parliamentary majority could therefore not only change the constitution, but do so in an underhand way, adopting Edmund Burke's approach to representation and supplanting popular opinion with its own judgment.

Dicey saw this as a democratic outrage and alighted upon a constitutional fix that would, at the same time, offer some constraint upon Parliament while not limiting its ultimate law-making authority. His idea was that the referendum would play the role of a "people's veto" to moderate the risk that a narrow victory within the House of Commons would be sufficient to bring about profound constitutional change.

Dicey's idea of the referendum has to be pieced together from his academic work and personal letters. The constitutional status which he attributed to the referendum was never entirely nailed down, but the clearest exposition of the idea came with his proposal for a Referendum Act. This would provide for the referendum in the course of the law-making process. Parliament would make law in the usual way, but the Referendum Act would not allow Royal Assent to be given to a bill that concerned fundamental constitutional questions until the electorate had approved of the law in a referendum. If the referendum rejected the change, the bill would not be sent for Royal Assent.

Dicey insisted that this was fundamentally a "conservative" proposal. And certainly, his conception of the referendum's place in the constitution was limited in several ways. In the first place, it would intervene to prevent change, not to prompt it. Dicey did not favour the "initiative" which would allow citizens to propose legislation. In this way, the referendum would act as a supplement to deliberative representative government of which Dicey was a great supporter, not as an alternative to it.[14] In some sense, Dicey saw the referendum as filling the void left by the House of Lords which had lost so much of its influence in the democratic era: as a check on the power of the Commons. The people's voice should be heard, not as an override of Parliament, but as a reminder to Parliament from whence its power derives; supreme authority must be undergirded by the legitimacy of consent.

[14] Mads Qvortrup, *A.V. Dicey: The Referendum as the People's Veto*, 20 HIST. OF POL. THOUGHT 531, 537 (citing a letter by Dicey).

Another point Dicey strove to make was that the referendum would be reserved for major issues; it would not become a fixture in political decision-making as it was in Switzerland. The dominant position of representative democracy would remain. Indeed, the beauty of his proposal as he saw it was that one could separate a constitutional issue from support for a party. One would not be prevented from supporting the Liberal Party simply because of its approach to Ireland. As Qvortrup puts it: "the referendum could provide voters with the opportunity of supporting the party with which they were in general policy agreement, while at the same time allowing them to vote against constitutional proposals forwarded by that very same party."[15]

Dicey also strove to fit the referendum within his conception of parliamentary sovereignty. The Referendum Act would not be entrenched and could be repealed. As Dicey acknowledged:

> It is true that an Act of Parliament might repeal or override the Referendum Act itself, but this though a plausible, is not a valid objection. The Referendum Act would practically be secured by the odium which any Ministry or party would incur by depriving the people of their right to be appealed to. I am quite certain that once established the Referendum would never be gotten rid of by anything short of a revolution.[16]

While not a formal constraint on Parliament's law-making supremacy, Dicey envisaged the constitutional referendum as morally and politically binding.

Although in his academic work Dicey elevated parliamentary supremacy as a freestanding truth, his view on the Ireland question led him to nuance this supremacy by setting it in the context of constitutional *sovereignty*, which was a broader and more politically conditioned concept.[17] He was explicit about this. The time had come for Britain to adopt "from America the constitutional provisions which, by delaying alterations in the Constitution, protect the sovereignty of the people."[18] The people's veto would restrain Parliament from "a fundamental change passing into law [that] which the mass of the nation do not desire."[19]

When we fast forward to 1975 and then to 2016, the usage of referendums in relation to Britain's relationship with Europe came with a subtle twist on Dicey's logic. Dicey's idea of the "people's veto" was not agenda-setting, but rather a brake in the system, giving Parliament cause to reconsider. Although Dicey was interposing an additional step in the legislative process, Parliament was still in control. In 2016, the model was arguably quite different. The entire issue of E.U. membership was being handed over to the people—Parliament had expressed no legislative view on whether the U.K. should leave the E.U.

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[15] *Id*. at 535.
[16] *Id*. at 545.
[17] Indeed, Bogdanor describes this approach as "paradoxical." Vernon Bogdanor, "Western Europe," in *Referendums Around the World: The Growing Use of Direct Democracy* 24, 34 (David Butler & Austin Ranney eds., Basingstoke) (1994).
[18] A.V. Dicey, *Ought the Referendum to be Introduced into England?*, 57 THE CONTEMP. REV. 506 (1890).
[19] Qvortrup, *supra* note 14, at 533, fn. 13 (citing Letter by A.V. Dicey to J. Bryce, March 23, 1911, (Bryce Papers, Fol. 23, Bodleian Library, Oxford)).

Parliament passed legislation in 2016 to facilitate the referendum and set the electoral rules for the process, but it thereupon left the stage to the people who were given ownership over this fundamental issue of constitutional change.[20] In this way, the 2016 referendum was certainly not a popular veto but far more akin to the type of self-determination referendum which we have seen proliferate in the latter half of the 20th century where the people play the ultimate authoritative role by taking control of a fundamental issue; in effect, determining the external dimension of state sovereignty for their territory by deciding whether or not to leave an existing polity of which it is part. In this way, I tend to think of 2016 as the 'British Independence' referendum in the same way as the process in Scotland in 2014 is characterised as the "Scottish Independence" referendum. In some sense, the British people's role was even greater than that of the Scots. The latter knew that if they voted for independence, they were voting in favour of a policy supported by the Scottish Government. The British people in 2016 were voting to set new state policy.

In this sense, the people were clearly the authors of Brexit. They were presented with the issue in the referendum and were given a clear sense that their vote would be determinative. It was, of course, not necessarily clear what Brexit would mean, but it was clear that it was a decision for the people to make. It is as a consequence of this that so many people reacted ferociously in 2019 at the thought that parliamentarians had sought to wrestle this issue back from the people in the intervening three years.[21]

There are important points of qualification here before we characterise 2016 as an act of utter self-abnegation by Parliament or that it marks a long-lasting diminution of Parliament's political role. First of all, it can be argued that the referendum was not binding. In one sense, no referendum in the U.K. is binding because it is always open to Parliament not to implement the result. The enabling legislation did not even go so far as to declare that the result would have an automatic effect. Secondly, the referendum was an exceptional event. Dicey's prescription that referendums be few and far between has been accepted by the British political system. Apart from two national referendums on Europe the only other U.K.-wide referendum took place in 2011 on the issue of the electoral system. Unlike Ireland or Australia, the U.K. does not have a formal amendment process that involves the referendum. That said, the referendum is a growing part of constitutional practice in relation to the devolved territories where referendums have been held in 1979 (Scotland, Wales), 1997 (Northern Ireland), 1998 (Scotland, Wales), 2011 (Wales) and 2014 (Scotland). Furthermore, there are various pieces of legislation where Parliament has committed to holding referendums as part of major constitutional decisions;[22] ironically, the people's veto is now part of the law relating to any reunification of Ireland.[23] It follows from this growth that, in practice, a constitutional convention may now exist according to which major constitutional decisions, such as relinquishing part of

[20] Vernon Bogdanor, *Europe and the Sovereignty of the People*, 87 POL. QUART. 348 (2016).
[21] There was in fact a risk between 2016-19 that Parliament would do the opposite of what Dicey had in mind; he advocated a people's veto of parliamentary law-making; what we nearly got was a legislative veto of a popular decision.
[22] Northern Ireland Act 1998, c. 47; Government of Wales Act 2006, c. 32; European Union Act 2011, c. 12 (repealed 2018); Scotland Act 2016. c. 11; and Wales Act 2017, c. 4.
[23] Northern Ireland Act 1998, c. 47, § 1; *id*. at § 1(1), sch. 1.

the territory of the state, abolishing the monarchy, or re-joining the European Union, could not be effected without a referendum.[24]

Parliament remains legislatively supreme, but the first lesson of Brexit is that when it denies itself the use of this authority in favour of popular will, Parliament implicitly reminds us that the exercise of its legislative supremacy in matters of fundamental constitutional change brings to the table the relationship between legal supremacy and political legitimacy within a broader concept of constitutional sovereignty. Dicey was alive to the legitimacy dimension of Parliament's power. He advocated the referendum because it was consistent with "the doctrine which lies at the basis of English democracy—that the law depends at bottom for its enactment on the consent of the nation as represented by the electors.'"[25] In a notable passage Dicey stated that although Parliament represented the nation, it was not "the same as the nation."[26] Parliament itself seems to increasingly recognise that this truth conditions its own authority over fundamental constitutional change.

III. PARLIAMENT: A SOVEREIGN OF SOVEREIGNS?

Parliament may well be legislatively supreme, but this raises the question: what is Parliament? It is in fact a deeply pluralised set of institutions. The law-making authority of Parliament is better framed as the legislative supremacy of *the Crown in Parliament*. This reminds us that Parliament, in its law-making role, involves a complex interaction between the Monarch, the Lords, and the Commons. Draft law requires to pass through both houses and depends for its authority upon Royal Assent, albeit that this assent is, by convention, automatically granted.

The Brexit process illustrated how politically divided the institutions that compose Parliament can be, both in relation to each other and internally. Following the success of the Leave proposition in the referendum, the Government struggled not only in its negotiations with the European Union but in giving effect to any agreement which it did manage to reach. This became a subtle and complex political struggle in which the European Union sought to exploit these divisions, hoping that allies within both houses would serve to frustrate the Brexit vote altogether, a strategy that enjoyed considerable success until it was blown out of the water by the 2019 general election.

The House of Lords almost certainly had a majority within it that opposed the U.K.'s withdrawal from the European Union. The hands of pro-Remain Lords were, however, tied by the constitutional limitation of the Lords' own role in the law-making process: the upper house can only delay legislation passed by the Commons, it cannot veto it.[27] Furthermore, conventions regulate even this delaying function. In particular, the Lords by established practice will not oppose the second or third reading of any government bill promised in the

[24] HOUSE OF LORDS CONSTITUTION COMMITTEE, REFERENDUMS IN THE UNITED KINGDOM, 2009-10, HL 99, at 19-20.
[25] Qvortrup, *supra* note 14, at 546.
[26] *Id*. at 539 (citing A.V. Dicey, Representative Government (1900) (unpublished manuscript)).
[27] Parliament Acts 1911 and 1949, c. 103.

election manifesto of the governing party.[28] Because the Conservative Party was elected to government in both 2016 and 2019 with a commitment to giving effect to the referendum result, this constrained the overt opposition of the Lords on a number of important legislative proposals.

The Lords did, however, still act as a forum for opposition to Brexit-related legislative proposals and helped to frustrate the passage of legislation designed to implement the referendum. I will shortly argue that in some ways this critical approach in fact helped improve the quality of legislation that was in the end passed, but it is also significant in demonstrating that Parliament's legislative supremacy must be understood as the sum of various (at times deeply divided) parts.

This brings us to the Commons itself. Theresa May replaced David Cameron as Prime Minister in July 2016. She proposed a general election, held on June 8, 2017, in the hope of giving herself a bigger mandate with which to negotiate Brexit. This plan backfired; the Conservatives lost their majority and could only govern through an arrangement with the Democratic Unionist Party from Northern Ireland. Even with this agreement, the Government's working majority was slim. For the next two years, the Government's attempts to negotiate agreement with the European Union and implement the agreement that was reached were endlessly frustrated by opposition in the Commons. Many MPs clearly sought to negate the result of the referendum. Of course, few openly proclaimed this intention. The Liberal Democrats, in the end, came clean and this led to their obliteration as a political force in the 2019 general election. Others sought to do so disingenuously, attempting to make the agreement of a withdrawal deal very difficult by imposing negotiating conditions on the Government or suggesting that they would only support a deal with certain stipulations such as remaining in the E.U. customs union or even the single market, both of which would have denied Brexit any material substance. Law was indeed passed that imposed conditions, not least the need for parliamentary ratification of any draft agreement with Brussels.[29]

The most significant outcome of this period was in fact parliamentary paralysis. With so much time spent on lengthy procedural debates, the passage of important Brexit legislation became very difficult. Given the machinations over the main Brexit bill (which became the European Union (Withdrawal) Act 2018), little time was available for other legislation.[30] The Government was also reluctant to advance other bills in case they were hijacked by amendments aimed at frustrating Brexit, as was the Northern Ireland (Executive Formation etc.) Act 2019.[31]

This wearisome period from 2018–19 (what Richard Ekins has called "the long crisis") in the end exposed the fact that Parliament, although constitutionally powerful, depends for its legislative might upon political conditions: a clearly united voice and a sufficient government majority to give

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[28] House of Lords, *The Salisbury-Addison Convention*, U.K. PARLIAMENT (Oct. 2017), https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/28/2804.htm.
[29] European Union (Withdrawal) Act 2019, c. 16; European Union Withdrawal (No. 2) Act 2019, c. 26.
[30] European Union (Withdrawal) Act 2018, c. 16.
[31] Stephen Laws & Richard Ekins, *Endangering Constitutional Government: The Risks of the House of Commons Taking*, POL'Y EXCHANGE (2019), https://policyexchange.org.uk/wp-content/uploads/2019/03/Endangering-Constitutional-Government.pdf.

effect to this. Both were lacking in the Brexit process to the point that very little meaningful law was made.

In such an environment, where the Commons is deeply divided and the Government finds it difficult to control the legislative timetable, the role of the Speaker can also be crucial both as neutral umpire and as facilitator of parliamentary business. In fact, the Speaker came to play a prominent and deeply controversial part in 2018–19, presenting yet another impediment to Parliament's role as lawmaker.

The curious office of Speaker has evolved over time through the practice of the Commons. It derives its authority from, and is regulated by, the law and custom of Parliament rather than legislation. Originally the voice of the Monarch in Parliament, the function of the Speaker evolved over time. It was during the constitutional turmoil of the 17th century that the Speaker's role changed markedly from representative of the king to representative of the House of Commons itself.[32] In the latter role, the Speaker became very much the champion of the independence of the Commons from the Monarch. The responsibilities of the Speaker also have evolved over time. One of these responsibilities is the authority to regulate Commons debates and procedures. This is a particularly significant power, particularly in the case of a "hung parliament" where the government has difficulty in asserting its control over the parliamentary process despite Standing Orders clearly prioritising the government's legislative programme.

Speaker John Bercow emerges from this period as a deeply tainted figure. Often grandstanding and seemingly in search of the limelight, he ignored the adage that a good referee is the person not noticed during the game. In light of the way in which he bent procedural rules, it is no surprise that many viewed him as complicit in aiding pro-Remain members of Parliament in frustrating the Leave agenda of the Government and with it the popularly expressed will of the people. In his appropriately titled autobiography, Bercow claims: "As Speaker, my job was not to presume to know the 'will of the people' but to facilitate the will of Parliament."[33] Maybe so, but in a situation of deep division, the will of Parliament was very hard to determine, and Bercow demonstrated a preparedness to favour procedurally the will of some over the will of others.

Where one stands on Bercow's role is a matter of opinion. For some, he really was standing up for backbenchers against an over-bearing government; for others, he undermined the legitimate role of the Government to pursue the legislative agenda it was elected to pursue. This episode does, however, raise a wider question in relation to Parliament's power. It is clear that the Speaker can assume a very influential role in the Commons in the event of a perfect storm. When the Government has only a flimsy working majority, where issues of great importance are before Parliament in the form of legislation, and where the Speaker decides to operate in a partisan manner and is willing to use his procedural powers in doing so, the Speaker can become a major impediment to

[32] Peter Reid, *Evolution Versus Devolution: Contrasting the Respective Roles of the Speaker of the House of Commons and the Presiding Officer of the Scottish Parliament in Historical Context* (2020) (unpublished LLM thesis, University of Edinburgh).
[33] JOHN BERCOW, UNSPEAKABLE: THE AUTOBIOGRAPHY 390 (2020).

the passage of legislation.[34] But is this an example of a further long-term undermining of Parliament's constitutional role? I do not think it is. The period up to the 2019 general election was highly unusual. In a situation where a Speaker does not abuse his or her position, even a weak government should still be able to promote its legislation before Parliament. If the Government has a working majority, this can be used to override any obstructionism by a Speaker or indeed to replace the Speaker. That said, the period of legislative stasis from 2018–19, which was mainly the result of divisions within the Commons and Lords themselves, suggests that "sovereignty" is a hard quality to ascribe to such a pluralist institution in which power is so disputed and when law-making is such a fraught and at times impossible thing to achieve.

IV. PARLIAMENT: INSEPARABLE FROM, AND CONDITIONED BY, THE EXECUTIVE

I have noted that the legislative supremacy of Parliament must be situated in the context of Parliament's composition and that is better described as the legislative supremacy of the Crown in Parliament. This highlights the fact that the United Kingdom does not have a formal separation of powers and that the constitution operates through a deeply inter-connected and multi-dimensional relationship between the legislative and executive branches. The Crown, as Her Majesty's Government, sits in Parliament and controls the vast majority of the legislative programme. Legislation is passed by both Houses but also depends, for its validity, upon the consent of the Crown. Although this latter role is a mere formality, of far greater significance is the Crown's influence in initiating and leading the passage of legislation through both houses.

When we talk either of Parliament's sovereignty or, less ambitiously, of its legislative supremacy, each concept must acknowledge that this authority is one that is shared intimately with the executive. This inter-connection is a legacy of Parliament's history as advisory council to the king. Although the Glorious Revolution of 1688–89 and the Bill of Rights that framed its constitutional outcome are often presented as symbolising the victory of Parliament over the Crown, and while in relation to the usurped Stuart monarch this is not without some degree of accuracy, the deal forged in the Bill of Rights and accepted by William III and subsequently by the Hanoverian succession was certainly no republican victory. It was in effect an agreement of peaceful coexistence between Parliament and the Protestant monarchy whereby the Crown remained a central, and in many ways a controlling, presence in Parliament. Although the personal power of the Monarch fell away, this was more than compensated for by the presence in Parliament of the Sovereign's ministers whose power has only grown over the intervening centuries. The reality today is that the government of the day largely controls the parliamentary process, in particular the legislative timetable, largely through Standing Orders (in particular, SO14).[35] In this way,

[34] David Howarth, *Speaker John Bercow shows the government's control is on even shakier ground than it thought*, THE TIMES (Jan. 10, 2019, 9:00 AM), https://www.thetimes.co.uk/article/bercow-shows-the-government-s-control-is-on-shakier-ground-than-it-thought-8808mjpg8.

[35] Standing Orders of the House of Commons – Public Business 2018 No. 14, ¶ 1, U.K. PARLIAMENT (2018),
("Save as provided in this order, government business shall have precedence at every sitting.").

Parliament's legislative supremacy is in political terms also the supremacy of the government of the day; and arguably more the latter than the former.[36]

From the perspective of a separation of powers, for some it did feel in 2018–19 that the House of Commons, if it could speak with one voice, had in fact wrested the agenda-setting power from the Government. Aided by the Speaker, MPs were able to propose motions which forced votes on important matters and came close to taking over the legislative programme altogether. Such a reductive analysis requires a significant point of qualification. This may have been a victory of sorts, but it is far too simplistic to present this simply as a Commons triumph over the Government. The Commons was bitterly divided and every victory for those who sought to frustrate or condition Brexit was a defeat for those parliamentarians elected to give effect to the Brexit decision. Furthermore, Parliament's supremacy, if it means anything, lies in the passage of legislation, not in frustrating it. Ultimately, Parliament cannot be conceived of as distinct from the executive. This is an enduring lesson of the Brexit process and one that conditions any notion of Parliament as sovereign.

V. PARLIAMENT AND THE EXECUTIVE: DISPUTING THE CONTENT OF LEGISLATION

Parliament has other important roles beyond the passage of law. Insofar as it takes on a persona that is at least conceptually separable from the executive, a crucial function is its scrutiny and amendment functions, changing legislation and in particular reining in the powers which the government seeks to grant itself through law. I now turn to how this relationship worked, arguably successfully, in the passage of significant legislation during the Brexit process. Parliament's role as a scrutinising and revising chamber can be seen in the passage of the seminal piece of Brexit legislation, the European Union (Withdrawal) Act 2018.

After more than 40 years within the European legal framework, the U.K. has transposed over 20,000 pieces of European legislation into U.K. law by various legal means.[37] After the 2016 referendum, it was clear that these would have to be sorted and either retained or repealed in fairly short order. Legislation was needed, and the European Union (Withdrawal) Bill was drafted for this purpose. The difficulty faced by the drafters was the uncertainty surrounding which laws would go and which would stay; much would depend upon ongoing negotiations with the European Union both to secure a transitional agreement and then to settle upon a final relationship treaty.

The solution upon which the Government settled was to keep all of this law on the statute books, give it a new status as "retained E.U. law," and to provide the Government with wide secondary law-making powers to sort through it and decide what to keep and what to dispose of. The problems were manifold, including how to define "retained E.U. law," what status to give this law in

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[36] Philip Norton, *Does Parliament Matter?* (Harvester Wheatsheaf 1993); Matthew Flinders, *Shifting the Balance? Parliament, the Executive and the British Constitution*, 50 POLITICAL STUDIES 23-42 (2002); Meg Russell & Philip Cowley, *The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence*, 29 GOVERNANCE 121-37 (2015); MEG RUSSELL & DANIEL GOVER, LEGISLATION AT WESTMINSTER (2017).

[37] House of Lords Constitution Committee, *The "Great Repeal Bill" and Delegated Powers*, Mar. 7, 2017, HL 123, 2016–17.

relation to other law passed by Parliament, the role the courts should have in interpreting retained E.U. law, guidelines judges should be given, and which powers should go to the devolved territories to deal with retained E.U. law in areas of devolved competence.

The other major issue, which is the only one I have space here to discuss, is the powers of the Government itself to make secondary legislation. As originally framed in the Bill, the Government would have been given an effectively open-ended power with very little in the way of limits and subject only to minimal levels of parliamentary scrutiny.[38] The Bill was critiqued extensively by parliamentary committees and on the floor of both houses. Parliamentarians got to grips with the detail and came up with constructive suggestions for its improvement. The Government gave ground in several ways. It limited the range of matters to which the powers would apply, it removed some altogether, and it agreed to enhanced scrutiny of these secondary powers. A "sifting committee" system was instituted in both houses. This allows a parliamentary committee to assess a secondary instrument for its significance. If it is deemed to concern an important area of law, then it will be subjected to full parliamentary assessment. If the committee considers its implications to be technical or trivial, then less scrutiny is needed.

The passage of the Bill is a good example of Parliament working as it should in its scrutinising capacity.[39] The Government was giving effect to an election commitment by bringing forward a bill of great constitutional significance. Parliament considered that its role was to pass the bill, but also to ensure that it was fully compliant with constitutional principles such as the rule of law and safeguards against excessive executive power. This was in many ways a positive engagement between Government and Parliament before the system started to break down over E.U. negotiations. The Bill highlighted how, when Parliament is working well, backbench MPs and the Lords are prepared to challenge the executive in the passage of legislation, making this a more genuinely collaborative process, while not blocking legislation altogether. In this way, the legitimacy of Parliament's legislative supremacy was arguably strengthened, highlighting that in its law-making role it remains significant as a genuinely powerful and assertive revising forum rather than just a tool in the hands of the executive.[40]

The story of course does not end there. Since then, there has been a glut of Brexit-related legislation and Parliament's success in reining in executive power has been more mixed. This is especially so since the 2019 election when, with a large majority, the new Government has not felt so compelled to give ground. The Government continues to accept modified powers, as in the Trade Act 2021 and Agriculture Act 2020. In other legislation , powers are framed in extremely wide ways. One example is the United Kingdom Internal Market Act 2020 where the Government assumes to itself almost unlimited powers to amend the provisions of the act itself.[41] In some sense today we see the other side of the coin from the pre-election period. At that time MPs who favoured the passage

[38] European Union (Withdrawal) Act 2018, § 8.
[39] Mark Elliott & Stephen Tierney, *Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018*, Public Law 29-52 (2018).
[40] *See* MEG RUSSELL & DANIEL GOVER, *supra* note 36.
[41] United Kingdom Internal Market Act 2020, s. 56(2); United Kingdom Internal Market Bill 2020, HL [151].

of law were frustrated due to strong opposition. Today, with a numerically strong government, MPs who seek to influence the content of legislation can be very weak. Each set of circumstances highlights how, fundamentally, Parliament's power as a revising chamber is largely dependent upon political circumstances.

The landscape since the 2019 election reminds us that the Crown in Parliament remains very powerful. But it is also the case that its legislative supremacy exists in consequence of the deep relationship between Parliament as legislature and Crown as executive. It is this relationship that gives the political constitution, as an alignment of the two democratic branches, its full legitimacy and force. But for Parliament to play its role fully within this relationship, it must properly and effectively perform its scrutinizing and revising roles; otherwise, Parliament becomes just the tool of the executive, and any notion of parliamentary supremacy slides into executive supremacy. This remains a real danger as the Government seeks to give effect to Brexit quickly through the acquisition of extensive secondary powers.

VI. PARLIAMENT'S NOISY NEIGHBOUR: THE U.K. SUPREME COURT

When Alex Ferguson was head coach of Manchester United, he would infuriate Manchester City fans by calling the underachieving team from across the city "the noisy neighbours." Manchester City is no longer underachieving, and neither is Parliament's increasingly noisy neighbour, the U.K. Supreme Court, situated in its own building across Parliament Square. It was during the Brexit process that the country's highest court became increasingly vocal as an antagonist to the Government and, arguably, to Parliament itself.

A defining feature of Parliament's legislative supremacy is that it is not subject to substantive judicial review. U.K. courts do not have authority to strike down primary legislation on the grounds of constitutionality. That said, the United Kingdom judiciary has become more assertive in recent decades, certainly in relation to the executive but also increasingly in relation to Parliament. This is an issue on which my two co-commentators have done considerable work. Richard through the influential Judicial Power Project as well as his own writings,[42] and Erin through her comparative analysis of recent English jurisprudence.[43]

The U.K. Supreme Court became involved dramatically in the Brexit process in two main cases. Neither was a direct challenge to Parliament's law-making authority, but each was significant both for the Court's articulation of its understanding of Parliament's constitutional position, and for the role which the Court took upon itself in this process of articulation. Each case focused upon different dimensions of the Royal Prerogative. This is an ancient area of law, the residue of the Crown's lawful power in areas such as foreign affairs and national defence. The prerogative remained part of constitutional law after 1688, albeit curtailed by the Bill of Rights and by Parliament's power to legislate contrary to and in superiority over prerogative powers. These powers, apart from a few

[42] RICHARD EKINS & CHRISTOPHER FORSYTH, JUDGING THE PUBLIC INTEREST: THE RULE OF LAW VS. THE RULE OF COURTS (Policy Exchange 2015).
[43] Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543 (2014).

personal prerogatives vested in the person of the Monarch such as the granting of certain titles, rest with the government of the day or in the person of individual ministers, in particular the Prime Minister.

Miller I was a case that concerned the prerogative power of treaty-making.[44] The issue was whether the Government could, by way of this prerogative power, notify the European Commission of the U.K.'s intention to withdraw from the European Union under Article 50 of the Treaty of European Union. The U.K. Supreme Court concluded that it could not and that an act of Parliament was required to take this step. The Court reasoned that since the U.K.'s obligations under E.U. law, now such an embedded part of domestic law, were a direct consequence of the European Communities Act 1972 (ECA), Parliament would be required by legislation to authorise the notificatory step that would inevitably lead to the termination of these obligations and the removal of much of this domestic law. There are different ways of looking at this decision. It can be interpreted as an unwarranted interference with the authority of the Crown to make treaties or presented as the Supreme Court standing up for Parliament. The decision was in my view a misreading of the scope of the prerogative power to make treaties, but there was at least a *prima facie* argument that Parliament had warranted the court's role here and that the ECA had indeed conditioned how the U.K. should withdraw. In the end the decision was of only marginal effect. The Government had clear parliamentary support to trigger Article 50; when the judgment was rendered, Parliament was quick to legislate, authorising Article 50 notification.[45] In that statute, which might well have been termed the Hollow Legal Victory Act, Parliament did not take the opportunity to constrain the discretion of the Government in relation to the subsequent withdrawal process, in effect handing to the executive the wide power which it had believed itself to possess through the prerogative.

The Supreme Court's reasoning in *Miller I* is tenuous, but it is at least sustainable. It is far harder to understand the Supreme Court's decision in *Miller II*.[46] This was both more controversial and potentially of greater significance, coming as it did on September 29, 2019, as the clock ticked down to the U.K.'s withdrawal from the E.U. on October 31. The context was the attempt by the Government to prorogue Parliament due to the effective deadlock in Parliament which both prevented endorsement of the draft withdrawal agreement and represented an attempt by a group of MPs to take control of parliamentary business.

The power of prorogation is an ancient prerogative power. Its effect is to end a parliamentary session and mark the gap between that session and the next. It differs from dissolution which dissolves Parliament ahead of a general election. In *Miller II*, the court reviewed the Government's decision to prorogue and concluded that the Government had no lawful power to prorogue Parliament and end the sitting of that session.[47] This was a remarkable conclusion. The power to prorogue Parliament has always been understood to rest squarely with

[44] R v. Sec'y of State for Exiting the Eur. Union [2017] UKSC 5 (appeal taken from Eng., Wales, and N. Ir.).
[45] Eur. Union (Notification of Withdrawal) Act 2017, c. 9.
[46] R v. The Prime Minister [2019] UKSC 41, [2020] AC 373 (appeal taken from Eng. & Scot.).
[47] *Id.* In doing so it upheld the initial appeal decision (which followed a distinct and even less comprehensible rationale) from the Scottish Court of Session.

the Crown, and certainly not to be open to judicial review, as a central part of Parliament's internal function.

The Court called upon two principles to defend its radical innovation. The first was, in fact, parliamentary sovereignty. In this claim it draws a tortuous, indeed odd, connection between parliamentary sovereignty and the very sitting of Parliament: seemingly, the simplistic notion that if Parliament isn't sitting it can't exercise this sovereignty. The principle of parliamentary sovereignty, or as I have framed it, of legislative supremacy, is however not concerned with the sitting of Parliament but with its legislative authority. In other situations where courts have used parliamentary sovereignty to justify constraining an otherwise lawful competence, they have done so in the context of statute, by citing Parliament's intention to limit a particular power. This was certainly a key rationale in *Miller I*. However, the Supreme Court was unable to call upon this argument in relation to prorogation. Parliament had unequivocally rejected any legal circumscription of this prerogative power in the Fixed-term Parliaments Act 2011. This important statute set fixed terms for general elections to occur every five years. Until then the Government had free rein to dissolve Parliament at any time in its five-year cycle. In making the new rule, however, Parliament was clear that the restriction of the dissolution power "does not affect Her Majesty's power to prorogue Parliament."[48] It is difficult to see therefore how this can be justified on the basis of Parliament's legal supremacy, particularly since Parliament could have legislated to stop the prorogation if it had so wished.

The second arm of the court's justification was an appeal to the "fundamental principle" of "Parliamentary accountability." Accountability is indeed central to the U.K. system of government, but it is an amorphous, nebulous constitutional concept with no legal source in prerogative, statute, or common law. There are of course conventions of ministerial responsibility to Parliament, but it is long settled that these are not judicially enforceable.[49] Somehow in *Miller*, the elastic principle of accountability was ascribed with sufficient normative authority to justify placing legal limits on the prerogative of prorogation, despite the specific exclusion of this prerogative from legal controls by Parliament itself.

The Court also goes further, suggesting that the Crown has a duty to justify the use of the prerogative power of prorogation. That there is a legal onus on the Crown to justify its use of the power:

> It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason—let alone a good reason—to advise her Majesty to prorogue Parliament for five weeks … We cannot speculate, in the absence of further evidence, upon what such reasons might have been.[50]

This suggests that the principle of parliamentary accountability has acquired the authority of a new precautionary principle in relation to prorogation; the

[48] Fixed-term Parliaments Act 2011, c. 14, § 6(1) (note that in the Northern Ireland (Executive Formation etc.) Act 2019, c. 22, § 3(4), Parliament provided for the possibility of recall during a prorogation period by way of a Royal Proclamation but did not seek to delimit the scope of the power itself).
[49] Madzimbamuto v. Lardner-Burke & George [1968] UKPC 18, [1969] 1 AC 645 (appeal taken from S. Rhodesia).
[50] R v. The Prime Minister [2019] UKSC 41 [61].

Crown, if challenged, is now required to offer acceptable political reasons to the courts for any decision to prorogue. This is in my view an astonishing level of interference by the courts with the political constitution.[51]

In both these cases the court claimed to be acting in Parliament's name, defending Parliament from an over-reaching executive. In the first case, this had some degree of superficial plausibility, but in the latter, it does not stand up. Instead, the Supreme Court invaded an area of hitherto exclusive parliamentary jurisdiction. The question then is whether this marks a category shift in the court's approach. As I say, various commentators add these decisions to a wider story of greater judicial assertiveness. In these cases, and in extra-judicial pronouncements before and during the Brexit process, senior judges certainly gave the impression that they are increasingly prepared to constrain Parliament's legislative power.[52]

VII. PARLIAMENT AND THE DEVOLUTION CHALLENGE

Parliament created the devolved institutions in 1998. In doing so, it was careful to assert that it retained its own legislative supremacy. From this perspective devolution seems very different from federalism: the constitution constrains the powers of the territorial governments but not those of the central government. It is also the case that at the time of its creation, Westminster made clear that the very existence of devolution depended upon Parliament. By the logic of legislative supremacy, devolution could be removed by simple act of Parliament. Secondly, Parliament retained the authority to legislate in devolved areas even though it agreed by convention not to do so in "normal" circumstances without the consent of the relevant devolved legislatures.

The U.K. state received a shock to the system in the independence referendum held in Scotland on September 18th, 2014. On the question: "Should Scotland be an independent country?", "Yes or No," 45% voted "Yes." This was too close for comfort and immediately plans were put in place to try to placate nationalist sentiment. One strand of this was constitutional. In the Scotland Act 2016, two moves were made that moved the U.K., institutionally, in a federal direction. The first step was a legislative declaration that Scottish devolution was permanent.[53] Of course an argument rages as to whether the U.K. Parliament could simply override this later in time.[54] This issue has never been tested. The second, which is of more immediate practical relevance, is a statutory recognition that Parliament will respect devolved autonomy. Under the Scotland Act 1998, section 28 sets out the legislative power of the Scottish Parliament.[55]

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[51] *See* John Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment*, POL'Y EXCHANGE (2019), https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf.

[52] Lord Hope, *supra* note 7 (citing Lady Hale, "The U.K. Supreme Court in the United Kingdom Constitution," Inaugural lecture at the Institute for Legal and Constitutional Research, University of St Andrews (Oct. 8, 2015).

[53] Scotland Act 1998, c. 46, § 63(A).

[54] Mark Elliott, *A "Permanent" Scottish Parliament and the Sovereignty of the UK Parliament: Four Perspectives*, UK CONSTITUTIONAL LAW BLOG (Nov. 28, 2014), https://ukconstitutionallaw.org/2014/11/28/mark-elliott-a-permanent-scottish-parliament-and-the-sovereignty-of-the-uk-parliament-four-perspectives/.

[55] Scotland Act 1998, c. 46, § 28.

It also provides that section 28 "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."[56] I noted that a convention developed to limit Parliament's sphere of operation, and this has now been recognised in the Scotland Act 2016.[57] The new section 28(8) of the Scotland Act 1998 states: "it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."[58] Notably, this new section was not the conversion of the convention into a legal rule, but rather a curious legal recognition that a convention exists.

The provision has in fact been tested, in *Miller I*.[59] The argument went that if legislation was needed to trigger Article 50 notification, then by this provision of the Scotland Act, the consent of the Scottish Parliament was also required.[60] Leaving the European Union would affect devolved matters and so consent would be needed. The court side-stepped the issue of whether the convention was engaged. It fell back on the issue *ex ante* that conventions are not legally enforceable. Here, the court took a very orthodox approach to this provision. The Supreme Court took the view that the Sewel convention,[61] even with statutory recognition, constituted no more than "legislative recognition" of a "political convention" which "operates as a political restriction on the activity of the U.K. Parliament."[62] The court could not treat the convention as a legal restriction, but nor did it even emphasise its status as a constitutional rule moderating behaviour but falling short of being a law—the normative *via media* by which conventions are given salience within our uncodified constitution.[63] In this way, the U.K.'s devolution settlements have not been treated by the courts as any kind of constraint upon Parliament during the Brexit process.

However, the other area in which devolution has surfaced as significant is in the passing of Brexit legislation itself. Here, there is evidence that the devolved territories can be influential and when they are not, they can show enough political weight to push for greater power. In the passage of the main Brexit bill, the European Union (Withdrawal) Act 2018 (EUWA), the initial draft planned for all powers to come back from Brussels to London; the U.K. government would then distribute them to the devolved authorities in due course.[64] This caused such an uproar that the plan was fundamentally changed, with powers returning directly to the devolved areas unless there were exceptional circumstances.[65]

A more recent example illustrates that Parliament will, on occasion, override the will of the devolved authorities. With a large majority in Parliament, the

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[56] *Id*. at § 28(7).
[57] Scotland Act 2016, c. 11, § 2.
[58] Scotland Act 1998, c. 46, § 28(8), *amended by* Scotland Act 2016, c. 11, § 2.
[59] *See generally* R v. Sec'y of State for Exiting the Eur. Union [2017] UKSC 5, (appeal taken from Eng. & N. Ir.).
[60] *Id*.
[61] Scotland Act 1998, c. 46, § 28.
[62] R v. Sec'y of State for Exiting the Eur. Union [2017] UKSC 145.
[63] *Id*. at 151 (stating that the policing of the scope and the manner of operation of political convention "does not lie within the constitutional remit of the judiciary, which is to protect the rule of law."); *but see* Attorney-General v. Jonathan Cape Ltd and Others [1976] QB 752; *see also* Reference Re: Resolution to amend the Constitution [1981] 1 SCR (Canada) 753 (noting this is undoubtedly true, but courts can recognise the existence and salience of conventions).
[64] European Union (Withdrawal) Act 2018, HC Bill [367].
[65] European Union (Withdrawal) Act 2018, c. 16, § 12.

Government was able to secure the passage of the United Kingdom Internal Market Bill despite criticism from the Scottish, Welsh and Northern Irish governments that it took away a lot of their power in pursuit of frictionless trade across the U.K.[66] The devolved legislatures refused to consent to the Bill, but Parliament passed it anyway.[67] This clearly shows Parliament's legislative supremacy in relation to other lawmakers in the United Kingdom. Again, however, it is important not to confuse the formal power to pass legislation with sovereignty. Secessionist sentiment in Northern Ireland and Scotland is being stoked and the pressure from the Scottish National Party for a referendum in Scotland after the Scottish parliament elections in 2021 continued, one key argument being that Westminster is rolling back from the obligations it passed in the Scotland Act 2016.[68] The new reality, recognised by the passage of the EUWA, is that Westminster must condition its power in respect for devolution or it could risk the Union itself.[69] The United Kingdom Internal Market Act may well be an outlier, replaced in time with an approach to devolution that clearly constrains Westminster's power to act in devolved areas. If it is not, the Union itself could be in peril. Parliament may retain formal supremacy in relation to the devolved territories, but the very sovereignty of the British state is at risk.

CONCLUSION

Parliament does remain legislatively supreme, but the Brexit process has exposed how even the formalism of parliamentary supremacy is conditioned in various ways. What has been emphasised over the past four years is that Parliament cannot be characterised as one voice and that the divisions within it can constrain its role as supreme legislator, at times even preventing any meaningful legislation from passing. We have also seen how the very conception of Parliament is one that must take account of its close relationship with the Crown with which its legislative supremacy is shared. This can be a very powerful association, the two great political institutions of the British state working together. But if a fine balance is not maintained, Parliament's supremacy collapses into that of executive dominance. It is the perception of this risk, rightly or wrongly, which the U.K.'s highest court now uses to justify itself in wresting power not only from the latter but also, in effect, from the former, bringing the U.K. closer than ever to a legally limited legislative authority.

My broader claim, however, is that in any event legislative supremacy is not sovereignty. Sovereignty is a concept that embraces the deep interconnection between the political and legal dimensions of state power: it is always encapsulated in a relationship between the two. Parliament does not and never has encapsulated the state, but at a time when the U.K. was unitary in its government and free from deep entanglements with its European neighbours, Parliament did at least appear to be a proxy for the state. Nearly fifty years of E.U. membership showed the extent to which Parliament's authority can in fact be truncated by important political and legal commitments. It may be answered

[66] United Kingdom Internal Market Bill 2020, HC Bill [177].
[67] United Kingdom Internal Market Act 2020 c. 27.
[68] Scotland Act 2016, c. 11.
[69] European Union (Withdrawal) Act 2018, c. 16.

that power has now returned from Europe; the conclusion of the E.U.-U.K. Trade and Cooperation Agreement on December 30th, 2020, is the basis for future relations between the European Union and a fully independent U.K., but even it binds the U.K. to customs controls in respect to Northern Ireland and to an elaborate dispute resolution procedure.[70] A clearer sovereignty challenge is closer at hand. The rise of nationalism within the devolved territories has led Parliament to cede more and more powers and even to attempt to limit its own authority in relation to these territories. Parliament remains a uniquely powerful legislature within modern democracies. But its supremacy is conditioned by the fact that sovereignty is to be found elsewhere. Only by understanding the changing nature of the U.K.'s sovereign relationships with its own territorial minorities and the new relationships it forges with the outside world after Brexit will we get a sense of the real limits of parliamentary authority.

[70] Trade And Cooperation Agreement, E.U-U.K., Dec. 24th, 2020, O.J. 149; European Union (Future Relationship) Act 2020.