

## BREXIT: Regaining Sovereignty?

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### INTRODUCTION

That the UK is experiencing a period of constitutional upheaval seems almost trivially true.<sup>1</sup> There are rival views on the extent, significance and appeal of this upheaval, but few would dispute that over the last forty or so years many of the broad contours of the UK constitution have been redrawn. Indeed, it is little exaggeration to suggest that the UK no longer has a ‘settled constitution’—i.e. one characterised by slow evolution, where parliamentary sovereignty was the unimpeachable rule in a highly centralized state. Rather, it has an increasingly ‘unsettled constitution’—i.e. one characterized by substantial and seemingly far-reaching change, with reforms in one decade triggering spill-over effects in subsequent years, and all of which occurs against the backdrop of increasing doubts about the relevance of parliamentary sovereignty in a multi-polar state.<sup>2</sup> Amongst the factors contributing to the ‘unsettling’ of the constitution are questions about the UK’s continued membership of the European Union, which not only generate political and legal uncertainty in their own right, but also have very real implications for other aspects of the UK’s constitutional unsettlement, most obviously the politics of independence in Scotland.

No doubt a web of factors accounts for the resurfacing of ‘the European question’ at the forefront of constitutional debates in the UK. One such factor is the changing and complicated views of political elites. That the majority of political leaders believe that the UK should remain a member of the EU, and that none of the mainstream parties has advocated withdrawal since 1983, belies a deep-seated ambivalence in significant swathes of the political class,<sup>3</sup> with a

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<sup>1</sup> It might be more accurate to talk of numerous different constitutional transitions within the various UK constituent polities. See C. Bell, ‘Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison’ [2014] P.L. 446

<sup>2</sup> N. Walker, ‘Our Constitutional Unsettlement’ [2014] P.L. 529.

<sup>3</sup> A. Gamble, ‘Better Off Out? Britain and Europe’ (2012) 83 P.Q. 468, 472.

strong streak of scepticism a long-standing current in political discourse about the EU.<sup>4</sup> Political opinions have also been very fluid over forty years, with the two main parties at Westminster flipping their positions. Today's Conservative Party bears little resemblance to 'the party of Europe' under Heath that shepherded the UK into the then EEC, while the pro-Europeanism of most of the Labour Party is in contrast with sceptical attitudes in the 1970s, when a majority of Labour MPs voted against entry in 1972 and 'no' three years later in the referendum.<sup>5</sup> The shifting attitudes amongst political elites on the UK's relationship with the EU are no doubt driven in large part by electoral and ideological considerations. But, as we see it, they also shape and are shaped by deeper anxieties about the UK's constitution, with many of these anxieties dressed up in the language of 'sovereignty'.

In this paper we focus on the political anxieties that find expression in parliamentary debates on sovereignty. The legal literature has been enriched by analyses of whether ours is a 'post-sovereignty'<sup>6</sup> age, with suggestions that talking in terms of sovereignty is no longer a good fit for our times,<sup>7</sup> or at the very least that a revised understanding is required to reflect the dispersal of legal and political authority within many polities to the sub-national and supra-national levels.<sup>8</sup> Irrespective of whether such analyses are correct, it is very clear that the traditional language of 'sovereignty' exercises a firm grip on the political imagination. Our goal in this paper is to reflect on some of the concerns that underlie the language of sovereignty in parliamentary debates. We begin by comparing how MPs used this term during the 1971-72 and 2010-11 parliamentary sessions, paying special attention to the debates in the House of Commons on section 2 of the European Communities Act 1972 and section 18 of the European Union Act 2011. The former is the gateway provision by which directly effective provisions of EU law apply in domestic law, with all legislation to be 'construed and have effect' subject to EU law. The latter is known as 'the sovereignty clause', and provides that directly effective EU law is part of domestic law by virtue of the will of Parliament, and the 1972 Act in particular. Comparing parliamentary debates separated by almost forty years reveals a shift from anxieties primarily about the erosion of sovereignty by the law-making powers of European political

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<sup>4</sup> O. Daddow, 'Margaret Thatcher, Tony Blair and the Eurosceptic Tradition in Britain' (2013) B.J.P.I.R. 210. It is perhaps important to note the geographical dimensions to a Euro-scepticism that seems, for example, more pronounced in England than Scotland.

<sup>5</sup> See generally N. Crowson, *Britain and Europe: A Political History since 1918* (London: Routledge, 2010).

<sup>6</sup> See N. McCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: OUP, 1999); and H. Kalmo and Q. Skinner (eds) *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: CU2010).

<sup>7</sup> P. Eleftheriadis, 'Law and Sovereignty' (2010) 29 *Law and Philosophy*, 535.

<sup>8</sup> See N. Walker (ed), *Sovereignty in Transition* (Oxford: Hart, 2003).

institutions towards anxiety about its erosion by the courts, and the domestic courts at that. We examine each of these anxieties in turn to evaluate whether a possible exit from the EU would lead to a ‘regaining’ of sovereignty. We conclude by reflecting on what the shifting anxieties suggest about the UK’s unsettled constitution.

## THE POLITICS OF SOVEREIGNTY

### *European Communities Act 1972*

The European Communities Act was the subject of over 180 hours of parliamentary debate.<sup>9</sup> Recurrent were references to ‘sovereignty’. Many of these references involved claims that membership of the EEC would lead to the ‘loss’, ‘surrender’, ‘transfer’, ‘abrogation’ or ‘erosion’ of UK sovereignty (by many of those opposed to accession) or its ‘enlargement’, ‘sharing’ or ‘pooling’ (by some of those in favour). It is of course in keeping with the nature of parliamentary debate that there was little attempt to define exactly what sovereignty meant—and, indeed, several MPs noted that sovereignty was a ‘weasel word’ with the potential to obscure as much as to clarify.<sup>10</sup> Several MPs also suggested that understandings of sovereignty might be changing,<sup>11</sup> but many clung to a vision of sovereignty as an indivisible quality that the UK or its Parliament possessed in full or not at all.<sup>12</sup> Typical of much of the debate were references to sovereignty by Geoffrey Rippon, the Conservative minister who had been primarily responsible for negotiating the UK’s entry into the EEC. He referred to both

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<sup>9</sup> J. Seaton and B. Winetrobe, ‘The Passage of Constitutional Bills in Parliament’ (1998) 4 *Journal of Legislative Studies* 33, 45.

<sup>10</sup> Raphael Tuck, HC Deb 17 February 1972 vol 831, cols 721-2. See also: Kenneth Baker, HC Deb 17 February 1972 vol 831, col 688 (‘the word has been used frequently and I have reflected upon how it would be defined by various Members. I suspect that there would be about 630 different answers’); and Fred Peart, HC Deb 16 February 1972 vol 831, cols 541-542 (the word sovereignty ‘clouds’ the issues at hand).

<sup>11</sup> See e.g. J. Selwyn Gummer, HC Deb 14 June 1972 vol 838, col 1576 (‘the next step in national sovereignty is to exercise it in conjunction with our friends and neighbours’).

<sup>12</sup> See e.g. Harold Lever, HC Deb 14 June 1972 vol 838, col 1551 (‘There are those on both sides who believe that this groping by mankind to some better method of achieving the expression of national sovereignty is itself the abandonment of all national sovereignty’).

‘essential’ and ‘ultimate’ sovereignty,<sup>13</sup> but without elaborating on what exactly he meant by the two terms, or whether they denote distinct if related phenomena.<sup>14</sup>

These terms could be taken to reflect the fact that sovereignty has simultaneously both *internal* and *external* dimensions.<sup>15</sup> ‘Essential’ sovereignty, on this reading, has more of an external orientation, and can be taken to refer to the totality of a state’s capacity to enter into both domestic and international legal commitments. Hence, the question of whether membership reduces essential sovereignty would depend in part upon the extent to which the UK had transferred policy-making powers to the EEC. Inevitably, views differed on this question. Speaking for the Government, Rippon suggested that entry into the EEC entailed no diminution of the UK’s essential national sovereignty.<sup>16</sup> Opponents of membership roundly rejected this claim, arguing that it was not possible for the Government on the one hand to support the transfer of decision-making over large areas of public policy and on the other hand to maintain that there would be no reduction in essential sovereignty.<sup>17</sup> A common concern amongst opponents was that, even if the initial impact of membership on the UK’s essential sovereignty turned out to be relatively limited, it would expand over time as European integration accelerated and more and more policy competences were transferred to Community institutions. As Enoch Powell put it: ‘this is intended to be only a start...so, although the surrender [of sovereignty] begins as minimal, it is intended to become maximal’.<sup>18</sup> By contrast, some advocates of entry ‘cheerfully accepted a loss of sovereignty...arguing that [the UK] gained more by membership in terms of influence’.<sup>19</sup>

‘Ultimate’ sovereignty can be taken to have more of an internal orientation, which in the UK is traditionally equated with parliamentary sovereignty. Thus, the question of whether membership would reduce ultimate sovereignty would depend on the extent to which Parliament can legislate contrary to directly effective provisions of EC law. On several occasions Rippon had argued that the European Communities Bill did not ‘abridge the ultimate

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<sup>13</sup> Rippon, HC Deb 15 February 1972 vol 831 col 278-9.

<sup>14</sup> Rippon’s language drew on the Government’s White Paper which suggested that there was ‘no question of any erosion of essential national sovereignty; what is proposed is a sharing and an enlargement of individual national sovereignties in the general interest’: *The United Kingdom and the European Communities* (1971) Cmnd 4715 at para 29.

<sup>15</sup> N. Walker, ‘Sovereignty Frames and Sovereignty Clams’ in R. Rawlings, P. Leyland and A.L. Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford: OUP, 2013) 18, 20.

<sup>16</sup> Rippon, HC Deb 15 February 1972 vol 831 col 279.

<sup>17</sup> See e.g. M Foot, HC Deb 17 February 1972 vol 831, col 738.

<sup>18</sup> See e.g. Enoch Powell, HC Deb 17 February 1972, vol 831, col 701.

<sup>19</sup> D. Nicol, *EC Membership and the Judicialization of British Politics* (Oxford: OU, 2001 ) 90.

sovereignty of Parliament’.<sup>20</sup> At the same time, he also conceded that ‘Community law would override national law’<sup>21</sup> to the extent of an inconsistency, but suggested that nothing in the Bill ‘precluded successor Parliaments from changing the law’.<sup>22</sup> This can either be understood as an assertion of the ability of Parliament to legislate contrary to directly effective EC law or its ability to withdraw from the EEC, or both. Much of the parliamentary debate—and, indeed, the Government’s defence of its claim that ultimate sovereignty would not be diminished—slipped back and forth between these interpretations of ultimate sovereignty. For the most part, ministers and MPs agreed that the UK Parliament retained the ability to legislate to withdraw from the EEC but were much less certain that it could legislate contrary to Community law. Typical was the then Solicitor General Sir Geoffrey Howe’s tentative suggestion that most people agreed that a statute which, in clear and express terms, sought to legislate contrary to a particular provision of European law would be effective in domestic law ‘as the matter now stands’.<sup>23</sup> As Danny Nicol notes, Howe’s statement was ‘masterly in its ambiguity’, and in many ways captures ‘the confusion as to what exactly Parliament would retain by way of ultimate sovereignty’.<sup>24</sup>

For all the imprecision in the repeated references to sovereignty, and despite all of the uncertainty surrounding the possible impact of membership on ultimate and essential sovereignty, a distinctly political conception of sovereignty shines through much of the parliamentary debate. The conception is ‘political’ in the sense of being concerned with *power*. As the Labour MP and professor of politics John P. Mackintosh remarked: sovereignty must not be regarded ‘purely in the legalistic sense’ since it is, at the end of the day, ‘a matter of power to make decisions and to achieve purposes’.<sup>25</sup> More specifically, the conception of sovereignty at the forefront of the parliamentary debates was concerned with the power of *political institutions*—and in particular, on the extent to which Parliament would find its ability to enact the legislation it wishes impeded by membership of the EEC. Those in favour of membership focused on how the powers to be transferred were small in comparison to the scope of policy-making power that remained with the UK, arguing in addition that membership would in fact

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<sup>20</sup> See e.g. Rippon, HC Deb 15 February 1972 vol 831 col 278-9.

<sup>21</sup> Rippon, HC Deb 15 February 1972 vol 831 col 278-9.

<sup>22</sup> Rippon, HC Deb 15 February 1972 vol 831 col 278-9.

<sup>23</sup> Howe, HC Deb 13 June 1972, vol 838, col 1320.

<sup>24</sup> D. Nicol, *EC Membership and the Judicialization of British Politics* (Oxford: OU, 2001) 93-94.

<sup>25</sup> HC Deb 16 February 1972 vol 831, col 531.

increase the UK's overall power by giving it the ability to influence decisions at the European level and to play a larger role on the international stage as a member of the EEC.<sup>26</sup> Opponents focused on how the powers transferred were greater than that portrayed by the Government and likely to increase over time, leading to a loss of scrutiny over policy by Parliament, with power being transferred away from a national democratic legislature to the unelected and unaccountable European Commission.<sup>27</sup> This stress on the power of political institutions was a feature of the discussion on both essential and ultimate sovereignty.

What bears emphasis is that the debates in 1972—and the political conception that, in our view, underpinned and informed them—focused predominantly on the impact of membership on the policy-making power of the UK. It is noteworthy that there was comparatively little mention of the likelihood that joining the Community would lead to an increased judicial role, which in turn might erode traditional understandings of parliamentary sovereignty. Where judicial influence was mentioned, the main focus was on the role of the European Court of Justice, which was criticised for its creative approach to interpreting EC law.<sup>28</sup> Danny Nicol has criticized the ministers and MPs of the time for their ‘inability to see things in legal terms’. The result of thinking ‘in political rather than legal terms’ was a failure to grasp ‘how parliamentary sovereignty would be affected’ as a result of a changed ‘institutional balance within the British constitution in favour of the courts’.<sup>29</sup> Taking into account the legal and political arrangements in the early 1970s, and in particular the still limited role for domestic courts under judicial review, this was unsurprising (and Nicol’s criticism somewhat ungenerous). As Nicol concedes, ‘the world view of British parliamentarians was based on an autonomous political sphere in which legal considerations played little part’.<sup>30</sup> This changed over the next forty years, as illustrated by the parliamentary debates on the European Union Act.

### *European Union Act 2011*

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<sup>26</sup> See e.g. Dodds-Parker HC Deb 15 February 1972 vol 831, col 304; Knox HC Deb 16 February 1972 vol 831 col 478; Hopkins HC Deb 16 February 1972 vol 831 col 513; Johnston HC Deb 16 February 1972 vol 831 cols 573-4; Lever HC Deb 13 June 1972 vol 838, cols 1551-1555 and Selwyn Gummer HC Deb 13 June 1972 vol 838 col 1576-78.

<sup>27</sup> See e.g. Peter Shore, HC Deb 14 June 1972 vol 838, col 1547.

<sup>28</sup> See e.g. Enoch Powell HC Deb 17 February 1972 vol 831 col 700 and Charles Fletcher Cooke HC Deb 17 February 1972 vol 831 cols 335-341.

<sup>29</sup> D. Nicol, *EC Membership and the Judicialization of British Politics* (Oxford: OU, 2001) 52.

<sup>30</sup> D. Nicol, *EC Membership and the Judicialization of British Politics* (Oxford: OU, 2001) 254.

In the forty or so years since the enactment of the European Communities Act 1972, legal considerations have moved centre-stage in parliamentary debates on sovereignty and, more generally, the UK's relationship with the EU.<sup>31</sup> There is now a distinctively legal hue to these debates, with the actual or potential role of the courts casting a long shadow on how MPs discuss sovereignty. Many parliamentarians—especially but not exclusively on the Conservative benches—are acutely aware of and concerned by the growth of judicial power. Such concerns have bubbled up in parliamentary debates on the Human Rights Act, the European Court of Human Rights and domestic judicial review. They also featured prominently in parliamentary debates on section 18 of the European Union Act 2011, a provision commonly called ‘the sovereignty clause’ even though it avoids any explicit reference to sovereignty.

This section provides that directly applicable or directly effective EU law ‘falls to be recognized and available’ in domestic law in the UK only by virtue of the 1972 Act.<sup>32</sup> It sought to address concerns that parliamentary sovereignty may be eroded by future judicial decisions. By providing that EU law only takes effect in the domestic legal order by virtue of the will of Parliament, section 18 sought to provide authority to counter any arguments in any future litigation that EU law constitutes a new higher autonomous legal order that has become an integral part of the domestic legal system independent of statute.<sup>33</sup> Section 18 did not purport to alter the existing relationship between UK law and EU law or the primacy of EU law.<sup>34</sup> Domestic judges have tried to reconcile parliamentary supremacy on the one hand and the primacy of EU law on the other hand by tracing the applicability and effectiveness of EU law to an especially powerful expression of parliamentary will in the 1972 Act. Section 18 underscores this. On a strict legal level, then, section 18 is a statement of ‘the blindingly obvious’.<sup>35</sup> But, on a political level, it is intended to counter a perceived intrusion on parliamentary sovereignty by

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<sup>31</sup> See e.g. R. Rawlings, ‘Legal Politics: the United Kingdom and the Ratification of the Treaty on European Union: Part 1’ [1994] P.L. 254.

<sup>32</sup> The provision in full reads as follows: “Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act”.

<sup>33</sup> *Explanatory Notes to the European Union Act 2011*, para 120.

<sup>34</sup> See P. Craig, ‘The European Union Act 2011: Locks, Limits and Legality’ (2011) 48 C.M.L.R. 1925, 1937-1938.

<sup>35</sup> P. Birkinshaw, ‘Like Canute—Pushing Back the Waters of the Incoming Tides. The Prospects for Re-Inventing UK Constitutionalism’ in P.M. Huber (ed), *The EU and National Constitutional Law* (Boorberg, 2012) 183, 194.

domestic courts.<sup>36</sup> It responds to suggestions by some judges (and, in particular, Lords Steyn and Hope in *Jackson*<sup>37</sup> and again from Lord Hope in *AXA*<sup>38</sup>) and academics (including oral evidence from Professor T.R.S. Allan to the Commons' European Scrutiny Committee<sup>39</sup>) that the UK constitution is founded upon the rule of law, which in turn is superior to and capable of generating judicially enforceable limits on parliamentary sovereignty. As Michael Gordon and Michael Dougan note, section 18 has 'only an incidental impact on the relationship between domestic and European law, in so far as it might establish which constitutional agent, the courts or Parliament, is entitled to determine the extent to which these two legal orders can coexist'.<sup>40</sup>

For present purposes, what is of interest is the predominance of a 'legal' conception of sovereignty in the debates on section 18. When lawyers discuss sovereignty, their focus is often on the account of sovereignty expounded by Dicey. Lawyers assess the extent to which Parliament has unlimited law-making power and whether institutions other than Parliament can question a statute enacted in Parliament (and, particularly with regard to the impact of EU membership, whether Parliament can bind its successors). This translates into an emphasis on the role of courts since it inevitably falls on judges to resolve any legal dispute arising from potential conflicts between UK legislation and EU law. As noted above, MPs in 1972 were not unaware of these issues when debating the European Communities Bill, but their emphasis was on power, and in particular on the ability of Parliament and the Government to pursue policy agendas unimpeded by EU law and institutions. By 2011, however, many MPs were appealing to a highly legalized language of sovereignty in order to give expression to an underlying anxiety about the expansion of judicial power, and more especially the risk that an increasing numbers of domestic judges might suggest that in the domestic constitution the rule of law has come to eclipse parliamentary sovereignty.<sup>41</sup> Though recognizing that it was only declaratory, several MPs regarded section 18 as sending a 'positive and powerful signal'<sup>42</sup> (in the words of Ian

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<sup>36</sup> See e.g. Bill Cash HC Deb 11 January 2011 vol 521, col 172.

<sup>37</sup> *Jackson v Attorney General* [2005] UKHL 56.

<sup>38</sup> *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

<sup>39</sup> House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty*, 10<sup>th</sup> Report of Session 2010-2011 HC 633-1, 6 December 2010.

<sup>40</sup> M. Gordon and M. Dougan, 'The United Kingdom's European Union Act 2011: "Who Won the Bloody War Anyway?"' [2012] *European Law Review* 3, 5.

<sup>41</sup> See e.g. Bill Cash HC Deb 11 January 2011 vol 521, col 182; Charlie Elphicke HC Deb 11 January 2011 vol 521, col 191; and Wayne David, HC Deb 11 January 2011 vol 521, col 182193.

<sup>42</sup> Ian Paisley HC Deb 11 January 2011 vol 521, col 217.



Paisley) to domestic courts that ‘reasserts the sovereignty of Parliament’, in particular by underscoring that Parliament ‘remains sovereign in all circumstances’ (to quote John Redwood, one of the leading Conservative Eurosceptic backbenchers).<sup>43</sup>

The provision was, above all, a symbolic concession to Conservative Euro-sceptic MPs who seek ‘a fundamental change in the UK’s relationship with the EU’.<sup>44</sup> It is striking, however, that the anxieties of many MPs about this relationship are now intimately entangled with, and in part prompted by, concerns about how membership of the EU has contributed to the larger trend of ascendant judicial power. That this differs from forty years earlier is illustrated by contrasting section 18 with the proposal in 1972 by the Labour Opposition that a ‘Declaration of the Ultimate Sovereignty of Parliament’ be included in the European Communities Bill. The effect of the Declaration would have been to underline Parliament’s ability to repeal the European Communities Act and exit the Community.<sup>45</sup> The Conservative Government opposed this amendment to the Bill and it was rejected by 278 votes to 265. The debate on the Declaration did not betray much concern at the prospect of judicial power, and if anything was viewed as a tool that domestic courts could in fact employ to give expression to parliamentary sovereignty by giving legal effect to a statute that sought to withdraw the UK from the Community. By contrast, section 18 of the 2011 Act is spurred by anxieties about how membership of the EU has now accelerated the growth of judicial power to such an extent that there is the prospect of domestic judges holding that the common law is the source of enforceable limits on Parliament’s ability to make law. In this, section 18 is a useful illustration of how membership of the EU has produced a profound change in how politicians as well as judges and lawyers envisage sovereignty.

## POLITICAL POWER AND SOVEREIGNTY REGAINED?

The question ‘what would be regained if the UK withdrew from the EU?’ is difficult to answer in terms of and by reference to political power. Faced with the knotty question of how to deal

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<sup>43</sup> John Redwood HC Deb 11 January 2011 vol 521, col 180.

<sup>44</sup> Charlie Elphicke HC Deb 11 January 2011 vol 521, col 188.

<sup>45</sup> HC Deb 05 July 1972 vol 840, cols 556-647.

with the several thousand pieces of EU legislation that currently form part of UK law, domestic politicians will likely find that their room for manoeuvre is relatively constrained. It is not safe to assume that the domestic political institutions would be able to remove all of the European law that had applied immediately before withdrawal given that much of it is now blended within domestic law. Their room for manoeuvre might be further constrained by vested rights enjoyed both by EU citizens in the UK and UK citizens in the EU. The range of domestic policy options available might also be circumscribed in practice by existing externalities, such as EU legislation on market regulation that will shape how UK businesses sell their products in the EU. It might also be the case that the UK's international influence is reduced following an exit from the EU. Putting these sorts of objections to a UK withdrawal from the EU to one side, it might be suggested that a withdrawal would at least address the anxieties articulated by MPs opposed to entry in 1972 about the shift of power from domestic to EU political institutions. This of course presupposes that these anxieties have proven prescient.

Arguably, the European project has not only affected political power by limiting the policy remit of national parliaments, but also by affecting a further shift in power away from those parliaments to national governments. It might even be suggested that this internal power shift has done more to marginalize national parliaments than the shift of decision-making power from the national to the European level. This is broadly in line with the 'deparliamentarisation thesis' that posits that national parliaments have been weakened constitutionally and politically as a result of European integration.<sup>46</sup> Constitutionally, a significant transfer of legislative competences from the national to the European level has led to a loss of control and influence for national parliaments.<sup>47</sup> The primacy of EU law creates judicially enforceable limits on the capacity of national parliaments to legislate, which in turn not only reduces their legislative remit, but also requires parliaments to take into account EU law when exercising their remaining competences. The emphasis placed on realizing the internal market in practice further limits the range of legislative options available to parliaments even within those fields that remain subject to domestic influence. Politically, European integration has led to further gains in power for national executives at the expense of domestic parliaments flowing from the fact that national ministers and officials dominate decision-making on EU matters to an even

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<sup>46</sup> See T. Raunio and S. Hix, 'Backbenchers Learn to Fight Back: European Integration and Parliamentary Government' (2000) 23 *West European Politics* 142, 144-147.

<sup>47</sup> See P. Norton (ed), *National Parliaments and the European Union* (London: Frank Cass, 1996).

greater extent than domestic matters, with the role of ministers and civil servants in EU negotiations also leading to information asymmetries between the national executive and the national parliament. Increased reliance on qualified majority voting in the Council has also made it difficult for national parliamentarians to force government ministers into making detailed *ex ante* policy commitments.<sup>48</sup>

More recently, some have argued that this standard deparliamentarisation thesis needs to be qualified. It is true that the power of national executives has grown as a result of the high levels of influence that ministers and officials enjoy over agenda-setting, policy design and policy implementation, but national parliaments have also increased their scrutiny of EU matters. Across member states, national parliaments have established specialized committees to coordinate parliamentary scrutiny of the government in EU matters. Many MPs now pay greater attention to European affairs, although inevitably there are limits on how much time it is rational for MPs to devote to European issues given that domestic issues typically have more electoral salience.<sup>49</sup> Finally, the Lisbon Treaty has introduced initiatives (e.g. an Early Warning Mechanism for subsidiarity monitoring) that confer on national parliaments formal if still relatively limited powers within the EU's political system, although some have questioned whether parliaments have the capacity to use these effectively.<sup>50</sup> Even taking these initiatives into account, national parliaments are far from central actors in European policy-making (and, to this extent, the deparliamentarisation thesis remains relevant). Rather, their primary role is to secure the accountability of ministers rather than influencing policy-making, albeit this role is one that they perform more effectively than twenty-five years ago.

The critical point to emphasise is that although in 1972 MPs were chiefly concerned about the shift of political power to European institutions, the real shift has arguably been domestic: that is, in terms of the UK Parliament's power, influence and control on European matters relative to that of the Government. Whitehall's empowerment at the expense of Westminster is of course a larger and longer standing pattern, and so its occurrence in the European context must

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<sup>48</sup> T. Raunio, 'National Parliaments and European Integration: What We Know and Agenda for Future Research' (2009) 15 *Journal of Legislative Studies* 317.

<sup>49</sup> T. Saalfeld, 'Deliberate Delegation or Abdication? Government Backbenchers, Ministers and European Union Legislation' (2005) 11 *Journal of Legislative Studies* 343.

<sup>50</sup> See e.g. A. Cygan, 'The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments' [2011] *European Law Review* 480; and R. Bellamy and S. Kröger, 'Domesticating the Democratic Deficit? The Role of National Parliaments and Parties in the EU's System of Governance' (2014) *Parliamentary Affairs* 437.

be viewed as one part of a larger and more complicated picture. The long tradition of strong government, party discipline and the further strengthening of the power of party leaders have all contributed to the growing power of Whitehall relative to Westminster. Withdrawal from the EU will do nothing to reverse this—and, indeed, to the extent that it is the Government that will be at the forefront of deciding questions such as which parts of domestic law deriving from EU law should be repealed and which parts retained, withdrawal might lead, at least in the short term, to the further concentration of power in the hands of ministers and civil servants.

## JUDICIAL POWER AND SOVEREIGNTY REGAINED?

The question ‘what would be regained if the UK withdrew from the EU?’ is rather difficult to answer in terms of and by reference to judicial power as well, and not least because answers to it are contingent on judicial attitudes to parliamentary sovereignty and the rule of law. When closing the debate on section 18 of the European Union Act, David Lidington, the Conservative Minister for Europe, noted that the provision ‘addressed the concern that the principle of parliamentary sovereignty, as it relates to EU law, might in future be eroded by decisions of ...domestic courts’.<sup>51</sup> As explained above, this erosion might occur if the courts were to regard EU law as entrenched in the domestic legal system as part of the common law, rather than deriving its authority from a statute. For Lidington, there were three reasons to suspect that judicial erosion of parliamentary sovereignty might be on the cards: (i) the judgment of Mr J. Laws (as he then was) in the ‘Metric Martyrs’ case;<sup>52</sup> (ii) obiter from Lord Steyn in *Jackson*;<sup>53</sup> and (iii) the risk of future challenges in domestic courts to the currently received view that EU law gains direct effect in the UK through the operation of a UK statute.<sup>54</sup> For Bill Cash, these fears were not limited to the EU context, but applied more widely to the relative importance of parliamentary sovereignty and the rule of law as understood by domestic judges. At the root of these concern is some domestic judges’ characterisation of parliamentary sovereignty as a principle of the common law. When asserting that parliamentary sovereignty is a common law

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<sup>51</sup> HC Deb 11 Jan 2011 col 243-4.

<sup>52</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

<sup>53</sup> *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

<sup>54</sup> HC Deb 11 Jan 2011 col 244.

principle, domestic judges are claiming authority over the content of parliamentary sovereignty itself, empowering themselves to revise its content, including conceivably by claiming that domestic courts are able to strike down legislation that is contrary to the rule of law.<sup>55</sup>

Two concerns arise from characterising parliamentary sovereignty as a common law principle. The first concern is whether membership of EU has changed the definition of valid law in the UK by requiring that all domestic legislation must be compatible with directly effective EU law. The starting point, here, is to recognize that if EU law derives its authority in the domestic legal system from *statute* (i.e. the 1972 Act), there is a greater possibility that Parliament can legislate contrary to EU law. This might be possible, for example, where a statute specifically repealed section 2 of the 1972 Act, perhaps by stating that its provisions were to take effect notwithstanding the provisions of EU law or by repealing the 1972 Act. However, if directly effective EU law derives its effect from the *common law*, then the possibility arises that even a statute enacted to specifically repeal the 1972 Act would not enable Parliament to legislate contrary to directly effective EU law. Domestic courts might simply refuse to recognise such a statute as valid legislation. The UK's exit from the EU might remedy the concern that membership has changed the definition of law by requiring domestic legislation to be compatible with EU law. Leaving the EU would simply undo this modification of the definition of valid law.

The second concern is more fundamental, inasmuch as it concerns the very nature of parliamentary sovereignty itself. It engages with a foundational question for the UK's constitution: is parliamentary sovereignty derived from legislation, the common law or does it have a different and distinct nature all of its own? If a principle of the common law, domestic courts can modify parliamentary sovereignty in broadly similar fashion to how they are able to modify other common law principles. This would presumably include modifying the common law by claiming that Parliament had only a limited as opposed to unlimited law-making power, with it ultimately for the judges themselves to determine the scope of these limits on Parliament's legislative competence. The main source for the suggestion that parliamentary sovereignty is a common law principle is *Thoburn*, which concerned a potential conflict between UK law and EU law. In this case, Sir John Laws asserted that the 'scope and nature of

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<sup>55</sup> HC Deb 11 Jan 2011 col 248.

Parliamentary sovereignty are ultimately confided’ in the courts.<sup>56</sup> As such, the courts had created exceptions to the doctrine of implied repeal, also a creature of the common law. According to Laws, constitutional statutes—including the European Communities Act 1972—cannot be impliedly repealed. Rather, a constitutional statute can only be repealed when it can be demonstrated that this was ‘the legislature’s *actual*—not imputed, constructive or presumed—intention’, either by express words or words that are so specific that it is ‘irresistible’ to conclude anything other than an intention to overturn the provisions of a constitutional statute.<sup>57</sup>

It is important to stress that the supremacy of EU law was only a partial catalyst for Sir John Laws and others to characterize parliamentary sovereignty as a principle of the common law. After all, directly effective EU law had been given effect in UK law prior to *Thoburn* in the *Factortame* series of cases, where domestic judges had claimed that the authority for the enforcement of directly effective principles of EU law stemmed from the UK Parliament when it enacted the 1972 Act. In *Factortame I*, Lord Bridge stated that the 1972 Act required domestic courts to read into every Act of Parliament the requirement that its provisions took effect subject to directly effective provisions of EU law.<sup>58</sup> In *Factortame II*, Lord Bridge asserted that any modification of sovereignty had been entirely voluntary and had been effected by the Westminster Parliament when it enacted the 1972 Act.<sup>59</sup> There was no suggestion of the modification of the doctrine of sovereignty by the common law in these cases, and this is so even though the House of Lords in *Factortame II* broke new constitutional ground by suspending the application of the Merchant Shipping Act 1988.

In other words: the Law Lords felt no need to assert that parliamentary sovereignty was a common law principle in order to accommodate the primacy of directly effective EU law. Echoes of the Law Lords’s approach in *Factortame II* can be seen in the recent *HS2* decisions, where the Supreme Court made clear that the extent to which directly effective EU law was recognised in domestic law was itself subject to constitutional statutes, constitutional measures and constitutional principles. There are two points to take from all of this. First, the UK’s membership of the EU is at best only a partial explanation for the characterization of

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<sup>56</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [60].

<sup>57</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [63].

<sup>58</sup> *Factortame I* [1990] 2 AC 85, [140].

<sup>59</sup> *Factortame (No 2)* [1991] 1 AC 603, 658 – 659.

parliamentary sovereignty as a creature of the common law. That the Law Lords successfully accommodated the primacy of EU law without having to recast parliamentary sovereignty as a common law creation suggests that there must be some other factor (or factors) compelling some domestic judges to classify parliamentary sovereignty as a principle of the common law. Second, insofar as this analysis suggests that the UK's membership of the EU does not by itself explain why some judges now choose to characterize parliamentary sovereignty as a principle of the common law principle, and given that some MPs seem chiefly concerned about this characterization, then withdrawal from the EU would not regain the sovereignty that those MPs today feel that Parliament has lost to the courts.

If membership of the EU was only a partial explanation of Sir John Law's statement in *Thoburn*, what other factors might lead some to characterise parliamentary sovereignty as common law principle that is itself subject to whatever legal limits the judges find in the common law? The most obvious contender is the rise of the theory of common law constitutionalism.<sup>60</sup> In very rudimentary terms, this theory posits that the rule of law is a reservoir of fundamental values against which the legality of political decisions can be tested, including the legality of primary legislation. According to this theory, the courts have a crucial role in ensuring that statutes respect these values, and in extreme cases are empowered to invalidate statutes at odds with the rule of law. This theory has long had proponents within academic circles, and it had also attracted support from a small handful of judges in their extra-judicial writing. Until recently, however, no judge had endorsed it in a judicial capacity. This changed in *Jackson*, where Lord Steyn accepted that parliamentary sovereignty is a principle of the common law that the courts are permitted to modify, including by finding in the rule of law justiciable legal limits on Parliament's ability to legislate. For Steyn, in 'exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the... Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament...cannot abolish'.<sup>61</sup> Similar statements were made by Lord Hope in both *Jackson* and in *AXA*, where he asserted that the 'rule of law, enforced by the courts, is the ultimate controlling factor on which our constitution is based'.<sup>62</sup> Lords Steyn and Hope conceived of the

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<sup>60</sup> See generally T. Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 O.J.L.S. 435.

<sup>61</sup> *Jackson v Attorney General* [2005] UKHL 56 [102]

<sup>62</sup> *AXA General Insurance v Lord Advocate* [2011] UKSC 46, [51]. See also *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, [107].

possibility that domestic courts might be authorized to invalidate legislation that those courts deem inconsistent with the rule of law. If Lords Steyn and Hope are correct, then a UK exit from the EU would make little difference to the perceived rise of the power of the courts. The common law will continue to exist, and the courts will continue to be charged to enforce the rule of law. Moreover, there is the risk that, deprived of one way of protecting human rights by applying EU law human rights protections within the sphere of EU law, the courts may instead develop the common law further to provide stronger rights protections, and in this way further eroding parliamentary sovereignty.

It is important to keep in proper perspective the threat to parliamentary sovereignty posed by common law constitutionalism. Within judicial circle, the position of Lords Steyn and Hope remains a minority one. Even within academic circles, not all of those who favour common law constitutionalism claim that the rule of law empowers courts to override legislation.<sup>63</sup> Even some who are often taken to make this sort of claim are in fact better understood as arguing for a much more subtle theory. Take the theory of common law constitutionalism favoured by T.R.S. Allan, which was frequently cited in parliamentary debates on section 18 of the European Union Act 2011. Allan argues that the rule of law applies both to Parliament and the courts. If legislation is enacted that does not comply with the rule of law, then this legislation would not generate the conditions under which individuals would have a general *prima facie* obligation to obey the law. It does not necessarily follow from this the courts would refuse to recognise the legislation as valid law. Contrary to common readings of his work, Allan's theory has no general principle as to what would happen were Parliament to enact legislation that breached the rule of law. Any case where such a conflict arose would instead be decided on its own specific facts and circumstances. As recognised by the courts, such facts would need to be exceptional for the courts to overturn legislation and would only occur when the courts were unable to read the legislation in a manner that did comply with the particular requirements of the rule of law. All of this is to say that not only might withdrawal from the EU make no difference to the perceived threat of common law constitutionalism, the 'threat' may actually be far smaller than politicians perceive it to be.

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<sup>63</sup> Craig reference.



There is an alternative reading of the case law commonly cited to evidence the rise of common law constitutionalism which posits that, far from removing the judicial threat to parliamentary sovereignty, withdrawal from the EU may exacerbate further erosion of parliamentary sovereignty. For both Steyn and Lord Hope, the removal of judicial review constitutes an exceptional circumstance in which the rule of law would require courts to insist that legislation having such an effect would not be recognised as law.<sup>64</sup> This choice of example was likely no accident, and may instead have been influenced by the attempt around the time of the decision in *Jackson* to introduce legislation which would have removed the possibility of judicial review from immigration decisions.<sup>65</sup> Understood in its context, the obiter dicta from Steyn and Hope illustrate the tension between the legislature and the court in an unwritten constitution. Courts can employ both the principle of legality and the Human Rights Act to overturn executive acts, or to reinterpret legislation, but it is also possible for Parliament to react to such measures by re-enacting legislation to counteract judicial decisions, even retrospectively.<sup>66</sup> Each institution can assert its sovereign will to an extent. Parliament asserts its sovereignty to make legislation. Judges determine whether legislation is valid or invalid, applying the common law that they can create, develop and enforce. If parliamentary statements (such as those found in debates over section 18 of the European Union Act 2011) and judicial statements (such as the dicta in *Thoburn* and *Jackson*) are read as assertions of relative sovereignty, a UK exit from the EU may actually reduce, rather than increase, Parliament's sovereignty vis-à-vis the courts, at least insofar as withdrawal from the EU might prompt courts to make stronger assertions about their ability to determine the content of parliamentary sovereignty.

## CONCLUSION

We began by noting how the UK now has an unsettled constitution, and it is therefore unsurprising that predictions about the constitutional implications of a UK withdrawal from the EU are so difficult to make. Parliamentary debates show how many MPs' view of sovereignty

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<sup>64</sup> *Jackson v Attorney General* [2005] UKHL 56 [52]

<sup>65</sup> See generally R. Rawlings, 'Review, Revenge and Retreat' (2005) 68 M.L.R. 378.

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has evolved: shifting from more political to more legal conceptions of sovereignty, with concerns about the loss of law-making power superseded by new concerns about the relative power of domestic courts. The chief concern of many of the most fervent Euro-sceptic MPs seems to be the status of parliamentary sovereignty in the unsettled constitution, and the threat posed to it by judicial pronouncements about the rule of law. Membership of the EU might have been a catalyst for some of these judicial pronouncements, but it is today very clear that debates about whether parliamentary sovereignty is subject to legally enforceable limits found in the rule of law have a life of their own outside of the EU context. Against this background, many of the attempts to regain Parliament's sovereignty over domestic courts by leaving the EU seems a case of (much) too little, (much) too late. Perhaps above all, it is important for all of us—MPs included—to realise that the UK's constitution is distinguished by its evolutionary and changing nature. Rather than harking back to regaining what may well have only been a temporary certainty, it might be better for Parliament to embrace the unsettled constitution and using this as an opportunity for constructive collaboration where, at the European level, the UK can protect its interests through a combination of negotiation and attrition. It is perhaps a paradox that it is only by embracing the unsettled constitution, including the potential erosion of the traditional conceptions of parliamentary sovereignty, that Parliament will be best able to protect its law-making power.