

Legislative Freedom in the United Kingdom

I. Introduction

The doctrine of parliamentary sovereignty makes legislative freedom the centrepiece of the constitution. The Queen-in-Parliament is free to enact any law it chooses, save only that it may not bind its successors. This legally unlimited power to legislate is subject to constitutional limits, but Acts of Parliament that breach these limits remain legally valid and their validity cannot be challenged in a court of law.¹ These propositions are called into question in *Jackson*, with Lord Hope of Craighead saying that “[i]t is no longer right to say that [Parliament’s] freedom to legislate admits of no qualification whatever”² and Lord Steyn remarking that Dicey’s classic account “can now be seen to be out of place in the modern United Kingdom”.³ The qualifications that their Lordships have in mind are “[f]or the most part... themselves the product of measures enacted by Parliament”.⁴ Lord Steyn mentions *Factortame*,⁵ the incorporation of the European Convention on Human Rights (ECHR) by way of the Human Rights Act 1998 (HRA), and the Scottish devolutionary settlement;⁶ Lord Hope relies on the European Communities Act 1972 (ECA), s.3(1) of the HRA and the Act of Union 1707, as well as the litigation in *Jackson* itself about the Parliament Acts 1911 and 1949.⁷ These inroads into parliamentary sovereignty bolster the rule of law, the argument runs, which entitles (and perhaps requires) the courts to impose a further limit and to invalidate legislation that they conclude is oppressive or unjust.

This article argues that Parliament’s freedom to legislate has not been subjected to legal qualification and that this freedom remains of the utmost constitutional importance. The statutes on which Lord Hope and Lord Steyn rely are striking exercises of that freedom, but do not legally limit Parliament’s lawmaking capacity. Rather, they inform the subsequent exercise of that capacity by helping form part of the constitutional context in which successive Parliaments act, in which they form and promulgate their lawmaking intentions.⁸ However, while the statutes in question do not legally qualify Parliament’s legal power to legislate, they do, in different ways, impose constitutional or practical limits on that power, limits that warrant close evaluation. The plenary legislative authority of Parliament in Westminster grounds the United Kingdom’s parliamentary democracy, making provision for each Parliament to decide for itself, on behalf of and in conversation with the British people, what is to be done. The Scotland Act and the Parliament Acts are fully consistent with the freedom Parliament should enjoy in our constitution. The HRA and ECA do not legally limit Parliament’s freedom to legislate but do unduly encumber the constitutional freedom it ought to enjoy. The article advances these propositions by considering each statute in turn, before

* St John’s College, University of Oxford; I am grateful to John Finnis, Graham Gee, Paul Yowell, and participants in a University of Notre Dame in London workshop on ‘International Perspectives on Public Law’ for helpful comments on an earlier draft; the usual disclaimer applies.

¹ *Madzimbamuto v Lardner-Burke* [1969] 1 A.C. 645 (PC).

² *Jackson v Attorney-General* [2005] UKHL 56; [2006] 1 A.C. 262 at [104].

³ *Jackson* [2006] 1 A.C. 262 at [102].

⁴ *Jackson* [2006] 1 A.C. 262 at [105], per Lord Hope.

⁵ *R v Secretary of State for Transport ex. p. Factortame (No.2)* [1991] A.C. 603.

⁶ *Jackson* [2006] 1 A.C. 262 at [102].

⁷ *Jackson* [2006] 1 A.C. 262 at [105]-[108].

⁸ R. Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), at pp.258-260.

briefly contesting Lord Hope and Lord Steyn’s account of the doctrine of parliamentary sovereignty and their conclusion that the courts are free to unmake it.

II. Enacting Devolution

The main reason to think that parliamentary sovereignty has been subjected to legal limitation is of course the ECA and its judicial reception in *Factortame*. I consider this complex question in section III below. By contrast, it is much less clear how the legislative provision made for devolution to Scotland might constitute a limitation on parliamentary sovereignty.⁹ Still, in rejecting the Attorney General’s submission that the United Kingdom has an uncontrolled constitution,¹⁰ Lord Steyn first cites *Factortame* and then goes on to say that “[t]he settlement contained in the Scotland Act 1998 also points to a divided sovereignty”.¹¹ But the Scotland Act does not *divide* sovereignty. It is ordinary legislation, open to amendment or repeal as and when Parliament chooses, legislation which, moreover, in no way aims to limit the scope of Parliament’s lawmaking authority. Strictly, it is wrong to say that in law the legislation devolves powers from Westminster to Holyrood, for Westminster remains fully competent to legislate on all and any question of Scottish law (as s.28(7) of the 1998 Act states expressly). The legal change the Scotland Act realises is to institute a new legislature, with a limited competence. Acts of the Scottish Parliament are in one sense delegated legislation, notwithstanding that the legislature in question (like others created in former colonies or overseas territories) exercises a general competence to legislate, such that what it enacts is in another sense primary legislation.¹²

The Scotland Act 2016 makes two important changes to the Scotland Act 1998 that might be thought to strengthen the argument that the devolutionary settlement qualifies parliamentary sovereignty. The first change is to introduce a new s.63A into the 1998 Act, recording Parliament’s commitment that the Scottish Parliament and Government are to be a permanent part of the United Kingdom’s constitutional arrangements and are not to be abolished save with the support of the people of Scotland in a referendum. It would be lawful but unconstitutional for Westminster to sweep away the devolutionary settlement without the consent of the Scottish people. The terms of s.63A articulate a political and constitutional commitment but not a legal limitation.¹³ The commitment is, for the foreseeable future, reasonable and Parliament rightly understands itself not to be free, in the constitutional sense, to abolish Scottish devolution without consent. This limitation is similar in kind to the Imperial Parliament’s respect for self-governing dominions.

The second change is to introduce a new s.28(8), which puts the original understanding of the Sewel convention on a statutory footing by reciting “But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without

⁹ The same holds for the devolutionary settlements in relation to Wales and Northern Ireland: Lord Steyn does not mention either, referring only to Scotland.

¹⁰ This might seem a contradiction in terms. However, “uncontrolled constitution” is a term of art intended to convey that the legislature has authority to change the constitution by ordinary legislative action rather than by way of some special procedure: *McCawley v The King* [1920] A.C. 691.

¹¹ *Jackson* [2006] 1 A.C. 262 at [102].

¹² A. McHarg, “What is Delegated Legislation?” [2006] P.L. 539.

¹³ This analysis is consistent with views expressed in the legislative process itself: Constitution Committee of the House of Lords, *Proposals for the Devolution of Further Powers to Scotland* HL Paper 145 (2015) at [61] and [64]; Lord Keen of Elie, The Advocate-General for Scotland, HL Deb, 21 March 2016, col 2071. See also: C Himsworth “Legislating for Permanence and a Statutory Footing” (2016) 20 Edin. L. Rev. 361 at 362-364.

the consent of the Scottish Parliament.” This provision does not impose a legal limit on Parliament’s continuing lawmaking authority. This is clear from s.28(7) and from the terms of s.2 of the 2016 Act, which aims to recognise a convention, not to make a new legal rule.¹⁴ Putting the convention on a statutory footing in one sense changes nothing, but in another sense is intended to make the convention more secure and stable.¹⁵ The legal significance of the convention, whether enacted or otherwise, is to support a presumption that Parliament is unlikely to have legislated with regard to devolved matters in Scotland without consent. The presumption is defeasible, not least since the convention itself refers to what will *normally* be done, and Parliament in any particular case may conclude that it should still legislate despite the absence of consent.

These two changes are constitutionally significant and do further cement the Scottish devolutionary settlement. But the Scotland Act 1998, as amended, still fails to constitute any legal limitation whatsoever on Parliament’s continuing authority. The stability of the settlement turns on the joint recognition of constitutional limits that Parliament accepts, again much as in relation to the Imperial Parliament and the dominions. The Statute of Westminster 1931 marks out one extreme (short only of an Independence Act) of Parliament’s recognition of the constitutional limits of its legally unlimited authority. That legislation made provision for the dominions to be fully self-governing, but preserved Parliament’s continuing lawmaking authority, an authority that was for many years very significant, for example, in relation to Australia and Canada.¹⁶ The Scotland Act falls well short of this, for the obvious reason that Scotland continues to form part of the United Kingdom, with Scots sharing in British self-government at Westminster.

Lord Hope does not mention the Scotland Act but does mention the Act of Union.¹⁷ In a recent paper, he considers its relevance further.¹⁸ There have been suggestions, as he notes in *Jackson*, that some provisions in the Act of Union, say protecting the Presbyterian Church or Scottish private law, are fundamental, being incapable of change. However, this has been contradicted expressly by some Scottish judges, not to mention recent scholarship, some of which Lord Hope notes.¹⁹ (He does not note the relevant part of Jeffrey Goldsworthy’s work, which concludes that the limits in question were understood to bind in political morality but not in constitutional law.²⁰) More generally, there was very good reason for the understanding of the doctrine to have been constant across the Union.²¹ No Scotsman would be impressed, Lord Hope suggests, by Dicey’s argument that the English Parliament would

¹⁴ Constitution Committee of the House of Lords, *Proposals for the Devolution of Further Powers to Scotland* [72] and [76]; Himsworth “Legislating for Permanence and a Statutory Footing” (2016) 20 *Edin. L. Rev.* 361 at 364-366; *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 *W.L.R.* 583 at [146]-[148].

¹⁵ Whether the intention is likely to succeed is an open question.

¹⁶ R. Ekins, “Constitutional Principle in the Laws of the Commonwealth” in R. George and J. Keown (eds), *Reason, Morality and Law: The Jurisprudence of John Finnis* (Oxford: Oxford University Press, 2013), at pp.399-401.

¹⁷ Having said this, in *H v Lord Advocate* [2012] UKSC 24; [2013] 1 *A.C.* 413 he asserts flatly, at [30], that the Scotland Act cannot be repealed by implication. For incisive criticism see F. Ahmed and A. Perry, “The Quasi-Entrenchment of Constitutional Statutes” (2014) *C.L.J.* 514

¹⁸ Lord Hope, “Is the Rule of Law now the Sovereign Principle?”, Ch. 6 in R. Rawlings, P. Leyland and A. Young (eds.), *Sovereignty and the Law* (Oxford: Oxford University Press, 2013), at p.89

¹⁹ Lord Hope, “Is the Rule of Law now the Sovereign Principle?” in Rawlings, Leyland and Young (eds.), *Sovereignty and the Law* (2013), at pp. 90-92.

²⁰ J. Goldsworthy, *The Sovereignty of Parliament* (Oxford: Oxford University Press, 1999), at pp.165-173.

²¹ M. Loughlin, *The British Constitution: A Very Short Introduction* (Oxford: Oxford University Press, 2013), at p.67.

not have understood itself to be lessening its powers by uniting with the Scottish Parliament. However, the Act of Union formed one undivided realm,²² represented by one Parliament which was to act for all in making the law. For only a part of the whole – especially the weaker part – to understand the authority of that Parliament to be limited in scope would be disastrous, hence there would have been good reason for English and Scottish practice on point to coincide, with English practice, as the dominant partner, likely to be gravitational if it were the case that they ever differed at all.

III. Incorporating European Law

The ECA is more difficult than the Scotland Act to square with parliamentary sovereignty or to explain as a familiar type of constitutional limit on a free legislature. The Act incorporates European law and makes provision for that law to take effect notwithstanding enactments to the contrary. I argue, against the scholarly consensus to the contrary, that in enacting the ECA Parliament did not legally limit its lawmaking powers: Parliament continues to be free to legislate inconsistently with European law but, with one or two arguable exceptions, has chosen not to do so. That is, successive Parliaments have taken up and intended to conform to the default rule articulated in s.2(4) of the ECA.

Section 2(1) of the Act provides that propositions of European law “are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly”, while s.2(4) provides that “any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section”. Lord Hope explains the significance of these provisions thus:²³

“Although Parliament was careful not to say in terms that it could not enact legislation which was in conflict with Community law, that in practice is the effect of section 2(1) when read with section 2(4) of that Act. The direction in section 2(1) that Community law is to be recognised and available in law and is to be given legal effect without further enactment, which is the method by which the Community Treaties have been implemented, concedes the last word in this matter to the courts. The doctrine of the supremacy of Community law restricts the absolute authority of Parliament to legislate as it wants in this area. This plainly is how the matter would be viewed in Luxembourg: see Professor David Feldman, *None, One or Several? Perspectives on the UK's Constitution(s)* [2005] CLJ 329, 346-347; see also, for the practical effects in this country, *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603.”

The force of the phrase “that in practice is the effect” in the first sentence turns on the assertion in the second sentence that s.2(1) concedes to the courts the last word about what it is that Parliament has legal authority to enact. But the assertion is groundless and the section itself does not spell out or imply any such (unconstitutional) concession on Parliament’s part. Section 2(1) does not incorporate Luxembourg’s understanding of the supremacy of Community Law such that if Parliament were to attempt to legislate inconsistently with that

²² *Halsbury’s Laws of England*, 2009, 5th edition, para 717.

²³ *Jackson* [2006] 1 A.C. 262 at [105].

law British courts would have authority to invalidate its acts.²⁴ Rather, European law takes effect in the United Kingdom in accordance with the terms of the ECA: this is clear from first principles and is confirmed by s.18 of the European Union Act 2011 (EUA) and by the Supreme Court in *HS2*.²⁵ Section 2 does not attempt to articulate limits on the authority of Parliament to legislate as it sees fit. And one should be slow to conclude that Parliament had made such an attempt for this would flout the doctrine of parliamentary sovereignty and hence in our constitution should fail.

Factortame (No 2) is the standard authority for the proposition that the ECA limits Parliament's lawmaking authority, making provision for the courts to set aside statutes that are inconsistent with European law, including statutes enacted after the ECA itself. The *Factortame* litigation concerned how to address an apparent clash between European law and the Merchant Shipping Act 1988. The House of Lords, in the first stage of litigation,²⁶ held that it was unable to grant interim relief (pending clarification of the substantive position at European law) in the form of suspending the operation of an Act of Parliament that was arguably contrary to European law. The decision was referred to the European Court of Justice (ECJ) to rule whether interim relief of this kind was required (and thus authorised) by European law, with the ECJ ruling that it was. In the second stage of litigation,²⁷ the House of Lords duly applied the relevant proposition of European law, granting interim relief in the form of a suspension of the operative provisions of the 1988 Act, which had otherwise given priority to British-registered fishing vessels.

The received wisdom is that the effect of s.2(4), as interpreted in *Factortame (No 2)*, is that Parliament has bound its successors not to enact legislation inconsistently with European law. For any such legislation will, by reason of s.2(4), be held inoperative to the extent of the inconsistency with European law.²⁸ This departs from the doctrine of parliamentary sovereignty in that it makes it possible for one Parliament to bind its successors and it means that an institution other than Parliament itself – the court – is able to set aside primary legislation.²⁹ Many scholars and judges take the view that the significance of the *Factortame* litigation is that the ECA was held not to be impliedly repealed by the Merchant Shipping Act,³⁰ an Act later in time which should, per the aspect of the doctrine which provides that no Parliament may bind another, have had force notwithstanding the earlier Act and its assertion concerning later Acts.³¹ On this reading, the ECA is a “constitutional statute” and may only be changed expressly, not repealed (in part) by implication.³²

²⁴ *Macarthy Ltd v. Smith* [1979] 3 All E.R. 325 at 329, per Lord Denning MR: “Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.”

²⁵ *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324.

²⁶ *R v Secretary of State for Transport ex. p. Factortame* [1990] 2 A.C. 85.

²⁷ *Factortame (No.2)* [1991] A.C. 603.

²⁸ N. Barber, “The afterlife of Parliamentary sovereignty” (2011) 9 I-CON 144.

²⁹ H.W.R. Wade, “Sovereignty – Revolution or Evolution?” (1996) 112 L.Q.R. 568.

³⁰ *Thoburn v Sunderland City Council* [2003] Q.B. 151.

³¹ Barber, “The afterlife of Parliamentary sovereignty” (2011) 9 I-CON 144; Sir John Laws, *The Common Law Constitution* (Cambridge: Cambridge University Press, 2013).

³² Goldsworthy maintains that one way to square *Factortame* with parliamentary sovereignty is to accept that implied repeal is not an essential element of the doctrine and to reason that the ECA imposes a manner and form requirement on later Parliaments: J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010), at p.298.

Some go further, denying that Parliament is free to expressly qualify the ECA in part. Lord Hope's remarks in *Jackson* suggest it is not.³³ Likewise, Paul Craig maintains that it is arguable that even an express provision in a later Act stating that it applies notwithstanding any contrary rule of European law and/or s.2(4) itself, would not suffice to set aside the supremacy of European law.³⁴ Craig reasons that the supremacy of European law is inconsistent with any such partial departure, such that, per s.2(1), British courts should and would hold the later Act to be inoperative to the extent of its inconsistency. In other words, the argument is that any departure from European law has to be complete – repealing the ECA at large and perhaps also leaving the EU itself. The argument relies heavily on Lord Bridge's dicta in *Factortame (No 2)* about the nature of membership of the European Community,³⁵ which stressed that the United Kingdom joined the Community knowing full well that a condition of membership was the supremacy of European law.

The received wisdom is wrong. As I explain further below, the ECA does not limit Parliament's legislative authority, nor does it displace the operation of the doctrine of implied repeal. It remains open to Parliament to dispense with s.2(4) of the ECA in whole or in part,³⁶ with or without the United Kingdom choosing to leave the EU. Moreover, all the propositions made out in the past two sentences are consistent with *Factortame*, which did not involve the House of Lords treating s.2 as a decision by Parliament to bind its successors, still less as treating s.2 as having had that effect.

It was common ground in *Factortame* that if the terms of the Merchant Shipping Act were inconsistent with European law then that Act was to be disapplied to that extent. The live question concerned whether the English courts were required by European law, and hence authorised by s.2(1), to grant interim relief when the consistency or otherwise of national law with European law had not yet been authoritatively determined. The mythology of *Factortame* is that the 1988 Act was intended to override European law, but the whole premise of the legislative act, and the Crown's argument before the courts – the argument of the Government which had promoted the legislation – was that the Act was intended to take effect consistently with European law. Thus, the Act was to be interpreted at all times as if it contained a provision stating in terms that the main provisions of the Act were to take effect subject to the ECA, and hence subject to their consistency with relevant European law. Lord Bridge of Harwich in *Factortame (No 1)* says exactly this,³⁷ with all the other judges agreeing. His remarks in *(No 2)* are less careful, but Lord Goff of Chieveley in *(No 2)*, with whom the other judges agree, affirms the reasoning in *(No 1)*.³⁸

³³ *Jackson* [2006] 1 A.C. 262 at [105].

³⁴ P. Craig, "Britain in the European Union", Ch. 4 in J. Jowell and D. Oliver (eds.), *The Changing Constitution* 8th edn (Oxford: Oxford University Press, 2015), at p.104 and p.122. Ian Loveland argues that this proposition is implicit in Lord Bridge's judgment in *Factortame (No 1)*: I. Loveland, *Constitutional Law, Administrative Law and Human Rights* 6th edn (Oxford: Oxford University Press, 2012), at p.400.

³⁵ [1991] A.C. 603 at 658-659, per Lord Bridge.

³⁶ Indeed, the dicta in *HS2* [2014] 1 W.L.R. 324, per Lords Neuberger and Mance at [207], suggest that the ECA's incorporation of European law may already be only partial, not extending to propositions that qualify fundamentals of the British constitution. The dicta in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 W.L.R. 1591, per Lord Mance at [90], suggest further that the ECA may not incorporate the ECJ's fundamental misinterpretation of European law.

³⁷ *Factortame* [1990] 2 A.C. 85 at 140, per Lord Bridge.

³⁸ *Factortame (No.2)* [1991] A.C. 603 at 663-664, per Lord Goff.

Like other statutes enacted since 1972,³⁹ Parliament intended the 1988 Act to be read with s.2(4) of the ECA and to yield to inconsistent European law. This understanding of what Parliament did in 1988 is no fiction. In inviting Parliament to enact the Merchant Shipping Bill, the Government relied on legal advice that the bill was consistent with European law and assured MPs of this when asked.⁴⁰ The advice was that the legislation was *arguably* consistent and it is certainly true that the Government was taking a calculated risk, as Lord Hoffmann was later to put it,⁴¹ in introducing the scheme. It may in part have been taking advantage of the expected absence of interim relief, such that the scheme would have been expected to have been enforced for some time before there was any risk of inconsistency with European law being established authoritatively. The risk was that the United Kingdom would later be held liable for damages for acting inconsistently with European law.

Goldsworthy suggests that Parliament in 1988 may have had two inconsistent intentions, first to enact the terms of the 1988 Act and second not to flout European law.⁴² He argues that one might ask whether it is open to the courts to rectify the legislation to secure the second intention. But it would be more accurate to say that Parliament intended to enact the terms of the 1988 Act subject to the proviso that those terms were to be set aside if inconsistent with European law. That proviso did not need to be stated expressly in the 1988 Act itself: it was and is taken for granted by virtue of s.2(4) of the ECA, which forms part of the constitutional context in which Parliaments have legislated since 1972.

My analysis of the 1988 Act may seem to be at odds with the later litigation in which the House of Lords held that the United Kingdom, in enacting and enforcing the Act, had committed serious breaches of European law, entitling the applicants to compensation.⁴³ The United Kingdom's actions undoubtedly caused loss to the applicants, which would have been avoided had the former correctly understood its legal obligations. Recall the argument of the Secretary of State in *Factortame (No 1)*: if and when it is held that the 1988 Act is inconsistent with European law then, per the implicit terms of the 1988 Act itself (read with s.2(4) of the ECA), the 1988 Act will yield to the relevant European law. This was a good argument, wrong only in relation to interim relief, and what it means is that the United Kingdom's liability in the *Factortame* saga should have been for its responsibility for giving rise to the losses between enactment of the 1988 Act and authoritative determination of the inconsistency of its main terms with European law. For the 1988 Act was never intended to flout inconsistent European law, although its promoters may have been too sanguine about the inability of anyone to challenge that inconsistency promptly.

My concern is not with how European law should conceptualise the United Kingdom's breach but with the legislative intent that explains the 1988 Act and which governs how British courts act. Notwithstanding the United Kingdom's later liability, there was good reason for the House of Lords in the first and second stages of *Factortame* to have inferred that Parliament intended the 1988 Act to be subject (as the Bill's sponsors in Parliament told the Court they intended) to any inconsistent European law. This analysis is strengthened if one considers that the question before Parliament in 1988 was not only consistency with existing European law but also consistency with any European law that might subsequently

³⁹ There are arguable exceptions, including the EUA 2011.

⁴⁰ *R v. Secretary of State for Transport, ex. p. Factortame (No. 5)* [2000] 1 A.C. 524; HC, 126, cols 550-551, 28 January 1988.

⁴¹ *Factortame (No. 5)* [2000] 1 A.C. 524 at 547-548.

⁴² Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (2010) at p.296.

⁴³ *Factortame (No. 5)* [2000] 1 A.C. 524.

be introduced or adopted. That is, in enacting statutes after 1972, Parliament has intended not only to conform to European law at the time of each new enactment, but also to European law that is yet to come, per the ambulatory terms of s.2(1) and s.2(4), which extend to European law as it arises over time.

Section 2(4) of the ECA introduces a proposition bearing on the interpretation and application of all legislation, enacted before or after the Act. In relation to legislation enacted before 1972, the provision is a sweeping amendment. The provision works in relation to later legislation by constituting a new default rule, like the rule that legislation applies within jurisdiction, which is taken for granted until displaced. In saying it is taken for granted, I do not even mean to say it is not consciously adverted to, for in proposing and enacting legislation consistency with European law is a central consideration, always in play. With only one or two arguable exceptions, there is no reason to imagine that any particular legislative act after 1972 has intended to displace that rule, for the consequences of any such displacement are such (possible political and economic crisis) that one would quite rightly expect the decision in question to be made clear.

Parliament is free to change the law as it sees fit. But it frames its lawmaking acts in relation to the existing law, which it acts to change in part, and the existing constitutional order, which one presumes it is unlikely to displace.⁴⁴ This is not to say that Parliament never intends to change the existing constitutional order – plainly it often does, as it did in important ways in the 1972 Act – but rather that Parliament’s lawmaking intentions, which are the object of the interpretive inquiry, are formed in light of and are to be inferred against the backdrop of the constitutional order as at enactment. Section 2(4) has governed how later statutes intersect with European law because it articulates an ongoing commitment of Parliament, on which it acts in each successive enactment, that its statutes are to be subject to the application of norms of European law as they arise. The United Kingdom’s entry into the European Community worked a momentous and standing change of circumstances that has understandably changed the reasons Parliament has had to act. Its legal freedom to legislate as it sees fit has not been surrendered or expired, but that freedom has been exercised in view of the severe practical limitations (diplomatic, economic) that arise from the integration of the United Kingdom into the European Community and then, seamlessly into the partial state that is the European Union (EU).

The situation would be very different had later legislation been apparently intended to supplant (override, defy, flout) European law. An Act making out that intention would, I say, be straightforwardly effective notwithstanding s.2(4). The force of the default rule – and of the mythology about *Factortame* – is such that the intention would very likely require express formulation, but any enactment specifying that it was to take effect notwithstanding s.2(4) (or any rule of European law to the contrary, including the doctrine of the supremacy of European law) would be effective. No question of implied repeal need even arise, because the 1972 legislation is intended to mark out a default rule, which necessarily yields when a contrary intention is made out. In any case, the 1972 Act may be impliedly repealed by virtue of an Act that speaks to the question of the relationship between the law of the United Kingdom and European law – a later Act that addressed this question would, by implication, replace earlier inconsistent rules on point. Section 18 of the EUA might be such an

⁴⁴ See further Ekins, *The Nature of Legislative Intent* (2012), at pp.258-260; see also F. Ahmed and A. Perry, “Constitutional Statutes” (2017) 37 O.J.L.S. 461.

enactment – certainly it is not intended to be subject to contrary norms of EU law – but to my mind it is fully consistent with s.2 of the ECA.

The ECA does not constitute a legal limitation on the legislative freedom of Parliament. Section 2(4) continues to apply to successive Acts because Parliament takes it for granted and does not intend to displace it. It follows that there is no reason to think Parliament may not displace the rule in part or in whole, quite apart from any decision to leave the EU. For, pace Lord Hope, Luxembourg’s understanding of the supremacy of European law is not adopted by the constitution of the United Kingdom.⁴⁵ Parliament chose to give partial effect to the supremacy of European law without flouting (or even purportedly limiting) the continuing authority of its successors. That Parliament has not since chosen to flout European law on a partial rather than a wholesale basis does not entail incapacity to do so. Indeed the continuing capacity to do so, by making clear an intention to this end (which would likely, but need not, be express) is of immense constitutional significance.

One arguable exception, in which Parliament perhaps intended to set aside the s.2(4) default rule, is the European Union Referendum Act 2015, which in relevant part excludes from the franchise British citizens who have moved abroad and were last registered to vote more than 15 years ago. In *Shindler*,⁴⁶ the Act was challenged before the British courts as a breach of European law concerning free movement. Argument turned on whether the Act was within the scope of European law, which involved interpreting art.50(1) of the Lisbon Treaty, which provides that member states may withdraw from the EU in accordance with their own constitutional requirements. The Court of Appeal concluded that the 2015 Act was not within the scope of European law, so that the challenge failed. Elias L.J. gave a concurring judgment, with which King L.J. agreed,⁴⁷ in which he reasoned that even if the Act were within the scope of European law, s.2(4) of the ECA might not extend to an Act that made provision for withdrawal from the EU. This reasoning is consistent with the tenor of the *HS2* dicta. One might argue from the other direction that even if s.2 is as broad as it seems to be, nonetheless in making provision for possible exit from the EU, Parliament does not intend its provision to be set aside by inconsistent European law. The argument is powerful, but is open to the riposte that enacting the 2015 Act is not itself withdrawal and, especially in the event that the electorate had voted to remain in the EU, Parliament would not have wished the United Kingdom to be in breach of its obligations under European law.

The line of argument made out thus far supports the more general conclusion that Parliament entrenches its choices not by formally limiting its successors but by changing the circumstances in which they act. In this way, one informs how they are likely to (and must if they are to be understood) go about framing and expressing their legislative choices. For example, the devolutionary settlement informs the lawmaking choices of later Parliaments. Each remains free but each legislates in the world as at enactment. This is consistent with parliamentary sovereignty and the thought that it is not arises from an overly crude account of

⁴⁵ As s.18 of the EUA confirms; see also the dicta in *HS2* [2014] 1 W.L.R. 324 at [207] and *Pham* [2015] 1 W.L.R. 1591 at [90]. Cf. the majority’s confused analysis in *Miller* [2017] 2 W.L.R. 583 at [61] and [65], maintaining that the ECA constitutes EU law as an independent, overriding and direct source of law. This description cannot be squared with the majority’s recognition that the effect of EU law in the UK is radically dependent on the ECA (at [61]). Lord Reed’s critique is compelling (at [224]-[230]); see also R. Ekins, “Constitutional Practice and Principle in the Article 50 Litigation” (2017) 133 L.Q.R. 347 and M. Elliott, “The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle” [2017] C.L.J. (forthcoming).

⁴⁶ *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWHC 957 (Admin); [2016] 3 C.M.L.R. 22; *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469; [2016] 3 C.M.L.R. 23.

⁴⁷ The Master of the Rolls gave the lead judgment but did not comment on Elias L.J.’s concurrence.

how legislatures act, in which all that is enacted is the literal meaning of the statutory text, understood apart from intentions informed by and responsive to constitutional or other legal principles that legislators and others take seriously.

IV. Leaving the European Union

The United Kingdom has now begun the process of leaving the EU. Article 50 has been triggered and therefore, in due course, the EU Treaties will cease to apply to the United Kingdom. Parliament is likely soon to repeal the ECA and to enact legislation to provide for legal continuity.⁴⁸ How does this prospect bear on this article's study of legislative freedom in the United Kingdom? On Lord Hope and Lord Steyn's self-understanding, the repeal of the ECA must be a major blow to their argument that Parliament is increasingly subject to legal, justiciable restraint. It should undermine their conclusion that parliamentary sovereignty is being steadily overtaken by legal developments such that it is now open to the courts to assert further limitations on Parliament's lawmaking authority.

If one reasons that *Factortame* marked the end of parliamentary sovereignty, because it involved judicial acceptance of one Parliament binding another, then leaving the EU will hardly restore the doctrine: the damage has already been done.⁴⁹ On my analysis, however, Parliament has been free, as a matter of law, to legislate as it sees fit notwithstanding membership of the EU. Thus, departure from the EU is not strictly necessary to restore parliamentary sovereignty because it has never been legally qualified. Still, the prospect of departure does confirm the significance of an ongoing capacity to legislate, of freedom to make provision for the terms on which European law is incorporated. Parliament may choose to exercise this freedom *before* the EU Treaties come to an end or the ECA is repealed. For example, it might legislate to limit the reception of decisions of the Court of Justice of the EU which compromise national security, to qualify the free movement of persons (and to stipulate when rights to reside accrue), or to disarm British courts from applying the terms of the EU Charter of Fundamental Rights. The prospect of freedom from continuing integration in the strictures of the EU legal order may encourage Parliament to use its existing legal powers more aggressively. Still, there are reasons for caution, not least to avoid diplomatic complications and to uphold Britain's reputation as an honourable state.

The United Kingdom would not be leaving the EU but for the June 2016 referendum, in which a majority voted to leave. The referendum outcome confirms the British people's commitment to self-government. This is sometimes, and not unreasonably, phrased as an attachment to parliamentary sovereignty. There is something to this analysis and leaving the EU will restore, if not Parliament's legally unconstrained authority to legislate (which should never have been in doubt), at least Parliament's effective freedom to legislate on a wide range of questions which have otherwise been entrusted to the EU for decision. Leaving the EU may or may not be good policy but in one obvious sense it involves a restoration and revitalization of constitutional principle, lifting from the Westminster Parliament far-reaching practical and constitutional restrictions (partly arising out of the United Kingdom's international legal obligations) that inevitably made Parliament less central to the democratic life of a self-governing people.

⁴⁸ Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union* (White Paper, Cm 9446, 2017).

⁴⁹ Barber, "The afterlife of Parliamentary sovereignty" (2011) 9 I-CON 144 at 152-153.

There would have been no referendum but for the European Union Referendum Act 2015. Making provision for a referendum on the question of membership of the EU was not an abdication of parliamentary democracy. Rather, it was a responsible exercise of lawmaking authority, with Parliament reasonably concluding that the question of membership was one that was rightly put to the people as a whole for decision, not only because it touches so directly on the identity of the state and its people but also because of the mismatch between popular controversy about the merits of membership and elite support for the status quo. Referendums led by Parliament are an intelligible part of Westminster constitutional practice, especially in the Commonwealth. There is no incoherence or self-refutation in a campaign for restoration of parliamentary democracy centring on successful contestation of a referendum – the United Kingdom has not substituted popular sovereignty for parliamentary sovereignty.⁵⁰ There was good reason for Parliament to exercise its authority to hold the referendum and for Government and Parliament to honour its outcome, quite apart from the fact that leaving the EU will help restore effective legislative freedom.

In the aftermath of the referendum, the Government announced its intention to implement the vote to leave by initiating the art.50 process. Its authority to do so by way of the royal prerogative to enter into or withdraw from treaties was challenged in the courts. The use of the prerogative to trigger art.50, and to begin the process of withdrawing from the EU Treaties, would, it was said, culminate in the destruction of statutory rights and hence would change the law by executive fiat, which is forbidden in our constitution.⁵¹

The Supreme Court ruled that departure from the EU Treaties was of such constitutional importance that it could not be implemented by way of the prerogative – primary legislation was required.⁵² The decision has been widely hailed as a vindication of parliamentary sovereignty,⁵³ preventing the executive from riding roughshod over statutory rights and requiring the Houses of Parliament to consent via legislation to the decision to trigger art.50. This analysis is misconceived. The Supreme Court rightly affirmed the doctrine of parliamentary sovereignty,⁵⁴ but its decision was not required or justified by that doctrine. The eventual expiry of EU legal rights, which art.50 sets in motion, is entirely consistent with the ECA, which gives domestic legal effect to treaty obligations in international law but does not commit the United Kingdom to membership of the EU.⁵⁵ And the 1972 Act does not abrogate the prerogative power to make or unmake treaties. Parliamentary sovereignty does not require that all major decisions are made by primary legislation.⁵⁶ It was entirely consistent with the lawmaking authority of Parliament for the Government to propose to trigger art.50 by way of the royal prerogative. Whether the Houses of Parliament, and especially the Commons, were willing to support the Government in this action is a different matter, but this was of course not for the Supreme Court to decide.

⁵⁰ Cf. V. Bogdanor, “Europe and the Sovereignty of the People” (2016) 87 *Political Quarterly* 348.

⁵¹ *Miller* [2017] 2 W.L.R. 583 at [36] (summarising the applicants’ case); see also *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2016] W.L.R. (D) 564 at [74].

⁵² *Miller* [2017] 2 W.L.R. 583 at [82]; see also [91]-[92] and [100].

⁵³ See for example: S. Fredman, “*Miller*: A Ringing Defence of Parliamentary Sovereignty” (OxHRH Blog, 24 January 2017) <<http://ohrh.law.ox.ac.uk/miller-a-vital-reaffirmation-of-parliamentary-sovereignty>> accessed 19 June 2017.

⁵⁴ *Miller* [2017] 2 W.L.R. 583 at [43] and [67]; see also *Miller* [2016] W.L.R. (D) 564 at [20]-[23].

⁵⁵ *Miller* [2017] 2 W.L.R. 583 at [193]-[195], [217], per Lord Reed; see also Ekins (2017) 133 L.Q.R. 347 and J. Finnis, *Brexit and the Balance of Our Constitution* (Policy Exchange, 2016).

⁵⁶ T. Endicott, *Parliament and the Prerogative: From the Case of Proclamations to Miller* (Policy Exchange, 2017); M. Gordon “The UK’s Sovereignty Situation: Brexit, Bewilderment and Beyond...” (2016) 27 *King’s Law Journal* 333 at 338.

In fact, the Government did enjoy the confidence of the Commons and indeed on the third day of the Supreme Court hearing the Commons expressed its support by resolution for the Government's plan to trigger art.50 no later than 31 March 2017. The Supreme Court's judgment wrongly required primary legislation in addition, effectively empowering members of the House of Lords to oppose or try to frustrate withdrawal. Parliament nonetheless promptly enacted the European Union (Notification of Withdrawal) Act 2017, which simply authorised the Prime Minister to trigger art.50 and begin the process of leaving the EU. It is a mistake, I say, to think that in *Miller* the Supreme Court saved parliamentary sovereignty from an overbearing Government and for a supine Parliament. The Court's affirmation of parliamentary sovereignty is welcome – the judgment seems a long way from the scepticism so evident in *Jackson* – but properly understood the Court's ruling is not justified by that doctrine and in fact departs from other settled propositions of constitutional law.

V. Incorporating Convention Rights

In *Jackson*, Lady Hale of Richmond says that “Parliament has also, for the time being at least, limited its own powers by the European Communities Act 1972 and, in a different way, by the Human Rights Act 1998.”⁵⁷ It is plausible but mistaken to think that Parliament has limited its own powers by enacting the ECA. But how has it limited itself by enacting the HRA? Lord Steyn contends that the ECHR, as incorporated by the HRA, “created a new legal order... in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction.” This is obscure. The ECHR imposes legal obligations on the United Kingdom, which inform Parliament's choice as to how to exercise its lawmaking authority. Parliament is of course free to legislate inconsistently with the ECHR or with rulings of the European Court of Human Rights (ECtHR). The ECHR, and its interpretation by the ECtHR, has effect in British law in accordance with the terms of the HRA, which like all statutes is always open to amendment or repeal. In one sense it is surprising that the HRA is thought capable of unsettling the continuing force of the doctrine of parliamentary sovereignty, for it is very often taken for granted that the point and consequence of the HRA was to give domestic effect to the ECHR without compromising the sovereignty of Parliament.⁵⁸ The promoters of the legislation stressed this aim, which is confirmed, inter alia, by s.3(2)'s provision that inconsistency with convention rights does not invalidate primary legislation and s.4(6)'s provision that declarations of inconsistency do not invalidate legislation.

Still, the judges in question have their reasons for thinking the HRA an awkward fit with the doctrine. The reason is not simply that the HRA makes it politically more difficult to legislate inconsistently with convention rights, although that must be somewhat true. The grounds for taking the HRA to undermine parliamentary sovereignty are more subtle. First, the structure of the Act requires judicial review of legislation, at least to the extent of judging its adequacy against another body of law. Second, the upshot of this review may be a declaration that is, some say, almost certain to force Parliament to change the legislation. Third, and most importantly, s.3 of the HRA licenses the courts to modify the meaning and effect of legislation, such that legislation enacted before and after the HRA is in a sense subject to judicial override by reference to convention rights.

⁵⁷ *Jackson* [2006] 1 A.C. 262 at [159].

⁵⁸ A. Tucker, “Parliamentary Sovereignty and the Ingenuity of the Human Rights Act” (2012) 3 *Jurisprudence* 307.

These grounds require some untangling. The fact that Parliament has authorised the courts to consider the compatibility of legislation with the ECHR is not itself antithetical to parliamentary sovereignty. It may or may not be wise but it does not curb the continuing legislative authority of Parliament. The same holds for the related judicial power to declare legislation incompatible, which may or may not prompt Parliament to change the legislation. There is, at least as yet, no convention that Parliament should conform to such a declaration.⁵⁹ If there were such a convention then this would constitute a very far-reaching, constitutional limit on the legislative authority of Parliament. It would not legally limit Parliament's capacity to change the law as it sees fit, a capacity that extends to reform or repeal of the HRA itself as well as to legislation that flouts the ECHR – or the ECtHR's interpretation of the ECHR, which is not quite the same.⁶⁰ There are good reasons to resist any such convention: it would be inconsistent with the structure and point of the HRA and would unduly limit the legislative freedom that is vital to parliamentary democracy.⁶¹ Quite different is the respect that Westminster shows for another elected legislature by refraining from interfering with matters devolved to the Scottish Parliament.⁶²

Section 3 warrants closer attention, however, for its judicial reception poses an arguable challenge to the doctrine of parliamentary sovereignty. The jurisprudence in question is characterised by some extremely surprising interpretations of primary legislation.⁶³ Further, the judicial rationale for this set of interpretations is very bold, providing that Parliament in 1998 directed and authorised the courts to depart from the intended meaning of the legislature that enacted the statute that now falls to be interpreted. This is to take s.3 to authorise the courts to depart from the intended meaning of the enacting legislature and to prefer some other meaning that is rights-consistent but which was, by hypothesis, not intended (chosen, adopted) by the enacting legislature. This is surprising, at least in relation to legislation enacted after the HRA (in relation to legislation that predates the HRA, s.3 constitutes an implied amendment of uncertain scope and effect).⁶⁴ Indeed, it looks to be a departure from a central implication of parliamentary sovereignty, which is that the intention of the enacting legislature is to be given effect in law.

The early case law, including the leading decision on point,⁶⁵ can be reduced to the proposition that while anything is possible under s.3, only some things are appropriate – such that s.3 authorises judges to amend legislation, but they should not do so if this would involve radical departure from the statutory scheme or would call for the court to engage in far-reaching deliberation of the kind a legislature might undertake.⁶⁶ This is a plausible reading

⁵⁹ Cf. A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), at pp.320-322; J. King, "Rights and the Rule of Law in Third Way Constitutionalism" (2014) 30 *Const. Comment.*, 101; J. King, "Parliament's Role following Declarations of Incompatibility under the Human Rights Act", Ch. 8 in M. Hunt, H. Hooper, and P. Yowell (eds.), *Parliaments and Human Rights* (Oxford: Hart Publishing, 2015).

⁶⁰ The ECtHR routinely misinterprets the ECHR: see further the essays by Lord Sumption, Lord Hoffmann, and John Finnis in N. Barber, R. Ekins and P. Yowell (eds.), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016).

⁶¹ Lord Judge, *The Safest Shield* (Oxford: Hart Publishing, 2015) at pp.89-93.

⁶² R. Ekins, "Human Rights and the Separation of Powers" (2015) *U.Q.L.J.* 217 at 234.

⁶³ See for instance *R v A (No. 2)* [2001] UKHL 25; [2002] 1 A.C. 45 and *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] 1 A.C. 440.

⁶⁴ P. Sales and R. Ekins, "Rights-consistent Interpretation and the Human Rights Act 1998" (2011) 127 *L.Q.R.* 217 at 231.

⁶⁵ *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557.

⁶⁶ Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009), at pp.88-90.

of the early case law but an unsound reading of s.3 itself, not least since it rejects the section's central proposition which is that (by implication) not everything is possible, but where a reading *is* possible it *must* be adopted. On this view, s.3 confers a power on the courts, whereas in truth the section is a direction to all concerning how statutes are to be approached.⁶⁷ If s.3 did empower the courts to amend primary legislation then it would be a prospective Henry VIII clause.⁶⁸ The courts would resile from this understanding were it put in such stark terms (witness the stress that Lord Nicholls of Birkenhead places in *Ghaidan* itself on the judicial action being required by the intention of the 1998 Parliament) and indeed they did in *Wilkinson*,⁶⁹ a case in which Lord Hoffmann gave the lead judgment, speaking for a unanimous court *including* Lord Nicholls. Lord Hoffmann set out a much more modest and sensible understanding of s.3, making clear that the focus remains on the meaning Parliament may reasonably be understood to have intended to convey.

In relation to pre-HRA legislation, s.3 is an amendment of uncertain scope and effect, whereas in relation to post-HRA legislation it serves as a strong default rule that indicates that Parliament likely intends to legislate consistently with the ECHR. Importantly, there is no reason to think that Parliament intends its statutes to take effect subject to the ECHR (or convention rights as judicially construed). There are no grounds for inferring any such intention because s.3 expressly negates such, in specifying that readings must be possible (and in mimicking the structure of s.6 of the New Zealand Bill of Rights Act 1990 in relevant part), in affirming that inconsistent legislation remains valid, and in making provision for cases in which the courts conclude that legislation is inconsistent, in which case a declaration may be issued. The central reason that drove the ECA, viz. the imperative of partially incorporating another legal system central to which was a doctrine of the supremacy of European law, is absent in relation to the ECHR. The point of the HRA was to minimise Strasbourg challenges whilst preserving Parliament's effective capacity to decide as it saw fit. The HRA was intended to bear on how Parliament forms its intentions and indeed thus does it function, but it was not intended to mark out a continuing rule, to be adopted by successive Parliaments, subjecting whatever particular choice Parliament had made in this or that Act to contrary European human rights law.

The case law is equivocal and the judicial understandings confused and inconsistent. Many cases involving s.3 have failed to interpret legislation correctly, instead adopting unreasonable readings which depart from the will of Parliament. Still, a host of judicial errors does not change the constitutional fundamental – accepted by almost all those judges – that the intention of Parliament is the object of statutory interpretation. And even if s.3 had been intended to be, or had been received as if, a Henry VIII clause, it would not limit the doctrine of parliamentary sovereignty. It would be unconstitutional,⁷⁰ but it would be an exercise of legislative freedom, open to any subsequent Parliament to correct.

VI. Making Provision for How Parliament Acts

⁶⁷ R. Ekins, "Abortion, Conscience and Interpretation" (2016) 132 L.Q.R. 6 at 7.

⁶⁸ K. Mason, "Legislator's Intent: How Judges Discern it and What They do if They Find it" in C. Stefanou and H. Xanthaki (eds) *Drafting Legislation: A Modern Approach* (Aldershot: Ashgate 2008), at p.55; Sales and Ekins, "Rights-consistent Interpretation and the Human Rights Act 1998" (2011) 127 L.Q.R. 217 at 232-233. On prospective Henry VIII clauses, see more generally N. Barber and A. Young, "The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty" [2003] P.L. 112.

⁶⁹ *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30; [2005] 1 W.L.R. 1718.

⁷⁰ Lord Judge, "Ceding Power to the Executive: The Resurrection of Henry VIII", April 12 2016, Dickson Poon School of Law, King's College London.

I have been tracing the dicta in *Jackson* that suggest parliamentary sovereignty has been increasingly qualified. But the case itself is also often thought to undermine the doctrine because, it is said, it involves judicial consideration of the validity of an Act of Parliament and judicial affirmation first of the manner and form theory, which seems to make legislative action open in principle to further legal limitation, and second of a justiciable, constitutional limit on legislative action, which concerns the term of Parliament. This line of argument mistakes the role of the court in *Jackson* and overstates or misconstrues what the court (as opposed to a minority of judges) affirmed therein.

Lord Hope places much stress in *Jackson* on the significance of the court hearing the challenge to an Act of Parliament.⁷¹ And others have commented likewise.⁷² It was significant that the court heard the challenge, I say, but not because this indicates that the validity of primary legislation is open to challenge in a court of law. Rather, there were good reasons why the court should have concluded that it did not have jurisdiction to hear the challenge, reasons which were not the subject of proper argument or decision: specifically, the 1911 Act itself excludes jurisdiction and the litigation touched too closely on Parliament's own internal proceedings and arrangements.⁷³ However, all this aside, it was not a radical constitutional move for the courts to consider whether what was before them was indeed an Act of Parliament. The courts, like every other legal subject, have always had to determine whether Parliament has acted. That no careful inquiry is usually required is a very good thing, but it does not mean that undertaking such tacitly introduces a judicial power to determine which acts of Parliament are to be considered Acts.

Their Lordships held that legislation enacted pursuant to the Parliament Acts 1911 and 1949 is primary rather than delegated legislation.⁷⁴ Some of the judges took the view that one should understand the Parliament Acts to have redefined Parliament to be in part the Queen and the Commons alone.⁷⁵ Some who took this view relied on, and thus in turn provided some support for, the so-called manner and form theory, which provides that Parliament may require a certain manner and form to be followed before successive legislatures may enact legislation.⁷⁶ The abolition of the House of Lords' power to veto legislation, as many of the judges framed the effect of the 1911 Act,⁷⁷ was thus understood to be an exercise of Parliament's power to change the law of legislation. In this case, Lady Hale suggested, Parliament had made it easier to legislate, but perhaps in later cases it might make it harder (by implication: imposing super-majority requirements or similar).⁷⁸ All such changes were consistent with the sovereignty of Parliament, Lady Hale reasoned, for that sovereignty simply meant that Parliament could change any law.⁷⁹ No mention here of the proviso, accepted for centuries (and by her colleagues), that Parliament may not bind its successors, which proviso is also accepted by the manner and form theorists, whose work Lady Hale tacitly adopts (those theorists take laws concerning the manner and form of future legislation to be different in kind to laws limiting successive legislatures as a matter of substance).

⁷¹ *Jackson* [2006] 1 A.C. 262 at [108].

⁷² J. Jowell, "Parliamentary Sovereignty under the New Constitutional Hypothesis" [2006] P.L. 562.

⁷³ R. Ekins, "Acts of Parliament and the Parliament Act" (2007) 123 L.Q.R. 91 at 111-114.

⁷⁴ See further M. Plaxton, "The Concept of Legislation: *Jackson v Attorney General*" (2006) 69 M.L.R. 249.

⁷⁵ *Jackson* [2006] 1 A.C. 262 at [75], per Lord Steyn and [159-160], per Lady Hale.

⁷⁶ P. Oliver, *The Constitution of Independence* (Oxford: Oxford University Press, 2006), at pp.80-92.

⁷⁷ *Jackson* [2006] 1 A.C. 262 at [133] and [135], per Lord Rodger.

⁷⁸ *Jackson* [2006] 1 A.C. 262 at [163]; see also [81], per Lord Steyn.

⁷⁹ *Jackson* [2006] 1 A.C. 262 at [159]-[160].

Properly understood, the Parliament Acts do not support the manner and form theory, nor do they involve any curb on the lawmaking authority of Parliament.⁸⁰ The 1911 Act made provision for King, Commons and Lords to legislate together – to exercise their joint authority to legislate – notwithstanding disagreement amongst the three about what is to be done. The provision in question is to make clear that when the procedure laid out in the Act is followed the Queen-in-Parliament has acted. That is, the Lords participate in the enactment of legislation enacted pursuant to the Parliament Acts: it is their joint act, with the Commons and King or Queen. The 1911 Act provides for a particular enacting formula to be used, which recites that the Parliament Acts have been followed. That formula, contra Wade and many others,⁸¹ does not entail that the legislation is enacted on the authority of the Acts themselves. Rather, the authority for legislating is Parliament’s inherent authority under our constitution to change the law by an act expressing an intention to this effect.⁸² (It is for this reason that legislation enacted by way of the Parliament Acts is primary not secondary.) The formula refers to the Parliament Acts to make clear that, when the Speaker certifies (authoritatively, per s.3 of the 1911 Act) that this is a public bill and that the procedure in question has been followed, the assent of Commons and of Queen suffices for the Queen-in-Parliament, which is Lords, Commons and Queen, to legislate. In other words, the formula is a direction to the subjects of the law that notwithstanding the absence of the assent of the Lords to this particular measure, the enactment is indeed an Act of the Queen-in-Parliament, which includes the Lords, and is to be received as such.

Section 2(1) of the 1911 Act provides that the procedure in question does not apply to a bill extending the term of Parliament beyond five years. Lord Hope asks:⁸³

“Is this to be regarded simply as a self-denying ordinance? Or is this another instance where Parliament has conceded the last word as to what it can do to the courts? And if it is the latter, how much further can the courts go in controlling the use of the procedure that section 2(1) has enacted? These are the questions that lie at the heart of this appeal.”

The court duly concluded that s.2(1) does not apply to a public bill extending the term of Parliament or to a bill amending s.2(1) to permit extension of the term.⁸⁴ Jowell thinks this is a judicial recognition of a constitutional limit on Parliament.⁸⁵ In a somewhat similar vein, Young argues that s.2(1) creates, and the courts give effect to, a limit on Parliament, a limit which is justified only if it forms part of a change in the rule of recognition on point – a change initiated by Parliament in 1911 perhaps and effective because later accepted by others including judges.⁸⁶ These arguments are, I suggest, confused. The limited scope of the procedure set out in the Parliament Acts is *not* a limit on the lawmaking authority of Parliament. It is Parliament’s own provision concerning how and when it – the group that is the Queen, Lords and Commons – is to act. Absent any procedure concerning how the group is to act, the group acts like any other when its members all agree. The significance of the

⁸⁰ Ekins, “Acts of Parliament and the Parliament Acts” (2007) 123 L.Q.R. 91 at 109.

⁸¹ H.W.R. Wade, *Constitutional Fundamentals* (London: Stevens & Sons Ltd, 1980), at pp.27-28; O. Hood Phillips, *Constitutional and Administrative Law* 7th edn, (London: Sweet & Maxwell, 1987 by P. Jackson), at pp.90-91; G. Zellick, “Is the Parliament Act Ultra Vires?” (1969) 119 N.L.J. 716 .

⁸² Ekins, “Acts of Parliament and the Parliament Acts” (2007) 123 L.Q.R. 91 at 94-100.

⁸³ *Jackson* [2006] 1 A.C. 262 at [108].

⁸⁴ Lord Bingham was alone in thinking s.2(1) would permit its own amendment on this point: *Jackson* [2006] 1 A.C. 262 at [32].

⁸⁵ Jowell “Parliamentary Sovereignty under the New Constitutional Hypothesis” [2006] P.L. 562 at 577.

⁸⁶ A. Young, “Hunting Sovereignty: *Jackson v Attorney General*” (2006) P.L. 187.

Parliament Acts is that it makes provision for action apart from agreement about the particular measure. Within the scope of the chosen procedure, the Queen-in-Parliament acts; outside its scope, any purported Act would be just an assertion of Queen and Commons. Hence, the limited scope of the procedure in no way limits the Queen-in-Parliament, which retains as it ever did the full capacity to act. The limit does not make it the case that the term of Parliament is entrenched against change, in the sense that Parliament must use the ordinary procedure rather than the Parliament Acts procedure to change it.⁸⁷ Parliament has not acted if the Commons and Queen attempt the latter.

Likewise, *Jackson* does not establish that the rule of law limits Parliament, by way of judicial determination of how it may act. Eleftheriadis argues that Parliament is subject to the disability that it cannot change the law without following the established procedure, which thus entails that Dicey's schema was overly simple, for judicial application of existing procedure cuts across his proposition that no person or body may question an Act of Parliament.⁸⁸ However, Parliament is subject to no disability simply because it only changes the law by manifesting the joint intention of Queen, Lords and Commons to act on some proposal to change the law. This is just what it is for Queen-in-Parliament to act.

Still, some leading scholars have long thought it obvious that Parliament is subject to law governing how it legislates.⁸⁹ The manner and form theory takes for granted that the laws in question are common law rules, amenable to statutory change. And throughout the common law world, in the former British Empire, legislatures have had authority to legislate concerning the manner and form by which they legislate, because the grant of power in question made such provision and because there was a contingent grant open to such amendment. Or in other words, the relevant legislatures were the creatures of statute, the terms of which were always open to change. Not so the Westminster Parliament, the legislative authority of which is fundamental to the constitution and, pace Lord Steyn's idiosyncratic legal history,⁹⁰ was not conferred by judicial grant.⁹¹

Consider whether the Houses of Parliament must meet separately to give their assent. Eleftheriadis and Latham each assert that that the law would not recognise as an Act of Parliament a measure that was adopted by the assent of the two Houses meeting as one chamber.⁹² The assertion is unsafe, for were the Lords and Commons to make such provision for joint session and then were to recite that each assents to the legislation in question, as does the Queen, then the Queen-in-Parliament would have acted. That the Houses each meet separately is ancient custom as is much concerning the way the Houses govern their proceedings with a view to determining when or if they assent. The way in which the members of the Houses, and the constituent elements of the Queen-in-Parliament, understand their joint action is decisive, and particular common law rules do not here bind, such that the assertion that one has amended said rules is not impressive. This is why the manner and form theory fails: it is always open to any later legislature to make clear, notwithstanding an earlier Parliament's attempt to amend the law of legislating, that it acts to make as law that which it

⁸⁷ See also P. Mirfield, "Can the House of Lords be Lawfully Abolished?" (1979) 95 L.Q.R. 36.

⁸⁸ P. Eleftheriadis, "Parliamentary Sovereignty and the Constitution" (2009) 22 Canadian Journal of Law and Jurisprudence 267 .

⁸⁹ S. de Smith and R. Brazier, *Constitutional and Administrative Law* 8th edn (London: Penguin, 1998 by R. Brazier), at pp.87-97; P. Oliver, *The Constitution of Independence* (Oxford: Oxford University Press, 2006), at pp.80-92.

⁹⁰ See further section VII below.

⁹¹ T. Bingham, *The Rule of Law* (London: Allen Lane, 2010), at p.196.

⁹² R.T.E. Latham, "What is an Act of Parliament?" (1939) King's Counsel 152 at 153.

chooses to make law. The assent of each House and of the Queen is the joint action of the Queen-in-Parliament, notwithstanding any legal rule that asserts that only some such acts shall be counted as Acts of Parliament, for what is or is not an Act is not settled by the application of some contingent definition but turns instead on whether the institution in whom authority is vested has acted. And the institution's continuing capacity for action does not turn on a set of legal rules.

VII. Unsettling the Constitution

In any particular enactment, Parliament changes the law by making clear that this is its intention. Parliament deliberates about how or if to change the law, including the law of the constitution, by reference to the existing law and constitution, which form the context in which it acts. This extends to action intended to reform or disrupt the existing constitutional order. The balance of this article confirms this analysis of how Parliament legislates. The changes that the Scotland Act, ECA, HRA and Parliament Acts each introduce fall to be understood by reasoning first about Parliament's intentions in enacting the relevant statute and second about how those Acts plausibly inform the intentions of successive Parliaments. This mode of legislative action and reaction makes it possible for one Parliament to inform the choices of its successors, by changing the constitution and the reasons for legislating, without imposing legal limits on what may be enacted or what must (not) be done. The effect of the ECA, for example, turns not on the judicial evaluation of constitutional principle,⁹³ but on what it is that Parliament sought to do in 1972 and, especially, on what Parliaments since that time have sought to do in light of what was done then. It is in this sense that the Acts of Parliament considered in this article are constitutional statutes, viz. they form part of the constitution, which forms part of the context in which successive Parliaments act.

This analysis undermines the assertion that the constitutional changes realised by the Scotland Act, ECA, HRA and Parliament Acts establish that "Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled".⁹⁴ These statutes do not confirm either that "[t]he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based" or "that the courts have a part to play in defining the limits of Parliament's legislative sovereignty."⁹⁵ On the contrary, the statutes in question are consistent with the central rule of the United Kingdom's constitutional settlement – that it is for each Parliament to choose freely how or if to change the law. The principle of the rule of law does not impeach this rule, for it neither authorises judges to overhaul fundamental constitutional law, nor requires judicial oversight of Parliament itself.⁹⁶ Rather, it requires judges, like others, to uphold settled constitutional law, including that law which recognises the legally unlimited lawmaking authority of Parliament.

Lord Hope and Lord Steyn in *Jackson* aim to undo this constitutional settlement by asserting an open-ended judicial power to invalidate statutes that judges think are unjust. The uncertainty and arbitrariness that this power would introduce are anathema to the rule of law. And departing from settled constitutional law in this way itself flouts the rule of law. The

⁹³ Cf. T.R.S. Allan, *The Sovereignty of Law* (Oxford: Oxford University Press, 2013).

⁹⁴ *Jackson* [2006] 1 A.C. 262 at [104].

⁹⁵ *Jackson* [2006] 1 A.C. 262 at [107].

⁹⁶ See further R. Ekins, "Judicial Supremacy and the Rule of Law" (2003) 119 L.Q.R. 127.

argument that judges are free to qualify parliamentary sovereignty turns on the premise that it is a common law rule, which judges may recast. Lord Steyn asserts this baldly:⁹⁷

“Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.”

Lord Hope’s position is very similar:⁹⁸

“The principle of parliamentary sovereignty which in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve.”

In a paper published shortly after his retirement from the Supreme Court, Lord Hope elaborates his remarks in *Jackson*, arguing that the doctrine must be a common law rule, because it is not a statutory rule (there is no statute), and maintaining that as the constitution is unwritten there is no clear settlement concerning Parliament’s authority.⁹⁹ Judicial inaction or restraint, he says, has given rise to an appearance of unlimited legislative authority, which is hence not an authoritative resolution. For, the constitutional settlements of the late 17th and early 18th century were victories of Parliament over the Crown not over the judges, he continues, such that the question of judicial review of legislation remains open. Jowell likewise argues that the absence of any formal grant of power entails that the scope of Parliament’s authority evolves over time.¹⁰⁰

This is bad history and bad jurisprudence. The judges did not create the doctrine, as Lord Hope later concedes, in agreement with Lord Bingham.¹⁰¹ With other officials and citizens, they recognise Parliament’s lawmaking authority, affirming it in strong terms. The doctrine does not have to be a common law rule as their Lordships assert. It is part of the rule of recognition, part of the fundamental social rule that grounds the legal system, which officials and citizens jointly accept.¹⁰² Lord Hope sometimes adopts this Hartian analysis, although his use of it in explaining the Parliament Acts is unsound;¹⁰³ at other times he half abandons it, asserting that judges are legally free to depart from valid law. Allan objects, reasonably enough, to Lord Hope rather attempting to have it both ways.¹⁰⁴ The idea of the rule of recognition powerfully explains the place of parliamentary sovereignty in legal practice.¹⁰⁵ This is consistent with the thesis that grossly unjust legislation, properly enacted by

⁹⁷ *Jackson* [2006] 1 A.C. 262 at [102].

⁹⁸ *Jackson* [2006] 1 A.C. 262 at [126]; compare Lord Carswell at [168], who says (equivocally) that it is judge-made, but disavows any intention (or by implication any authority) to unsettle it.

⁹⁹ Lord Hope, “Is the Rule of Law now the Sovereign Principle?” in Rawlings, Leyland and Young (eds.), *Sovereignty and the Law* (2013), at pp.89-94.

¹⁰⁰ J. Jowell, “Parliamentary Sovereignty under the New Constitutional Hypothesis” [2006] P.L. 562 at 564-566.

¹⁰¹ Lord Hope, “Is the Rule of Law now the Sovereign Principle?” in Rawlings, Leyland and Young (eds.), *Sovereignty and the Law* (2013), at p.96.

¹⁰² Hart maintained that only official acceptance was strictly necessary: see H.L.A. Hart, *The Concept of Law* 2nd edn (Oxford: Clarendon Press, 1994), at pp.116-117. Maybe, but in any well-formed legal system it will be accepted jointly by citizens *and* officials: R. Ekins, “Facts, Reasons and Joint Action: Thoughts on the Social Ontology of Law” (2014) 45 *Rechtstheorie* 313 at 324-325 and 332-334.

¹⁰³ Ekins, “Acts of Parliament and the Parliament Acts” (2007) 123 L.Q.R. 91 at 110-111.

¹⁰⁴ Allan, *The Sovereignty of Law* (2013), at pp.144-145, referring to Lord Hope’s position in *Jackson*.

¹⁰⁵ Goldsworthy, *The Sovereignty of Parliament* (1999), Ch. 10; Ekins, “Judicial Supremacy and the Rule of Law” (2003) 119 L.Q.R. 127 at 135-139.

Parliament and hence intra-systemically valid, may fail to bind in conscience.¹⁰⁶ This sound thesis about moral obligation does not entail that citizens or officials should disobey the law, for much depends on the consequences of disobedience. Importantly, this is not a thesis about legal reasoning. Rather, like the slogan “an unjust law is no law at all” it presupposes a prior account of legal validity. Thus, the truths that any exercise of legislative authority may fail to secure the common good and that rebellion is sometimes justified do not entail that courts have a corresponding legal authority to invalidate such acts.

Lord Hope’s main argument that the judiciary *should* assert a power to invalidate unjust and oppressive legislation is that the executive is increasingly powerful, such that, per the practice in jurisdictions like Germany and the United States, we need our judges to stand between us and the executive, and its tame parliamentary majority.¹⁰⁷ Lord Steyn’s argument is similar, with his speech in *Jackson* beginning with an extraordinary jeremiad about executive dominance.¹⁰⁸ Their Lordships thus take it to be obvious that a good constitution is one that authorises courts to strike down statutes, and that principles of political morality, like the rule of law, authorise British courts to follow suit.

This is a very thin foundation on which to upend the constitution. The merits of Westminster parliamentary democracy are open to dispute, of course, but Lord Hope and Lord Steyn’s critique is meagre at best. The dynamics of parliamentary practice confound their assertions about executive domination: in truth, the executive is not all-powerful and cannot simply dictate terms to the Houses of Parliament, as the scale of changes regularly made to bills throughout the legislative process rather confirms.¹⁰⁹ Legislative assemblies are much better placed than courts to decide what should be done, to choose freely what justice and the common good require – and the ongoing process of legislative deliberation and choice makes self-government possible. Save perhaps when limited to applying the clear terms of a constitutional text, open to amendment, judicial review of legislation violates democratic principle.¹¹⁰ Lord Hope and Lord Steyn provide no reason to think that in a political community like Britain unelected judges should be free to overturn Acts of Parliament.

But quite apart from the merits of their political analysis, the *legal* mistake here is to take our constitutional law to be settled by the judicial assessment of the weight of principle. The German and American constitutions have adopted particular separations of power; the United Kingdom constitution has adopted another. The latter arrangement, which makes no provision for judges to strike down statutes they think unjust, *is* a constitutional settlement. The settlement is the upshot of a civil war that concerned the respective role of the Crown (including the Crown’s loyal servants, the judges) and the Houses of Parliament, a settlement that was continuous with the ancient law of the constitution, which provided that the King-in-Parliament may make or unmake any law whatsoever save that each successive King-in-Parliament is likewise empowered, with the Crown subjugated to the Houses by convention. The courts, amongst others, have repeatedly affirmed that settlement, disavowing any authority to limit that which Parliament enacts. In asserting that it is now open to the courts

¹⁰⁶ J. Finnis, *Natural Law and Natural Rights* 2nd edn (Oxford: Oxford University Press, 2011) at pp.357-362.

¹⁰⁷ Lord Hope, “Is the Rule of Law now the Sovereign Principle?” in Rawlings, Leyland and Young (eds.), *Sovereignty and the Law* (2013), at pp.96-97.

¹⁰⁸ *Jackson* [2006] 1 A.C. 262 at [71-72].

¹⁰⁹ M. Russell, D. Gover, and K. Wolter, “Does the Executive Dominate the Westminster Legislative Process?: Six Reasons for Doubt” (2016) 69 *Parliamentary Affairs* 286; S. Kalitowski, “Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation” (2008) 61 *Parliamentary Affairs* 694.

¹¹⁰ R. Ekins, “How to be a Free People” (2013) 58 *Am. J. Juris.* 163 at 173-176.

to modify the scope of Parliament's authority, Jowell and Lord Hope ignore the clarity and comprehensiveness of the official practice that is the joint acceptance by officials and citizens of the doctrine of parliamentary sovereignty.

The assumption that judges are free to abandon the central rule of the Westminster constitution may owe something to the mischief of Wade's influential formulation of the rule and its ground.¹¹¹ Wade termed the doctrine a political fact in the keeping of the courts. The formulation is insufficiently curious about the nature of our constitutional order. The doctrine is law as well as fact.¹¹² And while the disposition of very many persons (officials and citizens), now and over time, to maintain a certain rule is a fact, the importance of not arbitrarily and unjustly disrupting a people's continuous, chosen mode of self-government is a reason to maintain this mode, *even* on the part of those who would rather a different mode were chosen.¹¹³ It is good that the community should be ruled by authority. And the location of authority should, when possible, be settled by authority.¹¹⁴ For at least seven centuries England (and thence the United Kingdom) has been subject to the rule of the King-in-Parliament.¹¹⁵ The warring parties in the English civil wars disputed the relevant constitutional (but not always legal) authority of King and (Houses of) Parliament. That dispute was comprehensively resolved by way of constitutional settlement that provides, again, continuous with the preceding centuries, that the King-in-Parliament is competent to make or unmake any law, save that it may not bind its successors, which fundamental law of the constitution (not judge-made) is tempered by constitutional convention that makes the Houses, and now especially the Commons, the decisive agent within the single institution in which our law vests immense authority.

Lord Hope and Lord Steyn's dicta in *Jackson* have attracted much interest. In *AXA*, Lord Hope recalls them and says again "that the rule of law enforced by the courts is the controlling factor on which our constitution is based."¹¹⁶ In *Moohan*, Lord Hodge, with whom Lady Hale and Lord Neuberger, Lord Clarke and Lord Reed agree, cites Lord Hope's remarks in *AXA*, and notes that the existence and extent of a judicial power to quash abusive primary legislation (say curtailing the franchise) is a matter of debate.¹¹⁷ This is a cause for concern. However, other senior judges have affirmed the doctrine of parliamentary sovereignty in strong terms.¹¹⁸ Legislators have done likewise,¹¹⁹ and the decision to leave

¹¹¹ H.W.R. Wade, "The Basis of Legal Sovereignty" (1955) C.L.J. 172

¹¹² H.L.A. Hart, *The Concept of Law* 2nd edn (Oxford: Oxford University Press, 1994), 111-112; Mirfield, "Can the House of Lords be Lawfully Abolished?" (1979) 95 L.Q.R. 36 at 42-44.

¹¹³ On the double-life of law, as fact and reason, see J. Finnis, "On Hart's Ways: Law as Reason and as Fact" in M. Kramer et al (eds.), *The Legacy of H. L. A. Hart* (Oxford: Oxford University Press, 2008), at p.3.

¹¹⁴ Finnis, *Natural Law and Natural Rights* (2011), at pp.249-250; Ekins, "Constitutional Principle in the Laws of the Commonwealth" in George and Keown (eds.), *Reason, Morality and Law: The Jurisprudence of John Finnis* (2013) at p.411.

¹¹⁵ Goldsworthy, *The Sovereignty of Parliament* (1999), at pp.229-235.

¹¹⁶ *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; [2012] 1 A.C. 868 at [50]-[51].

¹¹⁷ *Moohan v The Lord Advocate* [2014] UKSC 67; [2015] A.C. 901 at [36]

¹¹⁸ Lord Neuberger, "Who are the Masters Now?", Second Lord Alexander of Weedon lecture, 6 April 2011; Bingham, *The Rule of Law* (2010), at p.167; *Evans v Attorney General* [2015] UKSC 21; [2015] A.C. 1787 at [168], per Lord Wilson; *Miller* [2017] 2 W.L.R. 583 at [43] and [67]; *Miller* [2016] W.L.R. (D) 564 at [20]-[23].

¹¹⁹ Dominic Grieve Q.C. M.P. (then Attorney-General), "Parliament and the Judiciary" speech to BPP Law School, 25 October 2012; see also D. Oliver, "Parliament and the Courts: a pragmatic defence of Parliamentary Sovereignty", Ch. 12 in D. Oliver, G. Drewry and A. Horne (eds.), *The Law of Parliament* (Oxford, Hart Publishing, 2013), considering the likely political dynamics of confrontation between courts and the political authorities.

the EU provides indirect support also. However, one might wonder if the point is now moot. If senior judges are willing to openly question parliamentary sovereignty, and suggest that the courts may invalidate legislation, has not the consensus that is the rule of recognition fractured?¹²⁰ No. The judicial remarks in question are significant, but not (yet) self-fulfilling. The judges in question, when writing judicially, remain speculative in their conclusions. It is telling that Lord Steyn was boldest in his final judgment. Further, both their Lordships appealed to – and thus in part confirmed – the historical and prevailing consensus in the course of arguing that the time had come to depart from it. One searches their speeches in vain for a cogent *legal* argument for this departure. And this is because the proposal is to unlawfully expand judicial power by overturning settled, fundamental constitutional law.

VIII. Conclusion

In enacting the Scotland Act, Parliament established new devolved institutions. It has undertaken not normally to legislate in relation to matters devolved to Scotland without consent and not to abolish the devolutionary scheme without consent. These undertakings are reasonable constitutional limits on Parliament's legally unlimited lawmaking authority, which bear on how it is likely to act in the future. In enacting the ECA, Parliament made provision to incorporate European law and to provide a default rule in the event of inconsistency between European law and statute. The default rule has been taken up by successive legislatures, who have intended their statutes to be read in line with this rule and hence to take effect subject to European law. The ECA has not qualified the unlimited lawmaking authority of Parliament but membership of the EU has subjected Parliament to far-reaching practical limits on how it may exercise that authority, limits that leaving the EU will largely undo, thus restoring effective legislative freedom. The HRA incorporates the ECHR in a different way, providing for judicial evaluation of statutes by reference to convention rights and requiring interpretation that is consistent with them when possible. This interpretive direction has been misinterpreted but the misinterpretation, while unfortunate, is not a qualification on Parliament's legally unlimited authority, although the Act as a whole does tend to weaken parliamentary democracy. The Parliament Acts make provision for how the Queen-in-Parliament may act, but do not impose limits on what may be enacted and do not reduce legislative action to amendable common law rules. Their judicial treatment in *Jackson*, while sometimes confused, was basically sound.

The Acts considered in this article are consistent with the continuing force of the proposition that the Queen-in-Parliament may make or unmake any law save that it may not bind its successors. The Westminster Parliament has yet to bind its successors and the Acts considered here do not disclose any intention to bind. Rather, they work by bearing on the intentions of later Parliaments, changing the reasons they have to act and informing the intentions they are likely to have formed, which interpreters have good reason to infer have been formed and promulgated. Thus, these enactments do not confound, but rather confirm, the proposition that Parliament remains free to legislate as and when it sees fit by making clear an intention to this effect, which intentions are not the product of legal rules. The doctrine of parliamentary sovereignty captures and articulates this proposition, providing that each enacting Parliament remains free to choose how or if to change the law. Lord Hope and

¹²⁰ A. Tucker, "Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty" (2011) 31 O.J.L.S. 61

Lord Steyn are wrong to assert that parliamentary sovereignty is a doctrine in retreat and to presuppose that it is open to judges to abandon it. The doctrine is a legal rule that has been affirmed as fundamental throughout most of English and British legal history. It is no mere judge-made rule, but rather is a fundamental practice of the people of the United Kingdom, the central proposition in the British constitutional settlement, which makes robust parliamentary democracy possible. Any judicial abandonment of that doctrine would be a lawless, unconstitutional act that should not lightly be accepted.