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PARLIAMENTARY SOVEREIGNTY AND THE LOCUS OF CONSTITUENT POWER IN THE UNITED KINGDOM

INTRODUCTION

The majority Supreme Court judgment in *Miller v Secretary of State for Exiting the European Union* quotes with approval AV Dicey's famous assertion that the United Kingdom (UK) is 'the most flexible polity in existence.'[1] In finding that an Act of Parliament was required to trigger Article 50 of the Treaty on European Union and commence withdrawal from the European Union (EU), *Miller* could be read as another example of the UK Constitution's ability to adapt to new challenges.[2] This article takes issue with this reading of the UK Constitution, arguing instead that parliamentary sovereignty's assimilation of constituent power—the ultimate power in a legal order to create and posit a constitution— has stultified the development of UK constitutional law. The result is a deeply ideological, as distinct from oft-heralded pragmatic, constitutional structure incapable of confronting systemic challenges. Consequently, this article contends that by conceptualising a more antagonistic relation between the Crown-in-Parliament and 'the people' through acknowledging the anti-democratic basis of the former's possession of constituent power, the UK constitutional order can be re-invigorated, parliamentary hubris tempered, and many of the constitutional challenges addressed. This re-appraisal also requires interrogation of the notion of 'the people' in the UK constitutional order itself.

Part I of this paper analyses the extant constitutional 'torpor' in the UK, arguing that despite what appear to be substantial constitutional reforms in recent decades, the persistent preservation of parliamentary sovereignty is inhibiting deeper constitutional restructuring. The result is a constitutional law in 'crisis' and, it is contended, in need of a paradigmatic revolution. Part II then introduces the concept of constituent power and questions the assumption made by much of the literature that constituent power is exclusively vested in the people. A descriptive as distinct from normative account of constituent power is instead advanced in order to provide a more critical lens through which constitutional orders can be assessed. This, in turn, paves the way for a distinction to be drawn between the possessor of constituent power in a constitutional order and the people. Part III then analyses constituent power in the context of the UK, arguing that the idea of parliamentary sovereignty shares many features with constituent power. However, this does not mean that constituent power is vested in the British people; rather, the locus of constituent power in the UK should be more forcefully critiqued from a democratic perspective and its monarchical or aristocratic/oligarchical bases exposed. By acknowledging this distinction between the people and the locus of constituent power in the UK, Part IV argues that the sacrosanctity of parliamentary sovereignty can be broached and more

[1] [2017] UKSC 5 [40] quoting AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed 1915) 87.

[2] Alison Young thus suggests that 'history may merely regard it [Brexit] as a blip in the ever-evolving nature of the UK's famously flexible uncodified constitution. See Alison Young, 'Will Brexit change the UK Constitution?' *Hansard Society* (7 August 2018) https://www.hansardsociety.org.uk/blog/will-brexit-change-the-uk-constitution accessed 23 August 2018.

effective constitutional reform can follow by embracing this tension between parliament and the people. These reforms may entail limiting the sovereignty of the Westminster Parliament in favour of empowering the devolved institutions or recognising the emergence of 'the people' or 'peoples' as constitutional authorities. Rather than inhibiting constitutional flexibility, such changes can provide the necessary points of contestation in a constitutional order, acting as fulcra around which democratic change can be levered.

1. THE UK'S CONSTITUTIONAL TORPOR

Amidst the throes of great instability would not ostensibly be the best time to claim that the UK is in a state of constitutional torpor. This claim makes sense, however, if constitutional tumult is symptomatic of this accidie. Neil Walker, writing in 2014 referred to the contemporary constitutional phase of the UK as 'our constitutional unsettlement.'[3] Walker was primarily focused on the impact of devolution, with the impending 2014 referendum on Scottish independence featuring prominently. Walker attributes much of this unsettlement to the constitutional reforms enacted by the New Labour government which came to power in 1997 and ushered in the era of devolution.[4] The Human Rights Act 1998 (HRA) and the concurrent growth in judicial power, and the continuing expanding influence of the EU on the constitutional landscape also combined to 'make the constitution more multipolar in its sources of authority and less institutionally concentrated.'[5] Analyses of these various changes during this period were often framed as the UK transitioning from a political to a legal constitution,[6] leading to a renewed focus on this apparent growth of judicial power.[7] None of these reforms — either individually or combined — have, however, mounted an insurmountable challenge to the doctrine of parliamentary sovereignty in mainstream constitutional theory. This is not to say that parliamentary sovereignty has not been tested or even modified to a degree; rather, it is the case that the challenges to date have not fully dislodged this principle. Indeed, these changes have resulted in more nuanced theories of parliamentary sovereignty accompanied by deeper normative defences of the principle and the UK constitution as a whole.[8] This may, of course, be interpreted as corroborating the robustness and flexibility of parliamentary sovereignty and the UK constitution; however, the opposite case shall be made here.

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[3] Neil Walker, 'Our Constitutional Unsettlement' [2014] *Public Law* 529.

[4] ibid 535

[5] ibid 536.

[6] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853,853.

[7] See, for example, The Judicial Power Project whose stated aims are 'to understand and correct the undue rise in judicial power by restating, for modern times and in relation to modern problems, the nature and limits of the judicial power within our tradition and the related scope of sound legislative and executive authority.' 'About the Judicial Power Project' *The Judicial Power Project* < http://judicialpowerproject.org.uk/about/ > accessed 14 August 2018.

[8] See, for example, Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); Graham Gee and Grégoire CN Webber, 'What is a political constitution?' (2010) 30(2) Oxford Journal of Legal Studies 273.

Parliamentary sovereignty: The Inviolable Constitutional Norm

The simple claim that Parliament may legislate as it sees fit belies a number of complexities. To say that Parliament may make or unmake any law it wishes necessarily implies that one parliament cannot bind a future parliament.[9] This raises the paradox of a constraint on Parliament's law-making ability in order to ensure its 'continuing sovereignty'. This 'positive' dimension of Parliament's omnipotence also requires what Dicey terms a negative dimension: that no institution is capable of declaring an Act of Parliament unconstitutional.[10] The principle of parliamentary sovereignty thus stands as the apex norm of the British constitutional order and shapes the functions, not only of Parliament, but of all other constitutional institutions also.

It is this relation between Parliament and the other branches of government that the principle of parliamentary sovereignty is primarily oriented towards. This has been the case since the establishment of the primacy of Parliament when sovereignty was wrested from the Crown in the muddled aftermath of the English Civil War, thus amounting to a claim of authority over the monarch. While the Monarch is still recognised in the statement that 'whatever the Queen-in-Parliament enacts as a statute is law,' the Bill of Rights 1689 and the Act of Settlement 1701 make it clear that the superior constitutional authority is located in Westminster Palace rather than Buckingham Palace.[11] Prerogative powers—residual powers of the Crown with no basis in statute— have also been tamed with legislation firmly established as a superior source of law.[12] Dicey's formulation of parliamentary sovereignty, however, was primarily concerned, not with the relation between Parliament and the Crown but between Parliament and the courts.[13] Parliamentary sovereignty thus injuncts the courts against finding a parliamentary statute invalid on the basis that Parliament acted ultra vires its constitutional mandate.[14]

Whether Dicey's formulation of parliamentary sovereignty has survived since the early Twentieth Century is a matter of considerable debate. The aforementioned challenges to parliamentary sovereignty in the form of UK membership of the EU, devolution, and the perceived trend towards legal constitutionalism have resulted in the need to re-appraise parliamentary sovereignty. That stated, the challenge to Dicey's formulation can be traced back further than this to the fraught question of Irish home rule and Dicey's own vehement opposition to it.[15] The blocking of home rule legislation by the House of Lords resulted in a showdown between the upper

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[9] Dicey (n 1) 3-4.

[10] ibid

[11] Roger Masterman and Colin Murray, *Exploring Constitutional and Administrative Law* (Pearson, 2013) 116-117; Adam Tomkins, *Public Law* (Oxford: Clarendon Press 2003) 44.

[12] Bill of Rights 1689.

[13] This institutionally-oriented aspect of parliamentary sovereignty is illustrated by TRS Allan's claim that, 'Parliament is sovereign because the judges acknowledge its legal and political supremacy'. TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 10.

[14] Dicey (n 9).

[15] See AV Dicey, *England's Case Against Home Rule* (Richmond Publishing 1973).

house and the Commons in a situation where the Irish Nationalists held the balance of power. The result was an alteration in how Parliament could enact legislation through the diminution of the power of the House of Lords,—a change that was ultimately upheld in *Jackson v Attorney General* over 90 years later.[16] This clearly affected future parliaments' law-making power; consequently, it has been suggested that parliamentary sovereignty is now 'self-embracing'— that Parliament possesses the power to change the law affecting itself, including the scope of its law-making power. The theory of parliamentary sovereignty has thus adapted to recognise the fact that one Parliament can limit or alter the processes through which Parliament exercises its unlimited law-making power; however, it cannot place limits on the substantive content of such laws.[17]

The viability of this distinction between formal and substantial limitations on Parliament's law-making power has, however, been criticised, most notably by Nicholas Barber who argues that if Parliament can limit itself formally, it could amend these formal rules to such an extent that it could, in essence, make it impossible to enact certain substantive changes; for example, requiring 'unanimous support of the population in a referendum—a more complicated way of achieving the exact same end.'[18] Barber thus contends that parliamentary sovereignty 'ceased to be a feature of the United Kingdom's constitution in 1991' when the House of Lords in *Factortame No.2* set aside the Merchant Shipping Act 1988 for conflicting with the European Communities Act 1972 (ECA).[19] Barber's analysis echoes William Wade's contention that *Factortame* constituted a 'constitutional revolution' as the 1972 Parliament had succeeded in binding the 1988 Parliament— something previously thought impossible.[20] Despite Lord Bridge basing his judgment on parliamentary intention by contending that Parliament's acknowledgment of the supremacy of European law was 'entirely voluntary', *Factortame,* nevertheless is an example of a past Parliament binding a future parliament. Barber's and Wade's analysis of *Factortame* thus poses a profound challenge to Parliament's continuing sovereignty and parliamentary sovereignty itself; however, the predominant position in the literature, and the responses provoked by Wade and Walker appears to be modification of the theory of parliamentary sovereignty away from Dicey's conception, rather than revolution of the paradigm completely.[21] The UK's decision to leave the EU (Brexit), has to an extent, further corroborated the predominant position by demonstrating Parliament's authority to repeal the ECA and show that Parliament's continuing sovereignty has not yet been curtailed, notwithstanding the possibility that this could occur.

Devolution, parliamentary sovereignty and the People

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[16] Parliament Act 1911 and subsequently, the Parliament Act 1949.
[17] See *Jackson v Attorney General* [2005] UKHL 56; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing, 2015) Ch2.
[18] Ibid 148.
[19] NW Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9(1) *International Journal of Constitutional Law* 144, 144.
[20] HWR Wade, 'Sovereignty— Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568, 568.
[21] See text from n 148 to n 157 below.

The ill-fated Irish home rule acts, the subsequent Irish War of Independence, and partitioning of Ireland and establishment of a Northern Ireland Parliament illustrates that devolution should not be conceptualised as a wholly recent innovation.[22] Nevertheless, the period of devolution ushered in at the end of the Twentieth Century presented its own challenges to parliamentary sovereignty. While Parliament could always point to its superior democratic credentials vis-à-vis the Crown or the courts, the same could not be said with regards to the devolved institutions, all of which have a direct democratic mandate from the people in their respective parts of the UK. The devolution statutes themselves also have enhanced democratic credentials beyond Parliament, with each devolved region ratifying the move to devolution through a referendum.[23] In particular, the establishment of the Northern Ireland Assembly was not simply endorsed by the people of Northern Ireland in a referendum but also, concurrently, by a referendum and constitutional amendment in the Republic of Ireland.[24] Devolution therefore is an attempt to recognise the heterogeneous or plurinational dimension to the UK polity while simultaneously preserving the unitary nature of the UK constitutional order and British demos demanded by parliamentary sovereignty.[25] This tentative balancing act is particularly pronounced in the context of Northern Ireland wherethe question of whether there is or ever was a unitary British demos to begin with is inherently problematic to say the least.[26]

Despite recognising a heterogeneous demos, the unitary, as distinct from federal, status of the UK still endures with devolution maintaining parliamentary sovereignty through what has been termed a 'triple lock'.[27] Firstly, devolved institutions are empowered to amend or repeal primary legislation but only within the jurisdiction in question and only within the ambit of the powers conferred upon them. Courts are therefore empowered to invalidate legislation passed by the devolved institutions should the act ultra vires.[28] Secondly, the devolution statutes are highly technical in their wording, shorn of lofty constitutional rhetoric, empowering more regionally based decision-making without undermining the unitary basis of the UK.[29] Only with regards to Northern Ireland is the prospect of future independence from the UK countenanced; however, this was the case since the Anglo-Irish Agreement of 1985.[30] Thirdly, the devolved powers can be traced back to the respective devolution statutes and so can be conceptualised as an expression of, rather than antagonistic to,

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[22] Government of Ireland Act 1920.

[23] Referendums (Scotland and Wales) Act 1997; Northern Ireland Office, 'The Belfast Agreement' (10 April 1998) 25 < https://www.gov.uk/government/publications/the-belfast-agreement> accessed 7 September 2018.

[24] The Nineteenth Amendment of the Constitution Act 1998.

[25] See Stephen Tierney, 'Giving with one hand: Scottish devolution within a unitary state' (2007) 5(4) *International Journal of Constitutional Law* 730.

[26] To reflect this, the Good Friday Agreement allows citizens of Northern Ireland to choose their citizenship. They may be Irish, or British or both. 'The Belfast Agreement' (n 23) 4 [vi]; Sylvia de Mars, Colin Murray, Aoife O' Donoghue and Ben Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press, 2018) Ch 4.

[27] Rodney Brazier, 'The Constitution of a United Kingdom' (1999) 58(1) *Cambridge Law Journal* 96, 102.

[28] s29 Scotland Act 1998.

[29] Brazier (n27) 103; Masterman and Murray (n 11) 368.

[30] Brazier ibid 100.

parliamentary sovereignty.[31] Westminster's right to legislate in the area of devolved competences is also preserved with devolution striving to avoid a strict separation of competences between central and devolved institutions.[32] Faith is instead placed in constitutional conventions or what Aileen McHarg has described as soft law in order to regulate this relation between Westminster and the devolved institutions.[33] The so-called Sewel convention thus provides that Westminster will not ordinarily legislate in an area of devolved competence without the prior permission of the devolved institutions.[34] This reliance on soft law has resulted in Mark Elliott distinguishing between legal and constitutional restrictions on parliamentary sovereignty, arguing that while devolution has not limited parliamentary sovereignty from a legal perspective, it has clearly had an impact constitutionally and has managed to 'conjure into life a constitutional principle—devolved autonomy— whose fundamentality is increasingly difficult to dispute'.[35] Elliott's analysis thus implicitly endorses the view of the UK constitution as a flexible, pragmatic entity capable of creating new principles and conventions that respond to the demands of the age without the need to resort to legal codifications and the limiting of parliamentary sovereignty.

Brexit, however, has demonstrated the fragility of this 'fundamental' constitutional principle of devolved autonomy. In *Miller*, on the question of whether the approval of the devolved institutions was required before Article 50 could be triggered, the majority judgment delivered a master-class in judicial restraint and constitutional conservativism. Although the Sewel convention was placed on a statutory basis in 2016 following the unsuccessful Scottish independence referendum,[36] the Supreme Court rejected the notion that it legally constrained the sovereignty of Westminster, upholding the orthodox position that courts could recognise the existence of a convention but could not enforce it.[37] This re-affirmation of constitutional orthodoxy, however, rather than settling the question has only resulted in further agitation from the devolved institutions, most notably in Scotland and has only served to illustrate the challenges posed to parliamentary sovereignty by devolution.[38]

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[31] Ibid 102-103.
[32] S 28(7) Scotland Act 1998.
[33] See Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) Modern Law Review 853.
[34]The Sewell Convention is named after Lord Sewel who first proposed the convention during a parliamentary debate on s28(7) of the Scotland Act 1998. HL Debs vol. 592, col 791 (21 July 1998).
[35] Mark Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in Jeffrey Jowell, Dawn Oliver, and Colm Ó Cinnéide, *The Changing Constitution* (8th ed OUP, 2015) 38, 42-3.
[36] S2 Scotland Act 2016.
[37] *Miller* (n 1) [149]-[151].
[38] Perhaps the most striking example of this at the time of writing was the walkout on 14 June 2018 by SNP MPs during the debate on the EU Withdrawal Act 2018. See Ann Perkins, 'SNP Promises more guerrilla tactics over Brexit powers' *The Guardian* (14 June 2018) < https://www.theguardian.com/politics/2018/jun/14/snp-promises-more-guerrilla-tactics-over-brexit-powers> accessed 7 September 2018; 'Nicola Sturgeon says she is proud of SNP MPs' Commons walkout' *BBC News* (13 June 2018) < https://www.bbc.co.uk/news/uk-scotland-44474429> accessed 7 September 2018.

All judges in *Miller* also reaffirmed orthodox constitutional position regarding the legal status of the referendum itself. The European Union Referendum Act 2015 which enabled and regulated the holding of the Brexit referendum was advisory in nature and non-binding on Parliament.[39] This finding was entirely unsurprising and, indeed, anything to the contrary would have amounted to no less than the uprooting of parliamentary sovereignty. However, to leave the question of the referendum and its impact on parliamentary sovereignty at that would constitute an over-simplistic analysis of the relation between Parliament and the 'will of the people' as expressed in a referendum. Certainly, the referendum was not legally binding; however, the political legitimacy it conferred upon Brexit was of such a degree that it compelled many 'Remainer' MPs who campaigned against the UK leaving the EU to, nevertheless, vote in favour of the European Union (Notification of Withdrawal) Act 2017, conferring the power to trigger Article 50 on the Prime Minister.[40] As the Brexit process continued, however, the relationship between the executive and Parliament experienced an unprecedented rupture, with the Government, at the time of writing, unable to pass its proposed withdrawal agreement it negotiated with the EU. Again, the 'will of the people' was invoked by various sides of this dispute.[41] An appeal to the 'will of the people' has also been proposed to break the impasse with a second referendum or so-called 'people's vote' advocated for by certain groups.[42] In contrast, there is little support for parliament to simply ignore the advisory referendum result. Of those that do advocate for this, the strategy is to challenge the legitimacy of the June 2016 vote on the basis of breaches of electoral spending laws or foreign interference in the referendum, rather than simply dismissing the referendum as advisory.

Brexit has thus revealed a schism between a sovereign parliament and the people it claims to represent. The classic distinction between 'legally binding' and 'politically binding' which is replete throughout British constitutional discourse can be deployed to explain this fissure and the role of referendums in the UK constitutional order; however, this analysis is also over-simplistic. Rather, the legitimating potential of referendums is a further example of the fragmentation of authority in the UK constitutional order but in this instance, the authority that challenges parliamentary sovereignty is not the courts, a devolved legislature or an international organisation

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[39] *Miller* (n 1) [119]-[125].

[40] The European Union (Notification of Withdrawal Act 2017 passed by the Commons by a margin of 498 to 114. See HC Deb 1 February 2017 vol 620, cols 1136-1140. In contrast, prior to the holding of the Brexit referendum in June 2016, 479 MPs stated their support for remain, with 158 MPs backing leave. See 'EU vote: Where the cabinet and other MPs stand' *BBC News* (22 June 2016) < https://www.bbc.co.uk/news/uk-politics-eu-referendum-35616946> accessed 7 September 2018.

[41] See Christian List, 'Is Brexit the will of the people? The answer is not quite that simple' (*LSE Blogs* 11 April 2019) < https://blogs.lse.ac.uk/brexit/2019/04/11/is-brexit-the-will-of-the-people-the-answer-is-not-quite-that-simple/> accessed 9 May 2019; Lea Ypi, 'Theresa May's Trumpian statement was reminiscent of a sovereign dictator' (*The New Statesman*, 21 March 2019) <https://www.newstatesman.com/politics/uk/2019/03/theresa-may-s-trumpian-statement-was-reminiscent-sovereign-dictator> accessed 9 May 2019.

[42] See 'The Roadmap People's Vote' (*People's Vote)* <https://d3n8a8pro7vhmx.cloudfront.net/in/pages/16122/attachments/original/1539865431/roadmap_pv_final.pdf?1539865431> accessed 9 May 2019.

but the people themselves; or, at the very least, different and competing conceptualisations of the people. Indeed, distinguishing between legal and mere political ramifications of a parliamentary decision arguably made the decision to hold a referendum on UK membership of the EU an easier pledge to make. Due to the lack of formal legal implications of an advisory referendum, little, if any, thought was given to opening Pandora's Box and potentially revealing a schism between Parliament and the people. In turn, this reveals a tension at the heart of the claim that Parliament possesses constituent power but that it is ultimately held by the People—a claim that will be explored further below.[43]

That the Brexit referendum result is an expression of 'the will of the people' is also over-simplistic; referendums in the UK have instead revealed a further schism in the very idea of 'the people' itself. A formalistic reading of the EU Referendum Act 2015 would legitimate the decision to hold a UK-wide referendum (and Gibraltar) with the sovereignty of Parliament re-affirmed. A UK-wide referendum was approved by Parliament on the grounds that relations with the EU were reserved to the UK level and therefore the decision should be one taken by the UK as a whole.[44] The alternative of a 'double-lock mechanism' whereby a majority of voters overall and a majority of voters in each of the constituent parts of the UK was rejected.[45] The heterogeneous or plurinational composition of the UK demos was thus not recognised and Brexit has exposed fissures between the various constituent parts of the UK. With both Scotland and Northern Ireland voting to remain in the EU, and England and Wales voting to leave, the two constituent parts of the UK where the question as to their continued participation in the UK is a live political issue, has made this issue more salient than ever.[46] Northern Ireland and Scotland face the prospect of being taken out of the EU with the consent of the 'British people' as a whole but without the consent of the people of Scotland and Northern Ireland. For Northern Ireland, where identities are more contested than in other parts of the UK, the issue is particularly pressing. Again, the case of home rule echoes similar tensions with Dicey, who was notoriously against referendums, nevertheless advocating for a UK-wide referendum on Irish home rule

[43] See Part 3 below.

[44] Aileen McHarg, 'Constitutional Change and Territorial Consent: The *Miller* case and the Sewel Convention' in Mark Elliott, Jack Williams and Alison L Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing, 2018) 155, 156.

[45] ibid.

[46] In Northern Ireland for example, a number of recent polls suggest that Brexit has resulted in an increased support for a united Ireland in the event that a border poll is held. See Lord Ashcroft, 'Brexit, the Border and the Union' *Lord Ashcroft Polls* (19 June 2018) < https://lordashcroftpolls.com/2018/06/brexit-the-border-and-the-union/> accessed 7 September 2018; a further online poll conducted by campaign group 'Our Future Our Choice' in September 2018 suggested that 52% of respondents supported a united Ireland once the UK leaves the EU'. See 'Brexit could create a majority for a united Ireland' *BBC News* (3 September 2018) < https://www.bbc.co.uk/news/uk-northern-ireland-45391529> accessed 7 September 2018; Seán Danaher, 'Further Analysis of Our Future our Choice NI Poll', *Progressive Pulse* (5 September 2018) < http://www.progressivepulse.org/brexit/further-analysis-of-the-our-future-our-choice-ni-poll> accessed 7 September 2018.

in order to defeat the proposal.[47] The result is that, like parliamentary sovereignty, the Brexit referendum conceptualised the UK as consisting of a unitary British demos and failed to give due consideration to its fragmented, plurinational aspects and the implications this has for both the legitimacy of the referendum result and of Westminster itself.

Parliamentary Sovereignty and the Courts

In addition to devolution, enactment of the HRA made a powerful impact on a constitutional landscape that traditionally eschewed the judicial protection of human rights. This has increased the propensity of both domestic courts and the European Court of Human Rights to act as competing authorities to that of Parliament. The HRA has thus been intensely scrutinised, owing to the statutory power in section 3 that requires courts to interpret legislation compatibly with the ECHR 'so far as it is possible to do so.'[48] At times, this power has been exercised in circumstances whereby the courts have prima facie gone against the express wishes of Parliament in a particular statute.[49] Nevertheless, the HRA preserves the sovereignty of Parliament in section 4 which allows courts to declare legislation incompatible with convention rights but such a declaration does not affect the validity of the provision in question.[50]

The interpretive obligation under the HRA builds upon what has been termed 'common law constitutionalism.' This describes the propensity of courts to interpret statutes in conformity with fundamental principles espoused by the common law such as the rule of law.[51] Similar to section 3 HRA, courts have creatively interpreted statutes in certain instances which ostensibly appear to be contra Parliament's intention. In the seminal case of *Anisminic v Foreign Compensation Commission*, for example, the House of Lords interpreted a provision that prima facie sought to oust judicial review in such a way as to render it redundant and preserve its jurisdiction.[52] More recently, in *Evans v Attorney General*, the Supreme Court interpreted the Attorney General's statutory power to veto a finding of the Upper Tribunal—a judicial body—in such a manner that it is difficult to imagine a circumstance whereby such a power could ever be exercised.[53]

Courts have also been instrumental in the shift away from the Diceyan conception of parliamentary sovereignty to the 'self-embracing' understanding of the theory, with the development of what have been termed 'constitutional statutes'. Constitutional

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[47] See Mads Qvortrup, 'AV Dicey: The Referendum as the People's Veto' (1999) 20(3) *History of Political Thought* 531.

[48] HRA 1998, s3.

[49] See, for example, *R v A (No.2)* [2001] UKHL 25. For competing perspectives on the operation of the interpretive obligation contained in section 3 HRA see Danny Nicol, 'Statutory interpretation and human rights after Anderson' [2004] *Public Law* 274 and Aileen Kavanagh, 'Statutory interpretation and human rights after Anderson: a more contextual approach' [2004] *Public Law* 537.

[50] HRA 1998, s4.

[51] See Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23(3) *Oxford Journal of Legal Studies* 435; Roger Masterman and Se-shauna Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] *European Huan Rights Law Review* 57.

[52] [1969] 2 AC 147.

[53] [2015] UKSC 21.

statutes are an attempt to make sense of what is prima facie a flat constitutional landscape in an era where elevating the normative hierarchy of some statutes over others is required to circumvent the legal difficulties that would arise should standard principles of legal interpretation such as '*lex posterior derogate priori*' prevail. Constitutional statutes therefore are not assumed to have been impliedly repealed by later conflicting statutes.[54] The idea of constitutional statutes is entirely a judicial creation; however, it is one that is a necessary result of this fragmentation of authority in the UK constitution. The idea of constitutional statutes, for example, has helped elaborate upon the sparse reasoning given in *Factortame* as to why the ECA 1972 should prevail over the later Merchant Shipping Act 1988. Constitutional statutes are still liable to being expressly repealed, however, and almost a quarter of a century after *Factortame*, the Supreme Court affirmed in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* that despite EU law's claim to primacy over domestic law, this claim was ultimately a function of the European Communities Act 1972. Due to this basis in the domestic law of the UK, the ostensible supremacy of EU legislation could potentially be tempered by other domestic constitutional principles of the UK, i.e. parliamentary sovereignty.[55]

HS2 thus illustrates the fact that the courts, although instrumental in the evolution of parliamentary sovereignty, still baulk at outright rejection of it. Similarly, both the case law and constitutional theorists strive to reconcile cases such as *Anisminic* with parliamentary sovereignty and parliamentary intention, despite the perceived growth in judicial power and rise of common law constitutionalism.[56] In *Anisminic*, the court rendered the ouster clause impotent while simultaneously intimating that an ouster clause would be followed if the words used in the statute were 'something much more specific than the bald statement than a determination shall not be called in question in any court of law.'[57] When a draft ouster clause was included in the Asylum and Immigration Bill 2003 that proposed to do exactly that, senior judges speaking extra-judicially warned that they could find it unconstitutional and the clause was ultimately dropped.[58] Common law constitutionalism arguably reached its apotheosis in *Jackson v Attorney General* where the Lord Steyn intimated that it could in future deploy the nuclear option and find a statute unconstitutional, '[I]n exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts'.[59] Despite these developments, however, almost 50 years after *Anisminic*, in *R(Privacy International) v Investigatory Powers Tribunal* the Court of Appeal held that the Investigatory Powers Tribunal was immune from judicial review.[60] This was, however, over-turned by the Supreme Court, thus demonstrating that common law constitutionalism can have considerable interpretative force and can temper the

[54] [2003] QB 151; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461,462.
[55] [2014] UKSC 3
[56] See Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58(1) *Cambridge Law Journal* 129.
[57] *Anisminic* (n 52) 170 (Reed L).
[58] Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68(3) *Modern Law Review* 378, 406.
[59] [2005] UKHL 56 [102] (Steyn L).
[60] [2017] EWCA Civ 1868.

exercise of parliamentary sovereignty.[61] Notwithstanding this, however, any judicial claims as to substantive limitations to parliamentary sovereignty are still obiter dicta only. It thus remains the case that rather than presenting an insurmountable challenge to parliamentary sovereignty, the doctrine is instead integral to the idea of common law constitutionalism.

Towards a Paradigmatic shift?

Like Lord Steyn in *Jackson*, Elliott too envisages an extreme, unprecedented constitutional crisis that would have to erupt before courts would fundamentally challenge the doctrine of parliamentary sovereignty.[62] Certainly, 'an attempt to abolish judicial review or the ordinary role of the courts' would be a prime candidate and Elliott's example is evocative of Bruce Ackerman's description of a constitutional moment where politics shifts from the everyday, ordinary running of the state to a more contested, combative form of higher law-making where formerly entrenched constitutional norms are up for grabs.[63] The idea of constitutional moments provides an excellent lens through which to view and predict fundamental constitutional change in the UK's uncodified constitutional landscape. However, short of an extreme crisis, the analysis above would suggest that there is little likelihood that courts will be the ultimate catalyst for finally ending parliamentary sovereignty and even if they were to do so, it is likely that they would be merely reacting to rather than precipitating this ultimate transition to legal constitutionalism. Moreover, the emphasis on legal constitutionalism implies that this would be the only result of such a crisis. That legal constitutionalism may be the ultimate destination of the current constitutional tumult does not, however, mean that the courts will be the catalyst for this change; nor does it mean that empowerment of the judiciary will be the exclusive outcome.

Elliott's ruminations were published in 2015, during the brief window between the 2014 Scottish referendum and the 2016 Brexit referendum. A strong case can be made that the latter referendum and subsequent constitutional turmoil that ensued correlates closely with Ackerman's idea of a constitutional moment. For Ackerman, a constitutional moment entails four steps: (i) a branch of government claims a constitutional mandate from the people to effect constitutional change; (ii) a proposal is put forward to such an effect; (iii) the proposal faces resistance from another branch of government; and (iv) a critical election takes place in which the people express 'broad and deep' popular support for constitutional change with the opposing constitutional branch of government subsequently withdrawing its opposition.[64] Ackerman draws on Franklin D Roosevelt's clash with the US Supreme Court over his New Deal programme as an illustrative example of a constitutional moment.[65] Constitutional moments therefore entail a clash between different branches of government—in the aforementioned example between the democratic branches and

[61] [2019] UKSC 22.
[62] Elliott (n 35) 61-65.
[63] See Bruce Ackerman, '*We the People, Volume 2: Transformation* (Belknap Press, 1998).
[64] Ibid 20-21; 279-312.
[65] Ibid.

the courts. Consequently, the phenomena that trigger constitutional moments may be much more 'banal' than an emergency situation whereby the legislature suspends or ends the jurisdiction of the judicial branch. Yet this does not mean that the constitutional change effected is less profound as a result.[66]

In contrast to Ackerman's example of Roosevelt's New Deal, the majority judgment in *Miller* sets up no such confrontation but instead demonstrates the Supreme Court shying away from such a constitutional clash. Brexit therefore does not map on exactly to Ackerman's description of a constitutional moment. Furthermore, the claim to a constitutional mandate from the people for Brexit as a result of the 2016 referendum is obfuscated by the outcome of the 2017 general election where no political party received an outright majority and thus 'broad and deep' popular support for the supposed constitutional change was not forthcoming.[67] What is central to this constitutional moment is, instead, the role of the people and the potential conflict between the people and Parliament, and between different conceptions of 'the people'. Ackerman views the people in his constitutional moment as interceding to resolve the constitutional dispute through affirmation or rejection of the constitutional change in an election. In the case of Brexit, however, the people themselves are an active participant in the constitutional clash as they emerge as a counter-authority to that of Parliament. There is also a clash between the people and different understandings of who 'we the People' are; between a unitary versus a heterogeneous demos. The emphasis on the judicial role in the changing constitution is understandable given that parliamentary sovereignty is an institutionally-orientated doctrine; however, in this constitutional moment, the courts have taken a backseat role, re-affirming the orthodox constitutional position of parliamentary sovereignty. In so doing, the courts have failed to recognise and facilitate the emergence of the people as a constitutional agent. This is a further example of the fragmentation of authority under the UK Constitution but not one that can be traced back to the courts. Accounts of constitutional crisis or change in the UK that focus wholly on the rise of legal constitutionalism and the role of the courts precipitating this may miss the challenge to parliamentary sovereignty being initiated by the people; a challenge that Parliament, ironically, unleashed upon itself.

The result is a constitutional order struggling to accommodate several constitutional innovations such as referendums, the judicial protection of human rights or other constitutional norms, and quasi-federalism while simultaneously preserving the sacrosanctity of parliamentary sovereignty. The case can certainly be made that the UK has, to date, managed to accommodate these innovations; however, this failure to unpack the role of referendums in particular and their impact on parliamentary

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[66] Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing, 2018) 209-213.

[67] The 2017 General Election returned a hung Parliament with the Conservative Party emerging as the largest party with 318 seats but losing their overall majority following the loss of 13 seats. 'General Election 2017: Results and Analysis' *House of Commons Briefing Paper Number CBP 7979*, (3 April 2018) < http://researchbriefings.files.parliament.uk/documents/CBP-7979/CBP-7979.pdf> accessed 16 August 2018.

sovereignty, merely leaving their influence on the UK constitutional order as 'political, not legal' only serves to leave more questions unanswered. The resultant constitutional torpor currently facing the UK, may be described as what Thomas Kuhn terms a 'crisis'.[68] Kuhn, referring to the history of science, argues that rather than being a steady accumulation of knowledge and progress, science is instead often tumultuous, prone to crises and revolutions. Crises occur when the dominant paradigm is incapable of explaining or accommodating new evidence. Very often the existing paradigm is modified and adapted but only to the extent that its core parameters remain inviolable. New theories may, of course, be proposed and these alternative paradigms may better explain the new data; however, their acceptance by the scientific community will not simply be down to their superior explanatory ability. The hegemonic forces will often resist any new theory in order to defend their subjective investment in the dominant paradigm.[69] A change in the paradigm only occurs through the unparalleled explanatory force of the new paradigm eventually over-coming the hegemonic inertia in the system. Kuhn describes this process of a paradigm change, not as one of evolutionary development; rather, it is nothing short of a revolution.[70] The changes to the UK constitutional order, coupled with the more radical contentions of Wade and Barber that Parliament is no longer sovereign have thus prompted modification of the theory of parliamentary sovereignty, rather than a paradigmatic revolution to date. However, the cumulative effect constitutional crisis resulting from Brexit may prove a step too far. The idea of constituent power may provide an insight into the trajectory that this paradigm shift may take.

2. CONSTITUENT POWER

The idea of constituent power is often traced back to Emmanuel Joseph Sieyès who, in his revolutionary pamphlet *What is the Third Estate?*, described it as 'the moment of a constitution's founding and an expression of the essential relation between the people and the state.'[71] Constituent power, according to Sieyès, determines the constitutional structure and creates the 'constituted powers' that derive their validity from the constitution. The constitution therefore is an expression of the constituent power.[72] Amidst the tumult of the French Revolution and regicide of Louis XVI, Sieyès sought a legitimating principle of constitutional authority that rejected the divine right of kings that underpinned the monarchy of l'*Ancien Régime*.[73] Sieyès turned instead to the people themselves, vesting them with the possession of constituent power.

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[68] See Thomas Kuhn, *The Structure of Scientific Revolutions* (4th ed University of Chicago Press 2012) Ch 7.

[69] ibid Ch 8.

[70] ibid Ch 9.

[71] Emmanuel-Joseph Sieyès, What Is the Third Estate? [1789], <http://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf> accessed 16 August 2018.

[72] Illan Rua Wall, 'Notes on an open constituent power' (2015) 11(3) *Law, Culture and the Humanities* 378, 379.

[73] Lucia Rubinelli, 'How to think beyond Sovereignty: On Sieyes and Constituent Power' *European Journal of Political Theory* (First Published online: 17 April 2016) < http://journals.sagepub.com/doi/abs/10.1177/1474885116642170> accessed 23 August 2018, 3.

Constituent power thus emerges from the rationalism of the enlightenment, filling the lacuna brought about by the rejection of God as a source of legitimate authority. Nevertheless, constituent power is often described as containing elements that are synonymous with a conception of sovereignty that Carl Schmitt described as 'political theology'; namely, its emphasis on legitimate authority and commands issued by an omnipotent authority.[74] On this point, other writers trace the origins of constituent power back further than Sieyès, with both Yaniv Roznai and Martin Loughlin finding its genesis the distinction Jean Bodin draws between sovereignty—the locus of authority—and government which is the instituted form through which sovereign rules.[75]

Like Bodin's distinction between sovereignty and government, by creating the constitutional institutions through which public power can be exercised, constituent power necessarily requires the positing of further powers that its exercise has created.[76] These 'constituted powers'—the constitutional powers of every day government—raise a number of questions regarding the nature of constituent power and its relation to the constitutional order it has established. Firstly, is constituent power exhausted at the moment of the constitution's creation or can it also be expressed subsequently? Secondly, if it can be expressed after the constitution's inception, how and what are the implications of this on the established constitutional order? Thirdly, if constituent power can be exercised subsequently, how can it possibly create a stable constituted order if its destructive potential constantly haunts the order it established? Constituent power therefore is Janus-faced, with both constructive and destructive potential; it can be both tyrannical and tyrannicidal. This destructive and constructive capacity of constituent power is clearly evident from the circumstances of the French Revolution, during which Sieyès articulated his theory, and in the influence that John Locke's writings on the rights of the people to overthrow a tyrannical government had on the American colonists and their Declaration of Independence.[77]

Exercising Constituent Power

Due to its constructive and destructive potential, revolutions are unequivocal examples of when constituent power is exercised. The destructive potential of constituent power may not necessarily be quarantined exclusively to revolutionary moments, however; consequently, constituent power has been described as having a 'tense and ambivalent relation towards the constitutional order founded by the

[74] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*' George Schwab tr (University of Chicago Press, 2005).

[75] Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Theory* 218, 220; Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017) 107.

[76] Sieyès (n 71) 12; Rubinelli (n 73) 5.

[77] Loughlin (n **Error! Bookmark not defined.**) 220; John Locke, *Second Treatise of Government*, CB McPherson (ed), (first published 1689, Hackett Publishing 1980) 84-88.

constituent power, regardless of the normative value of this constitutional order.[78] As a result of this tension, David Dyzenhaus argues against the notion of constituent power as a means of understanding the normative basis for constitutionalism.[79] Eschewing constituent power, however, results in an inability to explain how a constitutional order is founded in the first instance. In contrast, to Dyzenhaus' approach, some theories of constituent power deploy its creative potential only to explain this moment of revolution and the founding of the constitutional order. In essence, constituent power is viewed as a moment that 'gives meaning' to the constitutional order.[80] These theories then attempt to 'close' the constituent moment by banishing it from the constituted order. All state power is then conceptualised as being constituted *limited* power. The defensive nature of these closed models of constituent power is demonstrated by the phenomenon of unconstitutional constitutional amendments. Constituent power has a juristic function in a number of constitutional orders with courts deploying it to distinguish between the power to amend a constitution and the power to radically change or what the Indian Supreme Court has termed 'abolishing the fundamental features' of a constitution.'[81] The Indian approach endorses the distinction between constituent and constituted power, with a limited amendment power amounting to the latter.[82] In so doing, the 'fundamental features' of the constitution are preserved. Closed models of constituent power therefore can be viewed as defensive-oriented, banishing the destructive potential of constituent power beyond the very constitutional order it established; at the same time, however, it may be argued that its creative potential is banished also.[83]

Open constituent power and the people

Banishing the constituent power from the constituted order, however, raises an additional paradox as to the nature of constituent power. The creative potential of constituent power arguably creates the people themselves through its exercise and the creation of the constituted order; however, this raises only raises the further question of the relation between constituent power and the people as one must exist prior to the other but each cannot exist without the other.[84] Alternative perspectives on constituent power attempt to address this paradox by eschewing the idea of a 'closed' constituent power exhausted at the moment of a constitution's creation and, in turn, harness the creative potential of constituent power.[85] These 'open' perspectives view constituent power, not as exhausted at the moment of a constitution's inception, but

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[78] Andreas Kalyvas, 'Popular Sovereignty, Democracy and the Constituent Power' (2005) 12 Constellations 223, 227.

[79]See David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1(2) *Global Constitutionalism* 229.

[80] Wall (n 72) 379.

[81] *Kesavananda v Kerala* [1973] SC 1461

[82] Ibid; Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4*Journal of Civil Liberties* 48, 68-73.

[83] Wall (n 72) 391.

[84] Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 9, 12.

[85] Wall (n 72).

acting as a catalyst or irritant for change in the constitutional order, constantly interacting and shaping the constituted powers. Open models of constituent power tend to be less concerned with the destructive potential of constituent power, instead stressing its creative and normative dimension and placing a distinct emphasis on the People by drawing a close link between constituent power and democracy. This normative account of constituent power reaches its apotheosis in Antonio Negri's proclamation that 'to speak of constituent power is to speak of democracy'.[86] The tendency to conceptualise constituent power as almost a wholly normative theory is most clearly demonstrated in the field of global law, in particular, the work of those seeking to legitimate the EU and other international or pan-state institutions or sources of legal norms.[87]

In this discussion of constituent power's basis in 'the People', Carl Schmitt has been invoked as a surprise champion of democracy, heralded as aiming to 'rescue the primacy of democracy over the rule of law'.[88] For Schmitt's decisionistic conception of constituent power, the state is the political unity of the people brought about by a decision taken by the Sovereign to distinguish friend from enemy.[89] This decision creates the stability necessary for the state to be established; however, it continues to haunt the constitutional order it founds, lurking in the background and ready to re-assert itself when the stability that it initially created risks succumbing to entropy. At such a point that can only be determined by the Sovereign, the Sovereign will intervene in the constitutional order to restore stability. This power to intervene, however, is not one that can be constrained by law; it is beyond the law and necessarily prior to law and the establishment of the legal order.[90] Schmitt thus argues that constituent power or sovereignty is revealed in a constitutional order in extreme emergency situations where the rule of law cannot prescribe what ought to happen or control state power. In such instances, the constituent power reveals itself and the sovereign, as the sole arbiter, takes what it perceives to be the necessary steps to restore order. For Schmitt, therefore, 'Sovereign is 'he who decides on the exception'.[91] Constituent power, as a result, cannot be banished wholly from a constitutional order and liberal or legal constitutionalists who attempt to do so are doomed to fail. For Schmitt, the liberal perspective that the state *is* the legal order is utterly wrong; rather, the state exists prior to the legal order and consequently, the idea of constituent power cannot be banished by the constituted order.[92]

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[86] Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (Maurizia Boscagli trans, University of Minnesota Press, 1999) 1.

[87] See, for example, Geneviève Nootens, 'Constituent power and people-as-the-governed: About the "invisible" people of political and legal theory' (2015) 4(2) *Global Constitutionalism* 137; Markus Patberg, 'Challenging the masters of the treaties: Emerging narratives of constituent power in the European Union' (2018) 7(2) *Global Constitutionalism* 263.

[88] Lindahl (n 84) 21.

[89] Carl Schmitt, *The Concept of the Political* (George Schwab tr, University of Chicago Press 2007) 25-37.

[90] Schmitt (n 74) 12; Charles E Frye, 'Carl Schmitt's Concept of the Political' (1966) 28 *Journal of Politics* 818, 825.

[91] Schmitt ibid 1.

[92] ibid

Through his claim that the state is the political unity of the people, one can contend that Schmitt considers constituent power to be vested in the people and his reputation as a champion of democracy vindicated. However, Schmitt's claim that the people may hold constituent power was a reaction— and concession— to the relative success of democracy at the time as distinct from an endorsement of it.[93] Schmitt certainly never argued that only the people can be sovereign as he did not contend that the people could be the sole possessors of constituent power. Rather, constituent power could also be held by a monarch and, indeed, this was Schmitt's personal preference. Renato Cristi argues that Schmitt adopted the term 'constituent power' in *Constitutional Theory* in order to recognise the power of the people.[94] His preceding work, however, used the term 'sovereignty', reflecting Schmitt's preference for the monarchical principle. Schmitt's use of sovereignty, moreover, lacked the creative dimension of constituent power; instead sovereignty —particularly in Schmitt's earlier writings— is more synonymous with the power to issue military commands or *imperium* as seen in the Roman Republic and Empire.[95] Constituent power, however, due to this creative dimension cannot simply be conceptualised as a command; nevertheless, many of the same elements of Schmitt's theory of sovereignty are present in his theory of 'constituent power'.[96]

Furthermore, Schmitt always insisted that his theory of sovereignty was descriptive rather than prescriptive.[97] This, coupled with Schmitt's personal preference for vesting constituent power in a monarch suggests that Schmitt's theory of constituent power vested in the people should also be seen as descriptive rather than normative and certainly not motivated to 'rescue the primacy of democracy over the rule of law'.[98] Schmitt's theory of constituent power is therefore as equally legitimating of monarchical power as it is of democracy. Cristi further argues that Schmitt only affirmed the democratic potential of constituent power because he had found a way to neutralise it through the rule of law; in particular, through the idea of representative democracy. Indeed, the very idea of constituent power as a means to moderate Rousseau's conception of popular sovereignty is inherent in Sieyès' use of the term.[99] Thus, Cristi argues that 'Schmitt could escape the grip of democracy's logical consistency because he himself was not a sincere and honest democrat.'[100] Throughout Schmitt's work, there is a clear authoritarian bent with fear of the people latent. This should come as no surprise in light of Schmitt's willing embrace of National Socialism, a point that seems conspicuously absent from numerous ruminations on Schmitt and

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[93] Renato Cristi, 'Schmitt on Constituent Power and the Monarchical Principle' (2011) 18(3) *Constellations* 352, 352.
[94] ibid
[95] Thus the 'Sovereign Dictatorship' of Schmitt's *Political Theology* evolves from his earlier analysis of 'commissarial dictatorship.' See Carl Schmitt, *Dictatorship*, trans Michael Hoelzl and Graham Ward (Polity Press, 2014); Greene (n 66) 74-75.
[96] Kalyvas (n 78) 226-227.
[97] Ernst-Wolfgang Bökenförde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory' (1997) 10 *Canadian Journal of Law and Jurisprudence* 5, 10.
[98] Text to n 88 above.
[99] Rubinelli (n 73) 3.
[100] Cristi (n 93) 361.

constituent power. In turn, this raises further questions as to both the creative and destructive aspects of Schmitt's conception of constituent power and constituent power more generally.

3. THE LOCUS OF CONSTITUENT POWER IN THE UK

As the archetypal example of the exercise of constituent power is at the establishment of a new constitutional order, it should be of no surprise that the UK, lacking a clear-cut revolutionary moment has eschewed constituent power. Indeed, the best candidate for such a revolutionary moment—the civil war and execution of King Charles I in 1649— preceded the establishment of the UK and resulted in the dictatorial Protectorate of Oliver Cromwell which was then followed by the constitutional 'fudge' of the so-called Glorious Revolution and restoration of the monarchy, albeit with greatly reduced powers.[101] Arguably, there was a lack of intellectual and revolutionary philosophies to back up the revolution in the first instance and effect a new and truly innovative constitutional order; however, Martin Loughlin does attempt to trace the genesis of constituent power thought and democracy to the Levellers and their role in the Parliamentarian army.[102] The difficulty in this argument, as acknowledged by Loughlin, however, is that the Levellers lost.[103] Up until relatively recently therefore, it appeared that constituent power did not feature prominently in British constitutional discourse. Writing in 2007, Loughlin, for example, argues that constituent power serves no juristic function in the UK having been 'entirely absorbed into the doctrine of the absolute authority of the Crown-in-Parliament to speak for the British nation'.[104] An equivalence between parliamentary sovereignty and constituent power was also drawn by Alexis de Tocquvielle describing the Westminster parliament as 'at once a legislative and constituent assembly'.[105] Similarly, Joel Colón-Ríos contends that constituent power was not needed in a constitutional order where Parliament can create any norm it wishes.[106] Colón-Ríos' subsequent work, however, argues that the idea of constituent power was utilised in the British constitutional order prior to Dicey's dominance.[107] In particular, constituent power played an important role in empire and understanding the administration of the UK's overseas colonies. For instance, the Imperial Parliament was often considered to possess constituent power to found the overseas colonies of the British crown.[108] In total, Colón-Ríos identifies five separate conceptions of constituent power that can be seen throughout British history: constituent power as

[101]Loughlin thus describes the Restoration as a 'fudge'. See Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press, 2007) 42.
[102] Ibid 35-38.
[103] Ibid.
[104] Ibid 28.
[105] Alexis de Tocqueville, *Democracy in America* (first published 1835, New American Library, 1956) 74; Colon-Ríos (n 106) 308.
[106] Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Concept of Constituent Power* (Routledge, 2012) 89.
[107] Joel Colón-Ríos, 'Five Conceptions of Constituent Power' (2014) 130 *Law Quarterly Review* 306.
[108] Ibid 317-318.

parliamentary sovereignty; the Crown and Parliament and sources of constituent power; constituent power as the right of the people to instruct their elected representatives; constituent power as the right of resistance; and constituent power as popular sovereignty.[109]

This conflation of parliamentary sovereignty with constituent power raises the question of whether constituent power in the UK can be described as vested in the People. Loughlin does acknowledge that constituent power can be vested in a monarch; however, he does so only briefly and gives the example of the Japanese emperor.[110] At no point is the idea entertained that constituent power is possessed by the British monarch. That constituent power is possessed by the people instead appears to be axiomatic. Parliament becomes the locus for constituent power with its democratic credentials deployed to square the circle. Despite this, it still remains the case that it is one thing to say that Parliament possesses constituent power; it is quite another to say that this power is vested in the people. Thomas Poole acknowledges this, arguing that Parliament is not and cannot be the fundamental source of political authority; rather, Parliament possesses *derived* constituent power— a constraint power that acts according to the formal procedures and rules that were established by the constitution.[111] Original constituent power, however, still ultimately vests in the people. Poole argues that *Miller* paves the way for a 'more bespoke constituent process' whereby the people can be involved in substantial constitutional changes.[112] Poole thus envisages a symbiotic relationship between Parliament and the people, mollifying any tension that may exist between the two. In addition, in much the same manner as Loughlin, he gives no further justificatory reason that constituent power ultimately resides in the people, again implying that it is axiomatic.

Poole attributes the notion of derived constituent power to Roznai who, in turn, draws a close link between derived constituent power and the concept of delegation— the entrusting of a competence or power in a constitutional organ by the people.[113] Delegation also appears as one of the five concepts of constituent power identified by Colon-Ríos who argues that constituent power in the UK has been understood in certain instances as the right of constituents to instruct their Member of Parliament (MP).[114] The importance of 'trust' to derived and delegated concepts of constituent power underlies their 'limited' nature. Delegated constituent power has been deployed to explain the relation between the people and constituent assemblies in the United States with William Partlett contending that the limited nature of the constituent power exercised by a number of state-level constitutional assemblies in the US is explained by agency theory and the contention that the delegates to these

[109] ibid 307-309.
[110] Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 223-224.
[111]Thomas Poole, 'Devotion to Legalism: On the Brexit Case' (2017) 80 *Modern Law Review* 685; Roznai (n **Error! Bookmark not defined.**) 116.
[112] Poole ibid
[113] Roznai (n **Error! Bookmark not defined.**) 110.
[114] Colon-Ríos (n 107) 318-323.

conventions were acting as agents of the People.[115] Aside from the oxymoronic implications of a 'limited constituent power', the difficulty with transplanting delegated or derived constituent power to explain the relation between the British Parliament and the People is that the idea that MPs act as the agents of their constituents has been vehemently rejected. Rather, MPs, it is claimed, act as *representatives* with Edmund Burke famously stating that 'your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion.'[116] This representative understanding has been recalled throughout the various Brexit debates in Parliament, notably by MPs opposed to the UK's withdrawal from the EU.[117] If Parliament does exercise constituent power therefore and it is derived from the people, it is done so on the basis of representative— not popular— democracy, thus echoing Cristi's analysis of Schmitt that his embrace of constituent power vested in the people is tempered by the fact that he found a way to neutralise it through representative democracy. Consequently, the link between the people and Parliament is much more tenuous than delegated or derived constituent power would prima facie suggest.

The idea of Parliament possessing a derived or limited constituent power is further complicated by the fact that there are no actual limits to Parliament's law-making power with the sole exception of Parliament being unable to limit any future Parliament's law-making power—although, as we have seen, this exception has itself been challenged. As noted, this limit is paradoxically necessary in order to preserve Parliament's continuing sovereignty. Roznai's discussion of derived— or what he prefers to term secondary— constituent power is delineated in the context of a theory of unconstitutional constitutional amendments; i.e. to formulate a theory of a limited amendment power. Its transplantation to the UK where Parliament can make or unmake any law it wishes therefore is problematic. Moreover, it is also difficult to see from either a theoretical or historical perspective exactly how Parliament possesses delegated or derived constituent power. The people never delegated power to Parliament; rather, Parliament wrested it from the Crown which had previously possessed it. Certainly, the same case can be made about many constitutional orders given the limited role of the people in constitutional drafting or constitutional affirmation and particularly so in the context of constitutions externally imposed;[118] however, what is notable about the British example is that this seizing of the constituent power was made long before Parliament made any meaningful claim to be democratic or representative of the people. British constitutional history can instead be better understood as Parliament's coup d'état and seizure of the constituent power being gradually democratically legitimised through the expansion of the

[115] See William Partlett, 'The American Tradition of Constituent Power' (2017) 15(4) *International Journal of Constitutional Law* 955.

[116] Peter J Stanlis (ed), *Edmund Burke: Selected Writings and Speeches* (Transaction Publishers, 2009) 224.

[117] See, for example, Kenneth Clarke, HC Deb 31 January 2017 Vol 620 Cols 829-830. Similarly, Domnic Grieve stated that '…the idea that the House in some way forgoes its responsibility to safeguard the electorate's interests because a referendum has taken place is simply not a view to which I am prepared to subscribe'. HC Deb 7 February 2017 vol 621.

[118] See Joel Colón-Ríos, 'The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform' (2010) 48(2) *Osgoode Hall Law Journal* 199.

electoral franchise. In much the same way as Hannah Arendt describes Sieyès as placing 'the sovereignty of the nation in the place that a sovereign monarch had vacated'[119] so too did the English Parliament step in to the place left vacant by the execution of Charles I. Whether this Parliament, however, can be equated to the sovereignty of the nation—the people— is a different question.

The anti-democratic basis of constituent power in the UK

In contrast to the US where delegated constituent power was deployed to prevent constitutional assemblies from acting as runaway assemblies, fears of Westminster acting as such do not feature prominently in UK constitutional discourse.[120] Such a lack of fear is perhaps indicative of the disempowered status of the people whose expression can only be gleaned through representative rather than popular sovereignty. This lack of fear also stands in marked contrast to the idea of an omnipotent parliament capable of passing any law it sees fit. The creative and therefore destructive or tyrannical potential of Parliament to act as a runaway assembly is thus enormous. Nevertheless, Dicey flippantly dismissed any concerns regarding the substantive scope of Parliament's law-making ability owing to the political disposition of the English people. Indeed, Dicey advanced his theory of parliamentary sovereignty precisely because of his belief in the rule of law as the peak of English civilisation. It was unimaginable for Dicey that Parliament would violate the rule of law to such an extreme, notwithstanding a number of examples from Ireland and the colonies that should have undermined this faith.[121]

The people or a monarch are not the only candidates for possession of the constituent power in a constitutional order, however. Schmitt further suggested that constituent power could be concentrated in the hands of an aristocratic minority or oligarchy, with Cristi suggesting that Schmitt had in mind the powerful Italian city states of the Renaissance.[122] In light of Parliament's gradual democratisation, there is a strong case to be made that Parliament, for much of its existence, possessed—and perhaps continues to possess— constituent power on this aristocratic or oligarchical basis. Certainly, vast swathes of the citizens of the UK were excluded from the democratic franchise for centuries, with women not granted the same electoral rights as men until 1928.[123] In addition to sex, other limitations to the franchise included property ownership and religion. The emphasis on property restrictions, while certainly not exclusive to the UK, suggests that political authority derived from property itself rather than being inherent in the individual. The clearest distortion of this gap between Parliament and the people was in Ireland where the largely Catholic majority was disenfranchised for most of its tumultuous 120 years as part of the UK. Ireland instead was ruled by a Protestant ascendancy and when 26 of the 32 counties of Ireland

[119] Renato Cristi, 'Schmitt on Constituent Power and the Monarchical Principle' (2011) 18(3) Constellations 352, 352.
[120] Partlett (n 115).
[121] See Dylan Lino, 'The Rule of Law and the Rule of Empire: AV Dicey in Imperial Context' (2018) 81(5) *Modern Law Review* 739.
[122] Cristi 'Carl Schmitt on Sovereignty and Constituent Power' (1997) 10 *Canadian Journal of Law and Jurisprudence* 189, 198; Schmitt, *Constitutional Theory*;
[123] Representation of the People (Equal Franchise) Act 1928.

achieved independence, the idea of parliamentary sovereignty was abandoned by the fledging state, with strong constitutional controls placed on the constituted legislature out of fear of it acting as a runaway assembly.[124] Furthermore, embedded remnants of this aristocratic order remain in the British constitutional order. As noted above, the Crown still retains a role in legislating, albeit one rendered impotent through convention.[125] Moreover, only one house of Parliament is actually democratically elected and, while representative democracy's capacity to temper constituent power has already been noted, this is further amplified by the First Past the Post method of elections in the UK and its distortive effect on the composition of the House of Commons.[126] The result of this conflation of parliamentary sovereignty with constituent power is surmised by Kalyvas:

> [P]arliamentary sovereignty finds in the constituent power its own impossibility. It is exposed as a usurpation of the constituent power by a constituted power which reduces popular sovereignty to parliamentary representation and to the powers of elected officials.[127]

This usurpation is further entrenched by the contention that Parliament is no longer sovereign. By empowering Parliament to limit itself, self-embracing sovereignty enables such a radical reform to be effected by a constituted power or combination of constituted powers. However, this collapse is also evident in the orthodox Diceyan theory of parliamentary sovereignty. That Parliament could not change the rules affecting itself suggests that the ultimate constitution-making power in the UK was a step above Parliament or that there was (and is) a distinction between constituent power and Parliament's law-making power, notwithstanding the breadth of this latter power. However, the same objections can be raised concerning any constituent assembly. Some source prior to that assembly had to vest that assembly with constituent power raising the question as to whether the assembly possesses constituent power at all. As noted, derived constituent power is an attempt to explain this phenomenon and avoid the problem of infinite regression by linking constituent power with the people; however, but this is problematic in the UK owing to parliament's possession of the constituent power before it was meaningfully democratic. Consequently, the difficulty lies not with the claim that parliamentary

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[124] Indeed, such fears arguably came to fruition under the constitution of the Irish Free State and the infamous Article 2A of the Constitution, inserted by way of the ordinary legislative process and created military tribunals capable of trying any offence and pass any sentence up to and including death. The constitutionality of this was upheld in *The State (Ryan) v Lennon* [1935] IR 170.

[125] Text to n 11.

[126] Pippa Norris, 'The Politics of Electoral Reform in Britain' (1995) 16(1) *International Political Science Review* 65, 71-75; Peter Layland, *The Constitution of the United Kingdom: A Contextual Analysis* (Hart Publishing, 2016) Ch 5. That stated, a proposal to replace First Past the Post with an Alternative Vote system was rejected in a 2011 referendum by a margin of 67.9% to 32.1%. See 'UK-wide referendum on the Parliamentary voting system' *The Electoral Commission* https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/referendums/2011-UK-referendum-on-the-voting-system-used-to-elect-MPs accessed 11 September 2018.

[127] 'Kalyvas (n 78) 229.

sovereignty is a usurpation of the constituent power but a difficulty that afflicts all closed-models of constituent power.

Relational Constituent Power

The most rigorous attempt to construct a theory of constituent power applicable to the UK is, without a doubt, the work of Martin Loughlin.[128] Loughlin identifies three different theories of constituent power: normativism, which either deploys constituent power in the revolutionary moment but then banishes it from the legal order *or* rejects the notion of constituent power altogether; decisionism, which Loughlin attributes to Schmitt; and relationalism.[129] Relational constituent power is Loughlin's attempt to re-work decisionism and accepts many of Schmitt's foundations: for example, the necessity of relating a constitution's normative aspects to conditions that actually exist.[130] Moreover, it rejects the idea that the state is synonymous with the legal order, arguing that the political is a domain of indeterminacy that cannot be organised in accordance with some grandiose theory.[131] As a constitution is political as well as legal, there will always be a gap between the normative and the factual and this gap must be filled through the practice of governing.[132] Relational constituent power, however, differs from decisionism in one crucial aspect. Whereas decisionism struggles with the paradox of constitutionalism — the question of the people existing prior to the exercise of constituent power but also being constituted by the exercise of constituent power — relational constituent power seeks to overcome this by arguing that constitutional ordering is dynamic and never static. Relational constituent power instead establishes a dialectical relationship between the 'the nation' posited for the purpose of self-constitution and the constitutional form through which it can speak authoritatively.[133] In so doing, relationalism seeks to harness the creative potential of constituent power by providing an account that is 'able to enrich constitutional ordering'.[134] In order to ensure this, Loughlin argues that:

> If the democratic potential of this modern shift in the source of authority is to be retained, the political space must be recognised as incorporating an unresolved dialectic of determinacy and indeterminacy, of closure and openness. This is the basis of the relational approach.[135]

'The space of the political can be seen as a space of freedom ('the absolute beginning'), but if it is to be maintained, institutionalization of rule is required.'[136] Loughlin therefore envisages a 'dynamic of constitutional development without end'.[137]

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[128] Loughlin (n **Error! Bookmark not defined.**).
[129] Ibid 227-231.
[130] Ibid 227.
[131] ibid
[132] ibid
[133] ibid 229.
[134] ibid 231.
[135] Ibid 228.
[136] ibid 229.
[137] ibid

Loughlin further argues that constituent power is vested in the people but that does not mean that political *authority* is located in the people. Consequently, relational constituent power does not correlate with the assertion made by advocates of popular sovereignty that the people possess political authority; rather, relational constituent power identifies a 'virtual' equality of the people but in reality it 'founds an actual association divided into rulers and ruled in a relation of domination'.[138] Relational constituent power therefore seeks to establish a dialectic of 'right' between the rulers and the ruled such that it 'seeks constantly to irritate the institutionalised form of constitutional authority'.[139] In turn, Loughlin seeks a more constructive application of the paradoxical aspects of constituent power. For Loughlin, the constituent power is not only engaged (and exhausted) at the founding moment; instead it continues to operate and function within an established regime 'as an expression of the open, provisional, and dynamic aspects of constitutional ordering.'[140]

Relationalism contends that, '[C]onstituent power, produced by an intrinsic connection between the symbolic and the actual, signifies the dynamic aspect of constitutional discourse.'[141] Loughlin, however, cautions against subsuming constituent power into the constituted order as the very tension that gives constituent power its dynamic potential would be eliminated.[142] There is always a gulf between theory and reality— between facticity and normativity. The former is an expression of sovereignty whereas the latter is an expression of sovereign authority and it is in the dialectic relation between the two that constituent power resides. Loughlin thus contends that:

> …the constitution of a legal order by a political unity involves an exercise in positive law-making whereas the constitution of a political unity through a legal order refers not to the positing of a legal order (in a strict sense) but in the constitution of political unity through *Droit Politique* (political right).[143]

Loughlin thus argues that constituent power could equally be termed 'constituent right'. Ultimately, Loughlin must leave open the question as to where the locus of constituent power in the UK— and indeed any state— lies as he argues that:

> [L]egitimacy must be claimed in the name of the people, and the question of who represents that people remains the indeterminate question of modern politics. The function of constituent power is to keep that question open, not least because 'the people-as-on is the hallmark of totalitarianism'.[144]

In this regard, relational constituent power seeks to maintain the creative dimension of decisionism while at the same time attempting to address some of the absolutist

[138] Ibid.
[139] ibid.
[140] ibid 233-234.
[141] Ibid 232
[142] ibid.
[143] Ibid 229.
[144] Ibid 234.

concerns raised by Schmitt's conception of constituent power. Loughlin strives to preserve a space of freedom for the political and, ostensibly, one could contend that parliamentary sovereignty fulfils this function in the UK constitutional order. With no legal constraints on the content of legislation, Parliament is as free as possible to embody and preserve the political. Relational constituent power and its conceptualisation of a 'dynamic of constitutional development without end' has the potential to insert the people into a constitutional order that was founded without a clear-cut revolutionary moment and in so doing, legitimate gradual, incremental change. At the same time, however, relational constituent power evinces a degree of radical prowess by asserting its credentials of indeterminate scope and ends. In striving to strike this equilibrium between creativity and constraint, between rulers and ruled, Loughlin insists on the people being able to challenge those who claim to speak on their behalf. Relational constituent power is thus acutely aware of the destructive or tyrannical potential of constituent power but also its constructive and tyrannicidal potential too.

CONFRONTING THE LOCUS OF CONSTITUENT POWER IN THE UK

Colón-Ríos argues that appeals to the concept of constituent power 'typically involve some sort of challenge to the constitutional status quo'.[145] Relational constituent power, in contrast, when applied to the UK constitutional order, legitimates rather than challenges the status quo through supporting dynamic but slow, incremental constitutional change. This incrementalism makes it is difficult to see how, in the UK context, that constituent power is not collapsed into the constituted powers and, as a result, how the creative potential of constituent power is preserved. The result is the current constitutional torpor where parliamentary sovereignty is preserved at the expense of deeper and more fundamental reform of the UK constitutional settlement. Despite its ostensible radical potential, this enfeeblement of constituent power is potentially inherent to relationalism. This creative weakness can be traced back to shared foundations between relational constituent power and Schmitt's decisionism. As noted, Schmitt embraced democracy but only because he found a way of taming the people: through representation and the rule of law. Loughlin acknowledges this, arguing that Schmitt saw the President rather than the parliament of the Weimar Republic as the possessor of constituent power due to his:

> …concern about the radical implications of the rise of mass democracy and his analysis of the constituent power vested in the President served the purpose of safeguarding the authority of the social-democratic form of constitutional ordering under the Weimar Constitution.[146]

This reading paints Schmitt's vesting of constituent power in the President as an inherently defensive move, designed to temper the destructive potential of constituent power were it to be expressed through a mass democratic movement. Loughlin takes a similar step when he argues that although constituent power is vested in the people, this does not mean that political authority is vested in the people as maintained by

[145] Colón-Ríos (n 106) 334.
[146] Loughlin (n **Error! Bookmark not defined.**) 227.

adherents to popular sovereignty.[147] Relationalism seeks to leave the question as to where the locus of constituent power in a constitutional order resides unresolved by allowing the people to challenge those who speak on their behalf. In so doing, however, relationalism and open models of constituent power face the paradox that the easier it is for constituent power to be exercised and break through to the constituted order, the less legal theory needs to resort to constituent power as an explanation; i.e. the risk is greater for open models that constituent power will be absorbed by the constituted powers. The result is that rather than make the constituted powers more radical, the opposite occurs, and the constituent power is pacified. By leaving as much power up for grabs as possible to politics, relational constituent power appears to possess radical potential; however, this conclusion can only be reached if one ignores all other power structures in the British constitutional order that suppress this radicalness. If relational constituent power is to have creative potential, it *must* insist on critical appraisal of the means through which the people can issue their challenge those who claim to speak on their behalf. What is unclear, however, from Loughlin's account is how the people actually muster this challenge in the UK; no concrete examples are given. Relational constituent power thus does not necessarily have to legitimate the extant constitutional order but it may be susceptible to falling into this function.

Rather than seeking to legitimate the status quo ex-ante, UK constitutional theory and practice could instead benefit from a more antagonistic understanding of the relation between Parliament and the people through a descriptive—as distinct from normative—appraisal as to the locus of constituent power in the UK; an understanding of constituent power that does not necessarily seek to reconcile the locus of constituent power with 'the people'. Rather, by acknowledging the anti-democratic basis of Parliament's extant possession of constituent power in the UK owing to the aristocratic remnants of the constitution and enfeeblement of the people or peoples, the locus of constituent power can be legitimately challenged and the true creative potential of constituent power unleashed.

The Consequences of the Anti-Democratic basis of Constituent Power in the UK

The collapsing of constituent power into the constituted power in the UK is further compounded by responses to the contention that Parliament is no longer sovereign. Barber argues that parliamentary sovereignty is no longer a principle of the UK constitution as:

> The rule of Parliamentary sovereignty could not be changed by Parliament and could not, as a matter of law, be departed from by the courts. However, the courts did possess a political capacity to alter the fundamental rule of the British constitution, and it was this capacity that they had exercised in *Factortame*.[148]

In response, Alison Young contends that Barber incorrectly equates a modification to the rule that 'whatever the Queen-in Parliament enacts as a statute is law' with a

[147] Ibid 229.

[148] Barber (n 18) 150.

modification of the rule of parliamentary sovereignty.[149] Young contends, however, that 'whatever the Queen-in-Parliament enacts as a statute is law' is better described as 'a component of the rule of recognition not as the rule of parliamentary sovereignty'.[150] The rule of recognition is, itself, however, not the same as parliamentary sovereignty.[151] The difficulty with this analysis, however, is that explanations as to a change in the rule of recognition tend to focus on institutional forces, mollifying what role, if any, the people can play in this. Analyses centre on change 'in the customary consensus among senior legal officials'[152] leading to explanations of sovereignty as 'shared with the courts'[153] or as 'bi-polar sovereignty,' with Parliament possessing 'legal sovereignty' but requiring the 'coercive sovereignty' of the courts to enforce it.[154] The shift is thus seen as empowering the constituted power of the courts. If it is the case that Parliament is no longer sovereign, it is because constituent power is further collapsed in to the constituted power by these new theories of sovereignty. Young arguably comes closest to expressly acknowledging this collapse of the constituent power into the constituted power by arguing that sovereignty in the UK needs to be understood by:

> … focusing not on the lawmaking power, be it limited or otherwise, but on the power to alter constitutive rules. In this sense, it is closer to an understanding of *Kompetenz-Kompetenz* or an analysis of constituent power.[155]

Like TRS Allan,[156] Young sees a role for the courts in sovereignty, not because of the courts' superior ability to defend normative values but because a role for the courts would mean that modification of constitutive rules rest both in the hands of the legislature and the courts.[157] The most radical of legal changes—revolution of the legal order— is couched in technical language and debate as to whether the rule of recognition has changed and is thus one effected exclusively by the constitutional organs of the state; there is no need to invoke the people to explain this change.

Despite its explanatory force, however, it is difficult to see how this shared sovereignty can confront what Young identifies in her later work as the UK constitution's potential susceptibility to populism. Young contends that this is due to the UK Constitution's 'prevalence to favour pragmatic over redemptive arguments, evolving through a series of specific resolutions to practical issues, combined with the overly simplistic

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[149] Alison Young, 'Sovereignty: Demise, Afterlife, or Partial Resurrection?' (2011) 9(1) *international Journal of Constitutional Law* 163, 165.

[150] ibid.

[151] ibid166.

[152] Jeffrey Goldsworthy, 'Parliamentary Sovereignty and Constitutional Change in the United Kingdom' in Richard Rawlings, Peter Leyland and Alison Young, *Sovereignty and the Law* (OUP 2013) 50, 66.

[153] Young (n 149).

[154] See CJS Knight, 'Bi-polar sovereignty restated' (2009) 68(2) *Cambridge Law Journal* 361.

[155] Young (n 149) 169-170.

[156] See TRS Allan, 'Questions of legality and legitimacy: Form and substance in British constitutionalism' (2011) 9(1) *International Journal of Constitutional Law* 155.

[157] Young (n 149) 170.

use of parliamentary sovereignty as the means to resolve constitutional debates.'[158] Populist critiques of constitutional democracy tend to centre on the elitist hegemony of power at the expense of the 'true' people of the state's 'heartland'.[159] Walker notes that populists tap into parts of modern constitutional discourse that emphasise the ideas of popular sovereignty, the constituent power of the people and the purest crystallization of collective political will.[160] A constitutional order in which the constituent power is wholly collapsed into the constituted power of parliamentary sovereignty simultaneously creates the conditions that fuels populist sentiment as well as providing them with the constitutional tools necessary to effect the political changes they wish should they ever seize power.

These challenges can potentially be addressed, however, by expressly acknowledging the anti-democratic basis of parliament's possession of constituent power and restructuring the constitutional order to facilitate points of authoritative contestation that can harness the creative dimension of constituent power. As noted, it is in the space between normativity and facticity that the assessment as to the people's claim to the constituent power can be stress-tested and where the irritative potential of the people should be evident. In contrast to constitutions where the separation of powers creates flashpoints where constitutional authorities may clash and, in a constitutional moment, change is effected through the 'will of the people'; the dominance of Parliament in the UK constitutional order obviates such points of contestation. Much like John Locke's theory of the prerogative, the people in the UK constitutional order are left with no other possibility but to revolt.[161]

The True Role of Referendums in the UK Constitutional Order

In this space between facticity and validity, the true impact of referendums on the British constitutional order can be understood. Attempts have been made to accommodate an understanding of referendums in the UK that goes beyond simply considering them to be advisory while at the same time preserving parliamentary sovereignty. Gavin Phillipson, for example, argues that a constitutional convention should be acknowledged where the result of a referendum will be followed by Parliament.[162] This however, only raises the further problem of resolving a conflict between two competing conventions. Such is the case with the Brexit referendum as, should a new convention arise of Parliament implementing the result of a referendum, it would clash with the Sewel convention that Westminster will not ordinarily legislate in an area of devolved competence without the prior permission of the devolved institutions. One could contend that 'ordinarily' could be interpreted to exclude precisely such a scenario, with the referendum result taking primacy over the

[158] Alison Young, 'Populism and the UK Constitution' (2018) 71(1) *Current Legal Problems* 17, 51.
[159] ibid 20; Cas Mudde, 'The Populist Zeitgeist' (2004) 39(4) *Government and Opposition* 541, 545-546.
[160] Neil Walker, 'Walker, Neil, Populism and Constitutional Tension (May 21, 2018). *International Journal of Constitutional Law* (2019, Forthcoming); Edinburgh School of Law Research Paper No. 2018/18. Available at SSRN: https://ssrn.com/abstract=3182359 or http://dx.doi.org/10.2139/ssrn.3182359 10.
[161] Locke (n 77).
[162] Gavin Phillipson, 'Brexit, prerogative and the courts: Why did political constitutionalists support the government side in *Miller*?' (2017)36(2) *University of Queensland Law Journal* 311, 322-325.

constitutional principle of devolved autonomy; however, this only raises the further question of why this should be the case. Again, the question of a heterogeneous versus a plurinational British demos remains unanswered.

A convention therefore is limited to the extent that it can clarify the role of referendums in the UK constitutional order. Rather, what can assist in this regard is a clearer understanding of how referendums can challenge the authority of parliament owing to the undemocratic basis of Parliament's claim to the constituent power. Referendums, far from being simply advisory, have the potential to act as an alternative authority to the legitimacy of parliamentary sovereignty, particularly if the question asked is one that Parliament does not want answered in the affirmative as was the case with the Brexit referendum.[163] This potential is further amplified by the People's otherwise weak constitutional role as the pent-up irritative potential of a contesting claim to the constituent power is channelled through one outlet. This is not the same as saying that a referendum is an expression of the constituent power or even a claim to the constituent power; rather, it demonstrates that the tentative democratic legitimacy of the Crown-in-Parliament cannot be used to square the circle between Parliament's possession of constituent power and 'the people'. While this point may prima facie legitimate referendums in the UK as a means to re-invigorate the constitutional order by creating a commensurate authority to challenge Parliament, a clearer delineation of this contestation of authority may equally provide ammunition for those wary of the use of referendums in the UK and should be a factor borne in mind before the decision to hold a referendum in future is taken. It also has the potential to provide a strong justificatory basis for more robust or structured regulation of the referendum process itself. Regardless, the claim that referendums in the UK are simply advisory should be dismissed.

The Role of Conventions in the UK Constitutional Order

Indeed, the considerable reliance the UK places in constitutional conventions to constrain public power demonstrates the expansive dichotomy between facticity and normativity in the UK constitutional order. Conventions are necessary in all constitutional orders; however, in the case of the UK they do more than their fair share of heavy-lifting.[164] The binding nature of conventions has been described as a mixture of moral obligation and precedent with Dicey, for example, describing conventions as 'the morality of the constitution'.[165] Effectiveness is of fundamental importance to establishing the existence of and, by extension, the legitimacy a convention; however, without the moral or normative dimension, one cannot distinguish between a convention and what is simply a followed practice.[166] Conventions, however, are distinct from legal rules and principles given this importance of efficacy to their existence and, by extension, legitimacy. Generally, a convention cannot place the same claim to validity as a legal rule, owing to its creation beyond the formal rules of a legal

[163] See text at n 40.
[164] Nick Barber, 'Laws and Conventions' (2009) 125 *Law Quarterly Review* 294, 294.
[165] Dicey (n 1) 417; McHarg (n 6) 859.
[166]McHarg (n 6) 857.

order. Conventions thus tend to evolve through practice rather than through a formalised, validated rule-creation procedure. The legitimacy of a convention therefore is more fundamentally dependent upon its efficacy than a formalised legal rule. That stated, McHarg argues that there have been attempts to create conventions in a declaratory manner in the UK.[167] Adam Perry and Adam Tucker further argue that there exist 'top-down constitutional conventions' created through the use of normative rule-making powers as distinct from 'bottom up conventions' that emerge through the practices of constitutional actors.[168]

Conventions in the UK constitutional order, however, not only give effect to the constitutional identity and aspirations of the UK; often they are the exclusive defender of this identity. Convention, for example, ensures that the vast, unwritten prerogative powers, although legally vested in the monarch are, in practice exercised by the Government. If such powers were to be exercised by the monarch, it would radically alter the constitutional terrain of the UK and undermine its description as a constitutional democracy.[169] This gap between facticity and validity may be defended as symptomatic of the UK constitution's inherent flexibility and thus a testament to the irritative potential of constituent power. Moreover, the fact that conventions tend to be the product of politics rather than law adds an additional dimension of democratic legitimacy to them. Conventions, it may be argued, are the product of politics and thus simply manifestations of the will of the people and therefore conventions demonstrate that the People are firmly empowered in the UK constitutional order, notwithstanding their de jure status. On this reading, the UK constitution scores well on relational constituent power's insistence that the people must be able to challenge those who claim to speak on their behalf.

However, as the legitimacy of conventions is dependent upon their efficacy, conventions may also be symptomatic of constitutional inertia. Jennings, for example states that:

> Capacity for invention is limited, and when an institution works well in one way it is deemed unnecessary to change it to see if it would work equally well in another. Indeed, people begin to think that the practices ought to be followed. It was always done in the past, they say; why should it not be done so now?[170]

The normative dimension of long-established conventions therefore may be forgotten or not adequately interrogated; rather, a convention's legitimacy may become wholly dependent upon its efficacy. This echoes Thomas Paine's contention that 'Government which operates by precedent without regard to what lies behind that precedent, is one

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[167] ibid 861-863.

[168] See Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765.

[169] Thus, Adam Tucker argues that the convention that the monarch exercise her power on the advice of her minister is fundamental to ensuring that 'we live in a democracy rather than a dictatorship'. Adam Tucker, 'Constitutional Writing and Constitutional Rights' [2013] *Public Law* 345, 351.

[170] Ivor Jennings, *The Law and the Constitution* (University of London Press, 1959) 80. McHarg (n 6) 857.

of the vilest systems'.[171] Furthermore, the actual legitimacy of constitutional conventions has not been fully interrogated— a point that concerns Perry and Tucker given the prominent role conventions play in the British Constitution and that 'self-regulation' which is essentially what conventions are is viewed with scepticism in other areas of law.[172] This becomes further pronounced in the context of 'top-down conventions'.[173] In turn, if the gap between the de jure and de facto constitution is significant, it shrouds the constitution in clouds of ambiguity making it inaccessible to those without legal training or insider knowledge.[174] While conventions in the British constitution have generally been benevolent— a point noted by Perry and Tucker as perhaps why their legitimacy has not been fully interrogated[175]— conventions may, nevertheless, mask where the true power of the state resides. A rather striking example of this is the manner in which Augustus made use of conventions and the trappings of the old legal order to hide the true autocratic nature of the Roman Principate, giving the perception that the Republic still endured.[176] These points thus undermine the claim that the practices and conventions that underpin a constitution can be attributed to the people. In light of this, the wide gap between facticity and validity in the UK constitution cannot be described as the manifestation of the irritative potential of the constituent power vested in the people. Rather, it is, again, symptomatic of enfeebled role of the people in the UK constitutional order, further undermining the claim that constituent power is vested in the people. Movement away from this reliance on convention towards entrenched constitutional norms should thus not necessarily be seen as an anti-political or anti-democratic.

Towards Federalism?

Acknowledgment of the anti-democratic basis of Parliament's possession of the constituent power may also help to tame the hubristic manner in which Westminster has exercised its sovereignty, vis-à-vis other constitutional institutions. To date, Parliament's claim to sovereignty has remained inviolable precisely because other constitutional organs were incapable of mounting either a serious political or legal challenge to its legitimacy. As noted, the relegation of a referendum in the UK constitutional order to advisory status requires the simultaneous reassertion of parliamentary sovereignty and a representative theory of politics. Like Schmitt, parliamentary sovereignty embraces democracy and the constituent power of the people but only because a way has been found to disarm it.[177] This is evident, not just from the Brexit referendum but from others too, most notably the Belfast Agreement. Parliamentary sovereignty thus neuters what Stephen Tierney terms the 'highly

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[171] Thomas Paine, *The Rights of Man: Being an Answer to Mr Burke's Attack on the French Revolution* (First published, 1790 The Floating Press 2010) 285.
[172] Perry and Tucker (n 168) 780.
[173] Ibid 784-788.
[174] Political and Constitutional Reform Committee, *Consultation on a New Magna Carta* (2014-15 HC 599) paras 45-48.
[175] Perry and Tucker (n 168) 780.
[176] ET Salmon, 'The Evolution of Augustus' Principate' (1956) 5(4) *Historia: Zeitschrift für Alte Geschichte* 456.
[177] Cristi (n 94) 201.

imaginative and constitutionally radical' Good Friday Agreement, glossing over the plurinational dimension of the UK constitutional order that it affirmed.[178]

Acknowledging the anti-democratic basis of Parliament's claim to the constituent power could potentially provide the legitimating catalyst for the UK moving towards a fully federal model. Parliament's sovereignty would necessarily be curtailed; however, this would also give legal effect to the idea that the UK is constituted of individual nation states. While this is often evoked in political rhetoric, in reality, it has had no practical legal significance, owing to the UK's strongly unitary constitutional order. Thus, Scottish constitutional lawyer JDB Mitchell's contention that the UK parliament was 'born unfree' as it could not legislate inconsistently with the Treaty of Union of 1707, has fallen on deaf judicial ears.[179] While the obiter dicta remarks of Lord Cooper in *MacCormick v The Lord Advocate* questioned why the Parliament of Great Britain should have the all characteristics of the English parliament with none of the characteristics of the Scottish parliament, the legal impact of this contention is unclear.[180] As Gavin Little argues, Parliament has legislated inconsistently with the Act of Union on numerous occasions; moreover, courts have been reluctant to assume jurisdiction to review the legal validity of Acts of Parliament on this issue.[181]

In addition, Scottish courts have also made clear that the Scottish Parliament's powers are limited in much the same way as any other statutorily created authority exercising public power must stay within its statutory confines. In contrast, Westminster has been 'recognised as sovereign'. A point that is reinforced by the Supreme Court's approach to the devolution question in *Miller*. Little therefore concludes that despite some outlying judgments, the Scottish courts 'still view parliamentary sovereignty as forming a key part of the rule of recognition'. Notwithstanding this, Little cautions against 'the temptation to take a traditional, positivistic approach and assume that the debate of parliamentary sovereignty in Scotland is primarily a legal debate'.[182] As noted, Westminster's legal power to legislate over devolved issues has been politically tempered by the operation of the Sewel convention; however, Little contends that this may still not be sufficient to save the legitimacy of parliamentary sovereignty in Scotland as it does not align harmoniously with Scottish notions of popular sovereignty. Should the attenuation of the authority of Dicey's theory of parliamentary sovereignty continue to wane, the increasing gap between the legal and the political could mean that its normative force attenuates also until it becomes effectively spent.[183] Arguably the opposite has occurred, however, with claims that Westminster breached the Sewel convention; but this exercise of parliamentary

[178] Stephen Tierney, 'Giving with one hand: Scottish devolution within a unitary state' (2007) 5(4) *International Journal of Constitutional Law* 730, 739.
[179] JDB Mitchell, *Constitutional Law* (Green and Son, 1968) 69-74; Gavin Little, 'Scotland and parliamentary sovereignty' (2004) 24(4) *Legal Studies* 540, 543.
[180] (1953) SC 396
[181] Little (n 179) 550. Little was writing, however, before the House of Lord ruled in *Jackson v Attorney General* and where they did assume the jurisdiction to hear the challenge to the Hunting Act.
[182] ibid 533.
[183] ibid 564.

sovereignty has only served to magnify the fissure between Scottish conceptions of popular sovereignty and the legitimacy of parliamentary sovereignty.

By acknowledging the distinction between constituent power and parliamentary sovereignty through limiting the latter, it may be possible to realise Walker's concept of a developing, multi-dimensional, pluralistic and 'metaconstitutional' discourse between different levels of political and legal authority'.[184] While Walker was referring to the EU, the same principles could be realised in a UK that is, at least rhetorically, a union of nations. A federalised UK could thus create the necessary points of constitutional friction that could reinvigorate the constitutional order, allowing constitutional outlets for expressions of popular will, popular wills, and, indeed constitutional spaces wherein those claiming to speak for the popular will can be contested. At present, however, parliamentary sovereignty neutralises this possibility of creative constitutional conflict escalating to the degree whereby one needs to invoke a claim to constituent power to legitimise reform. The result is a stultifying and unimaginative constitutional jurisprudence where every square can be circled by reference back to parliamentary sovereignty. If relational constituent power is to unlock the flexibility and adaptability that is supposedly the hallmarks of British constitutional theory, a much more antagonistic relationship between the people and public institutions needs to be recognised. It may be better for a descriptive account of constituent power to be deployed to expose the anti-democratic basis of Parliament's claim to the constituent power and legitimate constitutional reform that seeks to claim it for 'the people' or peoples.

CONCLUSIONS

It is only through stressing the tension between the people and Parliament, acknowledging the monarchical and aristocratic legacies of British constituent power that true constitutional reform can be approached. This would necessarily entail a curtailment of parliamentary sovereignty, or, at the very least, a thorough comprehension of the institutionally-directed nature of parliamentary sovereignty and its weaker legitimacy vis-à-vis the people. This tension understood and confronted, a more stable constitutional settlement could be achieved. This does not mean, however, that it is up to courts to decide to invoke the concept of constituent power. Rather, it is not necessarily for the courts to utilise the doctrine of constituent power to face down parliament as this could do untold damage to the courts' legitimacy. It would be highly ironic that a plea to take heed of 'the people' in the British constitutional system would result in judicial supremacy, particularly in light of Dicey's claim, as endorsed by the Divisional Court in *Miller* that 'judges know nothing about any will of the People except in so far as that will is expressed by an Act of Parliament'.[185] However, it may take such a constitutional crisis for such change

[184] ibid 559; N Walker, 'Sovereignty and Differentiated Integration in the European Union' (1998) 4(4) *European Law Journal* 355.

[185] [2016] EWHC 2768; Mark Elliott, 'Brexit, sovereignty, and the contemporary British constitution: Four perspectives on *Miller*' *Public Law For Everyone* (16 December 2016) < https://publiclawforeveryone.com/2016/12/16/brexit-sovereignty-and-the-contemporary-british-constitution-four-perspectives/> accessed 11 September 2018.

to take place. Notwithstanding this, however, the simple re-assertion of parliamentary sovereignty in such a case would only serve to highlight the dichotomy that exists between Parliament and the People stressing the monarchical or, at the very least, the oligarchical origins and continued basis of its claim to the constituent power.

Legal norms possess both factual and normative dimensions. Gaps often emerge, however, between theory and practice—between facts and norms. In such instances, theory *should* adapt. Parliamentary sovereignty, however, has not. With parliamentary sovereignty as the apex norm of the UK constitutional order, it follows that all British constitutional imagination and reform must not infringe upon this. The major constitutional reforms of the HRA, devolution, and UK membership of the EU all had to be designed so as not to distort this natural order. While the case can be made that the UK has managed to effectively accommodate these changes, the recent impact of referendums has illustrated not so much a flexibility but a contortion in order to ensure the preservation of parliamentary sovereignty. Parliamentary sovereignty and the need to preserve it as the apex norm of the UK constitutional order has stultified British constitutional evolution or, at the very least, blinded constitutional actors to the potential illegitimacy of their actions. As an institutionally directed doctrine concerned primarily at establishing its supremacy in relation to first, the Crown, and subsequently, the courts, the relation between Parliament and the people has been neglected. So too has the composition of this people. If the UK constitution is to overcome the current torpor, it must confront the inviolable principle of parliamentary sovereignty. By recognising this tension between Parliament and the people, and between the competing conceptions of 'the people' a more lasting constitutional settlement unbridled by the traditions of the past could be achieved.