

## **‘The Will of The People’: The UK Constitution, (Parliamentary) Sovereignty, and Brexit**

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### **Abstract**

‘The Will of the People’ has become a key refrain of government ministers since the United Kingdom voted to leave the European Union in June 2016. This chapter draws on the theoretical contributions of Carl Schmitt to suggest that the Brexit referendum was a manifestation of constituent power, the legitimacy of which undermines accepted norms of the UK’s unwritten constitution. Given the peculiarity of referendums within standard UK constitutional practice, the chapter focuses on the underappreciated power of rhetoric surrounding Brexit to justify executive actions contrary to established norms. Going on to examine the possibility of Parliament being stripped of its role as the final decision-maker within the UK’s constitutional setup, the chapter concludes by warning of the potential for new discourses around public sovereignty to make fundamental changes to the constitutional practice of the UK.

**Keywords:** Sovereignty, Parliament, Brexit, Schmitt, ‘Will of the People’, Discourse

### **Introduction**

Voting to leave the European Union has placed the UK constitution on a collision course, setting Parliament—the majority of whom backed Remain<sup>1</sup>—for a clash with the proclaimed

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<sup>1</sup>See: ‘EU Vote: Where the Cabinet and Other MPs Stand’, (BBC News, 22<sup>nd</sup> June 2016) <https://www.bbc.co.uk/news/UK-Politics-EU-Referndum-35616946> accessed 25 March 2019.

‘Will of The People’, as encapsulated in the 52/48 decision to leave the EU.<sup>2</sup> In this clash, it remains to be seen whether the legal supremacy of parliamentary sovereignty or the legitimacy brought into being by the referendum decision will win out. Traditionally, at least since the Glorious Revolution,<sup>3</sup> the core constitutional value has been the sovereignty of Parliament.<sup>4</sup> Broadly speaking, this has operated as the ability of Parliament to make or unmake any law,<sup>5</sup> alongside a recognition that the government cannot act without lawful basis<sup>6</sup> and, as a corollary, the idea that individual rights cannot be impinged without lawful justification.<sup>7</sup> Another distinct aspect of the UK constitution has been that ‘the constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens.’<sup>8</sup> To put this another way, what has marked the constitution as distinctive is that it is one of only three, globally, which is not codified<sup>9</sup> and is therefore adaptable without special legislative procedures.

Building on the themes set out in the framework chapter,<sup>10</sup> this chapter charts the power of Brexit rhetoric to shift our understanding of the constitution. Specifically, I look at the framing of discourses on sovereignty, analysing how a movement from the orthodox theory of parliamentary sovereignty towards a conception of ‘people’s sovereignty’ around the issue of the EU referendum may have a lasting impact on the constitutional setup of the UK. To do this, I employ a theoretical framework which analyses emerging discourses

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<sup>2</sup> See: Electoral Commission, ‘UK Referendum results’ (Electoral Commission June 23<sup>rd</sup> 2016) <http://www.electoralcommission.org.uk/find-information-bysubject/elections-and-referndums/past-elections-and-referndums/eu-referndum/electorate-and-count-information> accessed 25 March 2019.

<sup>3</sup> Questions arise over the extent to which Scotland have ever subscribed to this view of the legislature. See: Declaration of Arbroath, 1320.

<sup>4</sup> As Lord Bingham recognises in Jackson, ‘The bedrock of the British Constitution is... the supremacy of the Crown in Parliament’. See *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [9].

<sup>5</sup> Albert Venn Dicey, ‘*Introduction to the Study of the law of the constitution*’ (6<sup>th</sup> Ed, Macmillan 1902) 38.

<sup>6</sup> Provided either by statutory powers or royal prerogative powers.

<sup>7</sup> *Entick v Carrington* [1765] EWHC J98 (KB).

<sup>8</sup> JAG Griffith, ‘The Political Constitution’ (1979) 42 *The Modern Law Review* 1, 19.

<sup>9</sup> This meaning simply that the constitution is not recorded or clearly articulated in one specific place.

<sup>10</sup> See Chapter in this volume: Tawhida Ahmed and Elaine Fahey, ‘Framing the Methodology of Justice, Injustice and Brexit: An Introduction’

around the referendum as a form of constituent power, providing an overriding legitimacy capable of shifting constitutional practice. The chapter is advanced over four sections. Sections one and two offer key definitions, including those of discourse, sovereignty, and constituent and constituted power. Section three then looks at the historical role of both constituent and constituted power within the UK, stressing the increased usage of referendums as a challenge to the sovereignty of Parliament. Finally, section four offers an analysis of the growing conception of ‘people’s sovereignty’ which, I argue, is beginning to re-shape the constitution, prompting moves towards the recognition of ‘The People’ as a constitutional actor. This has multiple justice implications. For example, if one sees participatory democracy as integral to producing justice, then such a change could be viewed as increasing democratic justice.<sup>11</sup> However, if one views majoritarianism as potentially incompatible with liberty, this could lead to injustice for minorities.<sup>12</sup>

The adoption of a constructivist framework—which views knowledge as built through discourse—requires several recognitions in light of the questions laid out in the framework chapter.<sup>13</sup> Firstly, this chapter is written from the standpoint that ‘objective’ research about Brexit—or any socio-legal/politico-legal category—is effectively impossible. Rather, academic texts, judicial decisions, and journalistic commentaries each contribute to the construction of a series of discursive epistemes.<sup>14</sup> These epistemes both delimit what is knowable and what is thinkable, meaning all subsequent contributions to knowledge or theory are themselves constrained by what has gone before.<sup>15</sup> In other words, existing

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<sup>11</sup> See for example: Ian Shapiro, ‘Elements of Democratic Justice’ (1996) 24 *Political Theory* 579.

<sup>12</sup> See for example: Eiko Thielemann and Natascha Zaun, ‘Escaping Populism—Safeguarding Minority Rights: Non-Majoritarian Dynamics in European Policy Making’ (2018) 56 *Journal of Common Market Studies* 906.

<sup>13</sup> See Chapter in this volume: Tawhida Ahmed and Elaine Fahey, ‘Framing the Methodology of Justice, Injustice and Brexit: An Introduction’

<sup>14</sup> Foucault defines episteme as something which ‘defines the conditions of possibility of all knowledge’. Michel Foucault, *The Order of things: Archaeology of the Human Sciences* (Routledge 2001) 168.

<sup>15</sup> Even ideas which are a radical departure from the status quo will usually be framed with reference to it.

knowledge about phenomena play a part in building the criteria by which new knowledge is assessed.

### 1. Understanding Discourse

According to Foucault, discourses are ‘practices that systematically form the objects of which they speak’.<sup>16</sup> Therefore, discourse is a performance—spoken, written, or acted—which forms the object in question.<sup>17</sup> For example, this chapter will contribute to discourses on sovereignty and, in so doing, will subtly alter how those who read it understand sovereignty—while having to remain closely associated with our current understandings, to remain intelligible—and thus will itself play a part in (re)constructing sovereignty. The key implication of this is that objects are always fluid and bendable.<sup>18</sup>

The significance of discourse to the constitution lies in the fact that, as an uncoded ‘document’, arising as much from practice as it does from written sources, accounts of the constitution are largely descriptive; they attempt to provide, in systematic terms, an account of the actual practice of constitutional law in the UK. Thinkers such as Dicey<sup>19</sup> and Hart<sup>20</sup> explicitly articulate this. This is significant as it creates a space in which how we talk about the constitution can have a profound impact on how the constitution is understood going forward. This leaves room for new conventions to take hold. Crucially, most conventions are reliant on being perceived as a necessary basis for legitimacy if they are to be obeyed.<sup>21</sup> For example, while the Queen would, as a matter of law, be free to appoint whomever she

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<sup>16</sup> Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (Sheridan Smith trans, Vintage 1982) 49; 135-140.

<sup>17</sup> See Michel Foucault, *Discipline and Punish* (Alan Sheridan trans, Vintage Books 1995) 233-239.

<sup>18</sup> Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Robert Hurley Trans, Penguin 1998) 138-144.

<sup>19</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (6<sup>th</sup> Ed, Macmillan 1902) 3-4.

<sup>20</sup> Herbert Hart, *The Concept of Law* (2<sup>nd</sup> Ed, Clarendon Press 1992) 239.

<sup>21</sup> This corresponds to the third limb of Ivor Jennings test to detect whether a convention exists. Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> Ed University of London Press 1959) 136.

pleased as Prime Minister, she is in practical terms bound by convention to appoint the leader of the largest party in the House of Commons.<sup>22</sup> This is primarily because the making of such an appointment would be considered the only legitimate course of action. Another example is the Sewel Convention, which holds that the Westminster Parliament should not legislate on devolved matters without seeking the consent of devolved legislatures.<sup>23</sup> Evidently, were Westminster to disregard the devolved legislatures, despite maintaining a legal right to do so, this would be viewed as illegitimate by the electorates of devolved nations. Thus, the Sewel convention is commonly upheld out of a desire for decisions to carry the weight of legitimacy as well as legality. In the same regard, if Parliament feel bound by the EU referendum, new conventions regarding upholding referendums may arise.<sup>24</sup> Otherwise put, the treatment of the referendum result—and the ways in which we speak about it—is suggestive of a new constitutional morality<sup>25</sup> that sees adherence to the ‘Will of The People’ as itself a constitutional convention.

## 2. Defining Sovereignty and ‘The Will of The People’

Sovereignty is an abstract concept which refers, generally, to holding absolute power or being the source of power within a given state.<sup>26</sup> However, in the UK context, sovereignty is usually invoked in reference to parliamentary sovereignty. Indeed, the first encounter with sovereignty for most UK law students is that handed down by Dicey, who argued that:

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<sup>22</sup> ‘The Cabinet Manual’ (1st edn, 2011)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60641/cabinet-manual.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf)> accessed 15 January 2019.

<sup>23</sup> Scotland Act 1998, S28(8).

<sup>24</sup> For an interesting discussion regarding the power of constitutional conventions to bind see: Joseph Jaconelli, ‘Do Constitutional Conventions Bind’ (2005) 64 Cambridge Law Journal 149, 149-155.

<sup>25</sup> John Laws, ‘The Miller Case and Constitutional Statutes’ in Mark Elliot et al (eds) ‘*The Constitution after Miller: Brexit and Beyond*’ (Bloomsbury 2018) 217.

<sup>26</sup> See for Example: Jean Bodin, ‘*on sovereignty*’ (Julian Franklin trans, Cambridge University Press 1992) 1.

The principle of parliamentary sovereignty means neither more or less than this, namely, that parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of parliament.<sup>27</sup>

This is simple enough, parliament may make any law and nobody, including a court, may challenge a statute.<sup>28</sup> However, when considering parliamentary sovereignty more discerningly, tensions begin to appear. One of the crucial tensions, for example, relates to another aspect Dicey identifies as central to the UK Constitution, that no Parliament can bind a future Parliament.<sup>29</sup> There are two core views on the ability of Parliaments to bind their successors, these being the theory of continuing sovereignty<sup>30</sup> and the theory of self-embracing sovereignty<sup>31</sup>. The theory of continuing sovereignty is the position articulated by Dicey, that no Parliament can bind its successor. The adherents of continuing sovereignty believe that the philosophical concept of *tabula rasa*<sup>32</sup> applies to Parliament, and therefore, that each new Parliament begins with a blank slate with no limitation on their law-making power. Accordingly, continuing sovereignty holds that Parliament is not permitted to make changes to its own structure.<sup>33</sup>

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<sup>27</sup> Albert Venn Dicey, *Introduction to the Study of the law of the constitution* (6<sup>th</sup> Ed, Macmillan 1902) 37-38.

<sup>28</sup> Even if a legal challenge relates to a claim that incorrect procedure was employed when passing a bill, a legal challenge must still fail. See: *Edinburgh and Dalkeith Railway v. Wauchope* (1842) 8 C.I. & F. 725; *Pickin v. British Railways Board* [1974] A.C. 765, 789.

<sup>29</sup> Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans, Green and co 1880) 192, as cited in Albert Venn Dicey, *Introduction to the Study of the law of the constitution* (6<sup>th</sup> Ed, Macmillan 1902) 65.

<sup>30</sup> See: William Wade, 'The Basis of Legal Sovereignty' (1955) 13 *Cambridge Law Journal* 172.

<sup>31</sup> See: Robert Heuston, *Essays In Constitutional Law* (Stevens & Sons Ltd 1964.).

<sup>32</sup> Which translates to The Blank Slate.

<sup>33</sup> Nicholas Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 *International Journal of Constitutional Law* 144, 144; Albert Venn Dicey, *Introduction to the Study of the law of the constitution* (John Allison ed, Oxford University Press 2013) 67-68.

Adherents of continuing sovereignty offer various explanations for their positions. For example, Wade argues that parliamentary sovereignty is underpinned by the principle of judicial obedience, with the implication that judges recognise what constitutes Parliament, rather than the House itself.<sup>34</sup> In essence, his argument holds that judicial acceptance of parliamentary sovereignty is the ultimate *political fact* on which the constitution is based. This analysis situates the judiciary as being the only institution able to recognise an alternative Parliament. Arguments for continuing sovereignty are supported by the doctrine of implied repeal, which holds that if Parliament legislates in a manner incompatible with older legislation that older legislation will be repealed.<sup>35</sup> However, in *Thoburn* Laws LJ held that:

We should recognise a hierarchy of Acts of Parliament: as it were “ordinary statutes” and “Constitutional” statutes. These two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the general relationship between citizens and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights... Ordinary Statutes may be impliedly repealed. Constitutional Statutes may not.<sup>36</sup>

This, I argue, was a clear statement of a principle which already formed the foundations of the decision in *Factortame (No2)*.<sup>37</sup> In *Factortame*, the merchant shipping Act 1988 was set aside with precedence given to the European Communities Act 1972. Though the decision in *Thoburn* was only at the High Court level, the concept of ‘constitutional statutes’ has now been fully adopted by the Supreme Court in *Miller*.<sup>38</sup>

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<sup>34</sup> William Wade, ‘The Basis of Legal Sovereignty’ (1955) 13 Cambridge Law Journal 172.

<sup>35</sup> See for Example: *Ellen Street Estates Ltd. v. Minister of Health* [1934] 1 K.B. 590.

<sup>36</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] 3 W.L.R 247 [62]-[63].

<sup>37</sup> *R v Secretary of State for Transport, ex p Factortame (NO 2)* [1991] 1 AC 603.

<sup>38</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 158. [66-68].

Accounting for the decision in *Miller*, I argue that the courts have gradually adopted self-embracing sovereignty, or at least the manner and form changes traditionally accepted as part of self-embracing sovereignty. Manner and form changes allow Parliament to alter its own makeup and procedures.<sup>39</sup> Or even to place procedural limitations on its successors. For example, the European Union Act 2011 set out a limitation on the UK's ability to accede to new EU treaties, requiring a referendum to take place before new treaties could be incorporated into national law. This meant, in effect, that Parliament limited their own powers to legislate in such a way that a new EU treaty would not come into force at the domestic level, without the support of the public in a referendum. While Parliament could have simply repealed the European Union Act 2011—as they have with the European Union Withdrawal Act 2018—I argue that the ‘referendum lock’ offers a prime example of manner and form change. This view has been embraced by Craig<sup>40</sup>. Other examples can be seen in the Parliament Act 1911, which set down a procedure by which the Commons could pass valid acts of Parliament without the consent of the Lords. Since the decision in *R (Jackson) v Attorney General*<sup>41</sup>, concerning the status of the Parliament Act 1949, there is clear precedent for Parliament making effective changes to its own form and procedures.

My purpose in exploring these theories of parliamentary sovereignty is twofold. Firstly, the debate between self-embracing and continuing sovereignty shows that even when discussion is purely about parliamentary sovereignty there is a lack of clarity over the precise meaning of concepts. This lack of clarity enables terms such as sovereignty to be discursively influenced and adapted for differing political and legal goals. Secondly, these theories show how understandings of the constitution develop over time. When Dicey provided his account,

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<sup>39</sup> See generally: Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015).

<sup>40</sup> Paul Craig, ‘The European Union Act: Locks, limits and Legality’ (2011) 48 *Common Market Law Review* 1915, 1936.

<sup>41</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.



he gave a largely accurate descriptive account of UK constitutional practice. However, his work was largely prior to the Parliament Acts, prior to Jackson, and prior to any concept of ‘constitutional statutes’.<sup>42</sup> As these two points show, our constitutional concepts are apt to being altered by changes in how they are deployed and discussed.<sup>43</sup>

Outside of the British context, sovereignty is understood in different terms. For example, Schmitt envisaged sovereignty as effectively relating to the decision to suspend constitutional norms.<sup>44</sup> Schmitt defines sovereignty by arguing ‘sovereign is he who decides on the exception’.<sup>45</sup> Indeed, for Schmitt, parliamentary democracy and sovereignty are incompatible.<sup>46</sup> Rather, he claims that political parties and parliamentarians undermine politics and, therefore, undermine the possibility of sovereign power.<sup>47</sup> Accounting for these differences, I draw a distinction between parliamentary sovereignty which, for our purposes, refers to the UK’s historic constitutional system whereby the legislature holds ultimate power, and sovereignty which, in Schmittian terms, refers to the individual or group who holds decisive power within a given territory. The interesting move which we now see could best be characterised as a discursive movement from parliamentary sovereignty to a more abstract conception of sovereign power which sees ‘The People’ as an extraordinary lawmaker whose will is absolute.<sup>48</sup>

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<sup>42</sup> Dicey does deal briefly with the Parliament Act of 1911 in his later work. See: Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> Ed, MacMillan 1915) xxvii-xlii; 418-421.

<sup>43</sup> There are some theorists who disagree with the idea of parliamentary sovereignty offering a justifiable account of the UK constitution. For example, Lakin argues that the principle of *legality* is the central organising feature of the UK constitution. See: Stuart Lakin, ‘Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution’ (2008) 28 *Oxford Journal of Legal Studies* 709.

<sup>44</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schuab Trans, University of Chicago Press 2006)

<sup>45</sup> *Ibid*, 5.

<sup>46</sup> Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy Trans, MIT Press 1988) 25-26.

<sup>47</sup> Carl Schmitt, *Legality and Legitimacy* (Jeffery Sietzer trans, Duke University Press 2004) ESP 30-41.

<sup>48</sup> This builds on the simple truism noted by Douglas-Scott that ‘it would be highly inexpedient to ignore the referendum result.’ Sionaidh Douglas-Scott, ‘Brexit, Article 50 and the contested British Constitution’ (2016) 79 *Modern Law Review* 1019, 1022.

Schmitt's conception of sovereignty builds on the idea of constituent and constituted power.<sup>49</sup> For Schmitt, there is a distinction to be drawn between the power held by the public, constituent power, which is absolute and carries a legitimacy which overrides existing norms, and the power held by constituted bodies, known as constituted power, which is limited by the need to act in accordance with the constitutional norms establishing it.

Constituent power should be understood as the 'legally unlimited power of creating (and re-creating) constitutions.'<sup>50</sup> Taking account of this, constituent power effectively means that those who are subject to the power of the constitution hold a power to alter or replace that constitution. For many social contractarians such as Rousseau<sup>51</sup>, Locke<sup>52</sup>, or Sieyes<sup>53</sup> sovereignty itself is the ability to make or unmake new constitutions.<sup>54</sup> Constituted power, on the other hand, should be understood as arising from the constitution and authorised only to act according to it. In the UK context, what is a constituted power is often unclear. Therefore, The Constitution of the United States, and its subsequent amendments, provide a stronger example of what is a constituted power. The US constitution sets out and legally limits the role and powers of the President of the United States.<sup>55</sup> At all times, the President is only empowered to act in accordance with these powers.<sup>56</sup> For example, when Donald Trump attempted to invoke bans on immigration from majority Muslim states, which violated the

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<sup>49</sup> Carl Schmitt, '*Constitutional Theory*' (Jeffery Seitzer trans, Duke university Press 2008) ESP 77.

<sup>50</sup> Joel I Colon-Rios, 'Rousseau, Theorist of Constituent Power' (2016) 36 *Oxford Journal of Legal Studies* 885, 885.

<sup>51</sup> Jean-Jacques Rousseau, '*The Social Contract*' (Maurice Cranston Trans, Penguin Books 1974).

<sup>52</sup> John Locke, '*Two Treatises of Government*' (Peter Laslett ed, Cambridge University Press 1998) ESP 222.

<sup>53</sup> Emmanuel Sieyès, 'What is the Third Estate?' in Michael Sonenscher (ed) '*Political Writings*' (Hackett Publishing Company 2003)

<sup>54</sup> Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12 *Constellations* 223.

<sup>55</sup> Constitution of the United States, 1787.

<sup>56</sup> Or with any provided by primary legislation held to be consistent with the constitution.

constitution, these actions were held invalid by the courts until the bans were constructed in a manner consistent with the Constitution.<sup>57</sup>

### 3. The EU Referendum as Constituent Power

In the UK, the notion of constituent power is rarely invoked. As Colon-Rios notes, such a separation is regarded as unnecessary in a system based on parliamentary sovereignty.<sup>58</sup> This means that, as Griffith famously identified,

In this country we have stayed clear of one bit of nonsense which is currently advanced in countries as diverse in their political structure as the Chinese People's Republic, the Soviet Union and the United States of America. I mean the view that sovereignty resides with the people who delegate it to their politicians who hold it on trust for them.<sup>59</sup>

One manifestation of this can be seen in the designation of our parliamentarians as representatives, who promote our interests instead of our desires, as opposed to delegates, who would be bound to represent our views and desires.<sup>60</sup> Indeed, in some senses, the powers Parliament hold are constituent. This is because Parliament is capable of amending or changing the constitution. Crucially, this means the powers held by Parliament have been traditionally observed as arising from parliament itself—or rather, the Crown in Parliament<sup>61</sup>—instead of belonging to ‘The People’ and being exercised by parliament.

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<sup>57</sup> *State of Washington and State of Minnesota v. Trump* 847 F.3d 1151; 2017 U.S. App. LEXIS 2369.

<sup>58</sup> Joel I Colon-Rios, ‘Rousseau, Theorist of Constituent Power’ (2016) 36 *Oxford Journal of Legal Studies* 885, 889.

<sup>59</sup> JAG Griffith, ‘The Political Constitution’ (1979) 42 *The Modern Law Review* 1, 3.

<sup>60</sup> To Quote Burke, ‘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.’ Edmund Burke, ‘The Works of the Right Honourable Edmund Burke’ (Henry G Bohn 1854) 446-448.

<sup>61</sup> Sionaidh Douglas-Scott, ‘Brexit, Article 50 and the Contested British constitution’ (2016) 79 *The Modern Law Review* 1019, 2021.

However, the introduction of referendums to the UK constitutional picture complicates this view. As Laws has identified:

The use of referendums creates a potential constitutional danger. It is that the referendum appears to offer a source of democratic power which challenges the democratic power of parliament. It creates two democratic poles, one representative—the elected legislature—and one direct—the people’s vote.<sup>62</sup>

To put this more clearly, referendums are one manifestation of constituent power.

Referendums have not historically had a place in the UK’s parliamentary democracy.<sup>63</sup>

However, they have become increasingly common in recent years. Seeing particular favour under the Blair administration, which employed referendums when addressing devolution<sup>64</sup>.

Since 2010 there have been UK wide referendums on the issues of the UK’s voting system<sup>65</sup>

as well as on membership of the EU.<sup>66</sup> Of course, each of these have been undertaken after

Parliament passed legislation to enact them. And, following the judgement in *Miller*, the

requirement for parliamentary oversight of changes to UK law—even where a referendum

has been held—remains in place.<sup>67</sup> However, in *Miller* the issue was that use of prerogative

to initiate article 50 would cut across a statute. In situations where Parliament has not spoken,

executive powers arguably could be used to implement some referendum outcomes.

Regardless, there has been a discursive impact brought about by wider acceptance of referendums as a valid tool within the UK. Principally, this arises because, while the legal framework remains clear that Parliament is the ultimate site of power within the constitution,

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<sup>62</sup> John Laws, ‘The Miller Case and Constitutional Statutes’ in Mark Elliot et al (eds) *The Constitution after Miller: Brexit and Beyond* (Bloomsbury 2018) 217.

<sup>63</sup> Sionaidh Douglas-Scott, ‘Brexit, Article 50 and the Contested British constitution’ (2016) 79 *The Modern Law Review* 1019, 1020.

<sup>64</sup> See for Example: Referendums (Scotland and Wales) Act 1997; Greater London Authority (Referendum) Act 1998; Regional Assemblies (Preparations) Act 2003.

<sup>65</sup> See: Parliamentary Voting System and Constituencies Act 2011.

<sup>66</sup> European Union Referendum Act 2015.

<sup>67</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 158.

serious issues of legitimacy would arise were Parliament to reverse a referendum decision. Indeed, the very act of holding a referendum discursively suggests that the ultimate decision-makers in the UK are 'The People'. Therefore, the act of holding a referendum itself challenges our orthodox understandings of parliamentary sovereignty.

Crucially, as Schmitt argues, there is a distinction between legitimacy and legality.<sup>68</sup> Indeed, for Schmitt, a referendum represents the example par-excellence of legitimacy while parliamentary decisions reflect only legality, which he claims is a purely formal—and therefore less valid—criterion.<sup>69</sup> This is because, for Schmitt, 'in the referendum...the people appear as extraordinary lawmaker in opposition to and certainly also superior to the parliament.'<sup>70</sup> Admittedly, Schmitt's analysis draws on the constitution of Weimar Germany, which had provisions empowering referendums.<sup>71</sup> Nonetheless, the uncodified nature of the UK constitution means that should the 'Will of The People' be carried, purely on the basis that Parliament feel bound by the referendum result, a convention regarding the acceptance of referendums could be created. This potential is particularly strong given the previously mentioned constituent power carried by a referendum. If such a convention were to be operative on Parliament, this would effectively represent an implicit transfer of sovereignty from Parliament to 'The People'.

To put this another way, overturning the referendum—while entirely legal—would not be regarded legitimate and may be politically impossible. For this reason, the way we discursively construct legitimacy is crucial to our conceptions of what is constitutional. This is particularly true in a constitution such as the UK's, being as it is, so heavily based on

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<sup>68</sup> See Generally: Carl Schmitt, '*Legality and Legitimacy*' (Jeffery Seizer trans, Duke University Press 2004) ESP 59-66.

<sup>69</sup> *Ibid*, 59-66.

<sup>70</sup> *Ibid*, 60.

<sup>71</sup> Constitution of the Weimar Republic 1919, A73-74.

conventions. So, for example, despite the long-standing precedential basis on which the decision in *Miller* was based, there was relatively little outcry when one of the UK's bestselling newspapers labelled the judges at High Court level 'Enemies Of The People' and claimed that they had 'declared war on democracy'.<sup>72</sup> Similarly, Theresa May has been able to survive a series of parliamentary defeats on matters including a finance bill<sup>73</sup> and her government's flagship policy—their withdrawal agreement with the EU<sup>74</sup>—in circumstances under which Prime Ministers would historically have felt bound to resign, on the basis that she has been delivering 'The Will of The People'. Going so far as to state 'I believe it is my duty to deliver on the British people's instruction to leave the European Union. And I intend to do so.'<sup>75</sup>

#### 4. Respect the 'Will of The People'

Following the EU referendum, the rhetorical invocation of 'The Will of The People' by government ministers has been used as a method of silencing critique of their approach to the UK's exit from the EU.<sup>76</sup> The attempt to cast the referendum as the 'Will of The People' is reminiscent of Rousseau's conception of the general will, which he claims is expressed whenever 'several men [sic] in assembly regard themselves as a single body'.<sup>77</sup> Crucially, for

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<sup>72</sup> James Slack, 'Fury Over 'Out of Touch' Judges Who Defied 17.4M Brexit Voters' (Mail Online, 3<sup>rd</sup> November 2016) <<https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>> accessed 31 January 2019.

<sup>73</sup> HOC DEB 08 January 2019 Vol 652 Col 278-282.

<sup>74</sup> Heather Stewart, 'May Suffers Heaviest Parliamentary Defeat of a British PM In the Democratic Era' (the Guardian, 15<sup>th</sup> January 2019) <<https://www.theguardian.com/politics/2019/jan/15/theresa-may-loses-brexit-deal-vote-by-majority-of-230>> accessed 31 January 2019.

<sup>75</sup> Theresa May, 'PM's Statement at Downing Street: 16 January 2019' (GOV.UK, 16<sup>th</sup> January 2019) <<https://www.gov.uk/government/speeches/pms-statement-at-downing-street-16-january-2019>> accessed 10 February 2019.

<sup>76</sup> See for Example: Peter Dominiczak, Steven Swinford and Ben Riley-Smith, 'Theresa May To Dare Parliament To 'Defy The Will Of The People' If She Loses Article 50 Court Battle' (The Telegraph, 3<sup>rd</sup> December 2016) <<https://www.telegraph.co.uk/news/2016/12/02/theresa-may-dare-parliament-defy-will-people-loses-article-50/>> accessed 31 January 2019.

<sup>77</sup> Jean-Jacques Rousseau, 'The Social Contract' in George Cole (ed) *'The Social Contract and the Discourses'* (Everyman's Library 1973) 213.

Rousseau, the general will is always consistent with the common good.<sup>78</sup> This also chimes with Schmitt's claim that 'the referendum is always the higher form of decision.'<sup>79</sup>

In attempting to cast the referendum as an expression of the general will, those desiring Brexit are able to paint a picture in which parliamentarians objecting to the decisions of the executive are 'saboteurs'<sup>80</sup> attempting to undermine the 'Will of The People'. This was most clear in May's 20<sup>th</sup> of March Address to the nation where she claimed that 'Parliament has done everything possible to avoid making a choice'<sup>81</sup> and 'you want this stage of the Brexit process to be over and done with. I agree. I am on your side.'<sup>82</sup> In effect, this kind of rhetoric serves to discursively undermine the legitimacy of parliamentary debate. It sees the referendum—a manifestation of constituent power—cast as overriding the legitimacy of parliamentary process. It suggests as Schmitt has argued, '[that] the representative must fall silent when the represented themselves speak, the democratic consequence is that the popular assembly must always recede into the background, if opposed by the people it represents.'<sup>83</sup> This was also present in Rees-Mogg's calls for the Queen to prorogue Parliament to prevent the passing of legislation to delay Brexit.<sup>84</sup> In this way, the idea that the government are delivering the 'Will of The People' enables the executive to undermine scrutiny based on legitimacy provided by the referendum. For example, after losing the 'meaningful vote' on her negotiated Brexit deal by 230 votes, rather than resigning, May resolved to carry on,

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<sup>78</sup> *Ibid* 72-74

<sup>79</sup> Carl Schmitt, '*Legality and Legitimacy*' (Jeffery Seizer trans, Duke University Press 2004) 63.

<sup>80</sup> See for example: Macer Hall, 'They Really Do Want to Steal Brexit: Rebel MPs 'Sabotage' Bid to Prepare for A No-Deal' (Express.co.uk January 9<sup>th</sup> 2019) <<https://www.express.co.uk/news/politics/1069319/brexit-sabotage-mps-no-deal-preparations>> accessed 31 January 2019.

<sup>81</sup> Theresa May, 'PM statement on Brexit: 20 March 2019' (Gov.UK 20<sup>th</sup> March 2019) <https://www.gov.uk/government/speeches/pm-statement-on-brexit-20-march-2019> accessed 25 March 2019.

<sup>82</sup> *Ibid*

<sup>83</sup> Carl Schmitt, '*Legality and Legitimacy*' (Jeffery Seizer trans, Duke University Press 2004) 61.

<sup>84</sup> Lizzy Buchan, 'Jacob Rees-Mogg Tells Theresa May To Suspend Parliament If MPs Block No-Deal Brexit' (*The Independent*, 23<sup>rd</sup> January 2019) <<https://www.independent.co.uk/news/uk/politics/brexit-jacob-rees-mogg-article-50-amendment-theresa-may-suspend-parliament-yvette-cooper-a8742616.html>> accessed 10 February 2019.

stating that, ‘if this House can come together we can deliver the decision the British people took in June 2016, restore faith in our democracy...’<sup>85</sup> As this shows, the executive used the legitimacy provided by the referendum to circumvent what would generally be considered a matter of confidence, with ramifications for the ability of the Prime Minister to stay in role.

Acceptance of referendums as a manifestation of the ‘Will of The People’, as opposed to merely being an advisory poll, presents a threat to the continued legitimacy of parliamentary sovereignty. This is because, as Schmitt argues, true sovereignty lies with the individual or body who hold ultimate decision-making power.<sup>86</sup> Therefore, if the vote in the referendum is considered binding on Parliament, even if only on the basis that failing to honour the result would present an insurmountable political issue, then Parliament cannot be considered to be sovereign in any recognisable sense of the term. Obviously, this interpretation relies on a rather absolutist definition of sovereignty. Often, in practice, decision-making power is far more divided, lying with numerous institutions and facing various limitations. Nonetheless, the traditional understanding of parliamentary sovereignty, as the theoretically unlimited power of parliament to make or unmake any law, is challenged by acceptance of a public will which directs parliament and legitimises executive action.

Gordon usefully suggests the potential significance of a move away from parliamentary sovereignty occurring in the minds of constitutional actors. He claims that parliamentary sovereignty:

Shapes and organises [constitutional] practice... for such practice is, to a significant extent, a function of the recognition by constitutional actors of the sovereignty of

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<sup>85</sup> Theresa May, ‘PM Statement to The House of Commons: 29 January 2019’ (*GOV.UK*, 29 January 2019) <<https://www.gov.uk/government/speeches/pm-statement-to-the-house-of-commons-29-january-2019>> accessed 10 February 2019.

<sup>86</sup> Carl Schmitt, ‘*Political Theology: Four Chapters on the Concept of Sovereignty*’ (George Schuab Trans, University of Chicago Press 2006) 5.



parliament... [W]ere discussions of constitutional practice to become disengaged from the doctrine of parliamentary sovereignty, the result would be, in the short term, to produce an inauthentic account of the operation of the constitution. And in the longer term... the ordering of, and relationships between, UK constitutional actors would be susceptible to changing from their present state.<sup>87</sup>

What Gordon identifies is the principle threat posed by the EU referendum; this being that the ordering of and relationship between UK constitutional actors is altered by the acceptance of a new overriding form of legitimacy. Namely, the 'Will of The People'. As Laws recognises, 'for MPs to treat a referendum as a mandate represents a new kind of constitutional morality.'<sup>88</sup> As of yet, it is unclear whether this new constitutional morality will firmly take hold. Regardless, the increased use of referendums, and the attempt to use them as a mandate for executive action is something new in the UK constitution, and that is something we should take very seriously.<sup>89</sup>

## 5. Conclusion

It should be noted that the potential for constitutional change due to alterations in our discursive understanding of the constitution are equally as present in the common law theory of Wade<sup>90</sup> as they are in the positivist and political framework laid out by Gordon.<sup>91</sup> This is because, regardless of methodological approach, most constitutional theorists seek to claim that they are offering a *descriptive* account of the constitution. Therefore, while theorists may not agree about the current status of the constitution, or how I have suggested it might

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<sup>87</sup> Michael Gordon, '*Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy*' (Hart Publishing 2015) 29.

<sup>88</sup> John Laws, 'The Miller Case and Constitutional Statutes' in Mark Elliot et al (eds) '*The Constitution after Miller: Brexit and Beyond*' (Bloomsbury 2018) 217.

<sup>89</sup> For a brief discussion of the historic use of referendums see: Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79 *Modern Law Review* 1019-2021.

<sup>90</sup> William Wade, 'The Basis of Legal Sovereignty' (1955) 13 *The Cambridge Law Journal* 172.

<sup>91</sup> Michael Gordon, '*Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy*' (Hart Publishing 2015).

change, they should take seriously the impact that altering public understandings of it could have on the shape of constitutional practice. This matters in terms of justice because it raises core issues around conceptions of fairness, legitimacy, and authority. Leading to questions over who holds power within the UK constitution? And who is accountable for the exercise of that power?

This potential for change is equally recognisable in the historical development of the constitution. Historically, the constitution has moved from ‘the idea of sovereign power with extraordinary linguistic powers... [to] a more diffuse and complicated set of discursive and institutional powers.’<sup>92</sup> This is the movement from the absolute monarch, largely capable of ruling by proclamation<sup>93</sup>, through the Bill of Rights<sup>94</sup>, to a position where the executive and Parliament can each claim different institutional rights in *Miller*.<sup>95</sup> The constitution has transitioned from a system close to absolute monarchy to one which centres democratic legitimacy with remarkably little change in its structures.<sup>96</sup> All this chapter suggests is that, just as discourses of democratic legitimacy were able to shift the practical operation of the constitution, we should be aware of the potential for Brexit discourses—and the overriding legitimacy they appear to carry—to do the same. Of course, Brexit discourses are themselves an alternative conception of democratic legitimacy, so their impact is in keeping with the historical and shifting traditions of the UK constitution. As Johnson has argued, ‘Sovereignty

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<sup>92</sup> Judith Butler, ‘Notes Towards a Performative Theory of Assembly’ (Harvard University Press 2018) 29.

<sup>93</sup> A power they retained until the case of proclamations. See: *The Case of Proclamations* [1610] EWHC KB J22.

<sup>94</sup> Bill of Rights 1689.

<sup>95</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 158.

<sup>96</sup> See Generally: Jo Eric Khushal Murkens, ‘Democracy as the Legitimizing Condition in the UK Constitution’ (2018) 38 *Legal Studies* 42, 42-56.

as a concept has changed and continues to change to reflect the needs [or wants] of modern society'.<sup>97</sup>

Finally, the 'warning' I seek to deliver is one long recognised. Lord Patten spoke of such issues as early as 2003, when he claimed that referendums 'undermine' Westminster.<sup>98</sup> While referendums do not pose a threat to the constitution in terms of legal theory, the ways in which we construct legitimacy means that referendums, as acts of constituent power, with the legitimacy that provide, pose a danger to the discursive underpinnings of the UK constitution, offering an alternative centre of power and therefore threatening radical transformation of our current constitutional practice.<sup>99</sup>

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<sup>97</sup> Marc Johnson, 'The Models of Parliamentary Sovereignty – University of Bristol Law School Blog' (Legalresearch.blogs.bris.ac.uk, 4<sup>th</sup> December 2017) <[https://legalresearch.blogs.bris.ac.uk/2017/12/the-models-of-parliamentary-sovereignty/#\\_ftn6](https://legalresearch.blogs.bris.ac.uk/2017/12/the-models-of-parliamentary-sovereignty/#_ftn6)> accessed 1 February 2019.

<sup>98</sup> BBC, Breakfast with Frost, (1 June 2003)

<sup>99</sup> Douglas-Scott has undertaken interesting work in this area, including in this volume. See Chapter: Sionaidh Douglas-Scott, 'Brexit and the Siren Like Allure of Sovereignty'; Sionaidh Douglas-Scott, 'Brexit, Article 50, and the Contest British Constitution' (2016) 79 *Modern Law Review* 1019.