Chapter 12

Giving Substance to Sovereignty: Parliamentary Sovereignty and Parliamentary Effectiveness

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Abstract

In its celebrated prorogation judgment, the Supreme Court made novel and controversial use of the principle of parliamentary sovereignty to hold that Parliament could not lawfully be impeded in the exercise of its legislative function without reasonable justification. In this chapter, I contend that this decision forms part of a developing line of Supreme Court cases which treat sovereignty as a substantive rather than purely formal principle, concerned, in various ways, with the effectiveness, and not merely the authority, of Parliament's legislative role. I argue that these cases not only represent a departure from constitutional orthodoxy, but also have the potential to undermine, as well as to enhance, Parliament's legislative authority. While the potential ramifications of this developing doctrine of Parliamentary effectiveness are currently unclear, I nevertheless suggest that there are reasons to be concerned about its constitutional implications.

Key words

parliamentary sovereignty; parliamentary effectiveness; Supreme Court; prorogation case

Introduction

In September 2019, an eleven-member Supreme Court bench (including Lord Kerr) handed down its remarkable and unprecedented decision that the attempted prorogation of Parliament for five weeks (in the run up to the intended date of the United Kingdom's withdrawal from the European Union, on 31 October) was unlawful, and therefore null and of no effect.[1] Several aspects of the judgment were novel and controversial,[2] but the focus in this chapter is on the Supreme Court's ruling that the prorogation was unlawful because it was incompatible with the legal principle of parliamentary sovereignty. According to the court:

> The sovereignty of Parliament would… be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased.[3]

The court recognised that Parliament does not remain permanently in session, and hence prorogation for short periods was undoubtedly lawful.[4] However, the court held that:

> a decision to prorogue Parliament… will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature.[5]

[1] *R (Miller) v The Prime Minister/Cherry & Others v the Advocate General for Scotland* [2019] UKSC 41, [2020] AC 373 (hereafter *Miller 2/Cherry*).
[2] See Aileen McHarg, 'The Supreme Court's Prorogation Judgment: Guardians of the Constitution or Architect of the Constitution' (2020) 24 *Edin LR* 88.
[3] *Miller 2/Cherry*, n 1 above, [42].
[4] ibid, [45].
[5] ibid, [50].

Since the court considered that Parliament clearly had been prevented from carrying out its constitutional role – at a time when parliamentary scrutiny of the executive was particularly important – and that no reasons for the exceptional length of the prorogation had been offered, it followed that the decision was unlawful.[6]

The Divisional Court in *Miller 2* had rejected the expanded reading of parliamentary sovereignty advanced by Lord Pannick, as extending beyond the supremacy of statute to include the ability of Parliament to conduct its business unimpeded, as lacking in authority, indeterminate in scope, and offending against the separation of powers.[7] According to that court, '[t]he expanded concept has been fashioned to invite the judicial arm of the State to exercise hitherto unidentified power over the Executive branch of the State in its dealings with Parliament'.[8] Critics of the Supreme Court agree. By conflating the constitutional functions of the Houses of Parliament with the constitutional authority of the Crown-in-Parliament, Martin Loughlin claims that the decision 'attempts to transform a formal principle into a functional principle' which 'converts orthodoxy into heterodoxy and is… misconceived'.[9]

By contrast, defenders of the Supreme Court's decision agree with its ruling that 'the effect that the courts have given to parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law'.[10] Thus, while recognising the novelty of the inference drawn from parliamentary sovereignty, they regard it as compatible with the normative underpinning of the doctrine. For Mark Elliott, for example, sovereignty should not be understood 'as a merely technical rule about the hierarchical legal status of legislation enacted by Parliament' but rather as 'a fundamental principle that determines and reflects the nature of constitutional democracy in the UK'.[11] Similarly, Paul Craig argues that '[t]he proposition that statutes are invested with supremacy over all else has never represented the totality of the principle of parliamentary sovereignty', and '[t]he very idea that that legal norms include protection for the conditions of their exercise is… standard fare within legal reasoning'.[12]

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[6] ibid, [55]–[61].
[7] [2019] EWHC 2381 (QB), [58]–[64].
[8] ibid, [63].
[9] *The Case of Prorogation: the UK Constitutional Council's Ruling on Appeal from the Judgment of the Supreme Court* (London, Policy Exchange, 2019) 16, available at https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf. See also Richard Ekins, *Parliamentary Sovereignty and the Politics of Prorogation* (London, Policy Exchange, 2019) 14, available at https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf; Timothy Endicott, 'Making Constitutional Principles into Laws' (2020) 136 *LQR* 175, 178; John Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment* (London, Policy Exchange, 2019) 5, 8, available at https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf; Steven Spadijer, 'The Royal Prerogative Revisited: Some Reflections on the Proposed Repeal of the Fixed Term Parliaments Act and a (Lengthy) Critique of Miller No 2' (SSRN, 2021) [130]–[139], available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788525&download=yes; Stephen Tierney, 'Turning Political Principles into Legal Rules: the Unconvincing Alchemy of the *Miller/Cherry* Decision' (*Judicial Power Project*, 30 September 2019), available at http://judicialpowerproject.org.uk/stephen-tierney-turning-political-principles-into-legal-rules-the-unconvincing-alchemy-of-the-millercherry-decision/.
[10] *Miller 2/Cherry*, n 1 above, [41].
[11] 'Constitutional Adjudication and Constitutional Politics in the United Kingdom: The *Miller II Case in Legal and Political Context'* (2020) 16 *European Constitutional Law Review* 625, 631.
[12] 'The Supreme Court, Prorogation and Constitutional Principle' [2020] *Public Law* 248, 254, 255. See also Nicholas Barber, 'Constitutional Hardball and Justified Development of the Law' (*Judicial Power Project*, 29

Mike Gordon notes that parliamentary sovereignty was used largely superficially by the Supreme Court, to provide a legal gloss for a decision primarily about executive *accountability* to Parliament.[13] The court itself regarded the case as a 'one off',[14] a view shared in the report of the Independent Review of Administrative Law.[15] In this chapter, however, I seek to demonstrate that the prorogation decision forms part of a developing line of Supreme Court authority (in which Lord Kerr was centrally involved) which treats parliamentary sovereignty as a substantive rather than purely formal principle, concerned, in various ways, with the effectiveness, and not merely the authority, of Parliament's legislative function.

I begin by outlining the differing implications that have been drawn from the idea of making parliamentary sovereignty fully effective, arguing that these represent a clear departure from constitutional orthodoxy,[16] and that – paradoxically – they have the potential both to enhance and limit Parliament's legislative authority. I then explore the broader question whether parliamentary sovereignty, as traditionally understood, is a purely formal principle concerned with legal hierarchy, or rather one with wider substantive implications for the allocation and regulation of constitutional power. To the extent that that the latter is true, I will argue that its substantive implications have traditionally been very different from the use now being made of parliamentary sovereignty; essentially acting as a brake upon, rather than a justification for, judicial activism in the constitutional arena. Finally, I will consider how this developing doctrine of parliamentary effectiveness relates to the substantive turn in constitutional adjudication more generally, how the doctrine might develop in future and the appropriateness of the constitutional vision it embodies.

The Dimensions of Parliamentary Effectiveness

Three distinct, though related, dimensions of parliamentary effectiveness, apparently derived from the principle of parliamentary sovereignty, can be identified in the case law.

1. *Parliament Must Have the Opportunity to Legislate*

The idea that underpins *Miller 2/Cherry* is that 'Parliament is sovereign only if it has meaningful opportunities to exercise its legislative powers'.[17] A similar idea – that Parliament's opportunity to legislate must not be circumvented by executive action – also appears in the majority judgment in the first *Miller* case.[18] There, the Supreme Court majority held that:

> We cannot accept that a major change to UK constitutional arrangements [in this case, withdrawal from the EU] can be achieved by ministers alone. It must be effected in the

September 2019), available at http://judicialpowerproject.org.uk/nick-barber-constitutional-hardball-and-justified-development-of-the-law/; Hasan Dindjer, 'Prorogation as a Breach of Parliamentary Sovereignty' (*UK Const Law Blog*, 16 September 2019), available at https://ukconstitutionallaw.org/2019/09/16/hasan-dindjer-prorogation-as-a-breach-of-parliamentary-sovereignty/; Alison Young, 'Deftly Guarding the Constitution' (*Judicial Power Project*, 29 September 2019), available at http://judicialpowerproject.org.uk/alison-young-deftly-guarding-the-constitution/.

[13] 'The Prorogation Case and the Political Constitution' (*UK Const Law Blog*, 30 September 2019), available at https://ukconstitutionallaw.org/2019/09/30/mike-gordon-the-prorogation-case-and-the-political-constitution/.

[14] *Miller 2/Cherry*, n 1 above, [1].

[15] CP 407, March 2021, para 2.37.

[16] By contrast, effectiveness *is* recognised as a core condition of state sovereignty; see Nicholas Barber, *The Principles of Constitutionalism* (Oxford, OUP, 2018) 25, 29–32.

[17] Dindjer, n 12 above.

[18] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 (hereafter *Miller 1*).

> only way that the UK constitution recognises, namely by parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law.[19]

Although the court did not explain which 'basic concepts of constitutional law' were in play, Alison Young argues that the clear implication – given its importance in the judgment more generally – is that this conclusion derives from parliamentary sovereignty.[20]

Of course, the idea that Parliament has a monopoly over legislation forms no part of the orthodox understanding of parliamentary sovereignty,[21] still less that it has a *right* to legislate. Parliament is not continuously in session,[22] and the *initiation* of legislation is primarily an executive function in Westminster systems, with opportunities for backbench MPs to legislate in the UK Parliament being heavily curtailed and dependent on government co-operation or – exceptionally, as seen during the Brexit process – the ability to wrest control of the parliamentary timetable from Ministers. In fact, in neither case did the Supreme Court regard the idea that Parliament should have the right to legislate as an absolute one: it was subject to the idea of constitutional importance in *Miller 1* and (in effect) to a proportionality test in *Miller 2/Cherry*. But, as Jason Varuhas points out, this appears to involve a further departure from orthodoxy, in treating Parliament's sovereignty, hitherto understood as an absolute rule, as a principle which could be qualified.[23]

Attempts to justify the idea that parliamentary sovereignty includes the right of Parliament to legislate variously involve unconvincing analogies, appeals to principle or the introduction of yet further departures from constitutional orthodoxy.

For example, in relation to *Miller 1*, both Craig and Young draw an analogy with the idea that constitutional statutes cannot be impliedly repealed, in order that Parliament must squarely confront the political costs of its proposed actions, to argue that it would be inconsistent if such statutes could be deprived of effect through ministerial action under prerogative powers, unless specifically authorised by Parliament.[24] Of course, this is an unrealistic depiction of the factual scenario in the case itself – there is no question that the political costs of a decision to leave the EU had not been squarely (albeit imperfectly) confronted. But more generally, this analogy turns a *limit* on Parliament's legislative freedom into a broader principle of constitutional regulation with the aim of empowering Parliament *vis-à-vis* the executive.

Elsewhere, Young acknowledges that the Supreme Court majority in *Miller 1* was reasoning in a deductive manner from the premise that Parliament is the most important institution in the UK constitution to the conclusion that major legal constitutional change should be enacted by Parliament and not by the executive acting alone.[25] As she acknowledges, however, this

[19] ibid, [82].
[20] '*Miller* and the Future of Constitutional Adjudication' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after* Miller*: Brexit and Beyond* (Oxford, Hart Publishing, 2018) 290.
[21] Mark Elliott, 'The Supreme Court's Judgment in *Miller*: in Search of Constitutional Principle' (2017) 76 *CLJ* 257, 267.
[22] The Bill of Rights 1688/Claim of Right 1689 require that Parliaments be held 'frequently', but the Inner House in *Cherry* (2019) CSIH 49 rejected reliance on this provision, and it formed no part of the Supreme Court's decision.
[23] 'The Principle of Legality' (2020) 79 *CLJ* 578, 588.
[24] Paul Craig, '*Miller*, Structural Review and the Limits of Prerogative Power' [2017] *Public Law* 48, 70; Young, n 20 above, 295.
[25] Young, ibid, 290.

involves 'a looser chain of causation'.[26] And her qualification that this novel principle applies only to 'legal' constitutional change[27] recognises the limits of any supposed parliamentary monopoly over constitutional change in a constitutional order only partially regulated by law.

Most startlingly of all, Tom Poole defends the decision by reference to a distinction between constituent authority and (constituted) legislative capacity – that is, certain constitutional changes are of such significance as to engage Parliament's role as a constituent assembly.[28] But again, it is axiomatic that the doctrine of parliamentary sovereignty, in its orthodox incarnation, is antithetical to any such distinction.

Similarly, in relation to *Miller 2/Cherry*, Craig draws an analogy with the continuing nature of parliamentary sovereignty:

> the precept that there can be no procedural and substantive limits to sovereignty attests to the fact that each Parliament in turn exercises the authority vested in it through representative democracy. The precept that Parliament should not be unduly foreclosed from exercising its legislative and scrutiny function is grounded in the principle that each Parliament should be able to exercise its representative authority for the period for which it has been duly elected.[29]

Once more, there is some logical distance between the idea that the latest expression of Parliamentary will prevails over earlier democratic choices and the assertion that Parliament *must in fact have the opportunity* to revisit its earlier choices.

Elliott appeals directly to arguments of principle:

> To cling to the notion of a sovereign Parliament with wholly unalloyed law-making competence that was vulnerable to legally uncontrollable powers of executive neutralisation would be absurd, since it would preserve those aspects of the sovereignty principle that go to the legal status of parliamentary sovereignty whilst dismantling the democratic scaffolding that supplies the normative support for the existence of such expansive powers in the first place.[30]

But no matter how attractive this argument may be, it again does not follow that it is either necessary or appropriate to develop a new constitutional rule to enforce it.

2. *Parliament Must Be Able to Legislate Free From Impediments*

A second element of the developing doctrine of parliamentary effectiveness is that, when legislating, Parliament must be able to do so free from impediments. This idea is most clearly seen in the *Scottish Continuity Bill Reference*,[31] in respect of the Supreme Court's decision that section 17 of the UK Withdrawal from the European Union (Legal Continuity) Scotland Bill was beyond the competence of the Scottish Parliament because it amounted to an unlawful

[26] ibid, 291.
[27] ibid, n 54. See also Gavin Phillipson, 'EU Law as an Agent of National Constitutional Change: *Miller v Secretary of State for Exiting the European Union*' (2017) 36 *Yearbook of European Law* 46, 77–8.
[28] 'Devotion to Legalism' (2017) 80 *MLR* 696. Phillipson makes a similar argument, ibid, 81–4.
[29] n 12 above, 255.
[30] n 11 above, 632.
[31] *Reference re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022.

modification of section 28(7) of the Scotland Act 1998. Section 17 purported to make the exercise of future powers conferred on UK Ministers by UK legislation to make delegated legislation modifying retained EU law in devolved areas conditional upon the consent of the Scottish Ministers. The court held that this amounted to an attempt to condition the future exercise of the Westminster Parliament's power to legislate for Scotland, which section 28(7) sought to preserve intact.

This aspect of the Supreme Court's decision is somewhat confusing in that it simultaneously rejected the argument that section 17 impinged upon the sovereignty of Parliament, since Westminster was free to amend, disapply or repeal the provision whenever it chose.[32] Given that section 28(7) was intended as a statutory affirmation of parliamentary sovereignty,[33] it is difficult to understand why an attempt to condition the exercise of future UK legislation in devolved areas could be incompatible with the statutory provision, yet compatible with the principle it embodied.[34] But whether the decision makes sense or not, it seems to evince a desire to protect Parliament's legislative freedom of action from constraints imposed by subordinate legislatures.

A similar idea may explain the decision in *Miller 1* in respect of the argument that legislation authorising the UK's withdrawal from the EU would be subject to the Sewel convention. Not only was the court not prepared to rule on the meaning and application of the convention, *qua* convention,[35] it also held that the statutory recognition (in section 28(8) of the Scotland Act) of the requirement to seek devolved consent had not converted the convention into an enforceable legal rule. This followed, the court said, from both the content of the rule and the wording used.[36] The nature of its content appears to be a reference to the fact that the Sewel convention constrains the Westminster Parliament in the exercise of its legislative authority in relation to devolved matters. However, as I have argued elsewhere, it would have been possible to give legal effect to section 28(8) without necessarily impinging on Parliament's sovereignty.[37]

Again, therefore, the Supreme Court appeared to be giving effect to an extended understanding of parliamentary sovereignty, as requiring that Westminster's legislative capacity be kept free from legal impediments, even ones that it is free to disregard. In other words, this appears to entail a move from the rule that Parliament *cannot* be prevented from legislating as it thinks fit, to a rule that there *must be no attempt* to impose such conditions, at least on the part of the devolved legislatures. However, this is no part of the orthodox understanding of parliamentary sovereignty, which has always recognised a distinction between Parliament's unlimited legislative authority, and the existence of a range of *de facto* constraints on its legislative

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[32] ibid, [63].
[33] See Christopher McCorkindale, 'Devolution: A New Fundamental Principle of the UK Constitution' forthcoming in Michael Gordon and Adam Tucker (eds), *The New Labour Constitution: Twenty Years On* (Oxford, Hart Publishing, 2021) 000.
[34] For an attempt at reconciliation, see Mark Elliott, 'The Supreme Court's Judgment in the Scottish Continuity Bill Case' (*Public Law for Everyone*, 14 December 2018), available at https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/.
[35] *Miller 1*, n 18 above, [144].
[36] ibid, [146].
[37] Aileen McHarg, 'Constitutional Change and Territorial Consent: the *Miller* Case and the Sewel Convention', in Elliott, Williams and Young, n 20 above, 174–7.

capacity.[38] It is also inconsistent with rules of interpretation – whether statutory or common law – which require Parliament to go to particular efforts to make its intention to achieve certain legislative objectives unusually clear. Moreover, as Keith Ewing notes in respect of *Miller 1*, there 'seems something slightly odd about a court refusing to apply primary legislation in a decision which for all practical purposes is about reclaiming the sovereignty of Parliament…'.[39]

3. *Legislation Must Be Capable of Being Effective*

The final aspect of the developing doctrine of Parliamentary effectiveness is potentially the most radical. Whereas the cases previously considered impose obligations on *other* constitutional actors in the name of parliamentary sovereignty, this part of the doctrine imposes limitations on Parliament itself. This is the idea that, in order for legislation to be effective, there may be certain conceptual limits on the content of legislation; specifically, Parliament may be unable to oust judicial review.

This idea appears to have originated in Laws LJ's speech in *Cart*, in which he said that:

> If the meaning of statutory text is not controlled by… a judicial authority, it would at length be degraded to nothing more than a matter of opinion. Its scope and content would become muddied and unclear. Public bodies would not… be kept within the confines of their powers prescribed by statute. The very effectiveness of statute law, Parliament's law, requires that none of these things happen. Accordingly… the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it…[40]

A similar argument was made by Lord Reed in *UNISON*, who said in support of the importance of the principle of access to the courts:

> Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.[41]

However, the issue received its most extensive consideration (albeit in *obiter dicta*) by the Supreme Court in *Privacy International*.[42] Dinah Rose QC, on behalf of the claimants, invited the court to accept the proposition that a provision purporting to oust the High Court's supervisory jurisdiction could not properly be upheld because it would conflict with the rule of law. However, in so doing, she emphasised that she did not seek to question the principle of parliamentary sovereignty, but rather to 'explain its boundaries, and why the laws of a

[38] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis, Liberty Fund, 1982) 26: 'There are many enactments… which Parliament never would and (to speak plainly) never could pass. If the doctrine of Parliamentary sovereignty involves the attribution of unrestricted power to Parliament, the dogma is no better than a legal fiction…'.
[39] 'Brexit and Parliamentary Sovereignty' (2017) 80 *MLR* 711, 723.
[40] *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), [38]. This passage was cited with approval by Lady Hale in the Supreme Court: [2011] UKSC 28, [2012] 1 AC 663, [30].
[41] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869.
[42] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

sovereign Parliament require an independent interpreter of unlimited jurisdiction to ensure those laws are faithfully implemented'.[43]

Although not necessary to dispose of the case, this proposition received endorsement from all seven members of the court, albeit in varying degrees. While Lord Lloyd-Jones was willing to 'wholeheartedly endorse' Laws LJ's dictum in *Cart*,[44] Lord Wilson did so only in respect of jurisdictional errors.[45] Lord Sumption (with whom Lord Reed agreed) was, however, only prepared to accept it 'up to a point'. He agreed that, if Parliament had intended to create a tribunal of legally limited jurisdiction, it was inconsistent with that intention for the courts to lack capacity to enforce those limits, and this was correctly described as giving effect to the sovereignty of Parliament, not limiting it. Nevertheless, he did regard it as conceptually possible for Parliament to create a legally-unlimited body or one with unlimited discretionary power to determine its own jurisdiction, and 'a sufficiently clear and all-embracing ouster clause might demonstrate that Parliament had indeed intended to do that', though 'it would be a strange thing for Parliament to intend'.[46] By contrast, Lord Carnwath (with whom Lady Hale and Lord Kerr agreed), while implicitly accepting the conceptual argument,[47] seemed to go further in regarding the rule of law as placing a normative limit on Parliament's ability to oust judicial review.[48]

In justifying this claimed conceptual limit on parliamentary sovereignty, Laws LJ drew an analogy with the rule that Parliament cannot bind its successors:

> The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament's sovereignty. The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective; that is another.[49]

But, once more, this analogy is far from compelling. The inability of Parliament to bind its successors derives directly from the unlimited legislative competence enjoyed by each successive Parliament. Parliament itself may choose to legislate compatibly or incompatibly with earlier legislation. Attempts at entrenchment are valid when enacted, but simply ineffective against a future Parliament which does not wish to be bound by them. By contrast, if ouster clauses can never have effect if they are deemed to be incompatible with the rule of law, this is an absolute limit on Parliament's legislative authority, enforced at the discretion of the courts.[50] Indeed, by placing conditions on judicial obedience to statute, this supposed conceptual limit on parliamentary sovereignty appears to turn the doctrine on its head.

Moreover, while there is a certain intuitive appeal in the idea that legislation should be effective, this, again, has never been part of the traditional understanding of sovereignty. On the contrary, it has always been accepted that practical effect, in terms of enforceability or

[43] ibid, [114], [209].
[44] ibid, [160].
[45] ibid, [236].
[46] ibid, [210].
[47] ibid, [116], [122].
[48] ibid, [132], [144].
[49] *Cart*, n 40 above, [38].
[50] In *Privacy International*, n 42 above, both Lord Carnwath ([131]–[144]) and Lord Sumption ([182]–[188]) accepted that it is for the court to determine whether a particular ouster clause is compatible with the rule of law.

likelihood of obedience, is an entirely different question from legal validity,[51] as in Sir Ivor Jennings' famous example of legislation banning smoking in the streets of Paris.[52] Nor, as the Supreme Court's treatment of the statutory recognition of the Sewel convention demonstrates, is there any necessary assumption that legislation is intended to create legally enforceable rules.[53]

The Doctrine of Parliamentary Sovereignty: Formal or Substantive?

It should be clear from the discussion so far that these various invocations of the idea of parliamentary effectiveness involve extensions of the doctrine of parliamentary sovereignty, rather than simply drawing out implications that were always inherent in it. Moreover, they entail significant departures from constitutional orthodoxy, using sovereignty as a substantive principle to control the executive, the devolved legislatures, and potentially even Parliament itself. Nevertheless, to draw substantive implications from parliamentary sovereignty is not, in itself, necessarily novel. Elliott argues that sovereignty, like all principles, consists of a core and penumbra; hence 'the additional penumbral implication ascribed by the Court in [*Miller 2/Cherry*]… is wholly defensible, albeit that it is admittedly a step beyond the implications that the court had previously attached to the doctrine'.[54]

At the core of the doctrine are Dicey's positive and negative aspects of sovereignty: that 'Parliament… has… the right to make or unmake any law whatsoever' and that 'no person or body is recognised by the law… as having a right to override or set aside the legislation of Parliament'.[55] Hasan Dindjer usefully terms these the 'plenary authority' and 'legal supremacy' rules.[56] These two rules are not uncontroversial. The legal supremacy rule does not necessarily entail the plenary authority rule,[57] and of course the questions whether Parliament is free of legal constraints, or whether its plenary authority is continuing or self-embracing, are matters of perennial debate. Equally, the plenary rule may permit Acts of Parliament to be overridden or set aside (for example the 'disapplication' of statutes incompatible with EU law, or the ability of Ministers via Henry VIII powers or the devolved legislatures to amend or repeal them) provided that the authority to do so may itself be traced to an Act of Parliament. Nevertheless, the core of the doctrine of parliamentary sovereignty is relatively stable and received strong endorsement by the Supreme Court in *Miller 1*.[58]

Beyond the core, it is undoubtedly true that 'the reach and influence of the idea of parliamentary sovereignty can be seen throughout our constitutional arrangements'.[59] It shapes the nature of the UK constitution in profound ways: by ruling out entrenchment and strong-form constitutional review, as well as a federal division of powers, it contributes to the constitutional

[51] See *Manuel v Attorney-General* [1983] Ch 77, 95 per Sir Robert Megarry.
[52] *The Law and the Constitution*, 5th edn (London, University of London Press, 1959) 170–1.
[53] See, generally, David Feldman, 'Legislation Which Bears No Law' (2016) 37 *Statute Law Review* 212.
[54] n 11 above 630–1. See also Mark Elliott, 'Judicial Power in the United Kingdom's Changing Constitution' (2017) 36 *U Queensland LJ* 273.
[55] n 38 above, 3–4.
[56] n 12 above.
[57] Colin Munro, *Studies in Constitutional Law*, 2nd edn (Oxford, OUP, 1999) 132.
[58] n 18 above, [43].
[59] Roger Masterman and Colin Murray, *Constitutional and Administrative Law*, 2nd edn (Harlow, Pearson, 2018) 123.

centrality of the Westminster Parliament,[60] and it lies at the heart of the theory of political constitutionalism.[61] However, it is important to recognise that the various penumbral implications of parliamentary sovereignty can and do take different forms.

In the first place, some of the most important constitutional implications of sovereignty – including the impossibility of entrenchment and the unitary (legal) character of the territorial constitution – are no more than logical out-workings of the core plenary authority and legal supremacy rules. Moreover, though important, their significance should not be overstated. For example, parliamentary sovereignty is (formally at least) compatible with weaker forms of constitutional review (whether under statute or at common law),[62] and with forms of political entrenchment, such as the protections for devolved autonomy provided by the Sewel convention and pre-enactment referendums. Similarly, Neil Walker has argued that the unitary conception of the constitution 'is actually a very flexible notion, capable of embracing a wide range of different constitutional structures and visions', and that although certain fundamental limits are set by the unitary conception, these 'are less constraining than is often assumed'.[63]

Secondly, while other constitutional doctrines may *look like* they involve deriving substantive implications from parliamentary sovereignty, they may not in fact be incidences of sovereignty at all. The best examples here are legal controls over prerogative powers. The Supreme Court in *Miller 2/Cherry* stated that:

> Time and again, in a series of cases since the 17th century, the courts have protected parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of parliamentary sovereignty.[64]

However, while the rules that prerogative powers cannot alter Acts of Parliament[65] and, by extension, cannot be used to frustrate the operation of statute,[66] follow more or less directly from the legal supremacy rule, other limitations on prerogative power do not. The rule that prerogative powers cannot be used to change the *common law*[67] (except to the extent that this is inherent in the prerogative power itself)[68] and the principle of dualism, which means that international treaties entered into by the executive cannot alter domestic law unless and until

[60] The constitutional centrality of Parliament also rests on the idea of responsible government, which, as Jeffrey Goldsworthy notes, is conceptually and practically different from parliamentary sovereignty: *The Sovereignty of Parliament: History and Philosophy* (Oxford, Clarendon Press, 1999) 9. The Supreme Court in *Miller 2/Cherry* recognised what it called Parliamentary accountability as a distinct principle (at [46]), albeit it subsequently tended to conflate the two. Parliamentary privilege (which, as Dawn Oliver notes, reinforces, but is not a necessary incident of, parliamentary sovereignty: 'Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament', in Alexander Horne, Gavin Drewry and Jeff King (eds), *Parliament and the Law* (London, Bloomsbury Publishing, 2018) 296)) further contributes to the insulation of Parliament from judicial control.

[61] John Griffith, 'The Political Constitution' (1979) 42 *MLR* 1; Keith Ewing, 'The Resilience of the Political Constitution' (2013) 14 *German Law Journal* 2111; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30 *King's Law Journal* 125.

[62] cf Gordon, ibid, 134–5.

[63] 'Beyond the Unitary Conception of the United Kingdom Constitution' [2000] *Public Law* 384, 388.

[64] n 1 above, [41].

[65] *Case of Proclamations* (1611) 12 Co Rep 74; Bill of Rights 1688, Arts 1 and 2; Claim of Right 1689, Art 2.

[66] *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

[67] *Case of Proclamations*, n 65 above.

[68] See *Miller 1*, n 18 above, [52]–[53].

given effect by Act of Parliament,[69] confine the scope of the executive's law-making power beyond that strictly required to uphold the supremacy of statute. As Craig correctly notes, the courts could have, but did not uphold 'a theory of parallelism, whereby statutory power and prerogative power existed in tandem, subject to the fact that Parliament could expressly curtail the prerogative if it wished to do so'[70] (similar to the treatment of common law rule-making and devolved legislation). Instead, prerogative powers were expressly confined, 'in order thereby to foster and support parliamentary sovereignty'.[71] The Supreme Court in *Miller 1* also viewed the dualist system as 'a necessary corollary of parliamentary sovereignty',[72] citing Campbell McLachlan as follows:

> If treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged.[73]

But are these additional constraints on executive rule-making really justified by reference to parliamentary sovereignty? In fact, the constitutional basis of the dualist system has increasingly been questioned. Eirik Bjorge has argued that its traditional justification is one grounded in the separation of powers, in order to protect citizens against abuse of power by the executive,[74] and that this traditional view 'is once again gaining ground'.[75] This explanation has been accepted by both academics[76] and judges,[77] and indeed received its strongest endorsement from Lord Kerr in *R (SG) v Secretary of State for Work and Pensions*,[78] where he held (in dissent) that Article 3 of the United Nations Convention on the Rights of the Child had direct effect in domestic law. He justified this conclusion by saying that if it is right to characterise

> the rationale for the dualist theory as a form of protection of the citizen from abuses by the executive, the justification for refusing to recognise the rights enshrined in an international convention relating to human rights and to which the UK has subscribed as directly enforceable in domestic law is not easy to find. Why should a convention which expresses the UK's commitment to the protection of a particular human right for its citizens not be given effect as an enforceable right in domestic law?[79]

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[69] eg *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418.
[70] n 12 above, 258.
[71] ibid.
[72] n 18 above, [57].
[73] *Foreign Relations Law* (Cambridge, CUP, 2014), [5.20]. See also Philip Sales and Joanne Clement, 'International Law in the Domestic Courts: the Developing Framework' (2008) 124 *LQR* 388, 389.
[74] 'Miller, Treaty-Making and the Rights of Subjects', in Elliott, Williams and Young, n 20 above, 100-4.
[75] ibid, 99.
[76] eg McLachlan, writing after *Miller 1*, appears to have endorsed a separation of powers-based, rather than sovereignty-based rationale for dualism: 'The Foreign Relations Power in the Supreme Court (2018) 134 *LQR* 380, 394–5. But Sales and Clement are strongly critical of abuse of powers justification: see n 73 above.
[77] See Lord Steyn in *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, [52]; Lady Hale in *Nzolameso v City of Westminster* [2015] UKSC 22, [2015] WLR 165, [29].
[78] [2015] UKSC 16, [2015] 1 WLR1499, [235]–[257].
[79] ibid, [255]. See too ch 2 by Lady Hale and ch 7 by Gráinne McKeever above.

Bjorge sees the rule that the executive cannot override the common law as equally being grounded in the separation of powers.[80] Craig argues that the principal beneficiary of the rule laid down in the *Case of Proclamations* was Parliament, 'since the case concerned the extent of monarchical regulatory power independent from the legislature'.[81] However, the case was decided before parliamentary sovereignty in its modern sense was fully established, and served to control *the forum in which* the King could change the law, rather than to strip the Crown of law-making authority. In any case, as Goldsworthy notes, the legislative sovereignty of the Crown in Parliament is not incompatible with the independent authority of the Crown.[82]

Finally, though, parliamentary sovereignty does seem to have had – in the traditional constitution – a genuinely substantive penumbral effect in relation to another aspect of the separation of powers: the constitutional role of the judiciary. Roger Masterman and Se-shauna Wheatle describe a minimalist conception of the separation of powers attributable to the normative influence of parliamentary sovereignty, which prescribed the legally and constitutionally inferior or subservient role historically adopted by courts in the UK.[83] The influence of parliamentary sovereignty can be seen most clearly in the *ultra vires* model of judicial review, where it both provided the justification for the courts' role in policing the legality of decision-making by constitutionally-inferior bodies, yet placed strict limits on that role, in order that the courts did not themselves usurp the intention of Parliament. This sovereignty-supporting version of the separation of powers also mandated an approach to statutory interpretation based on the primacy of legislative intent.

More generally, Dawn Oliver describes parliamentary sovereignty as a 'tenet of the constitution', by which she means that it is 'a proposition that serves as the foundation for a system of belief or behaviour'.[84] At the heart of this belief system is the understanding that responsibility for ensuring constitutionally appropriate behaviour is a *shared* endeavour, not one which lies solely with the courts.[85] Thus, alongside the limits on the constitutional role of the judiciary, it entails a belief in the *positive* merits of political modes of constitutional regulation, manifested in a reluctance to codify, in a preference for conventional rather than legal rules and in the insistence that aspects of constitutional behaviour ought to be beyond the reach of the courts.

It is, of course, a continued adherence to this traditional understanding of the substantive implications of parliamentary sovereignty that explains much of the criticism of the very different substantive use made of the doctrine in the cases discussed above, especially *Miller 1* and *Miller 2/Cherry*. For example, the more traditional account of control of the executive as a partnership between the courts and Parliament can be seen in the dissenting judgments in *Miller 1*,[86] and in dismay at the Supreme Court's dismissal in *Miller 2/Cherry* of political constraints on the abuse of the prorogation power as offering 'scant reassurance'.[87] As Gordon notes, there is little sense in the latter judgment that 'the responsibility of upholding the values

[80] n 74 above, 107.
[81] n 24 above, 50.
[82] n 60 above, 9.
[83] 'Unpacking Separation of Powers: Judicial Independence, Sovereignty and Conceptual Flexibility in the UK Constitution' [2017] *Public Law* 469, 472–5. See also Elliott, n 54 above, 274–8.
[84] n 60 above, 303.
[85] ibid, 294.
[86] See Lord Reed at [240] and Lord Carnwath at [244]–[255].
[87] n 18 above, [43]. See, eg, John Finnis, n 9 above, 12–3.

and principles of our constitution and making them effective'[88] is a shared task with the political institutions.[89]

Parliamentary Sovereignty, Parliamentary Effectiveness and the Substantive Turn in UK Constitutional Law

The transformation of parliamentary sovereignty from a doctrine requiring judicial restraint into an active justification for judicial intervention in constitutional controversies is part of a more general substantive turn in constitutional adjudication. A key aspect of this substantive turn has been the development of the principle of legality,[90] which was explicitly relied upon in *Miller 1*[91] and *Privacy International*,[92] and was arguably implicit in *Miller 2/Cherry*.[93]

Varuhas has recently traced the development of the principle of legality from an interpretive principle protective of a narrow class of vested rights, to a broader principle concerned with the protection of a more general category of fundamental or constitutional rights, to an even broader tool encompassing a wider set of constitutional values and principles.[94] This last group now includes, to borrow Craig's term, 'structural' norms,[95] concerned with the allocation of power between the branches of state, as well as what might be termed 'content-based' norms, concerned with the substance of public decision-making. Varuhas explains that:

> The shift involved in recognising values as trigger norms [for the principle of legality] is that such values are elevated from the substrata that underpins legal norms to the surface level of the law, themselves now having the status of legal norms and, where engaged, having direct legal consequences.[96]

The broader the principle of legality becomes, and the more widely it is deployed as a technique of constitutional reasoning, the more it makes sense to subsume the sovereignty of Parliament within it. In part, this is because an account of the principles of the UK constitution which did not include parliamentary sovereignty would be obviously incomplete. But in addition, in so far as the principle of legality is perceived to be *in competition with* parliamentary sovereignty, as in its stronger forms which do not merely supplement, but may appear to rewrite, statutory language,[97] its legitimacy is open to question. In the face of criticisms of illegitimate judicial

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[88] *Miller 2/Cherry*, n 1 above, [39].
[89] n 13 above.
[90] *R v Secretary of State for the Home Dept, ex parte Simms* [2000] 2 AC 115, 131 per Lord Hoffmann.
[91] n 18 above, [87].
[92] n 42 above, [100]–[101], [165].
[93] Alison Young, 'Prorogation, Politics and the Principle of Legality' (*UK Const Law Blog*, 13 September 2019), available at http://ukconstitutionallaw.org/2019/09/13/alison-young-prorogationpolitics-and-the-principle-of-legality; Mark Elliott, 'Constitutional Adjudication and Constitutional Politics', n 11 above, 637–8. The Divisional Court held in *R (Elgizouli) v Secretary of State for the Home Dept* [2019] EWHC 60 (Admin) that the principle of legality is limited to the statutory sphere. On appeal to the Supreme Court, only Lord Kerr was prepared to accept the existence of the common law right contended for (that it was unlawful for the State to facilitate the execution of the death penalty, in this case through the provision of mutual legal assistance in respect of a former British citizen detained in the United States on terrorism charges). In his view, however, the fact that the Home Secretary was exercising a prerogative power was immaterial to the application of the principle, citing in support the decision in *Miller 2/Cherry*: [2020] UKSC 10, [2020] 3 All ER 1, [142]-[143], [161].
[94] n 23 above, 580–2.
[95] n 24 above.
[96] n 23 above, 582.
[97] See ibid, 590–604, for discussion of different variants of the principle of legality.

activism,[98] couching judicial creativity in the language of parliamentary sovereignty offers significant presentational advantages. It suggests that the courts are engaged in an inherently conservative exercise of defending traditional constitutional values (albeit one that may necessitate drawing out hitherto unnoticed implications), rather than refashioning the constitution in wholly novel ways. Thus, for example, Craig rejects the criticism that the decision in *Miller 1* involved judicial usurpation of political power, since the case involved a zero-sum contestation between the legislature and the executive, 'and the result either way did not augment judicial power'.[99] Ewing agrees, since '[i]t seems unlikely to be both an assertion of parliamentary sovereignty and an expansion of judicial power'.[100]

However, for a number of reasons, this reassurance may be misplaced. First, to locate parliamentary sovereignty within the principle of legality is to subtly downgrade its constitutional status; no longer 'constitutional alpha and omega', but rather 'a constitutional principle that, while of critical importance, forms part of a network of fundamental principles'.[101] As Elliott points out:

> On this view, the very meaning of parliamentary sovereignty – and hence the degree of constitutional authority it ascribes to the legislative branch – is not an isolated matter, but is something that is informed by and must take account of the other fundamental principles with which it sits in relationship.[102]

Thus, for instance, we see the reimagining in *UNISON* and *Privacy International* of the relationship between parliamentary sovereignty and (a more than purely formal account of) the rule of law, not as antagonistic, but as mutually supportive, in turn entailing that a refusal to give effect to (even clear) statutory words is no longer seen as a contradiction of parliamentary sovereignty, but rather an affirmation of it.

Moreover, to treat parliamentary sovereignty, not as a legal *doctrine* with specific implications, but as a legal *principle* focuses attention on the underlying values that the principle is said to serve – in this case, representative democracy. While this, as has been discussed, has the potential to generate new legal rules which protect and enhance Parliament's constitutional status, it also has the potential to limit its authority. As Trevor Allan has argued, if the doctrine of parliamentary sovereignty 'articulates the courts' commitment to the current British scheme of parliamentary democracy', their continuing adherence to it 'must entail commitment to some irreducible minimum concept of the democratic principle'. Hence, if 'Parliament ceased to be a representative assembly, in any plausible sense of the idea, or if it proceeded to enact legislation undermining the democratic basis of our institutions' judges may no longer feel obliged to respect its legislative output.[103] Not only are the demands of democratic legitimacy inherently contestable, but if the Westminster Parliament's authority is based on a democratic rather than a purely institutional or historical claim, then it becomes vulnerable to democratic

[98] In particular from academics and commentators associated with the Judicial Power Project. For discussion, see Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 *U Queensland LJ* 355 and Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36 *U Queensland LJ* 375.
[99] ibid, 359.
[100] n 39 above, 724.
[101] n 11 above, 645.
[102] ibid.
[103] 'The Limits of Parliamentary Sovereignty' [1985] *Public Law* 614, 620, 624. And see *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901, [35] per Lord Hodge.

rivals. The 'authority Parliament derives from its representative character' is not, as Lord Hoffmann claimed in *Bancoult*, in fact 'unique'.[104] Rather, Westminster is one of four representative legislatures in the UK, each with their own – in some respects, arguably superior – democratic claims.[105] The direct democratic authority of the people, acting in referendums – swept aside by the Supreme Court in *Miller 1*[106] – may also come to take on a greater constitutional significance.

Secondly, the uncertainty inherent in this new approach to parliamentary sovereignty – and hence the potential for further judicial creativity – can be seen in relation to each element of the developing doctrine of parliamentary effectiveness identified above. For example, as regards meaningful opportunities to exercise legislative authority, the UK government is obviously concerned about the potential for the decision in *Miller 2/Cherry* to be extended to dissolution as well as prorogation of Parliament. Consequently, its proposal to repeal the Fixed-Term Parliaments Act 2011 and 'revive' the dissolution prerogative has been accompanied by a comprehensive ouster clause[107] (with the potential to test the limits of judicial obedience to statute mooted in *Privacy International*). Similarly, while arguing that the constitutional scale argument played only a supporting role in *Miller 1*,[108] Gavin Phillipson suggests that it may have the potential to act as an independent limit on prerogative authority in a limited number of other situations, most notably in requiring statutory authorisation for a decision to withdraw from the European Convention on Human Rights.[109] But what of the broader potential of the idea that Parliament must have meaningful opportunities to legislate? Could this be extended from Parliament as an institution to individual members, as for example in relation to controversy over the impact of the ending of the coronavirus virtual Parliament on the ability of particular MPs to participate effectively,[110] or the availability of resources for Private Members' Bills? Such arguments would appear to be ruled out by Article 9 of the Bill of Rights, but this was given a narrow interpretation in *Miller 2/Cherry* and may be vulnerable to further reading down in the light of the principle of legality.

Similarly, the decision in the *Continuity Bill Reference* has created a new, and highly imprecise, limitation on devolved competence, which at the time of writing is being tested in another reference by the UK government of two Holyrood Bills to the Supreme Court.[111] These place Human Rights Act-style interpretive obligations in relation to, and duties on UK Ministers acting under, Westminster legislation in devolved areas, and may therefore be seen as conditioning the future exercise of Westminster's power to legislate for Scotland. However, no

[104] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453, at [35].
[105] See *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868, [46] and [49] per Lord Hope.
[106] n 18 above, [116]–[125].
[107] *Draft Fixed-Term Parliaments Act 2011 (Repeal) Bill*, CP 322 (2020) 6.
[108] 'EU Law as an Agent of National Constitutional Change', pp 49, 56, 78–9. See also Jack Williams, 'Prerogative Powers after *Miller*: An Analysis in Four E's', in Elliott, Williams and Young, n 20 above at 53.
[109] n 27 above, 79–80. See also Gavin Phillipson and Alison Young, 'Would Use of the Prerogative to Denounce the ECHR "Frustrate" the ECHR? Lessons from *Miller*' [2017] *Public Law* (Brexit Special Issue) 150.
[110] See, eg, 'Coronavirus: Jacob Rees-Mogg Rules Out Return of Virtual Parliament' (*BBC News*, 15 October 2020), available at https://www.bbc.co.uk/news/uk-politics-54552690.
[111] The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill. See the letter from Alister Jack MP to John Swinney MSP, 24 March 2021, available at https://www.gov.uk/government/publications/alister-jack-letter-to-scottish-government-on-uncrc-bill-24-march-2021.

reference was made in relation to a duty under section 14(2) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 on UK Ministers to 'have regard' to the environmental principles created by that Act. The idea that there must be access to the courts in order for legislation to be effective also begs the question what other conditions of effectiveness may be implied into statutes. It is, for example, but a short step from holding (as in *UNISON*) that access to the courts rules out unreasonable court fees to a decision that it requires access to legal aid. In addition, it could permit the reading in of other rule-of-law-related conditions of legislative effectiveness. As Alexander Latham-Gambi notes, commenting on the implications of *Privacy International*, '[s]ince the nature of law is itself a controversial matter, this means that the frontiers of parliamentary sovereignty will themselves be controversial'.[112]

A final criticism of this expansive approach to parliamentary sovereignty concerns the appropriateness of the constitutional vision it embodies. For one thing, although the Supreme Court in *Miller 2/Cherry* presented its decision as a vindication of constitutional orthodoxy, it was, of course, not neutral. The court gave a highly simplistic account[113] of what is in fact a complex, contestable – and in the context of that dispute, actively contested – relationship between Parliament and the executive.[114] Similarly, I have previously criticised the decision in *Miller 1* as presenting a partial – in both senses of the word – account of the constitutional issues and authority claims at stake in the decision to leave the EU.[115] In giving substance to parliamentary sovereignty, there is therefore a danger of entrenching a particular understanding of the constitutional order which constrains the constitutional flexibility which has always been a major part of its appeal. What is required to maintain the effectiveness of parliamentary sovereignty may thus be a more fundamentally contestable issue than is assumed in the developing doctrine discussed in this chapter.

[112] 'What is Parliament Doing When it Legislates? Legislative Intention and Parliamentary Sovereignty in *Privacy International*' (*UK Const Law Blog*, 20 April 2020), available at https://ukconstitutionallaw.org/2020/04/20/alexander-latham-gambi-what-is-parliament-doing-when-it-legislates-legislative-intention-and-parliamentary-sovereignty-in-privacy-international/.
[113] n 1 above, [55].
[114] See David Howarth, 'Westminster *versus* Whitehall: What the Brexit Debate Revealed about an Unresolved Conflict at the Heart of the British Constitution', in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge, CUP, forthcoming); Loughlin, n 9 above, 15–8. For criticism of the court's attitude to executive power in *Miller 1*, see also Timothy Endicott, *The Stubborn Stain Theory of Executive Power: from Magna Carta to* Miller (London, Policy Exchange, 2017), available at https://policyexchange.org.uk/wp-content/uploads/2017/09/The-Stubborn-Stain-Theory-of-Executive-Power.pdf.
[115] n 37 above, 179. See also Elliott, n 21 above, 281–4.