Deviation from Dicey? Departures from orthodoxy in judicial treatment of parliamentary sovereignty

HUGO MAXIMILLIAN MICHAEL HOLMES

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Abstract

This thesis explores the judiciary's treatment of parliamentary sovereignty – the tenet regarded as the core of the UK constitution – examining where the courts' reasoning has departed from orthodox Diceyan understandings (which retain the *static* attitude that the judiciary are limited in their powers to curtail government policy) towards more dynamic approaches whereby parliamentary sovereignty may co-operate with other constitutional principles, allowing for a more flexible understanding of judicial authority.

Despite the courts' usual hesitancy to depart from settled norms, complex political themes have situated a series of key judicial decisions which examine sovereignty through a dynamic lens; EU primacy, human rights legislation, and devolution rights have required the courts to re-examine normative formulations of principle, reflecting a more dynamic outlook which allows for increased judicial engagement with statute. Decisions which provide a dynamic reading of sovereignty have been broken down and categorised to identify the courts' varying approaches when departing from orthodoxy – signifying the complexity surrounding advancements to the treatment of constitutional principle. Assessing the extraordinary political contexts prompting dynamic treatments of sovereignty, further analysis of judicial reasoning illustrates whether parliamentary sovereignty has undergone a lasting departure from orthodoxy whereby it may co-operate with wider constitutional principles.

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List of Abbreviations

Act of the Scottish Parliament	ASP
Constitutional Reform Act 2005	CRA
Constitutional Reform and Governance Act 2010	CRAG
European Communities Act 1972	ECA
European Convention on Human Rights	ECHR
European Court of Justice	ECJ
European Union	EU
Human Rights Act 1998	HRA
Independent Human Rights Act Review	IHRAR
Investigatory Powers Tribunal	IPT
R (Miller) v Prime Minister; Cherry v Advocate General for Scotland [2019] UKSC 41	*Miller 2*
R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5	*Miller 1*
R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768	*Miller 1 EWHC*
R v Secretary of State for Transport, ex p Factortame (No 2) [1991] 1 AC 603	*Factortame No 2*
Regulation of Investigatory Powers Act 2000	RIPA
Scottish Independence Referendum Bill, Re [2022] UKSC 31	*SIRB*
The Bangalore Principles of Judicial Conduct	BPJC
United Kingdom Internal Market Act 2020	UKIMA
United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill	

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, Re [2021] UKSC 42

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R (Miller) v Prime Minister [2019] EWHC 2381 (QB)

R (Miller) v Prime Minister; Cherry v Advocate General for Scotland [2019] UKSC 41

R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

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United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2023

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Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1

European Charter of Local Self-Government [1985] ETS 122

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ 306/1

United States

Bill of Rights 1791

Constitution of the United States 1789

1. Introduction

1.1. Overview

This thesis will examine judicial approaches to the constitutional principle of parliamentary sovereignty. In doing so, it will assess the extent to which judicial interpretations of the principle have varied between classical - or orthodox - accounts of the doctrine, and more contextual accounts. It will be suggested that decisions pertaining to judicial understandings of parliamentary sovereignty provide a spectrum of viewpoints, ranging from '*static*' to '*dynamic*'. A static understanding of sovereignty recognises the hierarchal, law-making authority of Parliament which limits judicial action to a responsive approach. A dynamic understanding sees the courts take a more active stance, allowing – for instance – for the balancing of sovereignty with other constitutional imperatives and the use of parliamentary sovereignty to justify constitutional restraints on government. In recent years, the courts have provided unprecedented authority exhibiting modern perspectives on parliamentary sovereignty. These examples provide a useful opportunity to analyse contemporary judicial approaches towards sovereignty.[1]

Understanding recent approaches to parliamentary sovereignty requires the study of changes to the treatment of the concept over time. The thesis therefore will track the courts' treatment of sovereignty and identify tendencies within judicial reasoning which depart from orthodox understanding to test whether courts are applying sovereignty in a more dynamic manner. Dynamic sovereignty shifts the role of the court away from an obligation to fulfil a subordinate role and favours the proactive use of sovereignty as a tool for understanding the balance between branches of government.

However, the application of dynamic sovereignty is not inherently assertive or oppositional, but rather has expanded allowing for three identifiable approaches. Firstly, a nuanced approach which maintains the core ethos of orthodoxy but refines characteristics in order to improve the account's suitability as a viable, modern approach within the UK's complex constitutional order (the refinement approach). Secondly,

[1] *See, R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (*Miller 1*)*; R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41 (*Miller 2*).

sovereignty may be perceived dynamically within the wider constitutional ecosystem, operating alongside constitutional fundamentals such as human rights legislation and devolution, rather than dominating them entirely. This dynamic application presents parliamentary sovereignty as one of multiple key constitutional elements with legislative legitimacy, co-operating in their application to allow for a more holistic consideration of constitutional practice (the holistic approach).[2] Thirdly, the courts may use sovereignty as an assertive constitutional tool, starkly contrasting orthodox aspects, allowing for the effective use of non-legislative authority to review legislation (e.g. common law, democratic legitimacy, EU authority), and for the courts to constrain law-makers within the political domain in those extreme instances where necessary. Reformulating the constitutional hierarchy, this latter approach has the potential to put the courts on a more direct collision course with the elected branches (the assertive approach).[3] This outlines the broad scope of dynamic sovereignty; while this may be an assertive tool to challenge an executive, it may alternatively function with nuance, reaffirming and embracing orthodox interpretations of sovereignty.

Three essential elements will be discussed in order to frame the subsequent study of judicial approaches towards sovereignty: a breakdown of the parameters of this study, mapping orthodox parliamentary sovereignty, and the identification of any longstanding change to understandings of sovereignty.

1.2. Parameters of study

To situate later discussion – to allow for critical analysis on the shifting role of parliamentary sovereignty – a benchmark for orthodox parliamentary sovereignty must first be determined. While any discussion into the incremental development of parliamentary sovereignty will consider a wide range of political and social factors, this study will primarily focus on judicial reasoning; providing insight as to how the dynamic application of sovereignty may be positioned within constitutional arrangements.

The first stage of analysis requires the tracking of different judicial decisions which express dynamic accounts of sovereignty. In order to frame this study, Dicey's account of

[2] *See; R (Jackson) v Attorney General* [2005] UKHL 56.
[3] *Miller 2* (n 1).

orthodoxy will be used as the benchmark for orthodox sovereignty.[4] This account is the natural choice, as while sovereignty has uncodified origins leading back to the foundations of the English legal system,[5] scholars widely acknowledge elements of orthodox parliamentary sovereignty to be an extension of those in Dicey's literature.[6] Considering parliamentary sovereignty to be the dominant concept of English (now UK) constitutional law,[7] Dicey's account presents an approach considering Parliament to hold ultimate and unchallengeable legislative powers.[8] Scholars have acknowledged how the influence of Dicey's account has broadened with subsequent research and application – '*[d]uring the twentieth century, Dicey's doctrine of parliamentary sovereignty acquired the status of orthodoxy'*.[9] Ultimately the prominent works of Dicey are recognised as having a foundational role in conceptualisations of sovereignty.

Dicey's account is the natural starting point for considering parliamentary sovereignty in its orthodox form. Although scholars suggest that seeking to establish a consistent benchmark within constitutional law is an inherently reductionist approach;[10] this study requires a focal point from which to measure any sudden or incremental movement in judicial understandings of parliamentary sovereignty, facilitating a discussion into the advancements of dynamic sovereignty and how it may be distinguished from the orthodox account. In spite of these barriers, as an artificial benchmark, Dicey's account shall suffice through contextualising orthodox sovereignty, and identify where changes to the courts understanding of principle indicate a wider departure from orthodoxy.

Additionally, identifying examples of deviation to constitutional principle will require an analysis into the natural evolution of the UK constitution. It is accepted that that an essential characteristic of the UK constitution is that it facilitates and experiences a state of '*constant change'*.[11] In spite of potential hesitancy to depart from settled norms, even fundamental principles such as parliamentary sovereignty are susceptible to this

[4] Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1885).
[5] *See, 1 Bl Comm 161.*
[6] Dicey, *Law of the Constitution* (n 4).
[7] Though, see *MacCormick v Lord Advocate* (1953) SLT 255 for reflections on sovereignty as an *'English principle'*.
[8] ibid.
[9] *Jackson* (n 2) [95].
[10] *See,* Martin Loughlin and Steven Tierney, 'The Shibboleth of Sovereignty' [2018] 81 (6) MLR 989-1016.
[11] Walter Bagehot, *The English Constitution* [1867] R. H. S. Crossman (ed) (Fontana 1963) 168.

process of change. It appears the most reasonable method to identify changes in sovereignty's application is to examine its treatment within judicial reasoning. The judiciary has an integral role as the focal point for constitutional advancement, with the courts left as the arbiters for '*cases of the greatest public and constitutional importance*'.[12] Therefore, judicial decisions will be the focus of analysis as the most useful method of identifying contemporary perceptions and applications of parliamentary sovereignty.

Furthermore, it will be essential to examine wider evidence (social/political prompts, academic reaction, international influences, etc.) to contextualise the courts' decisions and for example, determine where a court has been truly assertive in their application of sovereignty. As the trajectory of judicial decisions is often prompted by legislation and analysed in academic commentary, these sources will provide a more complete discussion to be considered alongside judicial treatments of sovereignty.

This methodology will provide insight into whether parliamentary sovereignty has undergone a nuanced refinement or whether it has radically departed from orthodoxy, and further will be useful in determining where recent Supreme Court approaches to sovereignty may be more dynamic than accounts within the House of Lords era.

1.3. Mapping parliamentary sovereignty

Parliamentary sovereignty is often considered our most essential constitutional principle,[13] with Dicey's definition providing that Parliament may enact any law that no other body may set aside.[14] Consequently, parliament's laws are incontrovertible; no authority aside from Parliament may create, alter, or repeal laws made by the sovereign Parliament. Parliamentary sovereignty is therefore widely perceived as constitutionally dominant, enjoying primacy above other constitutional principles. How the courts interpret and enforce sovereign legislation will provide insight into the contemporary

[12] 'Role of the Supreme Court' (The Supreme Court) <www.supremecourt.uk/about/role-of-the-supreme-court.html>; see, Loughlin and Tierney, 'The Shibboleth of Sovereignty' (n 10).
[13] *See,* John Hostettler, *Champions of the Rule of Law* (Waterside Press 2011).
[14] Dicey, Law of the Constitution (n 4).

understandings and expressions of parliamentary sovereignty, signifying how the courts' decisions may reflect wider movements of sovereignty's position.[15]

In its orthodox incarnation, parliamentary sovereignty has been applied as a tool limiting the judiciary from contravening legislation, as statute mandated by a democratic parliamentary majority is perceivably the highest UK law-making authority.[16] Significantly, the orthodox account of sovereignty has been understood to exercise a limiting function on the powers of the courts: a form of *judicial regulation*. However, as the modern courts enforce legislation, they provide a focal point to observe advancements to the treatment of parliamentary sovereignty.[17]

This thesis will analyse how certain themes have given rise to a requirement for more flexible formulations of sovereignty as principle shifts alongside increasingly complex political frameworks. The substantial change in perceptions of Parliament's unlimited power to make law following EU membership, human rights legislation, and the movement of authority to devolved governments requires further analysis; the departure from orthodox formulations of constitutional arrangements may give rise to increased dynamic judicial activity. As sovereignty is regarded as our most fundamental constitutional principle, the core of its application appears reasonably clear, however as constitutional dynamics shift there proves to be a potential for increased uncertainty at the fringes. Therefore, the need for tracing judicial articulations relevant to contemporary perceptions of sovereignty is clear, as their implications may reflect a tendency to reconceptualise sovereignty dynamically.

This thesis will consider Dicey's '*pure and absolute*' account as the benchmark for orthodox sovereignty.[18] Although Dicey's benchmark provided a clearly standardised approach for parliamentary sovereignty, tracking the expansive developments to constitutional arrangements will illustrate the extent to which it has been departed from in the contemporary account for sovereignty. As the courts become required to engage

[15] *See,* European Communities Act 1972 (repealed) (ECA); Human Rights Act 1998 (HRA); Scotland Act 1998; Wales Act 1998.
[16] Dicey noted that parliament's sovereignty derives from its democratic mandate; see, Albert Dicey, *A Leap in the Dark, or Our New Constitution* (London: John Murray, 1893).
[17] Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' [2012] 32 OJLS 1 179, 193*; see, Miller 2* (n 1).
[18] *Jackson* (n 2) [102].

with developing themes, implications suggest broader understandings of sovereignty will be considered, providing further obscurity to the UK's most *fundamental* principle.

1.4. Thesis objectives and projected findings

As discussed, this thesis identifies three categorisations of *dynamic* approaches towards parliamentary sovereignty which move away from static orthodox conceptualisations. The refinement, holistic, and assertive approaches illustrate that a broad range of understandings towards the treatment of sovereignty have emerged, impacting the trajectory of the tenet in practice to varying extents. These approaches are identifiable through their distinct aspects which are visible within relevant judicial reasoning; static orthodoxy no longer provides a catch-all response to how the courts should understand parliamentary sovereignty. It now plays a different role as one viewpoint within a spectrum for conceptualising sovereignty which allows for dynamic departure.

Ultimately, there has been a departure from orthodox principle pertaining to sovereignty – parliamentary sovereignty is not static, and the modern UK is highly distinguishable from its historical embodiment. This inevitable shift away from historic conceptualisations has given rise for the emergence of a spectrum of viewpoints towards sovereignty, providing implications upon the tenet's longstanding treatment. Although individual decisions rarely indicate grand shifts in understandings, they do present opportunities to examine visible expressions of how judicial attitudes towards treatments of sovereignty are gradually shifting. Considering how the judicial role has expanded in the past century (as will be examined throughout), this thesis will analyse how these changes have occurred alongside the emergence of dynamic activity in practice.

While discussion will provide conclusive insight towards the dynamic approaches and their implications upon the treatment of parliamentary sovereignty, it is immediately visible that the presence of dynamic attitudes does not signal a grand abandonment of orthodox principle. This is highlighted in contemporary judicial reasoning, whereby the comprehensive sovereignty granted to statute is reaffirmed at length alongside respectful deference to Parliament where constitutionally appropriate. Nevertheless, the emergence of dynamic activity within judicial conceptualisations of sovereignty do signal

a gradually evolving shift away from static applications and towards a more analytical and flexible approach allowing for a broader range of understandings of sovereignty. Providing more options where a static, Diceyan attitude may confine discussion, the judiciary has become increasingly able to respond to cases examining sovereignty using dynamic viewpoints to dull the sharper edges of orthodox principle in response to modern requirements.

While criticisms appear in response to dynamic conceptualisations of parliamentary sovereignty at the judicial level, this thesis will examine the legitimacy of dynamic viewpoints in practice throughout and identify whether they are defensible in the context of the UK's constitutional character.

Therefore, this thesis will examine an array of material to determine whether a dynamic reformulation of sovereignty will hold. A review of key dynamic decisions and the subsequent response will indicate whether a collective reaction may have found dynamic applications of sovereignty to represent illegitimate, undesirable expressions of judicial power which exceeds its boundaries.[19] Academic commentary, subsequent legislation and political reactions will frame discussion on the emergence of dynamic reasoning.

Although advancements to parliamentary sovereignty can be framed as the legitimate evolution of judicial understandings of principle, it may alternatively be identified as something rather less defensible: unwarranted judicial overreach. Crucially, the court may be seen as fulfilling its role by using assertive reformulations of orthodox principles to legitimately expand upon the incremental developments situating the increased judicial use of sovereignty.[20] Evidently, judicial overreach is a term difficult to define with precision in relation to the dynamic expansion of approaches towards parliamentary sovereignty, and therefore, it will be necessary to respond to criticisms throughout thus thesis when analysing dynamic judicial activity.

[19] Jason Varuhas, 'Judicial Capture of Political Accountability' (Judicial Power Project, 2016) 50.
[20] John McEldowney, *Public Law* (4th edn, 2016) 1-032; Stephen Sedley, *Lions Under the Throne* (Cambridge University press 2015).

An approach can be defensible in constrained instances – not every approach needs to be applicable in ordinary and regular proceedings. As will be explored throughout this thesis, there is a potential for more assertive rationalisations to be voiced only as an outlier in response to extraordinary circumstances. Nevertheless, these departures from orthodox principle which is historically embedded within constitutional understandings inevitably provokes criticism. Where dynamic activity oscillates between substantially different viewpoints towards sovereignty, it may give rise to an unpredictability in judicial conceptualisations of the tenet. It remains uncertain how dynamic approaches can defensibly coexist with orthodoxy, and therefore, whether dynamic sovereignty can be principled in the judicial sphere will be analysed in the findings of this thesis.

1.5. Structure

The thesis will follow a five-chapter structure, analysing parliamentary sovereignty and mapping its judicial treatment. The first chapter will further break down Dicey's orthodox account of parliamentary sovereignty; aiming to identify characteristics of the orthodox account and examining any gradual development of dynamic categorisations. Additionally, the critical analysis of sovereignty provided within judicial reasoning and academic commentary will offer broader insights into the nature of sovereignty's treatment throughout the era. Ultimately, this chapter will examine the foundations of Diceyan sovereignty within the judicial sphere, and further identify how they have become less visible as Diceyan sovereignty loses its foothold over conceptualisations of sovereignty – situating analysis against categorisations of dynamic sovereignty which may signify an evolving approach towards sovereignty.

The following three chapters will examine the dynamic viewpoint towards sovereignty and how it has directed the treatment of the tenet. Having investigated the nature of orthodoxy in chapter 1, these chapters will analyse where judicial treatment of sovereignty may illustrate a reconceptualization of sovereignty which departs from orthodoxy. First of the dynamic models, chapter 2 will examine the refinement approach; as the dynamic viewpoint providing the least substantial deviation to orthodox principle, this chapter will analyse the gradual development of judicial approaches towards the use of constitutional principle to identify the potential for constraints upon orthodox

perceptions of Parliament's ultimate legislative capacity. As political themes would require the judiciary to take a more dynamic approach in the later stages of the 20th century, chapter 2 will situate the dynamic activity to be examined in Chapters 3 and 4.

Chapter 3 will continue to examine the dynamic models, analysing the holistic approach. This chapter will analyse the dynamic themes effected by legislation, which prompted the courts to take an increasingly dynamic outlook towards parliamentary sovereignty's dominance over the wider constitutional ecosystem. EU primacy, the domestic incorporation of human rights, and the establishment of devolved governments will be examined alongside the judiciary's treatment of sovereignty through this era – as constitutional imperatives become increasingly difficult to reconcile with static orthodox sovereignty.

The fourth chapter will examine the final dynamic model which illustrates a departure from orthodoxy to the greatest extent – the assertive approach. As a shifting judicial role and extraordinary contexts increasingly require the higher courts to engage with government activity, whether a shift towards a more assertive outlook can be evidenced will be analysed throughout this chapter; primarily through investigating recent Supreme Court decisions which provide 'assertive' viewpoints through more visible reformulations of orthodox principle – with implications upon the longstanding treatment of parliamentary sovereignty. Among this analysis, academic commentary will be considered where useful, in addition to political/social influences which may have prompted judicial reasoning.

Having mapped the treatment of sovereignty through orthodox and dynamic eras, Chapter 5 will conclude through evaluating the shifting judicial attitudes and examining the position of each proposed model of applying parliamentary sovereignty. At this stage of discussion, this thesis will have tracked and comprehensively categorised the modern courts' treatment of sovereignty. Finally, Chapter 5 will examine the lasting position of the models for applying sovereignty and take a position on their roles in the contemporary judicial era.

2. Chapter 1

Orthodox Parliamentary Sovereignty

2.1. Introduction

In order to situate the analysis of any deviation towards dynamic approaches, the first chapter of this thesis will examine the orthodox model of applying parliamentary sovereignty. As discussed in the introduction, this orthodox outlook towards sovereignty builds upon the account provided in Dicey's literature – recognizing that beyond Parliament's ordinary law-making activity, it holds a hierarchal, unlimited right to make law for the UK which dominates the constitutional sphere entirely. As the models of dynamic sovereignty naturally depart from this benchmark, it is essential to investigate the complexities of the orthodox account of parliamentary sovereignty to illustrate the extent to which dynamic departure may be visible. Therefore, chapter 1 will break down the elements and aspects of the orthodox approach, analysing how they became foundational in the historical application of parliamentary sovereignty, and have developed within contemporary judicial understandings of the tenet.

The timeframe of this chapter will begin examining Diceyan literature and its incorporation into the sphere of constitutional understanding and move forward analysing the visibility of orthodoxy into the contemporary era. This is the only chapter that will examine such a wide a timeframe as aspects of orthodox conceptualizations cannot be abandoned entirely within those dynamic decisions which deviate away from historical, static understandings.

This chapter will examine where the orthodox outlook is visible in judicial treatments of parliamentary sovereignty and analyse relevant literature. Additionally, those periods where orthodox formulations of sovereignty are made less visible due to developing dynamic approaches will be examined, allowing for more comprehensive discussion in subsequent chapters surrounding dynamic departures from orthodoxy. This chapter will identify the trajectory of orthodoxy within judicial applications of parliamentary

sovereignty, identifying where static, Diceyan attitudes have lasted, and where alternative, more dynamic outlooks towards sovereignty have become situated within constitutional discussion.

2.1.1. The benchmark for sovereignty

Unlike many areas of UK constitutional principle, Diceyan parliamentary sovereignty is highlighted as being perhaps the most straightforward in providing a definition with little space for ambiguity or misinterpretation. It is presented as a decisive, constitutional fact:

> [T]he principle of parliamentary sovereignty means neither more nor 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 a right to override or set aside the legislation of parliament.[21]

Dicey's account neatly outlines that legislation made with the consent of parliament is incontrovertible and may only be amended or repealed with further legislative approval. Further, Dicey's orthodox account widely regards parliamentary sovereignty as the beating heart of the UK constitution, upon which (judicial commentary suggests) the entire constitutional system is structured:[22] '*our constitution is dominated by the sovereignty of parliament.*'[23] Dicey's account may be seen as the natural evolution of older *archaic* accounts of Parliament's dominance (e.g. Blackstone's Commentaries).[24] This continuity, as examined by Goldsworthy, suggests, '*[Diceyan sovereignty] owed its rapid acceptance to the familiarity of English jurists with the already well established doctrine of parliamentary sovereignty.*'[25] This continuity further affirmed Dicey's account as the natural choice for the courts and reinforced its perception as the leading account of orthodox sovereignty.[26]

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[21] Dicey, *Law of the Constitution* (n 4) 38.
[22] Constitution Committee, *Reviewing the Constitution; terms of reference and methods of working (First Report)* (HL 2001-02, 11) para 51.
[23] *Jackson* (n 2).
[24] See 1 Bl Comm; Thomas Smith, *De Republica Anglorum. The maner of Gouernement or policie of the Realme of England* (Smethwicke 1609) book 2, ch 2, 36.
[25] Jefferey Goldsworthy*, Parliamentary Sovereignty: Contemporary Debates* (CUP 2010)
[26] See ibid; Jeffery Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP, 2001); Charles McIlwain, 'The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries

However, Dicey's account notes a limitation upon on Parliament's power to enact legislation which effectively limits succeeding parliaments.[27] Dicey affirms this, assessing the inevitable failure of any attempt by a parliament to bind its successors, as parliamentary sovereignty permits a future parliament to repeal (purportedly) binding legislation; providing, '*That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure.'*[28] Ultimately, Parliament retains the right to '*retain, repeal, rejig [or] replace'* all legislation.[29] While certain statutes have been enacted with Parliament's intention for their provisions to remain effective *for ever*, subsequent Parliaments have evidenced its power reverse them.[30]

Considering this account alongside Dicey's provision that '*Parliament has the right to make or unmake any* law';[31] the extent of this right is uncertain as Parliament cannot effectively make *permanent* legislation, as Dicey suggests, the power to repeal remains. Effectively, parliament self-regulates this principle, reaffirming the ultimate power of parliament's sovereignty. This remains relevant within the modern discussions on constitutional law as orthodox sovereignty conceptually requires not only that legislation be incontrovertible, but additionally, that Parliament must be able to exercise its power as the need arises.

Currently, Dicey's account has a foothold in study of constitutional law as a figurehead.[32] This potentially elevated nature of Dicey's works among sources of constitutional literature is not limited to academic study, but arises in judicial commentary to reflect a desirable, orthodox account.[33] However, the political complexities of the 20th century and the subsequent judicial reaction signify sovereignty is subject to change through political

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Between Legislation and Adjudication in England' [1910] New Haven: Yale UP xix, 409. For critiques, see, Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' [2011] 32 OJLS 1 179.

[27] Dicey, *Law of the Constitution* (n 4).

[28] ibid 21.

[29] Constitution Committee, *A Question of Confidence? The Fixed-term Parliaments Act 2011* (12th Report) (HL 2019-2021 121) para 151.

[30] See the Acts of Union 1800 and their subsequent amendment.

[31] Dicey, *Law of the Constitution* (n 4) 38.

[32] ibid; *Jackson* (n 2).

[33] ibid.

and social circumstance.[34] Furthermore, Dicey himself recognised that sovereignty '*draws its authority from political conditions*', and therefore it cannot exist isolated and shielded from evolution.[35] Scholars go further, suggesting that to adopt Dicey's account as a universal benchmark risks over-simplifying and reducing any comprehensive understanding of constitutional law; Allison providing that, '*Dicey's elegant simplification [...] carried the risk of tempting future generations to treat its terms as holy writ [...] preventing the British from thinking creatively about constitutional matters.'*[36] This chapter will examine where the courts' treatment of sovereignty may evidence a movement away from the Diceyan account in order to apply more dynamic readings which address modern complexities.

When assessing orthodox rationalisations on sovereignty's application, the judgment will reflect positive and negative aspects of Diceyan sovereignty. While these aspects are intrinsically connected in enhancing the orthodox sovereignty, they may be distinguished through an analysis of the reasoning applied. Dicey's account identifies these aspects and what they fundamentally represent: *the positive aspect – 'Any Act of Parliament [...] will be obeyed by the courts'; and the negative aspect – 'There is no [body...] who can make override or derogate from an Act of Parliament.'*[37] While the positive aspect conceptualises Parliament's sovereign power and the ultimate authority of statute, the negative aspect expresses limitations upon external bodies and reaffirms the implicitly hierarchal relationship between branches of government.[38] Ultimately, these approaches refrain from explicitly limiting judicial power, but rather implicitly limit judicial action away from interfering with legislative provisions.

Furthermore, as Diceyan aspects promote a static view of sovereignty between branches of government and impose limitations upon the judiciary, this analysis will be essential in determining how the judiciary's evolving position in UK arrangements can be reconciled with orthodox approaches. Dicey's account provided a comprehensive and conservative approach to parliamentary sovereignty which throughout the 20th Century would feature

[34] *See,* Loughlin and Tierney, 'The Shibboleth of Sovereignty' (n 10).
[35] ibid.
[36] *The Oxford Edition of Dicey* JWF Allison (ed) (Oxford: OUP, 2013) vol 1, 12. xiv
[37] Dicey, *Law of the Constitution* (n 4) 38.
[38] See, Mark Walters, 'Common Law, Reason, and Sovereign Will' [2003] 53 U Toronto LJ 1 65-88.

as a point of reference for the courts for constitutional analysis. This chapter will next examine orthodox sovereignty's development in judicial decision-making, and where reasoning may be consistent with key characteristics of Dicey's orthodox account.

2.1.2. The benchmark in practice

Having identified our orthodox benchmark and outlined the Diceyan account of sovereignty, the chapter will now examine the courts' treatment of parliamentary sovereignty and analyse significant decisions which are static or dynamic. Dynamic readings will fall under three categorisations of dynamic sovereignty: the refinement approach – where judicial reasoning seeks to make minor modifications to orthodox aspects of parliamentary sovereignty in order to improve their suitability to meet contemporary requirements without compromising the core of Diceyan orthodoxy; the holistic approach – where judicial reasoning applies sovereignty balanced alongside wider constitutional elements in co-operation rather than domination; the assertive approach – where the courts displace orthodox sovereignty's dominance using non-legislative authority and interfering with the political domain. This analysis will illustrate how judicial treatment alongside political themes allowed for a departure from orthodox sovereignty over time.

2.1.2.1. The core of Diceyan sovereignty in the courts

Throughout the 20th century, the true extent of parliamentary power would be discussed considerably at the judicial level; while Parliament was the accepted law-making body, how this would be applied in practice left the courts to express attitudes on the sovereignty of Parliament. It is this opportunity which allowed Dicey's account to gain substantial judicial momentum as a point of reference for defining sovereignty. The case law provided within this discussion will correspond with fundamental aspects of Diceyan sovereignty: (1.) the legislative authority of Parliament, (2.) the incontrovertible nature of statute, and (3.) that no Parliament may bind its successors. This will provide insight into the early direction of the courts' treatment and application of orthodox principles.

2.1.2.1.1. 'The right to make or unmake any law whatever'

The supreme authority of Parliament has always been a dominant principle within constitutional law and has been built into judicial understandings of Parliament – there

could be no successful legal challenge which suggested that parliament was limited in its law-making authority. Archaic constitutional literature had directly outlined Parliament's '*sovereign and uncontrollable authority [...] the omnipotence of parliament*'.[39] This '*absolute power [confided] in the parliament*' is a longstanding element in English law with centuries of judicial treatment.[40] However, where Dicey's account separates itself in establishing a working benchmark for parliamentary sovereignty is in its codification of complex elements of sovereignty.

Fundamentally, '*the right to make or unmake any law whatever*' enshrined Dicey's clear interpretation that there are no practical limits to statutory power.[41] Scholars have questioned how this principle may be applied in practice as it theoretically permits parliament to make laws which may cause social upheaval; Mann provides that realistically, Parliament would not be able to enact legislation which is so grossly unreasonable, providing an example that society would not accept statute which '[*vests] the property of all red-haired women in the state*'.[42] Previously, the court addressed this supposed limitation upon Parliament, providing the contrasting interpretation:

> It is often said it would be unconstitutional for the United Kingdom Parliament to do certain [improper] things [...] But that does not mean that it is beyond the power of parliament to do those things, if parliament chooses to do any of them the courts could not hold that Act of Parliament invalid.[43]

In this instance, the courts provided an orthodox judgment consistent with positive aspects of Diceyan sovereignty – ultimate sovereign authority would be afforded to Parliament, further anchoring the Diceyan benchmark within constitutional practice. Through confining judicial intervention away from imposing limitations upon the statutory process, the unlimited power of Parliament was reaffirmed by the court; the judges took the orthodox approach and passed down authority in line with the static account.

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[39] 1 Bl Comm 161.
[40] Smith, (n 24).
[41] Dicey, *Law of the Constitution* (n 4) 38.
[42] Frederick Mann, *Further Studies in International Law* (Clarendon Press 1990) 104.
[43] *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723.

2.1.2.1.2. 'No person or body [may] override or set aside the legislation of Parliament'

Dicey's account further provides a hierarchal relationship between Parliament and the judiciary, with the judiciary restricted from challenging an Act of Parliament. Dicey considered this the negative aspect of sovereignty, providing, '*there is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament.*'[44] In further accounts, judicial articulations into the extent of Parliament's sovereignty are limited to a static reaffirmation of the *'[doubtless] power of the Imperial Parliament*',[45] which retains a hierarchal authority over the judiciary:

> Parliament [makes] whatever laws it thinks right. The Executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see that they are obeyed.[46]

The consistency of this approach within judicial understanding provides clear insight into the orthodox account of parliamentary sovereignty; the perceived role of the court is simply to enforce the sovereign legislation of Parliament. Adopting a negative approach to Diceyan sovereignty, this simplistic outline of the legislative and judicial roles may be reduced to as little as '*Parliament makes the laws, the judiciary interpret them*';[47] this further depicts static sovereignty – the legislative primacy of Parliament is unambiguous and isolated away from any effective judicial challenge.

Indeed, it has long been established within English law enacted legislation is incontrovertible. The enrolled Bill rule affirms that where legislation has passed both Houses of Parliament, the courts will be unconcerned with the legislative process.[48] The courts went even further in embracing this reserved approach in *British Railways Board v Pickin,*[49] in which Lord Morris clarifies judicial boundaries, providing, '*It must be for Parliament to decide whether its decreed procedures have in fact been followed.*'[50] This judgment clarifies that an Act of Parliament is unchallengeable where it has been passed

[44] Dicey, *Law of the Constitution* (n 4) 66.
[45] *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513 (HL).
[46] ibid 567.
[47] *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157.
[48] Anne Dennett, *Public law Directions* (OUP 2021).
[49] *British Railways Board v Pickin* [1974] AC 765.
[50] ibid 790.

in any event; the courts' focus remained on the *product* that was legislation, and not on the *process* which had taken place in its enactment.

However, assessing the developments to the judicial role of the past century, whether this account is confined to earlier modes of governance will be examined, as the relationship between branches of government has been an integral component of constitutional reform.[51] These historic accounts examine the hierarchal democratic authority of Parliament and suggests that the judiciary has a subordinate role, enforcing legislation rather than reviewing its provisions.

2.1.2.1.3. Parliament may not bind its successors

Furthermore, the courts have examined where provisions of legislation may conflict with one another, and the complexities surrounding the binding of successive parliaments. The Diceyan account of sovereignty affords Parliament '*the right to modify or repeal any law whatever*', preventing Parliament from creating legislation which cannot be reversed.[52] Furthermore, regardless of any political narrative surrounding legislation, Dicey suggests no statute may be considered more authoritative than another, providing '*neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered a supreme law.*'[53]

The full power of a standing parliament to repeal legislation was outlined in *Ellen Street Estates v Minister of Health*, in which justices considered where Parliament may override previous statute.[54] This power to repeal any legislation whatsoever ensured that no parliament could effectively bind its successors.[55] Maugham LJ echoed Dicey's account, providing '*If in a subsequent Act Parliament chooses to make plain that an earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature.*'[56] Protecting Parliament's power to expressly repeal prior legislation ensures that a Parliament (in spite of its sovereign authority) cannot effectively limit the powers of successive parliaments.

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[51] CRA.
[52] Dicey, *Law of the Constitution* (n 4) 118.
[53] ibid 145.
[54] *Ellen Street Estates v Minister of Health* [1934] 1 KB 590.
[55] Dicey, *Law of the Constitution* (n 4) 21.
[56] *Ellen Street Estates* (n 54) 597.

The courts have repeatedly reaffirmed this account, going further to consider where modern legislation contravenes previous legislation without the express intention to do so. In *Dean of Ely v Bliss*, justices considered this point and concluded '*Every Act is either made for the purposes of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some prior enactment'*.[57] This approach serves as a form of self-regulation within Parliament through preventing any constitutional crisis arising from the enforcement of rigid, unalterable legislation; the power to repeal any article of legislation whatsoever expressly or otherwise signifies the extent of Parliament's legislative power. At this stage, the judiciary widely avoid interfering with the will of the modern Parliament in any significant way – the primary concern of the court is the wording of legislation and its application.

Having analysed the rise of Diceyan sovereignty and examined how the increasing momentum of this approach became synonymous with judicial expressions on parliamentary sovereignty, the chapter will now assess the developing themes of this era and identify how they have prompted a departure from the dominance of Diceyan sovereignty within judicial understandings.

2.1.3. Jackson: A new approach

By the start of the 21st century, the shape of UK constitutional law had shifted greatly from former incarnations. Dynamic themes had developed, evidencing a departure from the static, classical account of orthodoxy that could not be reconciled with, for example, a law-making devolved government, or a hierarchically dominant European legislature. As a terminus allowing for reflection on the trajectory of orthodoxy in this era, the case of *R (Jackson) v Attorney General* will be examined – and how the House of Lords expressed varying viewpoints laying the groundwork for more expansive understandings of parliamentary sovereignty in the Supreme Court era.[58] Therefore, the statements made in this case will be analysed in every chapter which examines a model of parliamentary sovereignty.

[57] *Dean of Ely v Bliss* (Ely) (1842) 5 Beav 574, 582.
[58] *Jackson* (n 2).

The contentious issues presented in *Jackson* are surrounded by a highly technical legal context. The decision considers the Parliament Acts: legislation altering the procedures of Parliament to allow for the enactment of legislation without the consent of the House of Lords.[59] Prior to the passage of the Parliament Act 1911, assent required the consent of a majority of both the House of Commons and the House of Lords. However, following the narrow 1910 general elections, the Liberal government enacted legislation allowing the House of Commons to legislate unilaterally *'notwithstanding that the House of Lords have not consented to the Bill'* where two years had passed.[60] Significantly, the statute only limited these powers where a provision within a Bill would extend the maximum duration of Parliament beyond five years, which would still require the full consent of Parliament for enactment.[61] The 1911 Act additionally allowed for the enactment of Money Bills notwithstanding that the House of Lords had not consented to it providing one month had passed from it being sent to the Upper House.[62] Subsequently, Parliament enacted the Parliament Act 1949, amending the 1911 Act by reducing the time constraint component to one year.[63] The 1949 Act was passed without the consent of the House of Lords, the executive utilising the powers from the 1911 statute.[64]

The applicants in *Jackson* challenged the validity of the Hunting Act 2004, legislation enacted without the consent of the House of Lords one year from their initial rejection.[65] The applicants argued the 1949 Act and any subsequent legislation enacted using its provisions were invalid.[66] This reasoning was outlined by Lord Nicholls, providing:

> The effect of the 1911 Act was to restrict the power of the House of Lords and, correspondingly, to increase in practice the power of the House of Commons. This enlarged power of the Commons, it is said, did not enable the Commons to

[59] Parliament Act 1911; Parliament Act 1949.
[60] Parliament Act 1911, s 2(1).
[61] ibid.
[62] ibid, s 1.
[63] Parliament Act 1949, s 1.
[64] *See*, Mark Elliott, 'The Sovereignty of Parliament, The Hunting Ban, and the Parliament Acts' [2006] 65 CLJ 1.
[65] Hunting Act 2004; *Jackson* (n 2), [3].
[66] *Jackson* (n 2).

> enlarge its own power still more by further restricting the delaying power of the Lords. A power given in limited terms cannot be used to enlarge itself.[67]

The rationalisation and claims the 1949 Act is '*delegated*' legislation was strongly opposed by the Government.[68] In consideration of the language within the 1911 Act, the Attorney General asked the courts to examine the legislation in light of the *'statutory and historical context*'.[69] The approach from the government proposed that the 1911 Act fundamentally changed how an Act of Parliament may be passed, and any Act passed this way would be as valid and *primary* as any sovereign statute. Therefore, the 1949 Act is a sovereign Act of Parliament and may not be struck down by the courts. The holistic argument proposed by the government presents an alternative approach to the Diceyan account of parliamentary sovereignty; the affirmation that Parliament had restructured its law-making processes shifts the contemporary account of sovereignty towards Jennings' account and his theory of manner and form.

Ultimately, a departure from orthodox sovereignty within judicial reasoning would be inevitable; the applicants' argument would require the courts to strike down '*delegated*' legislation and depart from precedent entirely (although the legislation would not constitute true statute in the first place due to failing to satisfy procedural requirements).[70] On the other hand, to uphold the 1949 Act and subsequent legislation as enacted would be to affirm that Parliament had altered its manner and form with regards to how legislation is passed.[71] The judgment provided in relation to the applicants' challenge appears relatively straightforward, uncontroversial, and predictable. The court maintained that the 1949 Act and all subsequent legislation passed utilising the tools within are valid Acts of Parliament.

The 1911 Act expressly restricted legislating without the consent of the House of Lords only until the required time had elapsed (providing a Bill did not pertain to extending the duration of Parliament);[72] the court rejected the proposal that the 1911 Act's provisions

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[67] ibid [48].
[68] ibid [7].
[69] ibid [29].
[70] *Pickin* (n 49).
[71] Elliott, 'The Sovereignty of Parliament' (n 64).
[72] Parliament Act 1911, s 2(1).

could not be used to amend itself, with both Houses and the courts recognising the validity of the 1949 Act.[73] Lord Steyn provided his interpretation on the intentions of the 1911 Act, providing '*this statute created a new method of ascertaining the declared will of Parliament'*, rather than statute being of a different, delegated type.[74]

While the final decision in *Jackson* provides a conclusive response pertaining to Parliament's legislative capacity and the Hunting Act, as an opportunity for constitutional reflection following a series of incremental, yet significant deviations to Diceyan understandings of parliamentary sovereignty, justices engaged in broad and varied discussion. While the developments to dynamic activity will be examined in subsequent chapters, these judicial expressions had '*demonstrated the movement of authority to the realm of the courts*', particularly in light of the courts' capabilities in reviewing statute to any extent.[75] *Jackson* is particularly insightful in the justices' *obiter* conceptualisations of sovereignty, providing a useful analysis as a high-water mark in the lifecycle of the House of Lords for dynamic categorisations of sovereignty. With such variation between outlooks, different statements will be analysed in the chapters on the approach they are relevant to. This chapter will now examine the orthodox viewpoints which illustrate a conservatism towards constraints upon sovereignty.

2.1.3.1. Orthodox viewpoints in *Jackson*

While the judiciary is not permitted any tool within domestic law to directly strike down an Act of Parliament, Lord Bingham would reframe the approach taken by the House of Lords, providing that rather than striking down existing statute, the pertinent matter was whether the provisions can be considered '*enacted legislation*' in the first place.[76] Expressing this approach, the courts may theoretically nullify *legislation* where the provisions were never truly Acts of Parliament.

Lord Bingham further considered delegated legislation, and the inherent authority afforded to an Act of Parliament, providing:

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[73] *Jackson* (n 2) [68].
[74] ibid [75].
[75] Chong Siew Lin Grace, 'Jackson v Attorney General: Moving Towards a Legal constitution' [2007] 10 Trinity C L Rev 60.
[76] ibid [27].

> [The Parliament Act 1911] allows provisions to "become an Act of Parliament on the Royal Assent being signified". The meaning of the expression "Act of Parliament" is not doubtful, ambiguous or obscure. [...] It is used, and used only, to denote primary legislation.[77]

While the viewpoints of certain justices in *Jackson* would engage in dynamic reasoning pertaining to the potential for constraints upon sovereignty (as will be discussed in subsequent chapters), Lord Bingham would reaffirm '*the bedrock of the British constitution is [parliamentary sovereignty.] Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished.'*[78] Masterman and Wheatle note that Bingham's rejection of external restraints upon Parliament while others make reference to the increased use of common law authority illustrates the existing disagreement between viewpoints towards the nature and scope of constitutional principles.[79]

Bingham's approach outlines perceptions of Parliament's sovereign will, with his formulation of sovereignty being orthodox in its restrained nature, reaffirming fundamental elements of Diceyan sovereignty.[80] This retention of orthodoxy within reasoning leaves little space for any form of manner limitations upon Parliament's legislative capacity within the orthodox viewpoint. Bingham's judgment provides an orthodox account of sovereignty, remaining restrained, providing little dynamic authority in response to Parliament's dominance. In any event, while the orthodox statements of Lord Bingham would contrast the dynamic attitudes found throughout *Jackson* (with constitutional implications which will be examined throughout this thesis), the overall judgment provides an orthodox account – while the subsequent Parliament Act is identified as statute, dynamic discussion is confined to *obiter*.[81]

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[77] ibid [24].
[78] ibid [9]
[79] Roger Masterman and Se-Shauna Wheatle, 'Unity, Disunity and Vacuity: Constitutional Adjudication and the Common Law' in Mark Elliot, Jason Varuhas and Shona Wilson Stark (eds), *The unity of public law: doctrinal, theoretical, and comparative perspectives* (Hart Publishing 2018) 18.
[80] Tom Mullen, 'Reflections on Jackson v Attorney General: Questioning Sovereignty', [2007] 27 Legal Stud 1, 14.
[81] Christopher Forsyth, 'Showing the fly the way out of the flybottle: The value of formalism and conceptual reasoning in administrative law' [2007] 66(02) CLJ 325.

2.1.3.2. Retention of orthodox attitudes

As will be examined in all subsequent chapters, the movement into the Supreme Court era would signal a shift whereby an increasingly varied number of viewpoints towards sovereignty emerge. In light of decades of dynamic authority suggesting there had been a shift away from key aspects of orthodox sovereignty, the Supreme Court increasingly made reference to the developing roles of external institutions (e.g. EU, devolved governments) and affirmed how legislation had fundamentally altered the constitutional landscape pertaining to orthodoxy.[82] However, in spite of any potentially developing assertiveness in the judicial approach towards parliamentary sovereignty, it cannot be considered in isolation to indicate an absolute departure from orthodox principle.[83]

Although the Supreme Court's decisions which can be identified as *dynamic* will be examined in the following chapters, this chapter will evidence how authority continuing into the Supreme Court era would refrain from abandoning orthodoxy irreconcilably. Surrounding this judicial context, *Imperial Tobacco v Lord Advocate* provides an example of the courts analysing the debate surrounding the interpretation of devolution legislation.[84] Heard in the Supreme Court, the Tobacco and Primary Medical Services (Scotland) Act 2010 was challenged on the grounds its provisions were outside the Scottish Parliament's legislative competencies.[85] With provisions imposing restrictions on the display, sale and purchase of tobacco products, it was argued these inhibited the sale of tobacco products in a way which would have concerned the single market within the United Kingdom for the free movement of goods and services.[86] The court considered the significant element to be the purpose of the legislation; Lord Hope providing:

> The question whether [the 2010 Act "relates to" reserved matters] is to be determined by reference to the purpose of those provisions [...] The extent to

[82] *Jackson* (n 2); *Thoburn v. Sunderland City Council* [2002] EWHC 195; *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.
[83] Brice Dickson, 'Activism and Restraint within the UK Supreme Court' [2015] 21(1) EJoCLI.
[84] *Imperial Tobacco v The Lord Advocate (Scotland)* [2012] UKSC 61.
[85] ibid [1].
[86] ibid [3], [29], [36], [42].

> which those aims will be realised in practice does not matter, as it is to the purpose of the provisions that [determine] whether they are within competence.[87]
>
> But if, contrary to the conclusion I have reached, it could be said that one of the purposes of [the 2010 Act was to inhibit] the single market, I would hold that that purpose is simply a consequence of the purpose to promote public health which is what these provisions are really about.[88]

The court held that the observable purpose of the 2010 Act was to improve public health, and its provisions should be considered alongside their purpose rather than their consequences.

However, this case provides insight into the courts' continuing treatment of parliamentary sovereignty where the Supreme Court provides its approach towards the interpretation of devolution statutes. This had previously been addressed in *Robinson*, in which Lord Bingham within the House of Lords identified the Northern Ireland Act 1998 as a '*constitution [...] to be interpreted generously and purposefully, bearing in mind the values which the constitutional provisions are intended to embody.*'[89] While *Robinson* will be further examined in Chapter 3, if taken on its own terms, this case suggests that the judiciary will utilise a purposive approach towards devolution legislation by reading them as constitutional statutes – allowing for a broadened degree of interpretation and constitutional reasoning.[90]

Nevertheless, when the Inner House decided upon *Imperial Tobacco,* Lord Reed departed from this purposive approach, providing, *'[t]he Scotland Act is not a constitution, but an Act of Parliament [...] there are material differences*.'[91] Ultimately, at the Supreme Court, Lord Hope reaffirmed this approach towards the interpretation of devolution statutes, providing:

> [T]he description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other

[87] *Imperial Tobacco* (n 84) [39].
[88] ibid [43].
[89] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [11] (Lord Bingham).
[90] Adam Tomkins, 'Confusion and Retreat: The Supreme Court on Devolution' [2015] UKCLA.
[91] *Imperial Tobacco Ltd, Petitioner* [2012] SLT 749 [71] (Lord Reed).

> statute. But the purpose of the Act has informed the statutory language [...] So it is proper to have regard to the purpose if help is needed as to what the words actually mean.[92]

This decisively departs from the approach found in *Robinson*; the contemporary judiciary will read devolution statutes as ordinary statutes, narrowly deferring to the wording expressed within the legislation itself rather than utilising its broadened understandings of constitutional limits or the status of devolution.[93] Indeed, these principles have subsequently been found to extend to the interpretation of the Welsh Assembly's competence.[94]

With the model for interpreting devolution statutes in *Imperial Tobacco* becoming the dominant approach,[95] the treatment of sovereignty in this case has implications beyond reinforcing orthodox attitudes. McHarg, McCorkindale and Scott analyse how the court's treatment of the judicial role here reverted to a more static approach, providing:

> The approach ultimately taken therefore amounts in the first place to a multiple renunciation of judicial power: first, the power to depart from the ordinary meaning of words; second, the power to infer the purpose of the devolution statutes and to use it to place on the language therein a construction which the ordinary meaning of the words may not be capable of bearing.[96]

Significantly, this approach which identifies devolution legislation as ordinary statutes has further shifted the judicial treatment of the Scotland Act 1998, with subsequent decisions evidencing a resistance to consider the wider aspects of the constitutional framework which underpins devolution within the UK – instead considering '*neither more nor less than what is contained in the Scotland Act.*'[97] While these implications will be

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[92] *Imperial Tobacco* (n 84) [15].
[93] Aileen McHarg, 'Statutory interpretation and the Scotland Act' (Scottish Public Law Group 2024) <http://splg.co.uk/wp-content/uploads/2012/01/Statutory-Interpretation-and-the-Scotland-Act-Aileen-McHarg.pptx>.
[94] *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43.
[95] Tomkins (n 90).
[96] Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution, And Constitutional Review' [2018] UQLJ 7.
[97] *Re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 (Scottish Continuity Bill Reference) [35].

further analysed in Chapters 3 and 4, at this stage this approach evidences a retention of sovereignty's orthodox characteristics.

Ultimately, these articulations on the narrow scope of judicial interpretation and the *ordinary* nature of devolution legislation provide insight into the direction of parliamentary sovereignty's continued application. While academics noted how the developing Supreme Court was becoming increasingly dynamic at this stage, *Imperial Tobacco* evidences a more modest judicial attitude.[98] Any hesitancy by the court must be considered in relation to the wider law-making authorities; Aroney providing, '*For, as Imperial tobacco illustrated, what is at stake is not a simple confrontation between parliamentary authority and popular sovereignty, but between competing locations of both kinds of authority.'*[99] While only a brief analysis of the Supreme Court's outlook (which will be further investigated in chapter 4), this case provides an opportunity to reflect upon the trajectory of sovereignty in the Supreme Court era, clarifying that dynamic decisions have complex contexts, and these cannot be used to conclusively evidence judicial momentum towards the perpetual departure from orthodox principle.[100]

2.1.4. Brexit

While this chapter primarily examines judicial decisions relevant to sovereignty's development towards orthodoxy or dynamism, this section will require broader contextual discussion, significantly surrounding the UK's exit of the EU (Brexit). The significance of Brexit to constitutional developments would not be understated by the courts, providing that the UK leaving the European Union would represent '*a far-reaching change to the UK constitutional arrangements*.'[101] Consequently, as the context surrounding Brexit will ensure a more comprehensive analysis of the contemporary position of parliamentary sovereignty, it will be examined in depth where relevant.

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[98] Mark Elliott and Kirsty Hughes, 'Common Law Constitutional Rights' [2022] 26 Edin LR 137.
[99] Nicholas Aroney 'Reserved matters, legislative purpose and the referendum on Scottish independence' [2014] 3 P L 421.
[100] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 (HS2).
[101] *Miller 1* (n 1) [81].

As we have analysed throughout this thesis, the past century has seen significant developments to constitutional principle, and arguably the most significant of these was the UK's introduction to the European Union and subsequent empowering legislation. The vast judicial authority on EU primacy and the characteristics of the ECA signify how entrenched the relationship between the UK and EU had become within the study and practice of constitutional law.[102] The developments to parliamentary sovereignty had been fundamentally interconnected with the development of European primacy, the hierarchal status of EU law and the UK's role as a member state had shifted both political and legal perceptions parliamentary sovereignty.

Therefore, it was significant to the constitutional landscape when Parliament triggered a UK and Gibraltar-wide referendum on EU membership in 2016, resulting in a 52% majority vote to leave the EU.[103] Significantly, while the majorities of English and Welsh votes were in favour of leaving, the majority of Scottish and Northern Irish votes were in favour of remaining.[104] Nevertheless, the government committed to affecting the result of the referendum by withdrawing from the EU altogether.[105]

Although historically former Prime Minister Atlee identified referendums as '*a device so alien to all our traditions*',[106] as an advisory tool, referendums appear to have been increasingly common post-1997.[107] Enacting the 2015 Act would continue this approach, preserving negative aspects of orthodox sovereignty. In contrast to binding referendums which mandate legislation enacting their results (required in countries such as Italy, Croatia and Hungary where a minimum turnout is satisfied),[108] the 2016 Brexit referendum was purely advisory and its result had no legal effect in itself – in spite of

[102] See *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603 (HL).
[103] The Conservative Party had previously committed to renegotiating EU membership terms; see David Cameron, 'Speech: EU speech at Bloomberg' (Gov.uk, 23 January 2013); The Conservative Party Manifesto 2015 (Conservative Party 2015) p72; European Union Referendum Act 2015; Elsie Uberoi, 'Research briefing: Analysis of the EU Referendum results 2016' (UK Parliament, 29 June 2016) <commonslibrary.parliament.uk/research-briefings/cbp-7639/>.
[104] ibid.
[105] David Cameron, Speech: 'EU referendum outcome: PM statement' (Gov.uk, 24 June 2016) <www.gov.uk/government/speeches/eu-referendum-outcome-pm-statement-24-june-2016>.
[106] Geoffrey Wheatcroft, 'Europhobia: A very British problem' The Guardian (21 June 2016).
[107] Samantha Laycock, 'Is referendum voting distinctive?' [2013] 32 Electoral Studies 2 236.
[108] European Commission for Democracy Through Law, 'Referendums in Europe – An Analysis of The Legal Rules in European States' (Venice Commission, 20 October 2005).

immense social and political pressures, once again in relation to any legal requirements to legislate, Parliament has final word on the repeal of the ECA.[109]

However, *as no member state had formally left the EU previously, the act in itself was unprecedented, with no example nor precedent to follow.*[110] *Examining European law, with additional countries joining the supranational institution, there had been increased caution in relation to the omittance of any EU provision outlining an exit process; consequently, article 50 was ratified within EU law providing members a validated method for withdrawal.*[111] *The provision provides, 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.'*[112]

From what we have seen throughout this thesis, the domestic requirements for Brexit appear to be an Act of Parliament; historical decisions on the implicit repeal of significant European legislation had indicated that European treaties and empowering legislation would require '*express terms*' in statute for repudiation.[113] However, the exact process surrounding triggering article 50 (informing the EU of a formal intention to withdraw) was left uncertain. Subsequently, the executive would attempt to trigger article 50, beginning the Brexit process unilaterally using of *prerogative powers*.[114] This would ultimately result in a Supreme Court appeal on two grounds: Firstly, a challenge to whether the government could trigger article 50 using prerogative powers; and secondly, a challenge to whether further consent from the Scottish and Northern Irish devolved institutions would be required to begin Brexit proceedings.[115]

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[109] Owen Bowcott 'Parliament should make final decision on whether to leave EU, barristers say: More than 1,000 barristers sign letter to PM arguing referendum result is advisory as it did not set a threshold for leaving EU' *The Guardian* (11 July 2016); Juha Raitio and Helena Raulus, 'The UK EU referendum and the move towards Brexit' [2017] 24(1) Maastricht Journal of EU and Comparative Law 25.
[110] Patrick Wintour and Jennifer Rankin, 'What happens next if Britain votes to leave the EU?' *The Guardian* (31 May 2016); Raitio, Raulus (n 109).
[111] Martijn Huysmans, 'Enlargement and exit: The origins of Article 50' [2019] 20 SAGE J 2.
[112] Consolidated version of the Treaty on European Union [2012] OJ C 326/1.
[113] *Macarthys Ltd. v Smith* [1979] 1 WLR 1189 (CA) 789; *McWhirter v Attorney General* [1972] CMLR 882 (CA) 886.
[114] See *Miller 1* (n 1) [2]; Owen Bowcott, 'Article 50 appeal: royal prerogative is crucial, attorney general tells court' *The Guardian* (5 December 2016).
[115] *Miller 1* (n 1) [4-6].

2.1.4.1 Prerogative powers

Before going into the challenge itself, the prerogative power will be explored as a fundamental component of the challenge – '*The Secretary of State's case is based on the existence of the well-established prerogative powers of the Crown to enter into and to withdraw from treaties.*'[116] Prerogative powers encompass those powers once reserved directly by the monarch in their involvement with government; they include making treaties, declaring war and deploying the armed forces.[117] However, in contemporary government, these powers – other than the '*personal'* prerogatives – are used exclusively by ministers.[118] With the development of the liberal norms, the scope and usage of prerogative powers would become increasingly restricted; legislative and judicial authority evidences prerogative powers have been condensed, limiting the potential for interference with statute and individual rights.[119]

Prerogative powers have conventionally been uncontroversial and well-understood by law-makers,[120] *Blackburn v Attorney General* clarifies that prerogative treaty-making powers are usually unchallengeable by the courts; '*these courts will not impugn the treaty-making power of Her Majesty [...] Nor have the courts any power to interfere'*.[121] Decided prior to the ECA's enactment, this case examined the Treaty of Rome,[122] and thus whether the prerogative powers extend to modern EU treaties remained uncertain. However, the limits to the prerogative power were explored again in *McWhirter v Attorney General*; although the court reaffirmed the governments certain right to all treaty-making powers, these would be limited from interfering with domestic statute, and further that the court would always uphold legislation relevant to treaties.[123]

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[116] ibid [34]
[117] Thomas Poole, 'United Kingdom: The Royal Prerogative' [2010] 8 Intl J Const L 1, 146.
[118] Ministry of Justice, 'Review of the Executive Royal Prerogative: Final Report' (15 October 2009).
[119] See: *R v Earl of Northumberland (The Case of Mines)* (1568) 75 ER 472; *Case of Proclamations* [1610] EWHC KB J22; Bill of Rights 1689 s 1; *Rustomjee v The Queen* (1876) 2 QBD 69; Glenn Burgess, *The Politics of The Ancient Constitution* (Penn State Press 1993).
[120] Although not unanimously, see *R v Home Secretary, ex p Northumbria Police Authority* [1989] QB 26.
[121] *Blackburn v Attorney General* [1971] 1 WLR 1037, 1041; however, prerogative powers are not unlimited, see, Paul Craig, 'Prorogation' [2019] UKCLA.
[122] EC Treaty (Treaty of Rome, as amended).
[123] *McWhirter* (n 113) 886.

This leaves the prerogative powers in an interesting constitutional space. While other constitutional systems may require legislative consent to make or exit from treaties,[124] the UK constitution reserves these powers to the executive.[125] However these powers are reserved to matters which do not violate statute, with Parliament often consulted to implement significant treaties within domestic law.[126] This has resulted in an unfavourable perception towards the use of these powers in the modern United Kingdom; the powers themselves regarded as a '*relic of a past age*',[127] and their usage symbolic of '*the clanking of mediaeval chains of the ghosts of the past*'.[128]

2.1.5. Miller 1

The government's approach towards article 50 was challenged in *R (Miller) v Secretary of State for exiting the European Union* (*Miller 1*).[129] At the time of its hearing this would be widely considered the most high-profile case held before the Supreme Court, signifying its '*high constitutional importance*'.[130] Two grounds of appeal examined the government's intention to unilaterally initiate Brexit proceedings: (1) using prerogative powers and (2) doing so without direct consent from devolved regions; in *Miller* in the High Court and *Re McCord* respectively.[131] As expected, the government would not make any immediate attempts the trigger article 50 unilaterally following the referendum, as the political/legal reaction would render the action something from a *'kamikaze prime minister'*,[132] but rather the judiciary was placed under a public spotlight, with '*all eyes on the courts as they determined who had the legal authority [to trigger article 50].*'[133] With significant tension both from the political and legal communities, it would appear evident from the

[124] See US requirement for Senate ratification of any treaties; United States Constitution, art 2 s 2.
[125] Though, see Constitutional Reform and Governance Act 2010 (CRAG).
[126] See ibid; Poole, The Royal Prerogative (n 117); ECA.
[127] *Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75, 101 (Lord Reid).
[128] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 417 (Lord Roskill).
[129] *Miller 1* (n 1).
[130] Daniel Carter, 'Who Is Taking (Back) Control of Brexit? Assessing the implications of the UK Supreme Court decision in Miller' *Ars Aequi* (April 2017) <scholarlypublications.universiteitleiden.nl/access/item%3A2902891/view>; the constitutional significance mandated additional presiding justices, 'Panel Numbers Criteria' (The Supreme Court) <www.supremecourt.uk/procedures/panel-numbers-criteria.html>.
[131] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (*Miller 1 EWHC*); *Re McCord, Judicial Review* [2016] NIQB 85.
[132] Joshua Rozenberg, 'Brexit won the vote, but for now we remain in the EU' *The Guardian* (24 Jun 2016)
[133] Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' [2017] 76(2) CLJ 257.

early stages that a purely orthodox approach would be irreconcilable with political/social contexts.

The proceeding chapters on the dynamic categorisations of parliamentary sovereignty will analyse the judicial statements in *Miller* which may be visibly dynamic, and assess whether the case may illustrate an increasing judicial willingness to embrace a more assertive outlook within the Supreme Court's understandings of sovereignty. Nevertheless, while the decision in *Miller* may provide dynamic readings of sovereignty, this chapter has evidenced justices explicitly refrain from imposing any challenge to Parliament's legislative authority; as will be discussed, the decision may be perceived as a reformulation of orthodox attitudes rather than a permanent departure.

2.1.5.1. A reanalysed approach to devolution rights

While a more complete account of devolution will be provided in Chapter 3, this chapter will now examine the decision made by the court on the nature of EU authority, it would appear EU treaties were distinguished from ordinary treaties which typically are outside the scope of devolved competencies. By moving the narrative away from foreign affairs and towards domestic rights, devolved legislatures had been prompted to take the approach that by unilaterally exiting the EU, Parliament would be legislating on devolved matters.[134] While the prerogative power component of the judgment would take up the vast majority of judicial consideration and media attention, this devolution issue is indeed significant to the devolved legislatures and their populations. Scholars analyse how European treaties can be distinguished from ordinary external authority as a key element in the policy-making process within a dispersed and multi-level system of government which can constrain devolved decision-making.[135]

Considering the influence of European law prior to Brexit in devolved regions, it is evident that Brexit and its effects would decisively alter the legal landscape for devolved governments. It is significant that Brexit coincided with perceived momentum for the protection of devolved rights; devolution legislation expanded the powers of devolved

[134] Aileen McHarg and James Mitchell, 'Brexit and Scotland' [2017] 19(3) BJPIR 512, 520.
[135] ibid 518.

governments, and further reinforce the ordinary application of Sewel Convention.[136] While Parliament retains the legal right to legislate for the UK, devolution rights were perceived to be enshrined within the constitution. It is therefore understandable that the view of the devolved governments was that there may be a legitimate legal challenge where Parliament legislates on devolved matters.[137]

However, both academics and Parliament noted the ambiguities within recent devolution legislation; Parliament purposefully inserted the convention within statute, however it was explicitly limited in its enforceability.[138] The Supreme Court in *Miller 1* noted that the Sewel Convention and its inclusion in the parliamentary provisions provided devolved institutions with a reasonable expectation that the convention would be upheld.[139] It was the Court's belief that this had been honoured by the government preceding Brexit, as devolution legislation had satisfied criteria through devolved legislatures passing consent motions.[140]

Examining the devolution legislation containing provisions recognising the Sewel Convention, the courts would determine the intentions of Parliament and whether it had intended to create empowering legislation allowing for the enforcement of the Convention. Upon further analysis of the Scotland Act's provisions (and the Wales Bill which had substantially identical provisions), while retaining sovereign powers, Parliament articulated its view on how it should respect the rights of devolved institutions, providing, '*But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament*.'[141]

The court would determine that Parliament's use of words such as '*normally'* and '*recognised'* would indicate that the Sewel Convention's inclusion within statute merely recognised it as a '*political convention'* which is a permanent feature of constitutional

[136] Scotland Act 2016; Wales Act 2017; HM Government, *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly of Wales* (1999) Cm 4444.
[137] Gordon Anthony, 'Devolution, Brexit, and the Sewel Convention' (The Constitution Society, 2018).
[138] 'Briefing Paper: Devolution: The Sewel Convention' (House of Commons Library, 13 May 2020).
[139] *Miller 1* (n 1) [137-139].
[140] ibid.
[141] Scotland Act 2016, s 2(8).

arrangements.[142] This approach towards the Convention would limit its enforceability; should Parliament have wished to create an enforceable limitation to their power through legislation acting as a conduit-pipe, the court believed they would have worded it explicitly.[143] This perception of these provisions is significant to devolved institutions – the affirmation of devolution rights within statutory provisions, had prompted a reconsideration of the balance of power within the UK.[144] With these provisions appearing to protect devolved rights, there was a perception within devolved regions that '*the UK Government has breached both its letter and spirit'* by enacting the ineffective provisions.[145]

With recent devolution legislation removed as a method to enforce the Sewel Convention, the courts would further examine how it may be applied, considering the ordinary status and role of constitutional conventions. Historically, the courts and academics have clarified that constitutional conventions are not legal authority which can be used by the courts.[146] The Supreme Court was reluctant to depart from this approach, as constitutional conventions are inherently political, providing:

> Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question [...] but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world.[147]

With constitutional conventions existing solely within the political landscape, the courts perception would reduce the Sewel convention from what had been envisioned by devolved governments – '*The consequences of (and remedies for) disregarding the Sewel Convention are therefore, as with any constitutional convention, ultimately political.*'[148]

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[142] *Miller 1* (n 1) [148].
[143] ibid.
[144] Jo Hunt, The Supreme Court Judgment in Miller and its implications for devolved nations (UK in a Changing Europe, 1 February 2017).
[145] 'Briefing Paper: Devolution: The Sewel Convention' (n 138).
[146] See, Colin Munro, 'Laws and Conventions Distinguished' (1975) 91 LQR 218; *Madzimbamuto* (n 43); *Attorney General v Jonathan Cape Ltd* [1976] 1 QB 752; *Re Resolution to Amend the Constitution* [1981] 1 SCR 753.
[147] *Miller 1* (n 1) [146].
[148] 'Briefing Paper: Devolution: The Sewel Convention' (n 138).

Further providing their reasoning for diminishing any perceived legal effect to the Convention, the Supreme Court makes reference to the prerogative power discussion, highlighting how as only statute can change the rights provided by the ECA, similarly only statute can change the provisions outlining devolved competencies.[149] While scholars acknowledge that in spite of typical attitudes towards constitutional convention, '*It is also by no means inconceivable that, in a different context, the court might have been more reluctant to conclude that statutory recognition of the Sewel Convention had no legal effect whatsoever*.'[150] Nevertheless, the court's expressions of its enforceability was definitive, the political realities that are considered by devolved and central governments such as the Sewel Convention are excluded from legal practice and the court's rationalisation.

In any event, it was the view of the courts that even had the Sewel Convention been enforceable, it may only be applied where Parliament interferes with devolved matters – statute which had previously reformulated the established competencies of EU institutions had not required any devolved consent.[151] Therefore, the entire process of adding to or taking away from the authority of EU treaties was perceived by the courts to be reserved away from the business of devolved institutions. However, scholars disagree with this perception of the wider Brexit context. McHarg suggests that this may be distinguished from other occasions as leaving the EU entirely constitutes significant constitutional reform, '*thereby requiring a shared process of redrawing and rebuilding the United Kingdom's multi-level constitutional architecture in light of the removal of one of its major elements*.'[152]

The view of the courts is one that would have been a great disappointment to devolved governments which felt they were increasingly secure in their law-making rights without significant interference from Parliament. As clarified, any breach of constitutional conventions cannot direct a legal challenge, however those consequences will exist in the political domain. The implications of the court's decision are far reaching – with a perceived acceptance that Parliament retains a surprising degree of control over

[149] *Miller 1* (n 1) [132].
[150] McHarg and Mitchell (n 134) 523.
[151] *Miller 1* (n 1) [140]; see European Union (Amendment) Act 2008.
[152] McHarg and Mitchell (n 134) 518.

devolved regions in those instances which are deemed not *ordinary*, devolved institutions have been left frustrated in their ability to govern, prompting increased calls for independence.[153]

The judicial approach towards devolution in *Miller* may be static in its reaffirmation of Parliament as the unlimited law-making authority within the United Kingdom. However, departing from decades of increased political/legal momentum towards increased devolution rights, the Supreme Court reduced conventions and associated devolution safeguards as wholly ineffective before the courts. Ultimately in relation to the devolution decision, while at first glance the judgment in *Miller 1* appears to align with conventional aspects of orthodoxy (keeping ultimate law-making powers within Parliament unilaterally),[154] deeper analysis will show attitudes generally departing from orthodox behaviours.

This use of devolution case law to identify constraints upon devolved governments despite moving against the recent position on the significance of the Scottish and Northern Irish voice. This assertive challenge to democratic devolved governments illustrates a judicial approach which departs from static, restrained approaches towards engaging with democratic legislatures, with the court's (and Parliament's) decision to deprive the Sewel Convention of any enforceability whatsoever in spite of its statutory recognition potentially leading to a wide-reaching reconstitution of the UK.[155] This reading of sovereignty therefore has implications on the relationship between powers, further directing the power dynamic for legislation in the UK. While this does not necessarily introduce radicalised ideas surrounding assertive sovereignty, this judgment tracks alongside the trajectory of sovereignty developing nuanced implications for increased judicial dynamism and assertive challenges to constitutional norms.

[153] ibid; 'The Miller Case and the Devolution Settlement' (Centre on Constitutional Change, 6 December 2016); Jason Allen and Darren Harvey, 'Brexit and Devolution Post-Miller' (British Institute of International and Comparative Law, 2017).
[154] See, *Madzimbamuto* (n 43); *Johnathan Cape* (n 146).
[155] Allen and Harvey (n 153).

2.2. Conclusion

This chapter has mapped the orthodox model of parliamentary sovereignty and its treatment within the judicial sphere. While any effective conclusion on the ultimate role of the orthodox model will be more conclusive following the comprehensive analysis to be found through this thesis, it has been illustrated that static Diceyan attitudes towards the application of sovereignty in practice have increasingly lost a foothold within judicial understandings of the tenet. Nevertheless, this chapter has shown that orthodox principle has continued within judicial reasoning and is truly embedded within understandings of sovereignty; any ultimate departure seems impossible within the context of the constitutional understandings. While the static orthodox viewpoint provides the narrowest treatment of sovereignty's dominance alongside constitutional fundamentals, it is evident that there is space within dynamic decisions for orthodox attitudes and the reaffirmation of Diceyan outlooks.

Moving forward into chapters examining dynamic models of applying parliamentary sovereignty, orthodoxy as examined within this chapter illustrates a benchmark for the most static viewpoints and this will be used to identify the extent of deviation from orthodox principle found with dynamic judicial reasoning. As chapter 2 will highlight, dynamic approaches do not necessarily depart from principles of orthodoxy, and understanding how different models allow for varying outlooks throughout the spectrum between wholly orthodox or dynamic will be essential. Therefore, chapter 5 will provide a reanalysis of the state of orthodoxy and its position within contemporary judicial understandings that allow for dynamic attitudes to exist alongside orthodox principle and viewpoints.

3. Chapter 2

Models of Dynamic Parliamentary Sovereignty

The Refinement Approach

3.1. Introduction

Having analysed the historic judicial treatment of orthodoxy and the trajectory of orthodox principle this thesis will now begin examining the *dynamic* models of applying sovereignty. As noted in the introduction, dynamic understandings of sovereignty allow for a more active reconstruction of Parliament's ultimate hierarchal authority through the use and balancing of sovereignty alongside other constitutional imperatives. This thesis identifies three models of dynamic outlooks, allowing for the categorisation of certain decisions which depart from static orthodoxy to varying extents. This chapter will investigate and analyse the first model: the *refinement* approach.

While static orthodoxy provides an inherently restrictive approach, and other dynamic models illustrate a more concrete departure from orthodoxy, the refinement approach is somewhat more nuanced where visible. The approach is identified where judicial reasoning appears to make minor modifications to Diceyan, orthodox aspects of parliamentary sovereignty in order to improve its suitability to meet contemporary requirements without compromising the core of orthodoxy. Indeed, this approach does not exist in opposition to orthodox principle, but rather takes a less restrictive outlook towards the *potential* for constraints upon the application of sovereignty as constitutional understandings develop.

Ultimately, refining outlooks will illustrate how the role of the courts became increasingly constitutional as dynamic attitudes emerge in practice. For example. this approach allows for the principled and incremental advancement to the effectiveness of common law tools as a means of scrutinising legislative activity.[156] It will be evident throughout this

[156] *Simms* (n 82); *Thoburn* (n 82).

thesis that these refining decisions situate greater departure to orthodox principle in subsequent decisions, and therefore, it will be essential to analyse the implications of refining attitudes surrounding parliamentary sovereignty.

3.1.1. Refinement in literature

Throughout recent decades, social and political themes gave rise to a series of legal challenges triggering an increasingly complex account of parliamentary sovereignty. With Dicey's account seeming insufficient in isolation, more dynamic attitudes towards sovereignty would appear in discussion: the works of Jennings provided an account of sovereignty promoting a shift away from aspects of Dicey's literature and refining some of the sharper edges of orthodox principle to allow for dynamic application.[157]

Jennings is a key figure in criticising Dicey's benchmark, attempting to bridge the theory of sovereignty and the realities of sovereignty in practice.[158] Jennings responded to Dicey's account, suggesting that the orthodoxy carries the political aspects of sovereignty into the legal understanding.[159] Alternatively, Jennings critiques provides that Parliament cannot enjoy factual supremacy, rather Dicey '*had failed to prove that the law made [...] Parliament a sovereign law-making body*'.[160] This account presents Diceyan sovereignty as a fiction – Parliament's right to make or unmake *any* law failed to consider the realities of the modern legal system, in which Jennings viewed sovereignty as '*a legal concept, a form of expression which lawyers use to express relations between Parliament and the courts*'.[161]

Jennings further clarified his theory of sovereignty as a fiction, providing that the existence of realisable limitations are incompatible with orthodox formulations of sovereignty, and instead considers Parliament's 'sovereignty' as fiction, with 'legislative

[157] Ivor Jennings, *The British Constitution* (CUP 1967).
[158] ibid; Ivor Jennings, *Law and the Constitution* (University of London Press 1964) 156; Ivor Jennings, *Parliament* (CUP 1957); Ivor Jennings, *The Queen's Government* (Greenwood Press 1984); The Approach to Self-Government (CUP 1956).
[159] *See*, Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand*, ch 4 Theories of Parliamentary Sovereignty After 1931: New and Revised (OUP 2005) 81.
[160] Jennings, *Law and the Constitution* (n 158) 156.
[161] ibid 149.

supremacy' more accurate terminology,[162] providing, '*[it is] true that [Parliament] cannot in fact do all sorts of things. The supremacy of Parliament is a legal fiction, and legal fiction can assume anything'.*[163] This highlights the disparity between static and dynamic attitudes towards sovereignty; Parliamentary sovereignty's role as the dominant heart of UK constitutionalism has been increasingly criticised, while the judiciary as an organ of the state has moved away from its fusion with Parliament (culminating with the formal establishment of the Supreme Court in 2009 following the Constitutional Reform Act 2005).[164]

3.1.2. Manner and form

Significantly, within Jennings' account, he provides the manner and form theory, suggesting that Parliament can legislate to impose specific procedural steps upon themselves, and successive Parliaments will be forced to satisfy this procedure in order to pass legislation. Jennings considers the court's role in parliamentary procedure and criticisms of Dicey, providing:

> [T]he courts will always recognise as law the rules which Parliament makes by legislation; that is, rules made in the customary manner and expressed in the customary form. Unfortunately, Dicey does not use it in this sense when he proceeds to discuss the consequences of the sovereignty of Parliament. He draws [conclusions] which are not necessarily true [...] he asserts the principle that, because of its sovereignty, Parliament cannot bind its future [actions].[165]

Jennings suggests that where Parliament qualifies its own procedures, the judiciary may enforce imposed procedural requirements.[166] While this understanding that there may be conditions in reality that prevent Parliament from exercising unlimited law-making authority does not erode the core of orthodoxy, there is an unorthodox quality as this gives rise for the emergence of dynamic refinements to orthodox doctrine. The JCPC in *Trethowan v New South Wales* provided an early example of sovereignty's dynamic

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[162] ibid; *See,* Michael Gordon*, Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 287.
[163] Jennings, *Law and the Constitution* (n 158) 170.
[164] CRA 2005, s 23.
[165] Jennings, *Law and the Constitution* (n 158) 140.
[166] R Elliot, 'Rethinking Manner and Form' [1991] 29 Osgoode Hall LJ.

treatment when considering manner and form. The New South Wales legislature had passed an Act stating that any Bill which would abolish the Legislative Council requires consent through a referendum.[167] When subsequent legislation abolished the Legislative Council without any such consent, the Privy Council found this legislation invalid.[168] The legislature had previously altered the manner and form of its processes and any subsequent legislature was bound to abide by these processes (a referendum requirement). While Jennings' account will be considered further in this chapter, this provides an identifiable example of the dynamic treatment allowing sovereignty to operate as a fluid principle capable of legitimate change through the normative law-making process.[169]

Historically, the orthodox account of parliamentary sovereignty implied that the powers of Parliament were unequivocally certain, with the institution regarded as a '*virtually omnipotent body'*.[170] This seemingly unrealistic aspect of sovereignty originates from the archaic accounts, where parliament's authority is so absolute '*that what the parliament [enacts], no authority upon earth can undo'*.[171] Unsurprisingly, this absolute approach to sovereignty faced the consideration of JCPC justices; in *British Coal Corporation v The King*,[172] Law Lords were left to determine whether Parliament's constitutional authority is in fact limited to what may be realisable.

This case examined the sovereignty granted to commonwealth nations by statute following the end of their colonisation,[173] and whether Parliament could unilaterally repeal this legislation. This would in theory, oblige the foreign state to surrender their sovereignty at the will of the UK government. When the Law Lords assessed the context surrounding this case, they provided, '*the Imperial Parliament could, as a matter of abstract law, repeal or disregard [decolonisation statute…] that is a theory and has no relation to realities.*'[174] It is a political reality that any legislation enacting omnipotent

[167] *Trethowan v Attorney General for New South Wales* [1932] AC 526 (PC).
[168] ibid.
[169] Parliament Act 1911; Parliament Act 1949.
[170] Mark Elliott, 'United Kingdom: Parliamentary Sovereignty Under Pressure' [2004] 2 Int'l J Const 545, 547.
[171] 1 Bl Comm 161.
[172] *British Coal v R* [1935] UKPC 33.
[173] *See,* Statute of Westminster 1931.
[174] *British Coal* (n 172) 520.

powers will result in statute which cannot be enforced; the judicial reasoning applied in this example outlines that features of orthodox sovereignty may be refined in order to meet contemporary realities.[175]

While JCPC decisions cannot be generalised with other judicial proceedings as they are not impactful upon Parliament's internal jurisdiction, they are nevertheless principled and rationalised by the same justices who make up House of Lords approaches. This illustrates an early movement of sovereignty's position – expanding themes give rise for a more dynamic formulation of sovereignty as an increasingly flexible principle, reflecting an ongoing shift away from sovereignty's ideological, abstract characteristics in favour of those which are more suitable within the contemporary legal system.

This judgment adopts a refining approach towards sovereignty, consistently maintaining the powers of the '*imperial Parliament'*, while reformulating the traditional 'omnipotent' aspects of Parliament's power in practice. The court expressed the fundamentals of orthodox sovereignty, however, went beyond reiterating Parliament's static dominance, and acknowledged that contemporary sovereignty must refine the theoretical aspects of orthodox sovereignty.

3.1.3. Limitations to Diceyan fundamentals

The rest of this chapter will examine how refining viewpoints in practice have brought about a reconceptualization of the courts' treatment of parliamentary sovereignty. While Diceyan approaches towards the judiciary confine the courts' options when reviewing statute,[176] a number of cases illustrate an incremental, yet visible shift towards the increased judicial scrutiny of legislation and greater constitutional reasoning within treatments of sovereignty. As understandings of sovereignty deviate from static orthodoxy, the refinement approach gives rise to the emergence of a judiciary which is more able to effectively engage in dynamic activity without applying narrow limitations to Parliament's law-making authority and abandoning the core of orthodox principle.

Although some of these cases provide varied dynamic viewpoints towards the treatment of parliamentary sovereignty and will be discussed in later chapters, this chapter will

[175] See*;* Elliott, 'Parliamentary Sovereignty Under Pressure' (n 170).
[176] See text to n 40.

examine where the refinement of understandings of sovereignty is visible, and the impact upon the greater trajectory of parliamentary sovereignty in practice. Additionally, as refining outlooks maintain a strict deference to Parliament's legislative capacity, these decisions do not evidence any assertive shift in judicial understandings. However, these decisions embed dynamism within judicial reasoning, and understandings that static sovereignty is undergoing a permanent change. This developing constitutional sphere situates the increasingly dynamic activity to be examined in later chapters.

3.1.3.1. Categorising legislation

As examined in Chapter 1, Dicey's positive and negative aspects outline Parliament's unlimited ability to make law and the limitations upon the judiciary to review statute.[177] This extends to Parliament's power to repeal and modify laws unconstrained;[178] the courts historically have reaffirmed the doctrine of implied repeal – any inconsistencies between legislation must be resolved by the subsequent act taking effect.[179] However, with the emergence of refining attitudes towards the treatment of sovereignty, Laws LJ in *Thoburn v Sunderland City Council* provided a reconstruction of how implied repeal may be limited in certain contexts due to categorisations of statute.[180] The decision in *Thoburn* departs from Diceyan approaches as provisions within the ECA 1972 took precedence over inconsistent provisions in the Weights and Measures Act 1985, suggesting that Parliament could not implicitly repeal certain statutes despite orthodox principle.[181] While EU primacy will be discussed in Chapter 3, this decision is significant in regards to refinement due to the recognition of a *hierarchy* of legislation whereby '*ordinary'* statutes may be distinguished from '*constitutional'* statutes: '*a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights*.'[182] Laws LJ further identifies limitations to the implicit repeal of constitutional statutes, providing:

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[177] See text to n 21.
[178] Dicey, *Law of the Constitution* (n 4) 118.
[179] See text to n 52; Ellen Street Estates (n 54); Ely (n 57); Vauxhall Estates v Liverpool Corporation [1932] 1 KB 733
[180] *Thoburn* (n 82).
[181] ibid.
[182] ibid [62].

> Ordinary statutes may be impliedly repealed. Constitutional statutes may not. [The repeal of a constitutional Act requires] the legislature's actual—not imputed, constructive or presumed—intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes.[183]

This decision is significant as it opens the courts to ideas of protections for certain statutes such as the ECA within domestic arrangements. Examining Laws LJ's test for identifying constitutional statutes, Parliament consented to the UK joining the EU through the ECA and accepted the implications upon individual rights; as a constitutional statute it cannot be modified through the doctrine of implied repeal. Dicey's rejection of a legislative hierarchy through suggestions that no statute has more claim than any other seems increasingly out of place within Laws LJ's conceptualisation of refined sovereignty in practice.[184]

Ultimately, the decision in *Thoburn* does not effectively limit Parliament's ability to legislate or repeal its laws; Laws LJ's definition of constitutional statutes is considered too broad for consistent, principled application.[185] However, it does situate increasingly dynamic attitudes towards the classification of statutes, evidencing a shift towards the increased judicial ability to engage in review of a constitutional nature, with the absolute supremacy of Parliament no longer as unlimited in scope pertaining to implied repeal. The categorization of constitutional statutes does not align with static orthodoxy, Masterman and Wheatle provide, "*[The court] construed laws regarding the franchise as possessing superior constitutional status—despite that the consequences in rights terms were firmly against the grain of current constitutional thought and practice*".[186]

Nevertheless, *Thoburn* is not an outlier in the trajectory of refining judicial reasoning, as the requirement for constitutionally imperative statutes to be insulated from

[183] ibid [63].
[184] Dicey, *Law of the Constitution* (n 4) 145
[185] Geoffrey Marshall, 'Metric Measures and Martyrdom by Henry VIII Clause' (2002) 118 LQR 493, 495.
[186] Masterman and Wheatle, 'Unity, Disunity and Vacuity' (n 79), 5.

unintentional modification became increasingly evident in the contemporary UK. The refining viewpoints in *Thoburn* were developed upon by Supreme Court justices, with constitutional statutes discussed with further precision through a more assertive outlook.[187] These cases and the assertive implications of categorizing legislation will be examined in Chapter 4.

3.1.3.2. Legality and fundamental rights

Secondly, while *Thoburn* provides a refining outlook to the judicial treatment of sovereignty pertaining to the implied repeal of constitutional statutes, further examples of the courts using the principle of legality to reframe understandings of limitations to legislation which modifies *fundamental rights* without explicit language to such an effect. In *Simms*, the House of Lords examined the statutory modification of *fundamental rights*; section 47(1) of the Prison Act 1952 empowers the Secretary of State to make broad rules for prisons and prisoners, and justices ruled upon subsequent policy which restricted oral interviews with journalists.[188] While the implications of incompatibility with human rights legislation to be discussed in Chapter 3, Lord Hoffmann chose to speak at length about the principle of legality and its implications upon parliamentary sovereignty pertaining to fundamental rights.[189]

Initially Lord Hoffmann reaffirms the core of orthodox principle relevant to Parliament's law-making powers, providing, '*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. [... Existing constraints] are ultimately political, not legal*.'[190] However, he then identified enhanced requirements for any effective modification of fundamental rights:

> [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. [...] In the absence of express language or necessary

[187] *H v Lord Advocate* [2013] 1 AC 413; *HS2* (n 100); Farrah Ahmed and Adam Perry, 'The quasi-entrenchment of constitutional statutes' [2014] CLJ 514.
[188] *Simms* (n 82).
[189] ibid 131.
[190] ibid.

implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[191]

While previous cases suggested that fundamental rights could enjoy some form of protection from implicit repeal,[192] Lord Hoffman adopts a refining viewpoint using legality as a tool which allows the judiciary to engage in the review of legislation (albeit limited). While this does not enable to courts to unilaterally strike down statute or significantly restrict legislative options, it positions the courts within the constitutional sphere whereby it may give substantive effect to fundamental rights and constitutional principles.[193]

This dynamic use of legality develops judicial understandings of the treatment towards sovereignty; these refining approaches have empowered the courts to engage in a greater degree of interpretive discretion when examining legislation.[194] However, the court's use of legality remains ultimately confined, fundamental rights provided by common law lack the precision and definitional certainty of legislative rights – the courts must address this vagueness, preventing the use of legality to create greater limitations upon Parliament's sovereignty.[195] Indeed, refining viewpoints have clarified that the imprecise nature of common law rights creates difficulty in providing explicit definitions or methodologies.[196]

These cases illustrate dynamic movement in judicial understandings of parliamentary sovereignty. Refining outlooks in practice have given rise to the courts conducting an increasingly '*constitutional function of scrutinising the legality of administrative action*'.[197] The use of common law tools as a means of '*proto-constitutional review*' to recognise freestanding fundamental rights and constrain the doctrine of implied repeal evidences a growing departure from static, Diecyan norms.[198] However, there are clear limitations to these refining viewpoints: the courts' did not entirely reconstruct common law rights to

[191] ibid.
[192] *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 575.
[193] Roger Masterman and Jo Murkens, 'Skirting Supremacy and Subordination: The Constitutional Authority of The UK Supreme Court' [2013] PL 800.
[194] Phillip Sales, 'Partnership and Challenge: The Courts' role in Managing the Integration of Rights and Democracy' [2016] PL 456.
[195] Masterman and Wheatle, 'Unity, Disunity and Vacuity' (n 79), 7.
[196] ibid; *R v Lord Chancellor, ex p Witham* [1998] QB 575.
[197] Michael Fordham, 'Common Law Illegality of Ousting Judicial Review' [2004] 9:1 JR 86, 89.
[198] Masterman and Wheatle, 'Unity, Disunity and Vacuity' (n 79), 13.

allow the judiciary create rights or protect them from explicit repeal.[199] Contrasting more assertive viewpoints towards sovereignty to be examined in Chapter 4, these cases do not certainly break new constitutional ground, yet may illustrate a reconceptualization to the judiciary's capability to engage with constitutional principle, McHarg providing:

> [*Simms and Thoburn*] made more incremental doctrinal changes, which are ostensibly more respectful of legislative intent, but in practice they give judges considerable freedom to determine the hierarchy of constitutional values in ways which *have* affected the outcome of concrete cases.[200]

Evidently, these cases did signal a change towards the dynamic activity visible within the courts' treatments of sovereignty. While these cases maintain the core of orthodox principle, they situate later Supreme Court approaches towards legislative interpretation and the constraint of implicit repeal which provide more certainty through an assertive viewpoint.[201] Masterman and Wheatle note the significant implications upon the contemporary understandings of the judicial role , providing, '*These pursuits are central to developing a mature constitutional jurisprudence, supplying the means for settling the substantive requirements of the constitution over time.*'[202]

3.1.4. Refining viewpoints in Jackson

Having examined the visible orthodox viewpoints found within *Jackson* in Chapter 1, this thesis identified the broad range of viewpoints within the case.[203] While Lord Bingham's statements rejected external constraints upon Parliament's unlimited legislative capacity, other justices expanded upon dynamic developments to the role of the courts in practice and the shifting treatment of sovereignty.[204]

Lord Hope speaks at length about the shift in static understandings of the judicial role, with the courts increasingly capable of using the common law as a constitutional tool to review executive activity. While aspects of his judgment reflect a holistic viewpoint (to be

[199] ibid.
[200] Aileen McHarg, '50 Problematic Cases – A Comment JPP' [2016] JPP.
[201] *HS2* (n 100); *R (UNISON) v Lord Chancellor* [2017] UKSC 51 (*UNISON*).
[202] Masterman and Wheatle, 'Unity, Disunity and Vacuity' (n 79), 7.
[203] See text to n 76.
[204] *Jackson* (n 2), [9].

examined in Chapter 3), he goes on to examine the extent of Parliament's supremacy and observes the potential for limitations in practice. He provides:

> It is sufficient to note at this stage that a conclusion that there are no legal limits to what can be done [in legislation] does not mean that the power to legislate which it contains is without any limits whatever. Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law.[205]

These statements deviate from previous understandings that there are no constitutional limitations upon Parliament's power to enact highly improper legislation.[206] Dissenting Bingham's viewpoint, Lord Hope identifies the theoretical *potential* for constraints upon Parliament's ultimate law-making authority. Departing from Diceyan orthodoxy, Lord Hope suggests that Parliament's sovereignty exists upon a presumed condition that '*Parliament* represents the people whom it exists to serve.'[207] The implications of potential constraints on Parliament's sovereignty is further examined, providing:

> [I]t is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void [legislation] which exceed the limits of the power that organ derives from the law. [...] The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. [This case] is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty.[208]

Lord Hope affirms that sovereignty remains dominant in the UK constitution, with the legislature's effectiveness in responding to constituent's requirements paramount in the legal order. The legislative capacity is underpinned in Lord Hope's reasoning. Nevertheless, unlike Lord Bingham, Lord Hope provides a refining viewpoint towards the potential for constraints upon previously unqualified legislative freedom.[209] Furthermore, Lord Hope identifies the incremental, yet visible shift towards dynamism through

[205] ibid [120].
[206] With respect to '*moral, political and other* reasons'; Madzimbamuto (n 43), 723.
[207] *Jackson* (n 2) [126].
[208] ibid [107]
[209] ibid [104]

viewpoints which are categorised as refining; noting '*Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified*.'[210]

This decision does not go so far as to be categorised as assertive; it examined only the potential for limited constraints in extreme circumstances. And while it deviates from historic static decisions, it does not so grossly depart from norms surrounding sovereignty to suggest that *absurd* legislation may not take effect, although it remains on the Statute Book. In any event, such absurd legislation is not identified with precision, and Lord Hope's refining viewpoints may serve to restrain the more clearly assertive outlooks within Jackson to be examined in Chapter 4.

3.2. Conclusion

The literature and caselaw examined in this chapter illustrate an incremental, yet significant shift in judicial treatments of sovereignty. This dynamic reasoning contrasts the static viewpoints examined in Chapter 1; whereby parliamentary sovereignty dominates constitutional understandings as the overriding force. Alternatively, the refining reasoning provided by the courts evidences an ongoing revision of the judicial perception of sovereignty.[211]

Departing from decisions which reaffirm Parliament's absolute legislative capacity,[212] refining viewpoints in cases such as *Thoburn* and *Simms* evidence an ongoing judicial recalibration of how external constraints such as common law principles may give rise for the limited review of legislative provisions. Static constitutional doctrine which allowed for the fundamentally orthodox expression of sovereignty has become subject to increased challenges – limitations upon implied repeal and the use of legality to derogate from certain statutory provisions highlight the movement of the judiciary towards the constitutional sphere, with the common law increasingly capable as a tool of *proto-constitutional review*.[213] As the courts take on this broader role, there is a visible

[210] ibid.
[211] Although not entirely; see ibid [9].
[212] *Ellen Street Estates* (n 54); *Ely* (n 57); *Madzimbamuto* (n 43).
[213] Masterman and Murkens (n 193); Masterman and Wheatle, 'Unity, Disunity and Vacuity' (n 79).

openness for a reconceptualization of parliamentary sovereignty in practice to accommodate the developing requirements of the UK legal order.

Although at first glance these cases seem to illustrate a greater departure from orthodoxy, further inspection and analysis shows a persistent deference to the core of orthodox principle. Unlike more assertive decisions, the refining viewpoints examined retain an evidently respectful approach towards the legislative intent.[214] Justices do not indicate a willingness to strike down laws, they instead underpin Parliament's legislative capacity – this dynamic outlook is confined to a refinement of orthodox principle to satisfy contemporary realities. The inherent difficulties in applying any legal barrier to Parliament's ability to make law through express words is consistently acknowledged alongside the limitations to the common law tools applied.[215] While these cases certainly do not reflect a static, Diceyan attitude towards the treatment of sovereignty, they do provide refining outlooks preserving the core of orthodox principle within dynamic reasoning which refines sovereignty in practice.

Ultimately, as Diceyan approaches gained a foothold in judicial understandings, the need for an approach which dulls some of the shaper edges of orthodoxy became increasingly apparent. Therefore, the rise of alternative approaches towards applying sovereignty – through a more dynamic outlook – illustrates that sovereignty may be subject to change over time, and that there can be a refinement of orthodox understandings without engaging in substantial departure. Establishing the foundations for greater reformulations of parliamentary sovereignty in practice, the refinement approach provides an opportunity to bridge constitutional theory and contemporary judicial practice.

However, the refinement approach does not exist in isolation; these attitudes have developed judicial understandings of sovereignty, concluding that it is not a static imperative in the legal framework. These cases further develop the foundations for dynamism within judicial reasoning. As will be examined throughout this thesis, refining viewpoints have situated subsequent judicial conceptions which build upon constraints

[214] McHarg, '50 Problematic Cases – A Comment JPP' (n 200).
[215] See; Fordham, 'Common Law Illegality of Ousting Judicial Review' (n 197); Michael Fordham, 'Common Law Rights' [2011] 16:1 JR 14.

to Parliament's sovereignty to varying extents. Therefore, it will be examined in Chapter 5 whether the refinement approach can be defensible as an independent viewpoint towards judicial treatments of sovereignty, or merely that decisions which refine sovereignty serve as a vehicle for the eventual greater departure from the core of orthodoxy.

4. Chapter 3

Models of Dynamic Parliamentary Sovereignty

The Holistic Approach

4.1. Introduction

Having examined the gradual shifts towards more dynamic formulations of sovereignty in chapter 2, the thesis will now examine the second model of dynamic parliamentary sovereignty: the holistic approach. Through this model, sovereignty may be perceived dynamically within the wider constitutional ecosystem, operating alongside constitutional fundamentals such as human rights and devolution, rather than dominating them entirely. This dynamic application presents parliamentary sovereignty as one of multiple key constitutional elements with legislative legitimacy, co-operating in their application to allow for a more holistic consideration of constitutional practice.

This thesis has discussed the emergence of political themes throughout the 20th century which have prompted the courts to take a broader outlook towards the dynamic departure from orthodoxy. This chapter will examine three themes which have been identified as requiring the courts to take a holistic viewpoint when applying parliamentary sovereignty. These are: the UK joining the European Union, the incorporation of human rights within domestic law, and the creation of devolved governments.[216] While decisions pertaining to these themes situates further dynamic activity, the holistic viewpoint presents a more empowered judicial attitude. Significantly, these themes are all the intended product of Parliament's legislation, illustrating that any consequential holistic reconceptualization of the sovereignty through judicial activity remains within the parameters outlined by Parliament. Indeed, the holistic treatment of sovereignty takes its legitimacy from a legislative starting point.

[216] Elliott, 'Parliamentary Sovereignty Under Pressure' (n 170).

Nevertheless, the holistic approach allows for sovereignty's reconciliation with modern fundamentals which cannot become dominated by orthodox understandings of principle. This provides the foundations for a more substantial departure from static orthodoxy, with new themes becoming significant in the UK constitutional culture which requiring a more holistic reaction towards the expanding constitutional sphere. The relevant judicial reasoning is essential in providing a critical analysis into themes which have prompted a reconceptualization of sovereignty away from the orthodox benchmark. This discussion will analyse the foundations of holistic understandings of parliamentary sovereignty through balancing its historical dominance alongside new dynamic requirements, providing insight into the courts' reasoning and any visible development of dynamic departure from orthodoxy.[217]

4.1.1. Sovereignty and the EU

This section will outline how the UK's membership within the European Union directly reformulated the rigid account of sovereignty provided by Dicey, leaving the judiciary to examine parliamentary sovereignty through a broadened lens granted by the European legislation, which held precedence over the supposedly sovereign statutes enacted by Parliament.

At the time Dicey completed his works, the state of international law greatly differed from the modern perspective; supranational authority related to the subjugation of colonies by their foreign imperial leaders. However, in the modern international sphere, supranational institutions serve a very different purpose than to expand an empire. For example, the European Union outlines its aims, including: the promotion of peace, freedom, justice, scientific advancement, and economic solidarity;[218] a liberal approach ensuring the equal treatment of states and individuals now appears to be the founding purpose supranational institutions which hold legislative power.

The UK joined the European Union with the passing of the European Communities Act 1972 (ECA), and subsequently came within the jurisdiction of the EU law-making process. As an essential function of the EU, legislation protects rights through their

[217] See*;* ECA, HRA, Scotland Act 1998, Wales Act 1998.
[218] EC Treaty (Treaty of Lisbon, as amended) art 3.

codified '*freedoms'*, which must be applied consistently throughout the EU member states regardless of domestic law.[219] The ECJ would ensure this in *Costa*,[220] where justices provided, '*the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law that binds both their nationals and themselves.'*[221] While this affirmed the primacy of EU law over *limited fields*, the courts would further clarify that a member state's constitutional law is constrained, allowing EU law to be enforced within member states even where it directly contravenes domestic constitutional law.[222]

The implications of the UK joining the EU in spite of *Costa* suggest a willingness within Parliament to constrain its supreme law-making authority; judicial treatment of conflicting UK/EU authority would determine how EU membership would truly affect parliamentary sovereignty's continued practice. Indeed, there was a clear acceptance that EU membership would give rise to unprecedented limitations upon settled principle, with Lord Denning noting that joining the EU would signify '*The sovereignty of these islands will thenceforward be limited*.'[223]

While disapplication would become a part of the judicial toolkit where statute is irreconcilable with EU law, initially the courts appear to take a restrained, static approach. In *Felixstowe Dock,*[224] the court expressed that the intentions of Parliament should be paramount, providing, *'[any conflict with EU law] must be for Parliament to consider. If Parliament should take the view, [a Bill breaches EU law], then Parliament can refuse to pass the Bill.'*[225]

This approach towards leaving Parliament's business to Parliament resembles the historical static expressions; the courts should read as legislation as Parliament's intention to affect provisions, regardless of European law. Ultimately, this did not reflect

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[219] Peter Oliver and Wulf-Henning Roth, 'The Internal Market and the four Freedoms' [2004] 41 Common Market L R 407.
[220] Case 6/64, *Costa v ENEL* [1964] ECR 585, 593.
[221] ibid 593.
[222] Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr* [1970] ECR 01125.
[223] *Blackburn* (n 121), 1039
[224] *Felixstowe and Railway Company and European Ferries Limited v British Transport Docks Board* [1976] 2 CMLR 655 (CA).
[225] ibid, 666 (Scarman LJ).

the wider attitudes of the judiciary or their European counterparts,[226] and the courts' role in enforcing EU supremacy would again be examined in *Macarthys v Smith*.[227] In this case, legislation had been passed to give domestic affect to EU treaty provisions, which was challenged as being insufficient.[228] Justices referred the case to the ECJ due to uncertainty surrounding the provision and interpreting legislation in line with directly effective treaties rather than within the '*natural and ordinary meaning*.'[229] The approach of the court illustrates a judicial hesitancy to undermine legislation where not absolutely necessary, with the court resolving to '*consider [itself] under a judicial duty not to guess how [the ECJ] would construe it but to find out how it does*.'[230] Significantly, Lord Denning dissented, providing:

> Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament [explicitly repudiates EU law] then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. [...] Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.[231]

This dualist approach to EU supremacy reaffirms sovereignty and Parliament as the ultimate legislative force, while acknowledging the intended duty of the courts to satisfy EU law where possible within domestic legislation. The ECJ would finally overturn the domestic ruling, reinforcing Lord Denning's perception of the relationship between the courts and contravening statute.[232]

The judicial caution surrounding the true extent of the supremacy of directly effective EU norms would reach its terminus with a constitutional conflict arising through the introduction of the Merchant Shipping Act 1988 which contravened EU legislation.[233]

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[226] See, *Shields v E. Coomes (Holdings) Ltd* [1978] 1 WLR 1408 (CA).
[227] *Macarthys* (n 113).
[228] ibid.
[229] ibid 792 (Lord Denning).
[230] ibid 796 (Lawton LJ).
[231] ibid 789 (Lord Denning).
[232] Case 129/79, *Macarthys Ltd v Wendy Smith* [1980] ECR 01275.
[233] Merchant Shipping Act 1988.

Considered in *Factortame No 2*,[234] the Act contravened EU law by granting preferential treatment to British fishers, obliging the House of Lords to enforce EU law, even at the cost of disapplying statute.[235] While the court accepted there was no remedy within English law to strike down statute beyond parliamentary repeal, the Lords disapplied the Act in reliance on *community law*, enabling the court to enforce EU law where there would otherwise be '*no judicial remedy under national law*.'[236]

This approach by the court indicated a significant reformulation of parliamentary sovereignty; the Diceyan account that '*no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament',* had been directly contradicted and Parliament's legislation disapplied.[237] However, the courts provide constitutional rationalisation which reconciles the supremacy of EU law with the sovereignty of Parliament; Lord Bridge clarifies that through passing the ECA, Parliament 'voluntarily' accepted limitations to its sovereignty, and '*it was the duty of a United Kingdom court [to override domestic law which conflicts with community law].*'[238] Through this dualist approach, the court in disapplying the Merchant Shipping Act are perceived to be enforcing the will of Parliament.[239] Rather than an assertive tool for the judiciary to unilaterally strike down legislation, the power to disapply is the product of the ECA, which could be (and eventually was) repealed.

Nevertheless, the act of disapplication itself, which is only to be used where '*irresistible',*[240] is perceived as taking such a step which may have seemed '*not conducive to the articulation of constitutional theory*' from the orthodox perspective – illustrating a clear shift away from static sovereignty.[241] Aragones examines how justices expanded their judicial reasoning to consider the '*ultimate sovereignty of the community'* enshrined within constitutional law, and how justices were able to provide a judgment which would

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[234] *See, Factortame v Secretary of State for Transport* [1990] 2 AC 85 (HL); *Factortame (No 2)* (n 102); Case C221/89, *R v Secretary of State for Transport, ex p Factortame (No 3)* [1991] ECR 1-309.
[235] ibid; *See,* repealed Merchant Shipping Act 1988, found discriminatory under the four freedoms.
[236] *Factortame No 2* (n 102).
[237] Dicey, *Law of the Constitution* (n 4) 38.
[238] *Factortame No 2* (n 102) 659.
[239] Paul Craig, 'Constitutional Identity in the United Kingdom' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2019); European Union (Withdrawal) Act 2018
[240] *Thoburn* (n 82) [63]
[241] Elliott, 'Parliamentary Sovereignty Under Pressure' (n 170) 549.

be rooted within legitimate understandings of parliamentary sovereignty while protecting the role of the EU within the UK constitution.[242] The judicial understanding of parliamentary sovereignty had evidently undergone a significant revision. While only applied under the wider authority provided by domestic statute, this is a dynamic example of the courts becoming increasingly able to engage with the lawmakers, monitoring for the misapplication of power. Contrasting the orthodox account, the judicial expression indicates a holistic approach by the court: rather than adopting a steadfast Diceyan approach reaffirming the dominant authority of Parliament, the court balanced the sovereignty of legislative power alongside the constitutional role of hierarchal European law. Ultimately, this illustrates a repositioning of the judiciary within arrangements, moving away from the previously responsive attitude of the courts towards sovereignty and towards a more holistic perception of the balance of power within the wider constitutional sphere.

4.1.2. Sovereignty and human rights

The domestic incorporation of the European Convention on Human Rights by the Human Rights Act 1998 (HRA) has precipitated constitutional change that required a reconsideration of the static account of sovereignty.

The protection of fundamental rights in the UK historically took a less proactive approach than other Western nations; while comparative states such as the US have codified fundamental rights within an authoritative constitution,[243] the UK model provides *civil liberties*, permitting the individual to enjoy whatsoever does not violate any legal boundary.[244] The courts' have clarified this approach: '*England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.*'[245] Through this model, what may be considered a fundamental right is not necessarily restricted to any rigid

[242] Jay Aragones, 'Regina v Secretary of State for Transport Ex Parte Factortame Ltd: The Limits of Parliamentary Sovereignty and the Rule of Community Law *Comment*' [1990-91] 14 Fordham Int'l LJ 778 781.
[243] See US Bill of Rights 1791.
[244] See David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP 2002); Aileen McHarg, 'Rights and Democracy in UK Public Law' in Mark Elliott (eds), *The Cambridge Companion to Public Law* (CUP 2015).
[245] *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 357.

legislative provision, susceptible to becoming outdated and difficult to amend. Instead, the approach was founded upon social faith in Parliament to legislate where necessary, and refrain from impeding upon rights which were considered fundamental in the political sense (albeit not legal). Ultimately, this model takes an orthodox view towards parliamentary sovereignty; no fundamental right is outside the scope of parliamentary regulation, reaffirming the orthodox view of Parliament as the dominant, unchallengeable body capable of *'[making] any law whatever, [with no body] having a right to override or set aside the legislation of Parliament*.'[246]

However, with the socio-political developments of the 20th Century, there had been increased criticisms of the standard model of civil liberties; international tensions caused by governments violating rights of the individual which had been previously understood as *fundamental* led to a social desire for enshrined rights which were protected within law.[247] Browne-Wilkinson LJ dissenting in *Wheeler v Leicester City Council* provides:[248]

> [There exists] a conflict between two basic principles of a democratic society: [Parliament's right] to conduct its affairs in accordance its own views and [...]the right to freedom of speech and conscience enjoyed by each individual in a democratic society [...] Thus, freedom of the person depends on the fact that no one has the right lawfully to arrest the individual save in defined circumstances.[249]

Although Parliament had previously enacted legislation protecting specified rights,[250] these were not protected in the same fashion which constitutional rights within the US are; the US constitution presents hurdles such as super-majorities and regional consent which must be satisfied to repeal or amend protected rights, while under the UK model, Parliament may explicitly repeal any provision through its ordinary procedures.[251] This highlights the difficulty in implementing inviolable rights within UK law which are granted any protection from implicit repeal – Parliament cannot be sovereign if its competency to

[246] Dicey, *Law of the Constitution* (n 4) 38.
[247] *See,* Keith Ewing*, Freedom under thatcher: Civil Liberties in Modern Britain (Clarendon Press 1990)*
[248] [1985] AC 1054
[249] ibid 1061-1062.
[250] *See,* Magna Carta 1215; Bill of Rights 1689.
[251] See, Stephen Gardbaum, The New Commonwealth Model of Constitutionalism (CUP 2013).

legislate on fundamental rights is restricted.[252] The judiciary had historically appreciated that inviolable rights were incompatible with orthodox sovereignty; *Ellen Streets* and *Dean of Ely* had affirmed that subsequent legislation would always be afforded statutory priority over prior legislation and consequently repeal conflicting law.[253]

Furthermore, historical treatment of sovereignty provides insight into the court's role in protecting fundamental rights; in *R v Jordan,* the court examined the validity of an Act of Parliament where it interferes with essential individual liberties.[254] In *Jordan*, the defendant (convicted under the Race Relations Act 1965) applied for a writ of *habeas corpus*, claiming the legislation must be declared invalid due to its interference with fundamental human rights – freedom of speech in this instance.[255] The court response was unambiguous and reaffirmed the negative Diceyan approach to parliamentary sovereignty, legislation is valid in any event.[256]

However, with the mounting pressure upon the UK government to effectively implement the European Convention on Human Rights (ECHR) within domestic law, Parliament passed the Human Rights Act 1998 (HRA), incorporating most of the provisions of the convention within legislation.[257] From an academic perspective, the provisions of the HRA may be distinguished from those of *ordinary* legislation; the statute provided effective methods to protect itself from excessive contravention through the introduction of two significant judicial powers which are relevant to the court's role in reviewing legislation.[258] These powers are additionally significant as they reflect judicial power models to be discussed later in this thesis.

4.1.2.1. Section 3 HRA

The first of these – section 3 – presents an obligation upon the judiciary: '*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given*

[252] Fenwick notes, '*there is no test to discriminate between constitutional and less than constitutional elements';* statute is subjected to the same procedures in any event; Helen Fenwick, Gavin Phillipson and Alexander Williams, *Text, Cases and Materials on Public Law and Human Rights* (4th edn, Routledge 2020).
[253] *See; Ellen Street Estates* (n 54); *Ely* (n 57).
[254] *R v Jordan* [1967] Crim LR 483.
[255] ibid; Race Relations Act 1965.
[256] ibid.
[257] See HRA, sch 1; ECHR Art 13.
[258] Gardbaum (n 251), ch7 The United Kingdom.

effect in a way which is compatible with the Convention rights.'[259] This provision requires the courts to take an approach to statutory interpretation which can be distinguished from the traditional rules.[260] While historically the intentions of Parliament were typically considered paramount to the interpretation of legislation, section 3 requires a court to go to the lengths of what is possible to interpret statute to comply with the articles within the Human Rights Act. In *Ghaidan v Godin-Mendoza*, Lord Nicholls assessed the extent of the interpreting powers conferred through section 3, providing:[261]

> [S]ection 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear [... The court may] change the meaning of enacted legislation so as to make it Convention-compliant. [... A] court can modify the meaning and hence the effect of primary and secondary legislation.[262]

However, section 3 does not go so far as to grant the courts extreme powers to undermine the '*fundamental features of legislation [...] that would be to cross the constitutional boundary*'.[263] This outlines the limitations of the interpretative powers under section 3, and the tightrope judges walk on when seeking to reconcile the intended will of Parliament with the Convention (although this approach itself was intended by Parliament when enacting section 3). In *R v A*,[264] the court notes how section 3 departs from settled principle, providing, '*It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation [... Section 3] qualifies this general principle.*'[265] This reasoning expresses a clear judicial perception that section 3 has vastly altered the courts' role when interpreting statute relevant to human rights; Lord Hope's suggestion that the '*sole guiding principle'* is an intention to make statute compatible with convention rights contrasts the orthodox approach and expands the judicial role away from simply interpreting the text of statute.[266]

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[259] HRA, s 3(1).
[260] See, Elmer Driedger, Construction of Statutes (2nd edn, Butterworth-Heinemann 1983).
[261] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [31-32].
[262] ibid, [31-32] (Lord Nicholls).
[263] ibid, [33].
[264] *R v A* [2001] UKHL 25.
[265] ibid, [44] (Lord Steyn).
[266] *Duport Steels* (n 47).

In any event, the boundaries of section 3 powers are visible, and the courts may not overreach through interpreting legislation away from its core purpose. This hesitancy to assertively depart from orthodoxy is visible within the courts' reasoning; justices in *Anderson* considered where any interpretation using section 3 would erode Parliament's will, the courts would be '*[engaging] in the amendment of a statute and not in its interpretation, and section 3 does not permit the House to engage in the amendment of legislation*'.[267]

Thus, the extent of the powers granted under section 3 appear to be somewhat qualified, with the courts enabled to interpret legislation away from its wording, however, not to the extent that its core purpose has been eroded. While some academics consider section 3 to grant Convention provisions a hierarchically higher status than Parliament's legislation,[268] this is the product of statute: outlining Parliament' commitment to the ECHR. Nevertheless, the courts' powers to reformulate statutory text to enforce Convention rights illustrates a departure from negative orthodox attitudes. Kavanaugh suggests this indicates a shift away from *political constitutionalism* (where Parliament is the dominant constitutional force) towards *legal constitutionalism* (where Parliament and the judiciary share a central constitutional role).[269]

4.1.2.2. Section 4 HRA

The second judicial power granted under the HRA – section 4 – can be used at the discretion of the court where section 3 is inapplicable due to any compliant interpretation compromising the fundamental features of legislation (as in *Anderson*).[270] Section 4 provides, '*If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.*'[271] Significantly, a declaration made '*does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given*'.[272]

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[267] *R (Anderson v Secretary of State for the Home Department* [2002] UKHL 46. [30]
[268] Danny Nicol, 'Are Convention Rights a no-go Zone for Parliament?' (2002) Public Law 438.
[269] Aileen Kavanagh, *Constitutional Review under the Human Rights Act* (CUP 2009).
[270] *Anderson* (n 267).
[271] HRA, s 4(2).
[272] ibid, s 4(6)(a).

Unlike section 3, section 4 grants the judiciary a discretionary power, rather than imposing an obligation to act. While the strict wording of the provision may indicate that a declaration of incompatibility is not directly effective itself and '*undeniably weak in theory*',[273] political responses have suggested it provokes a severe government reaction, with ministers analogising a declaration to '*an unexploded bomb in the middle of a minister's room.*'[274] This approach appears to be reflected within judicial understandings; Lord Steyn clarified that '*section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course.*'[275]

The question, therefore, is whether a section 4 declaration amounts to merely a persuasive tool used to implore changes, or to an effective strike down power due to the insuperable political pressures which follow. An appropriate method to assess the effectiveness of a declaration of incompatibility (and therefore the degree to which the judiciary may be seen to influence the erosion of legislative provisions) would be to review declarations and the rate at which they have provoked a positive Parliamentary reaction.

It should be noted that as of July 2023, higher courts have issued 47 declarations of incompatibility, with 35 fully addressed and only 12 being overturned at appeal, evidencing a high degree of effectiveness.[276] This relatively high success rate indicates a declaration may prompt swift government action where not overturned at appeal, evidencing the effectiveness of the courts' powers. Although while it may be tempting to assume a section 4 declaration acts as a strike down power indirectly, academics note the cautious judicial approach towards issuing a section 4 declaration of incompatibility only where absolutely necessary, limiting any challenge to where legislation may otherwise result in an inevitable challenge to the European Court of Human Rights.[277] In

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[273] Robert Wintemute, 'The Human Rights Act's First Five Years: Too Strong, Too Weak, or Just Right?' [2006] KCLJ 209, 215.
[274] Select Committee on the Constitution, 'Judicial Appointments Process: Oral and Written Evidence' [2012] Lord Falconer, Lord Mackay and Jack Straw, Oral Evidence (QQ 121-161) p 228. <www.parliament.uk/globalassets/documents/lords-committees/constitution/JAP/JAPCompiledevidence28032012.pdf>.
[275] Ghaidan (n 261) [50].
[276] Ministry of Justice, 'Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2022–2023', November 2023, CP 958.
[277] Shona Wilson Stark, 'Facing facts: judicial approaches to section 4 of the Human Rights Act 1998' (2017) 133 LQR 631.

review, there was a positive response to the courts' caution, outlining that section 4 only functions as '*the courts have been guided by judicial restraint and institutional respect*.'[278]

4.1.2.3. Position of human rights within the constitutional framework

It is evident that the interpretive obligation under section 3 and the declaration of incompatibility power under section 4 could be perceived as an effective strike down power, suggesting the judiciary has been transferred into human rights legislators. However, this does not reflect the reality perceived by either the judiciary or Parliament. Both have fundamentally expressed an unwillingness to violate the core of sovereignty through intrinsically inserting the judiciary within the law-making process or undermining the core purpose of legislation enacted by Parliament.

In any event, the judiciary cannot directly dispose of an Act of Parliament using human rights legislation. Despite the context surrounding prior declarations, the consistent approach of the government has been to reaffirm Parliament's unilateral right to legislate, providing alongside the passage of the 1998 Act:

> Parliament must be competent to make any law on any matter of its choosing. [...] The authority to make those decisions derives from a democratic mandate [...] To allow the courts to set aside Acts of Parliament would confer on the judiciary a power that it does not possess, and which would draw it into conflict with parliament.[279]

More recently, the success of this approach was reiterated with The Independent Human Rights Act Review, outlining an objective of the Human Rights Act as '*to enable UK Courts to contribute to and help shape ECtHR case law, making a distinctive British (UK) contribution to it*.'[280] The review further examines the HRA's interaction with sovereignty, providing:

> [The HRA] does not therefore affect that, central, feature of Parliamentary Sovereignty. Sections 3 and 4 are clearly limited to a statutory review of legislation.

[278] The Independent Human Rights Act Review – Executive Summary (Ministry of Justice December 2021) (IHRAR) [53].
[279] HC Deb, vol 306, col 772 (16 February 1998).
[280] IHRAR (n 278)

> Section 3, properly understood, confers an interpretative power [...] not an amending power. [...] It is to be expected that [section 4 declarations] will be carefully considered by Parliament, but Parliament has the last word.[281]

The assertions on Parliament's authority are unambiguous – the judiciary are restricted from amending or disapplying statute. However, the implications of the 1998 Act upon the judiciary cannot be minimised; while the true extent of *incompatibility* remains a matter of debate, the significance of this provision would shift parliamentary sovereignty towards the '*age of human rights*' and greatly expand the judicial role away from a static orthodox account.[282]

Evidently, human rights legislation had expanded the judiciary's role, as Elliott's 2004 account provides, '*a new political environment is emerging in which [...] legislative supremacy appears almost anomalous.*'[283] Through enshrining section 3 and 4 powers within the judicial toolkit, the courts moved away from the static relationship isolating them as a subordinate institution to Parliament. The extent of this development would be highlighted by the Constitution Committee, Malleson noting:

> The senior judges are now required to police constitutional boundaries and determine sensitive human rights issues in a way which would have been unthinkable forty years ago. This new judicial role is still developing, but [...] the effect of this trend will be to reshape the relationship between the judiciary and the other branches of government.[284]

The attitudes of the court had shifted alongside the policy change – the HRA served as a starting point for increasingly dynamic approaches to parliamentary sovereignty. As will be further examined, the expanded role of the courts highlighted a departure in understandings from orthodoxy.[285] In spite of Parliament's express intention to avoid explicitly constraining its legislative options through incorporating Convention rights, the HRA made it more difficult to erode human rights, helping the courts to '*[protect] the*

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[281] ibid [51-52].
[282] Colin Warbrick, 'The European Response to Terrorism in an Age of Human Rights' [2004] 15 EJIL 989.
[283] Elliott, 'Parliamentary Sovereignty Under Pressure' (n 170).
[284] Constitution Committee, 'Relations between the executive, the judiciary and Parliament' (Report with Evidence) (HL 2006-07, 151) para 33, citing Appendix 3: Paper by Kate Malleson.
[285] *Jackson* (n 2) [102].

individual from arbitrary government.'[286] Without explicitly restricting Parliament, judicial reasoning insightfully provides more holistic treatments of parliamentary sovereignty relevant to human rights and signifies a need for co-operation between sovereignty and Convention rights for the latter's cohesive application.

Ultimately, it is evident that judicial powers granted under the HRA have prompted a more dynamic judicial outlook; balancing the sovereignty of Parliament alongside Convention rights, with the latter expressed by Lord Hope as the '*soul guiding principle*' directing judicial reasoning (where legislation is not outright contravened).[287] At this stage it should be reiterated that all consequences from the 1998 Act are an intended result of statute, and therefore any departure from orthodox sovereignty derives from Parliament's intentions (similarly to sovereignty and the EU).

While the judiciary cannot go so far as to disapply legislation, new judicial powers may present hurdles to the otherwise unlimited sovereign legislation, illustrating a shift away from static orthodox understandings of parliamentary sovereignty. Throughout this period, approaches towards fundamental rights and the judicial role have departed significantly from the account provided in cases such as *Ely*,[288] judiciary consistently adopt a more holistic attitude – reaffirming the core of sovereignty while allowing for co-operation alongside Convention rights.

4.1.3. Sovereignty and devolution

The nature of devolution has dramatically amended our understandings of parliamentary sovereignty from the era of Diceyan sovereignty – in which Parliament governed the UK unilaterally, with all law-making power vested within Westminster. This section will examine how devolution legislation prompted changes judicial treatment of parliamentary sovereignty and where this may be dynamic. On the subject of the devolved powers and regional legislators, Dicey's account suggests that devolved governments undermine orthodox sovereignty and institutionally weaken the centralised authority of Parliament.[289]

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[286] ibid [107] (Lord Hope).
[287] *R v A* (n 264) [108].
[288] *Ely* (n 57).
[289] Albert Dicey, 'Home Rule from an English Point of View', *Contemporary Review* (July 1882).

Briefly examining how the context surrounding Northern Ireland's constituent membership of the UK makes it unique, following a series of conflicts between Ireland and the UK, the Government of Ireland Act 1920 created the two legislatures in Ireland.[290] It would not be until the enactment of the Ireland Act 1949 that the *principle of consent* for Northern Ireland's UK membership would be affirmed in statute. While the Troubles (1968-1998) will not be examined in this thesis, as a consequence of the conflicts, there was a deterioration in security leading to the breakdown of the Northern Irish legislature in 1972.[291]

The Good Friday Agreement 1998 brought about a restoration of devolved powers in Northern Ireland following agreements between Northern Irish and the UK leaders, restoring devolved powers, underpinning the constitutional settlement, and restating the terms for Northern Ireland's principle of consent – although it failed to entirely resolve the relationship between governments with further disruptions to the Northern Irish legislature throughout the following years.[292]

Additionally, referendums in devolved regions would provide a mandate for the creation of further devolved governments,[293] Parliament passed the Scotland Act 1998 and the Government of Wales Act 1998. Subsequently, the Scottish Parliament and Welsh Assembly formed and were conferred '*legislative competence*' within devolved areas.[294] The powers conferred to devolved government have increased following further social and political pressures for greater autonomy within the UK's component nations. For example, subsequent Scotland and Wales Acts would broaden the powers and autonomy of devolved institutions and contextualise the shifting parliamentary/judicial attitudes towards devolved powers.[295] Additionally, decisions relevant to devolved powers may often be generalised between devolved governments in the UK by the courts.

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[290] For further reading, see, 'Devolution in Northern Ireland' (House of Commons library 23 October 2024).
[291] The Northern Ireland (Temporary Provisions) Act 1972.
[292] Secretary of State for Northern Ireland, 'The Belfast Agreement' (Presented to Parliament April 1998); 'Devolution in Northern Ireland' (n 290)
[293] *See,* Referendums (Wales and Scotland) Act 1997.
[294] *See,* Scotland Act 1998; Government of Wales Act 1998; *AXA* (n 100).
[295] ibid; Government of Wales Act 2006; Scotland Act 2012; Scotland Act 2016; Government of Wales Act 2017.

However, the extent to these powers and whether any limitations may exist upon Parliamentary intervention must be examined to determine the continuing approach to sovereignty following devolution legislation. When legislating on the creation of the devolved institutions, Parliament expressed how devolved powers would remain cohesive with sovereignty; providing, '*[Acts of the Scottish Parliament do] not affect the power of the Parliament of the United Kingdom to make laws for Scotland.*'[296] Ultimately, this provision theoretically ensures Parliament retains its sovereignty throughout the United Kingdom and may still make any law whatever affecting devolved regions.[297] Therefore, devolution legislation may be framed as dynamically reconceptualising sovereignty to allow devolved bodies to enact specified legislation while Parliament remains the unchallenged authority.

This section will examine whether in the creation of devolved institutions, Parliament crossed its *Rubicon* by releasing its legislative powers in practice. With the rise of devolved legislatures, it had become constitutional convention – the Sewel convention – that '*Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament*.'[298] Additionally, the significance of the devolved institutions had been highlighted within statute, the Scotland Act 2016 providing:

> (1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.
>
> (2) The purpose of this section is [...] to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.
>
> (3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.[299]

[296] Scotland Act 1998, s 28(7).
[297] ibid.
[298] HL Deb, vol 592 col 791 (21 July 1998); Scotland Act 2016, s 2; Wales Act 2017.
[299] Scotland Act 2016, pt 2(a).

Significantly, it must be noted that all movement of power away from Westminster derives from sovereign statute; any authority provided to relevant conventions and devolved legislatures derives from the 1998 Acts and subsequent devolution legislation. As discussed in EU and human rights sections, from this perspective, the judiciary are enforcing the will of Parliament as an intended consequence of the legislation which enacted changed to constitutional arrangements.

In order to examine how any perceived limitations upon Parliament (requiring consent to legislate) may be reconcilable with Parliament's retained sovereignty, Jennings' account would provide a perspective which helps us understand the relationship between parliamentary sovereignty and devolution. Although devolution legislation expressed Parliament's competencies had not been limited, this approach further evidences the distinction between sovereignty as a legal fiction, and legal practice.[300] The enactment of devolution legislation may have given effect to restrictions as a manner limitation upon Parliament, with devolution legislation having expressed Parliament's intentions to qualify its procedures. The Political and Constitutional Reform Committee would examine the status of the Sewel Convention as authority, providing:

> [Devolution legislation] does not put the Sewel Convention "on a statutory footing" [...] In its proposed form it can only be said to strengthen the Convention in political terms.
>
> If the Convention were to be given the force of statute, this would still, according to orthodox constitutional theory, not represent any entrenchment of the competence of the Scottish Parliament. There is a case [...] it would constitute a "manner and form" constraint on the power of future Parliaments to legislate in respect of the matters covered by the Convention.[301]

This approach outlines that sovereignty's dominance remains at the core of Parliament's expressions, while acknowledging that legislation may have imposed '*requirements for the government*' when legislating.[302]

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[300] Dicey, *Law of the Constitution* (n 4) 149.
[301] Political and Constitutional Reform Committee, *Constitutional implications of the Government's draft Scotland clauses (ninth report)*; (2014-15, HC 1022) [68-69].
[302] ibid [69].

The significance of devolution legislation is again highlighted by the courts in *Robinson*, providing that statute founding legislative bodies (in this instance, the Northern Ireland Act 1998) effectively serves as a '*constitution [...] to be interpreted generously and purposefully, bearing in mind the values which the constitutional provisions are intended to embody.'*[303] Therefore, how the courts interpret legislation may be '*therefore flexible [in its] response to differing and unpredictable events*', indicating a shift towards recognising devolution legislation as increasingly significant alongside other legislation.[304] If taken on its own terms, this would indicate a stark shift in our understanding of parliamentary sovereignty, however, subsequent judicial treatment (*Imperial Tobacco*) increasingly present *Robinson* as an outlier which is confined to its facts;[305] while many devolution articulations of sovereignty may be generalised and expanded upon, those in *Robinson* appear to be an exceptional anomaly within devolution case law.[306] Nevertheless, justices in *Robinson* provide accounts evidencing a shift in the judicial attitude of orthodox sovereignty's dominance within the constitution, and cautious study will contextualise the broadened approaches to sovereignty.

When discussing the impact of devolution upon the orthodox understanding of sovereignty, academic commentary returns to Jennings' account.[307] Considering the judicial expressions within *Trethowan* and the developing constraints upon Parliament's formerly unlimited legislative capacity,[308] there appears to be a constitutional rationalisation to manner limitations on devolved affairs: Firstly, as initial devolution legislation was only enacted following a referendum, academics consider this process to have afforded devolution with a '*higher degree of constitutional resonance'*.[309] Subsequently, this manner limitation would restrict Parliament from unilaterally diminishing devolved powers. Secondly, through granting devolved bodies *competencies* to legislate, implications of the Sewel Convention suggest that Parliament is constrained

[303] *Robinson* (n 89) [11] (Lord Bingham).
[304] ibid 12.
[305] Tomkins (n 90).
[306] Scholars suggest the courts have subsequently '*retreated*' from approaches within *Robinson*; Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: Legislative Supremacy, Parliament's 'Unqualified' Power, and "Modifying" the Scotland Act' [2021] UKCLA.
[307] Dicey, *Law of the Constitution* (n 4).
[308] *Trethowan* (n 167).
[309] Alex Schwartz, 'The Changing Concepts of the Constitution' [2022] 42 OJLS 3 758.

– where it would ordinarily legislate, it now grants a degree of law-making autonomy to devolved governments whereby Parliament will not ordinarily make law for Scotland without the consent of the Scottish Parliament (albeit through convention, not law).

Goldsworthy considers this further, examining how the manner and form theory may suggest '*procedural requirements*' are imposed upon Parliament; further, in highlighting the extent of the impact upon orthodox sovereignty, Goldsworthy provides:

> The clearest example [of a procedural requirement] is a self-entrenched referendum requirement, forbidding Parliament from amending or repealing a particular law without the explicit approval of a majority of electors. By diminishing Parliament's substantive power to change the law, this would plainly be inconsistent with comprehensive, continuing parliamentary sovereignty.[310]

Furthermore, Goldsworthy analyses how a referendum requirement constrains Parliament's legislative omnipotence and moves understandings of sovereignty away from the orthodox account. The positive aspects of Diceyan sovereignty expressing the supremacy of statute are inconsistent with a conventional requirement for Parliament to seek the democratic consent of devolved regions. The debate surrounding the extent of any practical limitations upon Parliament once again returns to the lacuna between sovereignty as a fiction and in practice; Parliament's retained right to legislate unilaterally may be the legal fiction, in reality constitutional convention and inevitable public response may ordinarily keep legislators away from undermining devolved governments.

The constitutional challenge in imposing such procedural requirements upon Parliament presents a need for further analysis. Gordon considers the existing referendum requirement for devolution legislation, providing:

> At what point does further devolution to one of the UK's constituent nations require a referendum to be held? [...] Yet while this is made possible by the manner and form theory, would it be democratically desirable to require even legislation

[310] Jefferey Goldsworthy, 'The "manner and form" theory of Parliamentary sovereignty' [2021] Public Law 3.

> concerning matters of transcendent constitutional importance to be approved at a referendum?[311]

Significantly the argument that Parliament may retain full legislative competencies in light of the provisions of the Scotland Act 1998 must be examined. During the passage of devolution legislation, the government proposed the three '*locks'*; these would supposedly ensure that the essential elements of orthodox sovereignty may be preserved despite increased devolution within the UK.[312] These are outlined by Brazier, who provides:

> The first component of that lock [...] The Scottish Parliament is a devolved legislature within the United Kingdom, and remains subject to the legal sovereignty of the British Parliament.
>
> The second [...] flows from the way in which that Parliament decided to give authority to the new Scottish institutions. The Scotland Act is drafted as prosaically as any other statute of the British Parliament. There is, for instance, no preamble which might have asserted in appropriately uplifting language the purposes for which the new settlement had been brought forth.
>
> The third part [...] consists of the express limitations which the Scotland Act places on the power of the Scottish Parliament to legislate.[313]

While these locks demonstrate Parliament's intention to maintain sovereignty's dominance, the government would later commit to the constitutional significance of devolved governments through the Memorandum of Understanding. Codifying the Sewel Convention, the Memorandum provided that any legislation relating to devolved competencies will not ordinarily be passed without the consent of the devolved institutions.[314] Furthermore, any legislation passed without such consent would be considered '*unconstitutional*' by the Scottish government.[315]

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[311] Michael Gordon, *Parliamentary Sovereignty in the UK Constitution Process, Politics and Democracy* (Bloomsbury Publishing 2015) 343.
[312] Rodney Brazier, 'The Constitution of the United Kingdom' [1999] 58(1) CLJ 96 102.
[313] ibid.
[314] *Memorandum of Understanding* (n 136) para 14.
[315] ibid; 'Scotland's Right to choose: Putting Scotland's future in Scotland's hands' [Scottish Government, 19 December 2019].

However, legislation suggests that the express wording of subsequent statute will have final word on the competencies of Parliament. Post-Brexit, Parliament passed the United Kingdom Internal Market Act 2020 (UKIMA), reserving spending powers within the competency of Parliament, consequentially reducing the economic independence previously afforded to devolved regions. Significantly, the Act was passed without devolved consent,[316] seemingly contradicting the previous approach towards reserved competencies, with Plaid Cymru leader providing this would indicate '*the destruction of two decades of devolution*'.[317] This highlights how Parliament's law remains sovereign, with devolution competencies a product of its authority.[318]

Early devolution legislation predicted the presence of contention regarding devolution legislation and enshrined within the judicial role a constitutional duty to resolve *'devolution issues'* and provide an answer to any *'question about whether a function is exercisable within devolved competence.'*[319] Following the 1998 legislation, the judiciary is called upon to resolve challenges surrounding devolution legislation; the statute allows governments to '*refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court [House of Lords] for decision.'*[320] This allows the judiciary to express where a Bill may exceed boundaries of devolved competence without proposing amendments to enacted legislation, avoiding controversial decisions.

The courts embraced their role in monitoring for misapplications of law pertaining to devolution matters, identifying where devolved legislation may exceed competency principles. In *Whaley v Lord Watson*,[321] the court affirmed that where devolved governments exceed their powers it may '*intervene and will be required to do so, in a manner permitted by the legislation*.'[322] While the courts expressed a readiness to

[316] Owen Bowcott, 'Brexit strategy risks UK 'dictatorship', says ex-president of supreme court' *The Guardian* (7 October 2020).
[317] Libby Brooks and Steven Morris, 'Plan for post-Brexit UK internal market bill "is an abomination"' *The Guardian* (9 September 2020).
[318] See, Daniel Wincott, CRG Murray and Gregory Davies, *The Anglo-British imaginary and the rebuilding of the UK's territorial constitution after Brexit: unitary state or union state?* (Routledge 2021).
[319] Scotland Act 1998, sch 6 para 1(f).
[320] ibid, s 33(1).
[321] *Whaley v Lord Watson* [2000] SC 340 (IH).
[322] ibid 348 (Lord Johnson).

challenge a devolved legislature, they would additionally ensure that those institutions were afforded the full extent of their legislatively mandated powers. In *Adams*, the courts rejected the suggestion that devolved legislatures could be regulated as any public body, illustrating devolved institutions are empowered by statute with a clear mandate and are therefore separated from the limitations imposed upon ordinary public bodies.[323]

However, Parliament's retained power to legislate for the whole of the UK illustrates the difficulty in identifying deviations to orthodoxy within the courts' understandings of devolution matters. While the role of the courts has expanded – in this instance, enabling the review of devolved legislation – this does not evidence any of these approaches would extend to statute. Rather, the judiciary is enforcing the devolution legislation which empowers it – aligning with orthodox viewpoints surrounding the judiciary and sovereignty.[324]

Additionally, any analysis of the judicial treatment of sovereignty becomes further uncertain as the judiciary increasingly provide narrowed approaches in their interpretation of devolution statutes. As examined in Chapter 1, the contemporary judiciary appears to take a restrictive approach in how it will utilize its ordinary understandings and interpretations of devolution and constitutional limits in practice; instead it will narrowly defer to what is expressed within Westminster's devolution legislation.[325] While these continuing attitudes will be further explored in Chapter 4, they seemingly depart from normative judicial approaches whereby the courts apply a reasonable degree of purposive interpretation in line with its historic role.[326] It is further significant that where the courts depart from these norms through a resistive, narrowed approach towards interpretations of devolution statutes which reaffirms Parliament's law-making dominance, this does not illustrate a universal shift towards an approach where all statutes are read as *ordinary*; subsequent reasoning which does not pertain to devolution matters has allowed for a broader, *constitutional* reading of statutes.[327] It

[323] *Adams v Scottish Ministers* [2004] SC 665 (IH).
[324] *Duport Steels* (n 47); *Fire Brigades Union* (n 45); Scotland Act 1998.
[325] See text to n 82, 134; *Imperial Tobacco* (n 84); *Miller 1* (n 1).
[326] Driedger (n 260).
[327] See *HS2* (n 100).

therefore cannot be taken that these approaches reflect a greater retention of orthodoxy without further analysis.

Similarly to previous findings in this chapter,[328] the contemporary judiciary have been empowered by statute to engage with matters which contrast static, historical viewpoints. In fulfilling their new role, the judiciary at this stage examine parliamentary sovereignty through a holistic outlook; Parliament's legislative sovereignty is fundamentally maintained as intended while extending legitimate law-making powers to devolved governments.[329] The clear desire to narrowly enforce expressions within devolution statutes regardless of constitutional limits and the status of devolution provides an understanding that the primary focus of the courts is to enforce Parliament's legislation in any event.

However, Parliament no longer *ordinarily* legislating for devolved regions (within competency limits) moves away from the static, orthodox perception of Parliament as the unilateral authority within the UK. Devolved powers and the extent of competencies remain an active debate politically and within the courts (as will be examined further). Orthodox understandings of Parliament's role in governing the United Kingdom have been holistically balanced alongside devolved governments and their rights to make law, with Parliament widely considered to have qualified its ordinary activities through committing to devolved governments.[330] Shaping the position of wider judicial treatments towards sovereignty, the courts consistently express devolution's fundamental significance within the UK; legislative and judicial expressions throughout this period will contextualise subsequent judicial articulations on the trajectory of understandings of sovereignty and its place in a devolved UK.

4.1.4. Holistic viewpoints in Jackson

The dynamic themes discussed in this chapter have evidently prompted judicial understandings of sovereignty to take an increasingly holistic outlook towards the application of parliamentary sovereignty. With such a departure from orthodox principle

[328] See text to n 237, 284.
[329] Brazier (n 312).
[330] See Scotland Act 2016.

becoming more visible in judicial statements, a collision between orthodox and dynamic attitudes becomes inevitable; the court's broad range of viewpoints allow for discussion in *obiter* pertaining to the shift towards dynamism. Although the facts in *Jackson* are not directly related to the holistic themes discussed in this chapter, as examined in pervious chapters, *Jackson* is such a case where justices provide varying statements on the extent of visible, incremental departure from orthodoxy – this chapter will now briefly analyse the statements in *Jackson* relevant to the development of the holistic model.

While the dynamic statements of Lords Hope and Steyn examine parliamentary sovereignty primarily through refining and assertive viewpoints respectively, their further statements consider the how holistic themes have developed dynamic activity and their implications upon the treatment of sovereignty. Lord Steyn analyses the holistic themes discussed throughout this chapter (EU primacy, human rights legislation, and devolution), providing:

> This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision made that clear. The settlement contained in the Scotland Act 1998 also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order.[331]

This identification of legislation which has divided sovereignty in practice and modified the legal order pertaining to Parliament's uncontrolled supremacy in law-making illustrates the extent of their implications upon the treatment of sovereignty. Both static and refining viewpoints refrain from placing constraints on Parliament's ultimate law-making power, whereas the visible holistic statements suggest that legislation has consequently constrained the options available to the legislature, such as the modification of EU membership arrangements without a greater, explicit departure.[332]

[331] *Jackson* (n 2) [102].
[332] See European Union (Withdrawal Agreement) Act 2020.

Lord Hope builds upon Lord Steyn's holistic viewpoints, considering the effectiveness of legislative provisions which attempt to rein in any true departure from orthodox formulations of sovereignty. He notes the existence of qualifications upon sovereignty as a consequence of legislation, providing:

> Although Parliament was careful not to say in terms that it could not enact legislation which was in conflict with Community law, that in practice is the effect [of the ECA. ...] The doctrine of the supremacy of Community law restricts the absolute authority of Parliament to legislate as it wants in this area. [...] Section 3(1) of the Human Rights Act 1998 has introduced a further qualification [...] So long as it is possible to do so, the interpretative obligation enables the courts to give a meaning to legislation which is compatible even if this appears to differ from what Parliament had in mind when enacting it.[333]

As examined throughout this chapter, it has been the intention of Parliament that when legislating to empower any qualifications upon its usual law-making authority, it will retain the final legal capacity to make law where required – aligning with orthodox principle and viewpoints.[334] However, Lord Hope suggests that in effect, statute has produced restrictions upon the formerly ultimate sovereignty of Parliament; it is through these statutes that the judicial understanding of sovereignty has undergone a reformulation, allowing for the effective departure from orthodox principle. While Lord Hope refrains from suggesting modern devolution legislation has qualified sovereignty as the Acts of Union have, the expansion of the potential for constraints has allowed the courts to take an expanded view towards sovereignty and the law-making rights of devolved institutions.[335]

Ultimately, these statements do not signal a sudden change in understandings of the extent of Parliament's legislative capacity. Indeed, the courts had identified limitations to sovereignty as a consequence of joining the EU at the time of joining.[336] Nevertheless, holistic attitudes in *Jackson* provide a moment for review: as the judiciary has come to

[333] *Jackson* (n 2) [105].
[334] HRA, s 4(6)(a); Scotland Act 1998, s 28
[335] *Jackson* (n 2) [106].
[336] *Blackburn* (n 121).

terms with their increased role in scrutinising legislation which attempts to override other constitutional imperatives, holistic viewpoints have emerged which have situated greater dynamic departure from orthodox understandings of parliamentary sovereignty.

4.2. Conclusion

The conclusion of this chapter presents a helpful opportunity to reflect upon the trajectory of parliamentary sovereignty's judicial conceptualisation and its treatment through the past century. Significantly, constitutional reform in the latter half of the 20th century developed our understanding of parliamentary sovereignty; EU primacy, human rights and devolution legislation have expanded the formulation of constitutional principle away from any unnecessary rigidity, yet developed a complex constitutional terrain alongside them.

This chapter has evidenced the judicial role has shifted away from a static one, becoming increasingly dynamic in its application of parliamentary sovereignty. Historically, it would have been reasonable to summarise the judicial role as a duty to interpret the law as enacted by Parliament,[337] with the orthodox court limited in any attempts to review sovereign legislation. Similarly, at the core of constitutional practice, static understandings of sovereignty identified the principle as the unrivalled, dominant force of the constitution.[338] These perceptions of the constitutional culture ultimately reflect the historical mode of governance, with the judiciary acting as a static organ of the state.[339]

However, it is evident from the analysis within this chapter that this approach towards the judicial role is out of place in our material constitutional culture with the emergence of a '*new political environment'*.[340] The legislated expansion of the judicial role has visibly directed practice, with judicial activity evidencing a willingness where required to cautiously utilise powers within modern, expanded judicial authority.[341] Scholars identify the judicial attitudes towards sovereignty had shifted away from the orthodox

[337] *Duport Steels* (n 47), 157.
[338] Dicey, *Law of the Constitution* (n 4) 66; *Jackson* (n 2) [103].
[339] Rui Verde, 'The Harmonious Constitution' Newcastle L School Working Papers 2000/07 (Delivered at Newcastle Law School Staff Seminar 1 November 2000).
[340] Elliott, 'Parliamentary Sovereignty Under Pressure' (n 170).
[341] See, *Factortame No 2* (n 102); 'Responding to Human Rights judgments' (n 276); *Trethowan* (n 167).

reaffirmation of statutory authority, noting that '*[legislation has] demonstrated the movement of authority to the realm of the courts*', particularly pertaining to the courts' role of assessing how statute may co-operate with wider constitutional fundamentals.[342]

With statute restructuring constitutional practice within identified themes, judicial treatments signify a tendency to embrace sovereignty holistically; beginning with dualist approaches towards parliamentary sovereignty and EU primacy, the courts have increasingly expressed that sovereignty may to some extent be considered alongside wider constitutional fundamentals, rather than simply dominating them.

However, aside from examples of courts testing the boundaries of recent expansions to the judicial role,[343] once new legislation had settled, the courts have maintained a restrained approach,[344] consistently evidencing how holistic approaches will not go so far as to proactively challenging statute using non-legislative authority. It has been clarified the courts have made every effort where possible to enforce legislation – the courts depart from orthodox formulations of sovereignty only where statutory prompts require them to.[345]

Therefore, the changing position of sovereignty cannot be misrepresented as a judicial leap towards a new legal order; the courts have consistently indicated that wherever possible they will express *institutional respect* and enforce the core of legislation.[346] While lasting findings of dynamic viewpoints will be provided in Chapter 5, the holistic approach uniquely presents a viable and sustainable response to dynamic understandings of sovereignty in regular ordinary practice. The presence of a legislative starting point provides legitimacy to dynamic decisions, allowing for a broad scope of dynamism which does not depart from fundamental constitutional principle.

Nevertheless, at this stage, parliamentary sovereignty's perception has changed from its orthodox foundations: Parliament is not factually supreme within the UK and judicial treatment has acknowledged as much. The introduction of wider levels of authority

[342] Chong Siew Lin Grace, 'Jackson v Attorney General: Moving towards a Legal Constitution' [2007] 10 Trinity C L Rev 60.
[343] See, *Robinson* (n 89).
[344] IHRAR (n 278).
[345] ibid; *Anderson* (n 267); *Ghaidan* (n 261).
[346] IHRAR (n 278).

(supranational, devolved) had made the constitutional hierarchy more complex,[347] however, the courts were aware that all perceived complexities are the intended product of legislation, and that legal barriers cannot effectively prevent Parliament from explicitly legislating.[348] Parliamentary sovereignty remains the driving factor in constitutional development. However, assessing judicial activity, dynamic categorisations of sovereignty have become less of an outlier where visible, with holistic conceptualisations of sovereignty paving the way for more expansive interpretations towards legislative authority and its interaction with contemporary principle, which may reflect wider shifts in judicial understandings of sovereignty leading into the analysis of more assertive viewpoints.[349]

[347] *Macarthys* (n 113) 789.
[348] See, UKIMA.
[349] Christopher Forsyth, 'The definition of Parliament after Jackson: Can the life of Parliament be extended under the Parliament Acts 1911 and 1949?' [2011] 9 I CON 1 132, 133; Elliott, 'Parliamentary Sovereignty Under Pressure' (n 170).

5. Chapter 4

Models of Dynamic Parliamentary Sovereignty

The Assertive Approach

5.1. Introduction

The final chapter examining models of sovereignty in practice will analyse expressions of the most dynamic viewpoint visible in this thesis: the assertive approach. Having examined the judicial treatment of parliamentary sovereignty, the thesis has identified how judicial decisions have illustrated a visible shift away from the orthodox account (which embraces historical Diceyan aspects of sovereignty and retains the *static* attitudes that the judiciary should refrain from interfering with the law-making process). Alternatively, the court's attitudes signify a departure towards *dynamic sovereignty* (an active stance restructuring the restrictive constitutional hierarchy where Parliament's sovereignty historically dominates).

While this thesis has thus far examined dynamic models of sovereignty which are identified through refining and holistic viewpoints within the judicial sphere, this chapter will analyse where dynamic applications of parliamentary sovereignty may go beyond less dynamic approaches and instead promote an assertive view (irreconcilably departing from orthodox fundamentals through displacing sovereignty in the constitutional hierarchy by using non-legislative authority to review legislation or reformulate parliamentary sovereignty in practice. This will be evidenced through an analysis of judicial decisions which illustrate developments to the courts' capability to depart from orthodoxy through their review of statute and executive action.

This chapter will further analyse where the courts' dynamic treatment of sovereignty may go beyond a holistic reading and be categorised as assertive. This requires an examination of the origin for any authority applied. Through Chapter 3, when the discussing the holistic shift of the judicial role, the courts have often reiterated that

sovereignty is reaffirmed as major developments (e.g. EU community law, human rights, devolution) are a product of the legislative design. Therefore, where the court exercises powers granted through these developments (such as declaration of incompatibility), the origin of authority is Parliament's law, or *empowering legislation* – statute providing Parliament's consent for the increased powers of external bodies (e.g. Judiciary, devolved institutions, EU). While this attitude may not be wholly orthodox,[350] it signifies judicial restraint towards departure from orthodox principle due to the retention of legislative supremacy as the core driving factor behind judicial action.

However, decisions which take an assertive approach towards sovereignty may use an origin of authority separated from statute to allow for increased judicial action. Significantly, where this theoretical discussion prompts the review of legislation using powers independent from statute (e.g. common law, devolved mandate, independent EU authority), an assertive outlook on sovereignty is evidenced as where previously there had been no constitutional rationalisation for rivals to legislative sovereignty,[351] non-legislative authority may assertively challenge orthodox sovereignty in reviewing parliamentary activity using a wholly separated core of authority from Parliament. Following the resurgence of judicial discussion on the use of authority separated from Parliament (e.g. Common law authority, EU authority, etc,),[352] moving forward through this thesis these two approaches will be distinguished: firstly, judicial review of executive activity and other authority which is explicitly authorised by *empowering legislation* evidences a holistic court tracking against parliamentary will as expressed within legislation; alternatively, the assertive use of common law principles to examine statute may give rise to an increased departure from orthodoxy may shift authority to the realm of the courts.

5.2. Assertive viewpoints in *Jackson*

For the final time in this thesis, the judicial statements made in Jackson and their reflection of attitudes towards the application of parliamentary sovereignty will be

[350] See text to n 37.
[351] Dicey, *Law of the Constitution* (n 4) 66.
[352] Michael Plaxton, 'The Concept of Legislation: Jackson v Her Majesty's Attorney General' [2006] 69 The Modern L R 2, 249.

examined. While the varying range of viewpoints visible within *Jackson* have evidenced a growing shift away from orthodox principle, this chapter will analyse the assertive treatment of sovereignty within this case and how it builds a growing account of assertive treatment leading into the establishment of the Supreme Court.

Obiter from Lord Steyn and Lady Hale offered insight towards how the themes giving rise to a change in perceptions of sovereignty had impacted how it would be applied. Similarly to Lord Hope, Lord Steyn was clear in establishing his view on the Diceyan benchmark, providing, '*The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom*';[353] however, unlike Lord Hope, Lord Steyn would go further in considering the more effective use of limitations upon Parliament's sovereignty deriving from non-legislative authority, inversely suggesting:

> [T]he supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.[354]

This goes beyond the refining expressions of Lord Hope, both recognising that limitations may exist upon the extent of Parliament's power, and further, that the judiciary are able to impose such limitations. Indeed, this viewpoint identifies sovereignty as principle anchored within the judicial sphere, which may be modified unilaterally by justices.[355]

Additionally, on constraints to Parliament's formerly unlimited legislative capacity, Lady Hale would provide, '*If parliament is required to pass legislation on particular matters in a particular way, then Parliament is not permitted to ignore those requirements when passing legislation on those matters'*.[356] Academics examine the extent to this interpretation on sovereignty, highlighting that *'it is possible, though improbable, that the courts will take a bold step in the direction of diluting [parliamentary sovereignty] and*

[353] *Jackson* (n 2) [102].
[354] ibid.
[355] ibid [126].
[356] ibid [163].

assert a power to review legislation in exceptional circumstances'.[357] This understanding into the evolution of sovereignty adopts an assertive approach through examining potential constraints upon parliament's legislative options, effectively allowing the courts to utilise sovereignty as a tool to restrict and challenge parliamentary activity.

The identification of restraining influences upon legislative powers notes that certain legislation could offend the rule of law so greatly as to require a challenge between Parliament and the judiciary; whether the judiciary would accept severe limitations upon their ability to scrutinize executive action is not assured. Additionally, the implications of these assertive statements suggests that '*legislative sovereignty should yield in the face of pernicious legislation which infringed upon the rule of law*', illustrating the distance between the assertive approach and other dynamic outlooks.[358] As evidenced throughout this thesis, viewpoints within *Jackson* vary to great extents, and yet the statements of Lord Steyn and Lady Hale are particularly eye-catching in their suggestions that the sovereignty of Parliament is subject to an overriding common law authority, notwithstanding any express intention.[359]

Interestingly, the court's judicial reasoning in *obiter* presents broad and varying characterisations of parliamentary sovereignty, with the apparent divide between approaches evidencing the space and room for reinterpretations towards sovereignty. Certain judicial expressions in *Jackson* appear to act as an effective antithesis to historical accounts of sovereignty, with views expressed considered inconsistent with the prior orthodox treatment of parliamentary sovereignty and critics labelling the comments of Lord Steyn and Lady Hale '*unsustainable as a matter of legal theory*'.[360] However, the expansion of the judicial role through refining reformulations of orthodox principle and holistic reasoning following empowering legislation had situated dynamic reasoning and evidently provided a foundation for a broader reconceptualization of sovereignty, and build a foundation for avenues allowing for more assertive reasoning in the Supreme Court era.

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[357] Forsyth, 'The definition of Parliament after Jackson' (n 349) 133.
[358] Masterman and Wheatle, 'Unity, Disunity and Vacuity' (n 79) 17-18.
[359] ibid.
[360] Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' [2008] 28 OJLS 4 709, 723.

5.3. Early assertiveness

Following the Supreme Court's establishment, scholars were keen to witness whether early decisions would reflect the transparency and independence highlighted throughout its development. Having examined the potential for an increased likeliness of dynamic readings of sovereignty which may result in further assertive tendencies, these initial decisions will be pivotal in tracking the treatment of sovereignty and the potentially expanding authority of the judiciary.

The first readings of sovereignty to be examined will be those in *AXA v Lord Advocate*.[361] This case would follow a series of decisions by law-makers; the House of Lords decision in *Rothwell* determined '*asymptomatic pleural plaques did not increase susceptibility to other asbestos-related diseases or shorten life expectancy, they did not constitute any injury capable of giving rise to a claim for damages*.'[362] In response, the Scottish Parliament enacted the Damages (Asbestos-Related Conditions) (Scotland) Act 2009, reversing the validity of *Rothwell* within Scotland.[363] Insurers within Scotland brought a challenge before the Supreme Court arguing the Scottish legislation was invalid; firstly, the 2009 Act was outside the legislative competence of the Scottish Parliament by virtue of its incompatibility with Convention rights, and secondly '*the Act [was] susceptible to challenge at common law as an irrational exercise of legislative authority*.'[364] In any event, the court identified that should the first ground fail to be satisfied, the second will inevitably fail under the same reasoning – consequently, it was unnecessary for the court to examine whether Acts of the Scottish Parliament (ASPs) were reviewable at common law.[365]

The value of judicial decisions in tracking the courts' treatment of sovereignty appears to have grown following increasing constitutional developments. In light of the shifting *judicial role* contemporary cases – such as *AXA* – examine multiple constitutional areas,

[361] *AXA* (n 100).
[362] ibid 868; *Rothwell v Chemical Insulating co Ltd* [2007] UKHL 39.
[363] Damages (Asbestos-Related Conditions) (Scotland) Act 2009.
[364] *AXA* (n 100) [98-99].
[365] ibid 884; Aileen McHarg, 'AXA General Insurance Ltd v Lord Advocate: Analysis' [2012] 16 Edinburgh L Rev 224 (AXA analysis), 225.

outlining the potential significance of early Supreme Court decisions.[366] In spite of the acknowledgment that comprehensive discussion into the extent of common law powers was unnecessary, Lords Hope and Reed examined the issue at length, specifying that the legal validity of ASPs in Scotland may be generalised to all devolved legislatures within the UK and their respective statute.[367] Firstly, articulations relevant to the authority of ASPs will be examined; as the courts were considering whether ASPs are susceptible to judicial review, Lord Hope assessed how the rights afforded to ASPs may compare alongside Acts of Parliament, providing:

> The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority.
>
> [The Scottish Parliament] is nevertheless a body to which decision making powers have been delegated. Sovereignty remains with the United Kingdom Parliament. The Scottish Parliament's power to legislate is not unconstrained.[368]
>
> [Parliament] shares with the devolved legislatures [...] the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances.[369]

Although the court does not identify the Scottish Parliament as a sovereign body, Lord Hope clarifies that ASPs have the same legal effectiveness as an Act of Parliament. Lord Reed identifies this as the intended product of devolution legislation; Parliament expressly gave the Scottish Parliament rights to govern in *lieu* of ordinary legislation, although '*its powers were conferred by an Act of Parliament, and those powers, being*

[366] Aileen McHarg, 'AXA General Insurance Ltd. v. The Lord Advocate' [2011] UKCLA.
[367] *AXA* (n 100) [43] (Lord Hope).
[368] ibid [46].
[369] ibid [49].

defined, are limited.'[370] This approach examines the Scotland Acts as *empowering legislation* providing constitutional rationalisation to the heightened authority of ASPs.[371]

Secondly, the court examined whether common law review powers extend to ASPs and other legislation. The court's discussion reaffirmed previous decisions that democratic devolved legislatures enjoy rights above those of local authorities,[372] and subsequently considered that ASPs were exempt from *ordinary* common law grounds of review. However, justices took different approaches: Lord Hope reaffirmed the democratic legitimacy of devolved legislatures, entitling them to '*the same degree of judicial respect as the UK Parliament*'; alternatively, Lord Reed considered the omission of any positive constraints upon devolved legislatures within respective devolution legislation to indicate standard grounds are insufficient to challenge legislation.[373]

Ultimately, the court agreed that where an ASP violates the rule of law in such an extreme instance, that legislation would be subject to judicial review. Once again, justices came to this conclusion through different reasoning; firstly, Lord Reed considered legislating to effect violations to fundamental rights to be outside of the devolved institution's competencies. Developing upon judicial discussion concerning the principle of legality and the violation of fundamental rights,[374] Lord Reed noted that statute cannot override fundamental rights impliedly, providing:

> The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.[375]
>
> Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so,

[370] ibid [138] (Lord Reed).
[371] ibid [145].
[372] *Adams v Local Authorities* [2003] SC 171.
[373] McHarg, 'AXA Analysis' (n 365) 226.
[374] *Simms* (n 82).
[375] *AXA* (n 100) [152].

> Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.[376]

Lord Reed's view that Parliament did not intend to empower the devolved legislatures to undermine the rule of law to any extreme extent clarifies a boundary to legislative competence; empowering legislation establishing devolved legislatures and their powers identifies those institutions as *liberal democracies* with no explicit permission to violate the core of their ideological purposes (to promote democratic representation). This approach appears to reconcile the common law review of devolved legislation which violates the rule of law with ASPs status as the highest form of legal authority in Scotland.

Alternatively, Lord Hope's approach focused less on the intentions of Parliament, but rather the rule of law and its relation to common law powers. To provide context to Lord Hope's expressions on common law authority, it will be helpful to consider his previous statements on the characteristics of the rule of law within *Jackson*.[377] In *Jackson,* Lord Hope provides a refining viewpoint towards the rule of law as a constraint upon Parliament's ability to enact legislation which is so *absurd* that in any event '*the populace at large refuses to recognise it is law*.'[378] While his approach was underpinned by an understanding that sovereignty is without realisable, legal limits, and refrained from taking an assertive attitude alongside Lord Steyn and Lady Hale, this developing account is less restrictive in its scope as in *AXA*, the rule of law and sovereignty are not in opposition, allowing for more expansive discussion into the changing treatment of sovereignty pertaining to dynamic activity.[379] He provides:

> [Whether parliamentary sovereignty] is absolute or may be subject to limitation in exceptional circumstances is still under discussion.[380]
>
> In our [devolution] case the rule of law does not have to compete with the principle of sovereignty. As I said in *Jackson*, the rule of law enforced by the courts is the

[376] ibid [153].
[377] See text to n 205.
[378] *Jackson* (n 2), [120].
[379] ibid.
[380] *AXA* (n 100) [50].

> ultimate controlling factor on which our constitution is based. I would take that to be, for the purposes of this case, the guiding principle.
>
> It is not entirely unthinkable that [a government may diminish the role of the courts]. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.[381]

It is interesting that within this expansive discussion, Lord Hope chose to reference the dynamic movements in the courts' treatment of sovereignty. Scholars note that these expressions on the validity of legislation go beyond merely an attempt to prompt academic development;[382] the increasing complexity of constitutional development presents a judicial hesitancy to constrain their review from legislative provisions. Alternatively, Lord Hope's rationalisation identifies relevant challenges to legislation as a pure product of the courts' common law authority, rather than resulting from empowering legislation. Lord Hope outlines that where sovereignty is not an opposing factor, the court may utilise common law review to challenge extreme legislation which prompts judicial intervention. Although this discussion on the extent of common law review was made in *obiter*, the wider contribution to the development of common law authority appears significant, potentially indicating shifting perceptions towards the role of the court and the extent of the judicial toolkit with regards to legislation.

5.3.1. Assertive implications upon the wider trajectory of sovereignty

The assessment of authorities provided by Lords Reed and Hope signify a development in understandings of sovereignty and its place in a constitutionally complex UK.[383] Firstly, identifying ASPs alongside Acts of Parliament as the highest form of authority within devolved jurisdictions does not advance perceptions of devolved legislation drastically, as there had been an understanding within academia and practice that devolved

[381] ibid [51].
[382] McHarg, 'AXA Analysis' (n 365) 227.
[383] See, Aileen McHarg, 'The Dog That Finally Barked: Constitutional Review under the Scotland Act' [2012] UKCLA.

institutions were unique in the constitutional culture as democratic authorities.[384] Additionally, the court went further in providing clarifying rationale for distinct approaches to the review of devolved legislation (democratic legitimacy and parliamentary intention to create a plenary institution), lasting perceptions that devolved legislation was subordinate or lesser to Acts of Parliament appeared to be cast aside.

While justices acknowledge the political impossibility of truly sovereign devolved institutions due to their introduction and constraints through empowering legislation, devolved governments have an institutional right to enact legislation as effective as Acts of Parliament.[385] The right to enact legislation of *the highest authority* has historically been the exclusive power of Parliament – this principle may be deemed to lie at the core of orthodox sovereignty.[386] The shift in constitutional culture surrounding the vital nature of devolved governments has prompted judicial expressions affirming the democratic authority of legislatures, further branching away from positive orthodox perceptions of Parliament as unilateral lawmaker within the UK.

Secondly, Lords Reed and Hope's findings on the susceptibility of legislation to challenges at common law illustrate the extent of the contemporary court's attitudes to the developing judicial role. Lord Reed's expressions on legality's interaction with sovereignty fundamentally develops upon legislative constraints; due to the principle of legality, Parliament cannot violate the rule of law by general or ambiguous terms.[387] While this does not effectively restrict Parliament's ability to legislate (theoretically allowing violations through express wording in statute), these varying forms of limitations to the unlimited right to legislate evidence the disparity between modern and orthodox approaches.[388] Going further to impose such limitations using legality rather than powers deriving from empowering legislation additionally signifies an assertive shift towards

[384] *Simms* (n 82); Bossman Asare, Paul Cairney and Donley Studlar, 'Federalism and Multilevel Governance in Tobacco Policy: The European Union, The United Kingdom, And Devolved UK Institutions' [2009] 29 J Public Policy 79 – Perceptions of the UK as a quasi-federal nation.
[385] Christine O'Neill, 'AXA raises as many questions as it answers' (InHouseLawyer December/January 2011/2012 Legal Briefing).
[386] See text to n 37.
[387] *AXA* (n 100) [152]
[388] *Ely* (n 57).

non-legislative authority.[389] Through legitimising ASPs as effective forms of authority and identifying the common law as a means of limiting legislative options (implicitly legislating), the Supreme Court uses judicial authority against orthodox conceptions of sovereignty, highlighting how the court's decision expresses assertive tendencies in practice.

The historical attitudes towards the dominance of Parliament and its orthodox right to make any law whatsoever has been analysed throughout this thesis and the core of sovereignty has been consistently reaffirmed: statute has supreme authority within domestic arrangements.[390] However, Lord Hope identifies an uncertain relationship between orthodox sovereignty and the rule of law – suggesting that in those most theoretically exceptional circumstances, common law review may constrain of devolved legislation. McHarg examines the significance of these decisions upon the wider trajectory of sovereignty, providing, '*the ruling on common law reviewability [...] adds weight to the line of authority, culminating in Jackson, suggesting that Acts of Parliament are no longer immune from review*.'[391]

However, this cannot be taken to illustrate a judicial willingness to strike down egregious statute in practice; the extreme legislation justices refer to would reasonably never be enacted by a democratic parliament. Elsewhere, McHarg examines the potential result of this '*loose judicial talk [...] about the possibility of striking down legislation in extreme cases. [...] judicial sabre-rattling may change the way the political game is played, even if battle is never actually joined.*'[392] This dynamic treatment of sovereignty appears to mark a starting point for the wider discussion into common law authority, with early Supreme Court expressions (at least in the *AXA* decision) developing this account to allow for increased judicial engagement.

[389] Paolo Ronchi, 'AXA v. Lord Advocate: Putting the Axa to Parliamentary Sovereignty' [2013] 19 European P L 1, 61
[390] Dicey, *Law of the constitution* (n 4); *Fire Brigades Union* (n 45); *Macarthys* (n 113); *Factortame No 2* (n 102).
[391] McHarg, 'AXA analysis' (n 365) 228.
[392] McHarg, 'AXA v Lord Advocate' (n 366).

5.3.2. Further opportunities for reformulation

Next, the court's treatment of the characteristics of sovereign legislation evidenced by Lords Neuberger and Mance found within *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* will be examined.[393] The facts of this case surround EU directive terms: following a government proposal on the framework of the HS2 construction project, its provisions were to be enacted within statute utilising the *hybrid bill* procedure.[394] A challenge was brought arguing that this process failed to provide the degree of public participation required by EU Directives on public projects with such a considerable environmental impact. [395]As this case highlighted a potential violation of EU law within the parliamentary process rather than the statute itself, the decision within *Factortame No 2* was insufficient in providing effective resolution.[396]

However, scholars note that within this case, '*justices evidently noticed an elephant in the room*' in that the *process* of enactment historically lies outside the boundaries of the UK courts.[397] This is reflected where the courts have previously considered where Parliament had been allegedly misled into enacting legislation; in *Pickin,* justices provided it was surely the case that '*It must be for Parliament to decide whether its decreed procedures have in fact been followed'*.[398] This potential complication was examined by the courts, evidencing a hesitancy for the judiciary to insert itself within the parliamentary process as this runs the risk of *'[impinging] upon long-established constitutional principles governing the relationship between Parliament and the courts'*.[399] Nevertheless, in this instance the court came to the conclusion that government action was not so problematic as to violate the Directive and require judicial intervention.[400]

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[393] *HS2* (n 100).
[394] ibid [57]; 'MPs' Guide to Procedure Hybrid bills' (UK Parliament 2023) <guidetoprocedure.parliament.uk/collections/j7BhK4fw/hybrid-bills>.
[395] Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1; David Hart, 'High speed rail, Parliament, and the EU Courts' [2014] UK Human Rights Blog.
[396] *HS2* (n 100) [79].
[397] Denis Edwards, HS2: The First Spike: *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] 26 J Environmental L 2, 319, 322.
[398] *Pickin* (n 49) 790
[399] *HS2* (n 100) [78]
[400] ibid [128].

Similarly to justices in *AXA*, the justices in *HS2* would provide significant *obiter* surrounding wider constitutional developments and implications; Lord Reed would reaffirm earlier expressions that the authority of EU primacy derives from the ECA, and examine the subsequent difficulty in reconciling this with fundamental constitutional instruments.[401] Elliott outlines that Lord Reed's approach implies that EU primacy may be constrained where it conflicts with the '*domestic constitutional landscape',* and is subsequently limited to the explicit terms of the 1972 Act.[402]

Significantly, Lords Neuberger and Mance would develop this approach towards EU primacy further, articulating:

> The United Kingdom has no written constitution, but we have a number of constitutional instruments [such as Magna Carta, the Bill of Rights, the Act of Union 1707, ECA, HRA]. The common law itself also recognises certain principles as fundamental to the rule of law. It is [for the courts to determine] that there may be fundamental principles [...] which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.[403]

HS2 seems to confirm that certain statutes and common law rights enjoy a heightened constitutional status [404] These dynamic statements build upon conceptualisations within *Thoburn,* which identified a hierarchy of constitutional and ordinary statutes.[405] However, *HS2* certainly goes further than the incremental refining approaches, instead providing examples of constitutional statutes which have (to some extent) a protected status among legislation and developing the beginnings of a test for identification.[406] *Resembling* the reasoning of Lord Reed in *AXA*,[407] Lords Neuberger and Mance's expressions on the validity of legislation expresses constraints upon Parliament's powers to abrogate fundamental principle implicitly, while the court's powers of review are restated and reaffirmed.[408] As the ECA did not explicitly confer ultimate control over all

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[401] ibid [79]
[402] Mark Elliott, 'Reflections on the HS2 case' [2014] UKCLA
[403] *HS2* (n 100) [207].
[404] Elliott, 'Reflections on the HS2 case' (n 402).
[405] *Thoburn* (n 82).
[406] Masterman, Wheatle, 'Unity, Disunity and Vacuity' (n 79).
[407] *AXA* (n 100) [152].
[408] Jo Murkens, 'Judicious Review: The Constitutional Practice of The UK Supreme Court' [2018] 77(2) CLJ 349, 369.

UK authority within EU primacy, the justices outlined that such a conflict between EU primacy and fundamental principle shall favour the domestic measure. Significantly, these instruments have long been considered to be vital to the continuance of constitutional rationalisation due to their considerable entrenchment within the UK – it would never have been truly conceivable EU primacy could affect the disapplication of the Act of Union for example.[409]

Analysis on the extent of the ECA made in this case provides an approach towards EU primacy which departs from settled principle. While *Factortame* established domestic legislation could be disapplied by the courts where incompatible with EU law, justices in *HS2* disagree that this primacy expands to all legislative instruments. Interestingly, this returns to discussion around the orthodox status of legislation. Orthodox sovereignty considers each Act of Parliament to be equally sovereign, with no process for distinguishing ordinary legislation from fundamental legislation.[410] This further disparity between orthodox and contemporary attitudes towards statute highlights the evolving dynamic treatment towards parliamentary sovereignty to ensure constitutional continuity.

Analysing how these approaches may provide insight towards the courts' jurisprudence, Elliott examines how '*the HS2 judgment envisages a far richer constitutional order in which the differential normative claims of constitutional and other measures fall to be recognised and calibrated in legal terms'.*[411] While varying degrees of deviation from orthodox approaches have been prevalent throughout, Elliott further notes that it was '*highly significant that a seven-Justice Supreme Court has endorsed an analysis of the constitution that is so un-Diceyan*.'[412]

Ultimately, the *HS2* decision illustrates an assertive expansion of the court's understandings of sovereignty. Justices examine the social significance of any legislation which affects the erosion of constitutional instruments which facilitate UK arrangements, and in response, impose assertive barriers upon their implicit repeal using

[409] Denis Edwards, 'HS2: The First Spike' [2014] 26 JEL 2, 319.
[410] See text to n 47
[411] Elliott, 'Reflections on the HS2 case' (n 402).
[412] ibid.

common law authority. This use of non-legislative authority to allow for engagement with statute further reconceptualises settled understandings of EU primacy from *Factortame*, evidencing a continuing assertive rationalisation of sovereignty.

Tracking the assertive treatment of sovereignty, the continuing development of common law rights once again signifies authority shifting to the realm of the courts. Academics suggest that such judicial decisions are not taking place in a vacuum; alternatively, the *HS2* judgment is perceived to map alongside the broader judicial trends towards common law authority. [413] With the application of non-legislative authority for judicial action gaining increasing momentum within judicial treatment, the position of sovereignty appears to be moving away from holistic categorisations towards assertive activity.

Once again, we have seen the Supreme Court advancing dynamic formulations of parliamentary sovereignty. The court's treatment of sovereignty appears to track alongside the prompts for an apex court which is increasingly effective in monitoring for misapplications of authority.[414] This provides an opportunity for reflection on how the apparent movement towards increased judicial authority may be reconciled with wider arrangements. Conceptualisations of sovereignty had become increasingly dynamic following its treatment in the early years of the Supreme Court, appearing to support the suggestion that the Court has an increased tendency to provide judgments which depart from orthodox principle. However, the decisions of the court have clearly not gone so far to abandon orthodoxy altogether; in spite of dynamic implications, the core aspects of sovereignty had not been fundamentally undermined.

5.3.3. The prerogative challenge

As examined in chapter 1, Brexit, and the subsequent *Miller 1* case brought about an opportunity for the Supreme Court to engage in a comprehensive analysis of viewpoints towards parliamentary sovereignty. Firstly, the used of prerogative powers to trigger article 50 will be examined. Upon the announcement of the government's intention to

[413] Roger Masterman and Se-Shauna Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] 1 European HR L R 57, 15.
[414] Typically, significant judicial review of legislation is based in the provisions of empowering legislation; see, ECA; *Factortame No 2* (n 102); HRA; Scotland Act 1998.

initiate Brexit unilaterally, Barber, Hickman and King anticipated a successful legal challenge due to characteristics of sovereignty – the ECA provides rights which only Parliament can set aside.[415] With a desire for effective scrutiny throughout the Brexit process, the government's decision was likened to a prerogative shortcut for triggering article 50:

> A quick pull of the Article 50 trigger is unlikely to be feasible under the UK's constitutional arrangements and may well not be desirable for any UK Government or Parliament, even one committed to eventual withdrawal from the EU.
>
> Brexit is the most important decision that has faced the United Kingdom in a generation and it has massive constitutional and economic ramifications. In our constitution, Parliament gets to make this decision, not the Prime Minister.[416]

Initially, the High Court was asked to respond to the prerogative challenge.[417] Usefully, the court would clarify this ground of appeal: '*The sole question in this case [...] is whether [...] the Crown [...] is entitled to use its prerogative powers to give notice under article 50 for the United Kingdom to cease to be a member of the European Union.'*[418] Ultimately, the court would accept the argument made by Miller's counsel – that the act of triggering article 50 would inevitably cause the loss of rights granted by Parliament through enacting the ECA, and this itself was beyond the scope of the prerogative powers due to the derogation of rights granted by statute.[419] The High Court would finally provide, '*the Secretary of State does not have [the] power [...] to withdraw from the European Union*.'[420] Consequently, an appeal was made to the Supreme Court, with the government suggesting the courts were causing a constitutional crisis through impeding the mandate

[415] See Nick Barber, Tom Hickman and Jeff King, 'Pulling the Article 50 "trigger": Parliament's indispensable role' [2016] UKCLA.
[416] ibid.
[417] *Miller 1 EWHC* (n 131).
[418] ibid [4] (Lord Thomas).
[419] Joshua Rozenberg, 'Enemies of the People? How Judges Shape Society' (Bristol University Press, 2020).
[420] *Miller 1 EWHC* (n 131) [111].

for Brexit, signifying the political tension and perception of judicial expressions which may constrain the executive's democratic authority.[421]

In their appeal, the government challenged the High Court decision; firstly, as the prerogative powers may be used on whatever European treaty as the ECA did not oust the royal prerogative expressly; and secondly the 1972 Act only implements EU law as required by European treaties, therefore any EU law will cease to have any domestic effect once ministers withdraw from those treaties.[422] The latter argument would suggest that rights provided by EU treaties may be distinguished from those of ordinary legislation as they are relevant to international sources of law, which are not outside the scope of prerogative powers due to the dualist framework of the UK's power structure;[423] Finnis outlining the government approach to treaty rights:

> Treaty-based rights are statutory in that they depend for their effect in UK law on Parliamentary enactment; but they are not statutory inasmuch as they are not themselves enacted by Parliament and can be terminated ("destroyed") by termination of treaties in the course of the Crown's dealings.[424]

The court rejected the government's interpretation of European treaties as legally indistinguishable from ordinary international law, instead identifying the ECA '*as a conduit pipe by which EU law is brought into the domestic UK law*.'[425] This dynamically reframes the ECA with the court pinpointing the 1972 Act as an expression of Parliament's intention to allow for the creation of law-making authority independent from Parliament. Ultimately, the court deemed the ECA to be the legislative anchor providing constitutional rationalisation for the domestic application of EU law, providing with reference to the constitutional character of the 1972 Act:

> EU law [cannot] properly be compared with, delegated legislation. The 1972 Act effectively operates as a partial transfer of law-making powers, or an assignment

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[421] See James Slack, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' The Daily Mail (3 November 2016).
[422] *Miller 1* (n 1) [37].
[423] Graziella Romeo, Edmondo Mostacci, 'A Br-Exit Strategy: Questioning Dualism in the Decision R (Miller) v. The Secretary of State for Exiting the European Union' [2017] 2 European Papers 1, 425.
[424] Finnis J, 'Terminating Treaty-based UK rights' (Judicial Power Project, 26 October 2016).
[425] *Miller 1* (n 1) [80].

> of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it), rather than a statutory delegation of the power to make ancillary regulations.[426]
>
> [W]e consider that, by the 1972 Act, Parliament endorsed and gave effect to the United Kingdom's membership of what is now the European Union under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties.[427]

This approach, rather than considering the ECA in a vacuum, analyses the significant constitutional step taken by Parliament and the context surrounding the intention behind its enactment. As evidenced, there had been comprehensive debate and consideration surrounding the implications of EU membership upon parliamentary sovereignty and the primacy which predates the UK's membership.[428] Indeed Lord Denning clarified in 1971 that '*The sovereignty of these islands will thenceforward be limited*' following EU membership.[429] Therefore, it would be the intention of Parliament when enacting the ECA to provide EU rights domestic implementation in such a way that cannot be ordinarily interfered with.[430]

The court's approach rejects the government's claim that, in dualistic terms, European law, regardless of its effects remain inherently *international*. Romeo analyses how this approach which considers UK-EU obligations alongside ordinary treaties, providing '*the dualistic logic, which distinguishes between the international plane and the domestic effects of a given international obligation, fails to catch the peculiar nature of the EU*.'[431] However, the court went further as to clarify that due to the *conduit pipe* that is the ECA, '*EU law [effectively constitutes] as an entirely new, independent and overriding source of domestic law.*'[432] While this perception of EU authority does not overhaul the authoritative nature of EU law, it remains significant in constitutional analysis. Elliott

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[426] ibid [68].
[427] ibid [77].
[428] *Blackburn* (n 121); *McWhirter* (n 113); Handelsgesellschaft (n 222).
[429] *Blackburn* (n 121) 1039 (Lord Denning).
[430] Aileen McHarg, 'Navigating without maps: Constitutional silence and the management of the Brexit crisis' [2018] 16 Intl J Const law 952, 960.
[431] Romeo, Mostacci (n 423) 427.
[432] *Miller 1* (n 1) [80].

clarifies, '*viewed from the vantage point of constitutional law, questions about where power lies are fundamental*' – the Supreme Court identified EU law as an authority which exists isolated from the ordinary domestic law-making process.[433]

Firstly, the court would clarify that through this approach to EU authority, the power to reverse the effects of EU treaties would be separated from those enjoyed by ministers, providing:

> EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form.[434]

The court's discussions of EU primacy are significant; while it anchors EU authority in the ECA, identifying EU treaties as a source of domestic law departs from previous judicial approaches. Conventionally the courts reassert that parliamentary sovereignty remained the dominant element of the constitution, as the 1972 Act outlines Parliament's terms for UK membership. Significantly, the Supreme Court's approach towards EU primacy may have had more assertive implications upon sovereignty had the UK not been on an inevitable path towards exiting the European Union. With Brexit upon the horizon, the court may have been prompted to provide an assessment of sources of domestic law which may be the final word on the role of EU primacy within the constitutional culture.

Ultimately, when examining the court's reading of EU law as an external source of power alongside the increasing use of dynamic approaches utilising non-legislative authority, the court's decision appears to have an unorthodox quality. Although this primacy was established by the conduit pipe that is the ECA, while the Act remained in effect European law held a unique constitutional position, enjoying powers which had been transferred

[433] Elliott, 'In Search of Constitutional Principle' (n 133) 257.
[434] *Miller 1* (n 1) [86].

from Parliament.[435] This approach, allowing for law-making powers separated from Parliament's authority, goes further than the holistic conceptualisations in which EU authority was directly empowered by the provisions of the ECA. Furthermore, while the court's articulations on the extent of prerogative powers did not go so far as to diminish the executive's powers, the elected executive were ultimately restricted from overriding these external sources of power unilaterally.[436]

Secondly, the court's statements pertaining to the nature of constitutional change in the UK situates further developments to dynamic understandings of parliamentary sovereignty. The Supreme Court in *Miller 1* considers that any decision which did not block ministers from unilaterally triggering article 50 would signal a departure to normative understandings that significant constitutional change cannot be enacted by Ministers but must be sanctioned by Parliament, providing:

> We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the 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.[437]

These statements analysing the requirement for Parliament to consent to any major constitutional modification provide interesting viewpoints surrounding qualifications to sovereignty. Scholars argue that these statements illustrate a developing departure from orthodox understandings, with greater implications upon the judicial treatment of sovereignty.[438] Building upon understandings of parliamentary sovereignty situated in cases such as *Simms* which identify a requirement for Parliament to squarely confront the political costs of its action, it is suggested the judgment in *Miller 1* provides that ministers could therefore not use prerogative powers as a barrier to Parliament being able to effectively direct the constitutional landscape and take on all consequential political

[435] ibid [68].
[436] Rene Reyes, 'Legislative Sovereignty, Executive Power, and Judicial Review: Comparative insights from Brexit' [2016-17] 115 Mich L R 91.
[437] *Miller 1* (n 1) [82].
[438] Jason Varuhas, 'The principle of legality' [2020] 79(3) CLJ 578; Paul Craig, 'Miller, Structural Review and the Limits of Prerogative Power' [2017] Public Law 48; Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing, 2018).

costs.[439] McHarg notes that in a general sense, '*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*.'[440]

McHarg further analyses these statements alongside the ongoing deviations to orthodox understandings of principle; the majority decision in *Miller 1* highlights the emergence of an approach which reformulates parliamentary sovereignty into a doctrine of *parliamentary effectiveness*.[441] While historic traditions and principles pertaining to sovereignty have been examined throughout this thesis, this developing line of authority '*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*', with this case identifying that the focus of the court is '*that Parliament has the opportunity to legislate.*'[442] While aspects of parliamentary effectiveness align with orthodox understandings that Parliament generally being able to effectively make law is embedded within the UK's legal framework,[443] the Supreme Court's creation of a constitutional parliamentary right to effectively direct constitutional change departs from orthodoxy.[444] There are many examples of significant legal change being brought about by ministerial activity, and similarly limitations in reality preventing Parliament from being able to legislate upon every significant decision, yet in this instance parliamentary effectiveness is seemingly proposed as a matter of constitutional importance.[445]

Following the judgment, the limitations upon the executive when directing the Brexit process alone were perceived to serve as an expression to the government that all legal and constitutional requirements must be satisfied throughout the Brexit process.[446]

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[439] Craig, 'Miller, Structural Review and the Limits of Prerogative Power' (n 438); Alison Young, 'Miller and the Future of Constitutional Adjudication' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing, 2018).
[440] Aileen McHarg, 'Giving Substance to Sovereignty: Parliamentary Sovereignty and Parliamentary Effectiveness' in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Bloomsbury Publishing 2021), 4.
[441] ibid.
[442] ibid, 3.
[443] Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) 25
[444] Elliott, 'In search of constitutional principle' (n 133).
[445] McHarg, 'Giving Substance to Sovereignty: Parliamentary Sovereignty' (n 440).
[446] James Bowen, 'Case Comment, The Supreme Court's Article 50 judgment: R (Miller) v Secretary of State for Exiting the European Union [2017 UKSC 5, (2017)' 18 Bus L Intl 185.

However, scholars note that while the court's decision significantly impacted executive action, the process by which justices concluded upon is perceived as vague, with constitutional principle excessively generalised and threshold for significant constitutional developments not clearly identified.[447] Elliott goes further in his analysis of the nuanced implications of the decision in *Miller*, firstly assessing how the court's decision '*might be considered either a triumph of constitutional progressivism or a defence of an anachronistically bilateral conception of a newly multilateral political-constitutional order.*'[448] In a subsequent article, Elliott further argues:

> [*Miller* is an example of] a formal mode of judicial overreach that is, of an adjudicative style, on matters of great constitutional sensitivity, that prizes curial instinct over transparent articulation of and rigorous engagement with whatever constitutional principles are considered to be in play. This is a type of overreach in itself.[449]

Within *Miller,* various readings of parliamentary sovereignty illustrate the developing attitudes towards the broad application of a dynamic account. Firstly, and perhaps most significantly considering the trajectory of parliamentary sovereignty, the Supreme Court's statements evidencing the shift towards a focus on parliamentary effectiveness develop assertive principle as it moves further from orthodox attitudes. The judicial capability to use parliamentary sovereignty to expand constitutional understandings departs from traditional understandings; and if taken in isolation, the reasoning within *Miller* 1 examining parliamentary effectiveness would appear to express a refining attitude – refining sovereignty towards a doctrine of parliamentary effectiveness, rather than departing from orthodox doctrine entirely. Building upon ideas of from Chapter 2, this approach could retain the core of orthodoxy through its broad and limited application of parliamentary effectiveness.

However, as the majority of those Supreme Court justices in *Miller 1* would build directly upon the continuing reformulation of parliamentary sovereignty in *Miller 2* (as will be examined later in this chapter), the unorthodox decision of the former serves

[447] Mark Elliott, 'Judicial Power and the United Kingdom's Changing Constitution' [2018] 36(2) UQLJ 273.
[448] Elliott, 'In Search of Constitutional Principle' (n 133) 287
[449] Elliott, 'Judicial Power and the United Kingdom's Changing Constitution' [2017] CLR 49.

unintentionally as a vehicle for the courts to expand the doctrine of parliamentary effectiveness through the court's treatment of sovereignty in the latter.[450] The judiciary's consideration of Parliament's ability to effectively make law for the UK could evidence a refining outlook towards the judicial role which empowers the core of orthodox principle; however, the judicial expansion of effectiveness to reformulate the treatment of sovereignty highlights the assertive viewpoints within judicial reasoning.

Secondly, an assertive approach may be evidenced through the court's perception of the ECA as a conduit pipe, bringing European law into the domestic constitutional sphere independently, identifying the authority used to prevent violations to EU law as separate to the provisions of the 1972 act itself. Upon justices acknowledging European authority as an independent source of domestic law, an assertive reading of sovereignty may be evidenced which is wholly inconsistent with orthodox attitudes. Rather than viewing EU authority merely as a delegated effect of the 1972 Act, the Supreme Court identify European law as an origin of authority in its own right following membership.[451] Similar to discussion on assertive common law authority, this perception of EU law as authority external to Parliament evidences an assertive reading of sovereignty which allows for a dynamic outlook towards EU authority and its position within the constitutional hierarchy.

Additionally, the judicial approach in *Miller* effectively limits the options of the democratic executive using parliamentary sovereignty, providing an assertive application within the political domain. The extraordinary course of restricting executive action had been assertively taken by the court in response to the extraordinary facts, with the democratic nature of the Brexit process insufficient in deterring judicial engagement. However, it remains significant that *Miller* does not provide an account of a court which vehemently uproots the relationship between powers, but rather poked at the boundaries of assertive authority without effectively restricting the executive's ability to achieve its goals; Elliott noting the court's judgment is perceived to have been '*veering as it does between muscular but ill focused constitutional assertiveness and unwarranted*

[450] *Miller 2* (n 1).
[451] ibid; *McWhirter* (n 113); *Costa* (n 220); *Miller 1* (n 1).

conservativism', further highlighting the complexity in identifying the judiciary's position as wholly assertive.[452]

Once again, these readings of sovereignty do not necessarily uproot constitutional principle, nor effectively derail government policy. Upon first inspection of the provisions within *Miller* provide an account of sovereignty which may appear orthodox,[453] however the implications of assertive treatments of sovereignty illustrate a departure from orthodox formulations. With further shifts to fundamental aspects of the orthodox account, these readings illustrate an increased judicial willingness to embrace assertive application. Although, once again we see a hesitancy to substantially abandon orthodox principle; with the court exposed to wider political context and prompts, this account may be confined to its unique facts.[454]

5.4. Treatment of sovereignty within the courts post-*Miller 1*

With the decision in *Miller 1* illustrating the extent of the departure from orthodoxy in the Supreme Court era, it is necessary to further analyse the wider position of the court to determine whether *Miller* provides insight into the developing jurisprudence of the court or proves to be inconsistent with broader judicial practice. Following the political/social response to *Miller 1,* the judiciary remained under a spotlight with those dissatisfied claiming justices were encroaching upon the democratic process.[455]

Nevertheless, in light of a successful major challenge to the executive and many questions left unanswered once Brexit had been triggered, further legal challenges surrounding constitutional principle seemed inevitable. This chapter will now analyse these cases, examining how decisions relevant to parliamentary sovereignty's continued place in the constitutional culture present an accurate image of its treatment in this period.

Scholars examine how following the *Miller 1* case, the executive have taken a narrowed perspective to the constitutional role of the courts, prompting proposals of a

[452] Elliott, 'In Search of Constitutional Principle' (n 133) 259.
[453] *Miller 1* (n 1) [67].
[454] Elliott, 'In Search of Constitutional Principle' (n 133) 259.
[455] Rozenberg, *Enemies of the People* (n 419).

reassessment of the balance of power between the courts and lawmakers.[456] The court would note within its commentary that ministers identified the contemporary court as a static institution fulfilling a public service, rather than a dynamic branch of government.[457] In response, the Supreme Court's judgment in *UNISON v Lord Chancellor* would address the conflicting perceptions of the judiciary within the constitutional sphere.[458]

The Lord Chancellor used his statutory powers found within the Tribunals, Courts and Enforcement Act 2007 to impose fees for those using Employment Tribunals where previously no such charges had existed.[459] A challenge was brought before the Supreme Court by trade union, UNISON, arguing the fees were unlawful; among these arguments, the claimants argued that the Lord Chancellor's decision impeded the common law right of access to justice. As situated through the refining viewpoints in *Simms*, any derogation to fundamental rights cannot be achieved through general or ambiguous words, which the claimants argued is inconsistent with the 2007 Act.[460]

Although the ECHR right of access to justice was only recently formally incorporated into domestic law through the HRA,[461] the court would identify the implications of historical common law rights, providing, '*Before this court, it has been recognised that the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law.*'[462] Upon this rationale, the primary challenge by the trade union surrounded the abrogation of common law access to justice. Additionally, the court found significant historical authority since the Magna Carta affirming the '*judicial recognition of the constitutional right of unimpeded access to the courts, which can only be curtailed by clear statutory enactment.*'[463]

Having identified access to justice as a fundamental right under the rule of law, the courts were left to resolve whether this would be sufficient grounds to quash the Fees Order. In

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[456] 'The Conservative and Unionist Party Manifesto 2019' (Conservatives 2019) 47.
[457] *UNISON* (n 201).
[458] ibid.
[459] Tribunals, Courts and Enforcement Act 2007, s 42; Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013/1893.
[460] *Simms* (n 82), 131; *UNISON* (n 201).
[461] See, ECHR art 6; HRA 1998, sch 1.
[462] *UNISON* (n 201) [64].
[463] ibid [76], see, Magna Carta 1215, Edward I, ch 29 (1297); Co Inst; Bl Comm.

their answer, the Supreme Court made reference to recent political perception of the courts as '*merely a public service like any other*', fundamentally disagreeing and providing a distinct approach to the purpose and role of the court.[464] The court, addressing the disparity between the political and judicial perceptions of the constitutional role of the judiciary outlined:

> Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced.
>
> Without such access [to justice], 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. That is why the courts do not merely provide a public service like any other.[465]

Once again, while the court reaffirmed that the discussion would be wholly different in the event legislation explicitly undermines the rule of law, they retained the approach that statute can be rendered nugatory where access to justice is grossly impeded. Scholars analysing this consider the court's approach to suggest that the common law principles noted by the courts '*underpin and shape the process of statutory interpretation in determining vires*.'[466] This clouds the constitutional hierarchy further;[467] while previous readings outline the common law as non-legislative authority capable of preventing statute from implicitly derogating fundamental rights, justices in *UNISON* expand upon the limited, refining viewpoints found in *Simms*, providing a more concrete constitutional rule whereby sovereign legislation may become unenforceable where essential common law rights are limited.[468] Through displacing parliamentary sovereignty's dominance within the constitutional culture, and challenging executive policy using common law authority, the Supreme Court appears to continue their assertive reasoning following *Miller 1*.

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[464] *UNISON* (n 201) [66].
[465] ibid [68].
[466] Alan Bogg, 'The Common Law Constitution at Work: R (on the application of UNISON) v Lord Chancellor)' [2018] 81 Modern L R 3 509.
[467] See, Michael Ford, 'Employment Tribunal Fees and the Rule of Law: R (Unison) v Lord Chancellor in the Supreme Court' [2018] 47 ILJ 1, 41.
[468] See text to n 188.

As scholars suggest, *UNISON* breaks no new ground (reinforcing the requirement for express wording within statute), however goes a step further in identifying the exercise of common law authority as an integral role of the court, creating a paradoxical situation where sovereignty and the rule of law may come into conflict or alternatively, act in a mutually supportive manner.[469] Elliott suggests the approach from the courts '*by so clearly situating the enterprise of statutory construction within the broader context of the rule of law's normative demands, underlines just how difficult it rightly is to dislodge some constitutional rights'*.[470]

UNISON provides a clear example of how the lines between orthodox and dynamic judgments are increasingly blurred. The provisions within the case do certainly not radicalise assertive perceptions of sovereignty and may seem consistent with more refining readings of sovereignty. On further analysis of the nuances within the continuing treatment of sovereignty, the Supreme Court (as in *Miller 1*) illustrates an openness to the use of constitutional principle and settled dynamic activity (*Simms*) to affect the reformulation of existing principle and doctrine. Again, the judiciary expands upon incremental dynamic viewpoints; while historically refining decisions examining fundamental rights have been underpinned by deference to parliament's sovereignty, *UNISON* identifies an approach whereby sovereign legislation becomes nugatory and ineffective.

Through the creation of further qualifications upon Parliament's ability to effectively legislate the court goes takes another small – yet significant step – in shifting the judicial role away from static implications of orthodoxy. Unlike statements in *HS2* relating to explicitly worded legislation being beyond the scope of review, justices in *UNISON* acknowledge fundamental limitations on Parliament's ability to effectively legislate to impede the rule of law: ultimately diminishing Parliament's formerly unlimited capacity to make law for the UK through restrictions to the effectiveness of explicit language. Furthermore, the court's continued reformulation of sovereignty is uncertain in its scope; McHarg identifying that if restrictions upon access to justice are sufficient to qualify

[469] Mark Elliott, 'The Rule of Law and Access to Justice: Some Home Truths' [2018] 77 Cambridge L J 5; McHarg, 'Giving Substance to Sovereignty' (n 440).
[470] ibid 8.

sovereignty in practice, it could give rise for the creation of further conditions upon the effectiveness of Parliament relevant to other rights.[471] In this light, *UNISON* evidences the complexity in identifying where a judgment may contain implications for increased challenges to orthodoxy; nevertheless, the assertive developments made within the judgment signify further shifts within the wider formulations of sovereignty.

5.4.1. Sovereignty in the Scotland Act

Following the devolution element of the *Miller 1* decision providing that the consent of the UK's constituent nations would not be required in order to begin Brexit proceedings,[472] the UK and Scottish governments would arrive at a serious disagreement pertaining to the continuity for EU-derived laws in Scotland.[473] In 2017, the UK Parliament introduced the European Union (withdrawal) Bill ('UK Bill'), which sought to achieve legal continuity for EU laws throughout all constituent nations.[474] During debate in the House of Commons, amendments which would empower devolved governments to take control over continuity within their jurisdictions were rejected, despite their support by the Scottish government.[475] In response, the Scottish Parliament passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018 on 21 March ('Scottish Bill'); among its provisions, section 17 sought to create a legal pre-condition for any subordinate UK legislation which affects the operation of retained EU law within Scotland to require the consent of Scottish ministers.[476]

Promptly, a reference was made to the court challenging the validity of the Scottish Bill under provisions within the Scotland Act 1998.[477] Notably, the Welsh Assembly initially passed legislation of a similar effect, however reached an agreement with the UK government to amend the UK Bill, resulting in the Assembly providing its legislative

[471] McHarg, 'Giving Substance to Sovereignty' (n 440) 16.
[472] See text to n 134.
[473] Mark Elliott and Stephen Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' (University of Cambridge Faculty of Law Research Paper No. 58/2018).
[474] Scottish Continuity Bill Reference (n 97), [6].
[475] ibid, [7].
[476] ibid, [22].
[477] ibid, [8]; see text to n 320.

consent.[478] In any event, any decision from the courts pertaining to legal continuity for devolved jurisdictions has significant implications for devolved governments.[479]

Significantly, by the time the decided upon *Scottish Continuity Bill Reference*, Parliament had enacted the UK Bill, and thus, changed the political landscape significantly from the time the Scottish Bill was passed.[480] Although the Advocate General for argued the Supreme Court ought to make examine the legal position of the Scottish Bill under the law that existed at the time of its enactment, this was quickly rejected by justices, who provide '*this court must have regard to how things stand at the date when we decide those questions*.'[481]

Examining the Scottish Bill alongside section 29 of the Scotland Act 1998, which delimits the legislative competencies of the Scottish Parliament,[482] the effects of the enacted UK Bill influenced understandings on how the court would apply the Scotland Act. Section 29(2)(c) clarifies that the devolved government would not be able to enact legislation which '*is in breach of the restrictions in Schedule 4*'; which in turn, outlines restrictions upon the modification of '*protected provisions.*'[483] In order to limit the effectiveness of the Scottish Bill, the UK Bill amended schedule 4 of the Scotland Act so that the UK Bill itself would constitute a protected provision which is outside the scope of the Scottish Parliament's legislative capacity. Additionally, section 28(7) of the Scotland Act 1998 provides that the Scottish Parliament's power to make-law '*does not affect the power of the Parliament of the United Kingdom to make laws for Scotland*.' Section 28 was enacted to empower the Scottish Parliament the power to make laws and provide a statutory affirmation of sovereignty, while section 29 was intended by Parliament to outline subsequent limitations.[484]

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[478] *Scottish Continuity Bill Reference* (n 97), [9].
[479] ibid [10].
[480] Mark Elliot, 'The Supreme Court's judgment in the Scottish Continuity Bill case' (Public Law for Everyone 14 December 2018.
[481] *Scottish Continuity Bill Reference* (n 97), [92].
[482] ibid [14].
[483] ibid.
[484] Christopher McCorkindale, 'Devolution: A New Fundamental Principle of the UK Constitution' in Michael Gordon and Adam Tucker (eds), *The New Labour Constitution: Twenty Years On* (Hart Publishing, 2021).

In light of these provisions and their effects, the Supreme Court identified two instances whereby the Scottish Bill would have contravened the Scotland Act 1998: firstly, section 17 of the Scottish Bill would have to modify section 28(7) of the Scotland Act; or secondly, section 17 would relate to a reserved matter provided within the Scotland Act and fall under the limitations within section 29.[485] In response to the UK government's arguments that the Scottish Bill '*fell foul in its entirety'* due to limitations applied by the UK Bill, the court distinguished restrictions upon *reserved matters* and *protected provisions* and concluded upon this suggesting, '*The UK Parliament had not made the subject-matter of the UK Withdrawal Act a reserved matter, meaning that the Scottish Bill could not be ruled invalid on the ground that it "related to" the subject matter of the UK legislation.*'[486] Therefore, the two identified instances relating to the modification of section 28 and the limits within section 29 of the Scotland Act were the focus of the Supreme Court's reasoning.

The court ultimately concluded that section 17 of the Scottish Bill would modify section 28(7) of the Scotland Act 1998, providing:

> An enactment of the Scottish Parliament which prevented such subordinate legislation from having legal effect, unless the Scottish Ministers gave their consent, would render the effect of laws made by the UK Parliament conditional on the consent of the Scottish Ministers. It would therefore limit the power of the UK Parliament to make laws for Scotland, since Parliament cannot meaningfully be said to "make laws" if the laws which it makes are of no effect.[487]

Scholars note the confusion surrounding the Supreme Court's decision; as provided, section 29 of the Scotland Act 1998 serves to set limits upon the Scottish Parliament's powers whereas section 28(7) affirms parliamentary sovereignty.[488] Significantly, the Supreme Court identified that section 17 of the Scottish Bill and its effects were it to be implemented, would not impinge upon sovereignty as Parliament could modify at will.[489]

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[485] *Scottish Continuity Bill Reference* (n 97), [37].
[486] ibid [51]; Elliott, 'The Supreme Court's judgment in the Scottish Continuity Bill case' (n 480).
[487] *Scottish Continuity Bill Reference* (n 97), [52].
[488] McCorkindale (n 484); Elliott, 'The Supreme Court's judgment in the Scottish Continuity Bill case' (n 480); McHarg, 'Giving Substance to Sovereignty' (n 440).
[489] *Scottish Continuity Bill Reference* (n 97), [63-64].

As McHarg clarifies, '*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*.'[490]

Considering the implications of *Scottish Continuity Bill Reference* upon the trajectory of the Supreme Court's dynamic treatment of sovereignty, this case at first may resemble orthodox, Diceyan principles which reserved law-making powers within Parliament. This case once again illustrates the judicial propensity to highlight the constitutional importance of devolved governments, while identifying limitations to the breadth of their authority in a somewhat self-contradictory way.[491] However, through identifying the potential for modifications to section 28(7), the Supreme Court uses devolution legislation in a way which goes against the grain of their understandings. The explicit limitations within the Scotland Act provide means for finding unlawful devolved legislation as a *nullity*, justices seemingly depart from the legislative intention when using other provisions to invalidate devolved legislation in a way which '*is not necessarily a nullity*.'[492]

Nevertheless, the court's statements relevant to distinguishing the effect of section 28(7) of the Scotland Act from that of parliamentary sovereignty appears to suggest the court's reasoning surrounds '*a desire to protect Parliament's legislative freedom of action from constraints imposed by subordinate legislatures*.'[493]

Therefore, the Supreme Court appears to build upon the reformulation of sovereignty identified in *Miller 1* – when providing expanded discussion on judicial understandings of sovereignty, the significant subject matter examines the requirement for the UK Parliament's legislative capacity to remain unconstrained by legal impediments, even where they are not effective.[494] Consequently, there must be no attempt to impose conditions upon Parliament's capability to legislate as it sees fit, as this doctrine

[490] McHarg, 'Giving Substance to Sovereignty' (n 440) 6.
[491] Elliott, 'The Supreme Court's judgment in the Scottish Continuity Bill case' (n 480).
[492] ibid; *Scottish Continuity Bill Reference* (n 97), [26].
[493] McHarg, 'Giving Substance to Sovereignty' (n 440) 6.
[494] ibid.

continues to develop within Supreme Court authority while taking on increasingly unorthodox qualities in its reformulation of sovereignty. [495]

5.4.2. Increasing development of judicial authority

In light of the recent developments to non-legislative common law authority and subsequent constraints upon Parliament's statutory options found in cases such as *AXA* and *UNISON*, the Supreme Court's decision in *Privacy International v Investigatory Powers Tribunal* proves to be a significant step in the contemporary treatment of parliamentary sovereignty.[496] This case concerned the Investigatory Powers Tribunal (IPT); established by the Regulation of Investigatory Powers Act 2000 (RIPA), the IPT is a judicial body which exclusively presides over cases pertaining to the UK's secret services acting in the interests of national security. Significantly, the legislation provides '*decisions of the [Investigatory Powers] Tribunal shall not be subject to appeal or be liable to be questioned in any court'*, effectively ousting the decisions of the IPT from the scope of judicial review.[497]

In *Privacy International*, claimants sought to appeal a decision by the IPT, suggesting it made an error in law and reached an unsafe decision. In the case under review – *Privacy International v Secret Intelligence Service* – the IPT supposedly arrived at their conclusion that the Home Secretary could order thematic computer hacking due to a misinterpretation of statute that amounts to an effective error of law.[498] However, the outer clause within RIPA would seemingly prevent any appeal of the IPT's decision, alternatively leading to the Supreme Court left to examine whether the legislation ultimately ousts erroneous judicial decisions from the scope of judicial review.[499]

Assessing the legal validity of ouster clauses, it is firstly recognised that in any event, parliament retains the power to restructure the jurisdictional authority of the courts, however historical judicial treatment of ouster clauses and their validity have outlined

[495] ibid; Kieth Ewing, 'Brexit and Parliamentary Sovereignty' [2017] 80 MLR 711.
[496] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.
[497] Regulation of Investigatory Powers Act 2000, s 67(8).
[498] See, *Privacy International v SSFCA* [2016] UKIP Trib 14_85-CH; Intelligence Services Act 1994, s 5.
[499] Robert Craig 'Ouster clauses, separation of powers and the intention of Parliament: from Anisminic to Privacy International' [2018] 4 Public law 570.

that ouster clauses are fundamentally more complex.[500] Scott examines the inherent constitutional conflicts within this case, providing, '*The classic modern framing of the British constitution sets up a contest between [Diceyan orthodoxy] and the constitutional value of the rule of law, understood – most often – to mean at its heart the availability of judicial review.'*[501] Historically, an error of law in any court which cannot be corrected makes the decision '*purported'* rather than '*real',* and thus the decision cannot be protected by an ouster clause, statutory or otherwise, thereby allowing judicial review.[502]

The approach of the Supreme Court examined two significant issues in *Privacy International*, firstly whether Parliament effectively ousted judicial review in RIPA; and secondly, to what extent Parliament can oust the review of judicial decisions.[503] Addressing RIPA, the court provided that similar to preceding judgments on the protection of fundamental rights, judicial review would be fail to be ousted when the requirement for clear and explicit wording had not been satisfied.[504] Furthermore, justices considered the omittance of explicitly ousting judicial review to indicate an intention not to do so. While RIPA ousted IPT decisions from appeal, it did not go as far as allowing the court to act entirely outside of the judiciary's scrutiny, with justices proposing Parliament failed to exclude '*challenges to any determination or "purported" determination as "a nullity by reason of lack of jurisdiction, error of law, or any other matter".'*[505]

Having reached this conclusion that RIPA did not create an *island of law* which is beyond the review of senior courts, justices clarified it was '*strictly unnecessary to go further in the appeal'* however found it to be of value to further discuss whether Parliament may oust the supervisory jurisdiction of appellate courts to review inferior court's decisions.[506] The view taken by the majority examined the CRA section 1 – which deliberately refrains from attempting to define the rule of law – concluding this omission outlines a

[500] ibid, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
[501] Paul Scott, 'Once More unto the Breach: R (Privacy International) v Investigatory Powers Tribunal' [2020] 24 Edinburgh L Rev 1 103.
[502] *Anisminic* (n 500); Mark Elliott and Allison Young, 'Privacy International in The Supreme Court: Jurisdiction, The Rule of Law and Parliamentary Sovereignty' [2019] 78 CLJ 490, 491-492.
[503] *Privacy International* (n 496) [104, 113]
[504] ibid [111].
[505] ibid.
[506] ibid [113].

parliamentary intention to leave the courts to determine how and when to apply the rule of law.[507]

Addressing ouster clauses specifically, justices acknowledged that the courts have historically ensured to avoid adopting a uniform approach towards ouster clauses, rather considering statutory context.[508] Ultimately, the Supreme Court would outline that comprehensive ouster clauses (explicit or otherwise) would fail to be universally enforceable where irreconcilable with the rule of law, providing:

> I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the [judicial review] of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law.[509]

Ultimately, the court's treatment of sovereignty in this case provides an approach to sovereignty which legitimises assertive activity where statute interferes with inviolable judicial access. With fair access to the courts a requirement for the application parliamentary sovereignty, an effective judiciary is required in order for Parliament to enact meaningful law. The Supreme Court's formulation of sovereignty in this case would therefore allow the courts to use principle to ensure access to justice is maintained to the same extent they may for sovereignty – still perceived as the dominant constitutional principle. Once again, this shows the nuances found within judicial decision-making: characteristics of an assertive judgment may be reconciled with the fundamental ethos of sovereignty.

Unlike judgments which have been identified as holistic, *Privacy International* signifies a further step taken by the judiciary away from orthodox sovereignty. With the majority of

[507] ibid [121].
[508] ibid [130].
[509] ibid [144].

justices identifying barriers to Parliament's legislative options in relation to comprehensive ouster clauses regardless of wording, the use common law authority of the court to enforce the rule of law appears to have the potential to displace sovereign legislation as dominant within the constitutional hierarchy in those extreme instances. Furthermore, where there is an explicitly clear intention for Parliament to oust judicial review of IPT cases, for the court to use policy to reach a conclusion entirely contrary to those realistic objectives. However, scholars examine how the majority would avoid taking an unambiguously radical view towards displacing sovereignty; the significance of sovereignty and the enforcement of Parliament's law remains the recognised fundamental principle of the UK constitution, and further that there may be theoretical circumstances for effective ouster clauses which would suffice in establishing a comprehensive ouster clause (although in reality, enactment would be politically impossible).[510] Nevertheless, '*This arguably amounts, at least to some degree, to a form of normative, as opposed to a merely conceptual, constraint upon sovereignty*.'[511]

5.5. *Miller 2*

This chapter will now examine *R (Miller) v Prime Minister (Miller 2)*.[512] Similarly to how *Miller 1* dealt with the issue of prerogative powers, *Miller 2* surrounds the historic '*annual procedural event'* of parliamentary prorogation.[513] Similarly to discussion surrounding *Miller 1*, this case may be identified as illustrating a dynamic shift away from orthodoxy. Therefore, analysis of the court's decision will be examined in the following chapters of dynamic models of sovereignty; however, the context surrounding *Miller 2* must be discussed in this chapter to situate analysis of the courts' decisions pertaining to orthodox principle post-*Miller*.

Parliament formally prorogues at the end of a parliamentary session, signifying the *recess* ending all legislative affairs until Parliament resumes in its next session.[514] The power to prorogue Parliament is outlined as being for when '*His Majesty shall be pleased, […] with the advice of the Privy Council […] to prorogue Parliament […] notwithstanding any former*

[510] Elliott, Young, 'Privacy International in the Supreme Court' (n 502).
[511] ibid.
[512] *Miller 2* (n 1).
[513] Anne Twomey, *The Veiled Sceptre* (CUP 2018).
[514] 'Prorogation' (UK Parliament) <www.parliament.uk/about/how/occasions/prorogation/>.

law, usage, or practice to the contrary.'[515] Consistent with prerogative powers, the contemporary power to prorogue Parliament is exercised on the advice of the prime minister at the end of one-year sessions.[516] Once Parliament has been prorogued, '*Parliament is unable to enact legislation or exercise any oversight and accountability powers, while the Government remains in power by default and continues to govern*.'[517] In light of Parliament's inability to undertake its essential duties, prorogation typically only lasts a number of days and concerns of abuse have been resolved through '*a strong constitutional convention the monarch will only prorogue Parliament in a predictable and politically uncontroversial manner*.'[518]

The controversy in *Miller 2* follows extended Brexit negotiations; prime minister Boris Johnson had hoped to pursue his arranged deal, while Parliament was divided between supporters, those arguing for a 'better' deal, and those hoping to remaining members of the EU. His predecessor, Theresa May had previously lost three parliamentary votes on Brexit negotiation Bills, and Johnson's approach of bargaining using a *no deal option* was not supported by Parliament. At the height of executive-legislature tensions, Johnson advised the Sovereign to prorogue Parliament for a period lasting five weeks.[519]

The prorogation was swiftly challenged in the English and Scottish courts; with the English court ruling that constitutional barriers prevented the courts from declaring prorogation unlawful as prorogation itself is *'inherently political in nature'* and therefore not justiciable.[520] However, the Scottish courts provided two different decisions; the Outer House of the Court of Session found the prorogation to be lawful, whereas the Inner House alternatively unanimously found that the prorogation had prevented Parliament from undertaking its proper functions, and further it had an *improper* purpose, and therefore must be unlawful, providing '*the true reason for the prorogation is to reduce the time available for parliamentary scrutiny [...] at a time when such scrutiny would appear to be a matter of considerable importance*'.[521] When the case was before the Supreme

[515] Prorogation Act 1867.
[516] Stefan Theil, 'Unconstitutional Prorogation of Parliament' [2020] PL 529.
[517] ibid.
[518] ibid.
[519] *Miller 2* (n 1) [1].
[520] *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB) [51].
[521] *Cherry v Attorney General for Scotland [*2019] CSIH 49 [53].

Court, the court avoided committing to any determination of whether prerogative powers are justiciable, instead reclassifying the issue to examining the scope of prorogation using prerogative powers rather than its use overall.[522]

While there were public claims that Johnson's reasons for proroguing Parliament surrounded '*an attempt to limit politically troublesome scrutiny and accountability for the EU withdrawal process*',[523] the Supreme Court seemed unconcerned with reasons and motivations, but rather focused on the effect of prorogation.[524] In identifying how a decision to prorogue Parliament would be invalid, justices would provide:

> [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 and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[525]

The expression that prorogation would be susceptible to judicial review was hardly surprising considering the context of its use; ultimately, '*an unlimited power of prorogation would be incompatible with the legal principle of parliamentary sovereignty*.'[526] Answering the significant remaining question as to whether the prorogation frustrated or prevented Parliament's legislative and scrutinising role, the court straightforwardly offered '*of course it did*.'[527] The court determined that the undesirably long length of the prorogation constrained Parliament's ability to act and considering the context of ongoing Brexit proceedings, there was a legitimate reason for Parliament to remain in session. Ultimately, it was the court's view that the prorogation was unlawful as there was no good reason for the prorogation to take place at that time

[522] *Miller 2* (n 1) [52].
[523] Stefan Theil, 'Unconstitutional Prorogation of Parliament' [2020] PL 529.
[524] Mark Elliott, 'Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context' [2020] 16 EU Const 625, 628.
[525] *Miller 2* (n 1) [50].
[526] Rozenberg, *Enemies of the People* (n 419).
[527] *Miller 2* (n 1) [56].

for that duration.[528] The prorogation was subsequently declared to be of no effect and previous Parliamentary session was resumed.[529]

Once again, the Supreme Court in *Miller 2* identifies within their reasoning that there is a fundamental requirement for Parliament to be effective in its legislative role, building upon the developing line of judicial authority which is reformulating parliamentary sovereignty in practice into a doctrine of parliamentary effectiveness.[530] While *Miller 1* provided insight towards how parliamentary effectiveness has become a subject of importance within judicial reasoning, it has been criticised for presenting a *partial* account of the constitutional tools wielded by justices.[531] As scholars further note, the subject of parliamentary effectiveness was brought into constitutional importance in *Miller 1*, proposing '*that Parliament's opportunity to legislate must not be circumvented by executive action*'; *Miller 2* expands upon this by creating an effective proportionality test.[532] Indeed, the viewpoint of the court in *Miller 2* surrounds the idea that '*Parliament is sovereign only if it has meaningful opportunities to exercise its legislative powers'*.[533]

The development of this doctrine which has advanced in its capacity to require that Parliament is empowered and effective in its supervision of the executive and the constitutional landscape more generally.[534] The Supreme Court does not suggest that Parliament must be fully effective in all instances, as this would undermine the Westminster framework of governance; instead, the court left the matter to itself to determine whether an issue is so constitutionally significant to require Parliament's scrutiny, further expanding their role within the developing doctrine of parliamentary effectiveness.[535] Ultimately, this assures that Parliament is does not have a monopoly over the entire constitutional domain, but rather that limitations may exist upon the

[528] ibid [61].
[529] ibid [70].
[530] McHarg, 'Giving Substance to Sovereignty' (n 440)
[531] ibid; Aileen McHarg, 'Constitutional Change and Territorial Consent: the Miller Case and the Sewel Convention', in Mark Elliott, Jack Williams and Alison Young (eds) *The UK Constitution after Miller: Brexit and Beyond* (Oxford, Hart Publishing, 2018) 179.
[532] McHarg, 'Giving Substance to Sovereignty' (n 440) 3.
[533] Hasan Dindjer, 'Prorogation as a Breach of Parliamentary Sovereignty' (UK Const L Blog, 16 September 2019)
[534] *Miller 2* (n 1) [50].
[535] McHarg, 'Giving Substance to Sovereignty' (n 440).

executive where extreme contexts (conditions for the exit of the EU) require the full extent of legislative oversight.[536]

It is difficult to definitively categorize the decision in *Miller 2* within the dynamic models. Elliott notes the confusion, suggesting ' *that the Supreme Court's judgment was at once both orthodox and path-breakin*g';[537] within *Miller 2*, many statements relating to sovereignty's role within the constitutional hierarchy reaffirm that statute is the '*supreme form of law in our legal system, with which everyone, including the government, must comply.*'[538] *Miller 2* examines an executive which is frustrating Parliament's ability to legislate, therefore frustrating sovereignty. In this case, the Supreme Court uses a reformulated parliamentary sovereignty as a tool to limit executive action in an area historically reserved from justices, reaffirming sovereignty's overriding authority while doing so.

The difficulty in categorising the approach is clarified by Elliott, examining:

> Paradoxically, Miller 2 is at once both a legal landmark and an orthodox application of existing constitutional principle. [... The judiciary appear] prepared to serve as a guardian of constitutional principle in a way and to an extent that previous generations of apex court judges in the UK were not. What stands out about this case is the way in which fundamental constitutional principle is operationalised so as to produce significant and concrete limitations on governmental powers that have hitherto been considered to be no-go areas for the courts.[539]

Miller 2 provides a complex reading of parliamentary sovereignty when mapped alongside orthodox and dynamic categorisations. The extent of any departure from orthodoxy is not certain at first glance. Scholars highlight how it would be problematic from a democratic viewpoint if representatives in Parliament could be so easily dismissed at a time of constitutional significance.[540] Therefore, the final decision itself to

[536] Alison Young, 'Miller and the Future of Constitutional Adjudication' (n 439).
[537] Elliott, 'Constitutional Adjudication and Constitutional Politics' (n 524).
[538] *Miller 2* (n 1) [41].
[539] Elliott, 'Constitutional Adjudication and Constitutional Politics' (n 524) 64.
[540] Thomas Poole, 'Devotion to Legalism' [2017] 80 MLR 696; Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' [2020] Public Law 248.

declare to prorogation unlawful is not in itself assertive nor requiring excessive departure from orthodoxy – as discussed in *Miller 1,* constraints upon the enactment of major constitutional change which is not consented to by Parliament *could* be identified as a refinement of orthodox doctrine.

Nevertheless, the Supreme Court justices proactively engaged in an assertive reformulation of sovereignty in practice through their further expansion of parliamentary effectiveness. By building upon this doctrine to allow for a proportionality test, *Miller 2* evidences an assertive outlook in which the contemporary judiciary can expand the requirements for Parliament to be effective – representing a departure from orthodoxy which is capable of enhancing or identifying constraints upon sovereignty in practice.[541] The court's openness to using sovereignty as an argumentative tool to this extent is unprecedented; traditionally parliamentary sovereignty has acted as a break upon judicial activity in the constitutional domain, however, McHarg suggests the court's ongoing reformulations of principle towards a doctrine of effectiveness may evidence sovereignty being used as '*a justification for judicial activism in the constitutional arena'*, signifying a '*substantive turn in constitutional adjudication*.'[542] While it may be desirable to ensure elected leaders are held to account through legal barrier and constraints, McHarg suggests that '*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*.'[543]

However, the court's decision has been widely regarded as an assertive shift away from orthodox formulations of judicial authority and its application. The movement away from settled norms through allowing an unprecedented challenge to prorogation powers and intervening in executive policy within the constitutional domain outlines the further complexity in analysing dynamic approaches: while the objective of restoring Parliament's scrutiny may be orthodox, the tools utilised by the court reframes the account. The courts appear more active in their review of executive action, with the direction of the Brexit process considered the most politically charged policy of the era.

[541] McHarg, 'Giving Substance to Sovereignty' (n 440).
[542] ibid.
[543] ibid 5.

While the government subsequently enacted their withdrawal agreement, the court intervening upon the direction of executive policy where it could have alternatively maintained settled norms signifies that the scope of the court's review has expanded.

Miller 2 may serve as a focal point for assessment into the complexity of assertive judicial treatment – a judgment does not need to be wholly dynamic or achieve dynamic objectives, but rather may feature subtle applications of assertive tools within its characteristics which move away from static conceptions. *Miller 2* evidences increasingly assertive judicial approaches to conceptualising parliamentary sovereignty, with the judicial toolkit allowing for the reformulation of existing norms and settled principle to varying extents.

5.6. Contemporary sovereignty: New political questions following reflection

Having identified the courts' assertive application of sovereignty as sufficiently underpinned in legitimate principle, this chapter will secondly examine whether the courts' formulation of assertive sovereignty has illustrated a lasting shift in the continuing application of parliamentary sovereignty. The broad discussion pertaining to increasing dynamic judicial activity signifies an ongoing uncertainty pertaining to contemporary treatments of sovereignty, requiring additional analysis into the current Supreme Court's decisions which examine themes relating to sovereignty. The modern court, having reflected upon its prior decisions and the subsequent reaction, may continue, or depart from the course of its dynamic application of sovereignty: clarifying whether assertive sovereignty may have any continued role in the court's approach towards principle.

Chapter 2 highlighted how assertive developments of parliamentary sovereignty would often originate from some form of exceptional contexts, prompting further questions as to whether those readings of sovereignty would direct continued approaches towards constitutional principle into the 2020s.[544] Alternatively, where the exceptional contexts cannot be recreated (e.g. establishment of the Supreme Court; the Brexit process) then

[544] Nathalie Brack, Ramona Coman and Amandine Crespy, *Understanding Conflicts of Sovereignty in the EU* (Routledge 2021); Jim McConalogue, *The British Constitution Resettled: Parliamentary Sovereignty Before and After Brexit* (Springer 2019); See text to n 130.

judicial expressions of assertive sovereignty may enjoy a less secure foothold as novel approaches which are not applicable in the more regular administration of the courts.

While the early 2020's has featured similarly extraordinary contexts facing the political/judicial domain, this era has largely seen the specific prompts leading to identified applications of assertive sovereignty resolved.[545] Current caselaw will clarify the courts' attitudes upon reflection of their previous treatments of constitutional principle – examining how new politically-charged events may give rise to further dynamic applications of sovereignty.

Despite the recency of assertive judicial treatment towards parliamentary sovereignty, the court's formulation of principle in relation to dynamic sovereignty will suffice in outlining contemporary attitudes illustrating how sovereignty will interact with contemporary prompts. These cases will be examined together before their analysing how they have directed models for understanding the application of dynamic categorisations of sovereignty.

5.6.1. *UNCRC*

Firstly, in *Re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* (UNCRC), the Attorney General referred the question to the Supreme Court whether Scottish legislation (UNCRC Bill) would go beyond devolved competencies by incorporating treaty terms into Scottish law without wider ratification.[546] Prompting a challenge from the UK government, the Scottish Parliament voted to enact legislation seeking to give international treaties (UNCRC) effect in Scottish law which had not been otherwise incorporated into UK law.[547] Certain provisions of the Bill heavily resemble provisions of the HRA examined previously (s19-21).[548]

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[545] For further reading on political developments within the UK post 2020, see literature on Covid-19, five prime ministers in six years [2016-22], Ukraine war, Brexit completion.

[546] *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, Re* [2021] UKSC 42 (*UNCRC*); United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2023.

[547] UNCRC Bill; United Nations Convention on the Rights of the Child (UNICEF 1990) accessed <www.unicef.org.uk/wp-content/uploads/2016/08/unicef-convention-rights-child-uncrc.pdf>; European Charter of Local Self-Government [1985] ETS 122 accessed <rm.coe.int/168007a088>.

[548] See text to n 243; UNCRC Bill, s 19-21.

Under the provisions, any legislation which appears to derogate from the core of the treaty may be read and applied so far as possible to make readings compatible (similar to HRA section 3) and where incompatible the Scottish court may act as *incompatibility declarators* (similar to HRA section 4), while legislation enacted prior to the Bills assent may be struck down entirely by justices.[549]

This case before the Supreme Court analyses section 28(7) of the Scotland Act 1998, which provides a statutory affirmation of parliamentary sovereignty within devolution legislation, clarifying: '*this section [which allows the Scottish Parliament to make laws] does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'* This follows the assertive reconceptualization of section 28(7) in *Scottish Continuity Bill Reference,* where the Supreme Court outlined how devolved legislation modifies the provision where it creates legal impediments upon Parliament's law-making capacity (for example through requiring subordinate legislation to obtain the consent of Scottish ministers).[550] The Supreme Court in *UNCRC* almost immediately endorses this reconceptualization, identifying the principal challenge to the UNCRC Bill is based around whether it had modified section 28(7) of the Scotland Act 1998.[551] In a pragmatic conclusion which avoids significant discussion into broader devolution principle, the Supreme Court found these three provisions of the UNCRC Bill to be outside the legislative competence of the Scottish Parliament as they would modify section 28(7) of the Scotland Act 1998 by supposedly *restricting* Parliament's power to make laws for Scotland.[552]

In relation to section 19 of the UNCRC Bill which provides, '*So far as it is possible to do so, legislation mentioned in subsection (2) must be read and given effect in a way which is compatible with the UNCRC requirements*', the court found that conferring such distinct powers of interpretation to Scottish courts would negatively affect Parliament's ability to legislate for Scotland.[553] Analysing the implications of extending the powers of interpretation used in review of potential human rights violations to enforcing Scottish

[549] UNCRC Bill, s 19-21.
[550] *Scottish Continuity Bill Reference* (n 97), [51], [52], [64].
[551] *UNCRC* (n 546) [5].
[552] ibid [90]; Scotland Act 1998, s 28(7).
[553] *UNCRC* (n 546) [24-35]; UNCRC Bill, s 19(1).

legislation, the court provided, *'[a] provision which required the courts to modify the meaning and effect of legislation enacted by Parliament would plainly impose a qualification upon its legislative power.'*[554] The implementation of these provisions were therefore considered to constitute a modification to section 28(7) by illegitimately reformulating how Parliament's law would be affected in Scotland.

In relation to section 20 of the UNCRC Bill, providing '*If the court is satisfied that [a pre-existing] provision is incompatible with the UNCRC requirements, it may make a declarator stating that the provision ceases to be law to the extent of the incompatibility (a "strike down declarator").*'[555] The court identifies this provision as more drastic in effect than others, giving rise for powers conferred upon the courts to invalidate provisions of an Act of Parliament and end their continuing operation in Scotland.[556] These powers go beyond those found in the HRA – a declaration of incompatibility does not invalidate statute, whereas UNCRC Bill section 20 may cease the legal effect of statute.[557] In analysis of how the provision would affect Parliament's ability to legislate, the court provided:

> Section 20 of the Bill would qualify Parliament's power to allow existing legislation to remain in force unamended. It would be compelled either to legislate [...] or to allow the decision as to which statutory provisions should subsequently continue to be law in Scotland to be made by the Scottish courts, applying section 20 of the Bill, rather than by Parliament itself.[558]

Ultimately, this provision was therefore deemed to undeniably affect Parliament's legislative options for Scotland, with the potential for '*Acts of parliament [to become] conditional on the courts' being satisfied as to their compatibility.*'[559] The court suggests the UNCRC Bill would broadly empower the judiciary to assertively review statutory provisions and unilaterally erode their effectiveness, evidencing a dynamic expansion of

[554] ibid [28].
[555] ibid [40]; UNCRC Bill, s 20.
[556] *UNCRC* (n 546) [40-45].
[557] ibid [39].
[558] ibid [42].
[559] ibid [45].

non-legislative authority whereby Parliament's law may require the courts' consent for its application.

Finally, the court examined UNCRC Bill section 21, which provides, '*If the court is satisfied that the provision is incompatible with the UNCRC requirements, it may make a declarator stating that incompatibility (an 'incompatibility declarator')*.'[560] Such a declaration would have the same legal affect as a declaration of incompatibility made under the HRA,[561] it would not affect the '*validity, continuing operation or enforcement of legislation*', rather imposing political pressures for reconsideration.[562] The Supreme Court's perception of any declaration made under section 21 would indicate *'judicial condemnation [of a Parliament failing] to meet a legal standard embodying international obligations*', inevitably affecting Parliament's options in legislating for Scotland through imposing '*pressure on Parliament to avoid the opprobrium which such a finding would entail*.'[563] Therefore, the pressures which may be imposed upon Parliament when attempting to legislate contrary to the UNCRC treaty are considered sufficient to make Parliament's law-making powers *conditional* – contrary to the provisions of the Scotland Act 1998.[564]

Consequentially, these three provisions were deemed outside of the competence of the Scottish Parliament due to their implications upon Parliament's ability to legislate for Scotland. However, academic reaction highlights the court's treatment of sovereignty as concerning in the extent to which it constrains devolved legislative competencies.[565] In their readings of the Scotland Act 1998 and its provisions on Parliament's freedom to legislate, the Supreme Court are perceived to have taken a '*very wide view*', going so far

[560] UNCRC Bill, s 21(2)
[561] See text to n 270.
[562] UNCRC Bill, s 21(4)(a).
[563] *UNCRC* (n 546) [52].
[564] ibid [54]
[565] See, Aileen McHarg, 'The contested boundaries of devolved legislative competence' (Bennet Institute for Public Policy, May 2023); Kasey Smith, 'Making Rights Real Through Human Rights Incorporation' [2022] 26 Edinb LR 1; Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: Legislative Supremacy, Parliament's 'Unqualified' Power, and 'Modifying' the Scotland Act' [2021] UK Const L Blog.

as to determine it provides Parliament with unqualified power to make law for Scotland.[566]

Ultimately, the provisions of the UNCRC Bill would not directly impugn upon parliamentary sovereignty if effected; nevertheless, the Supreme Court explicitly expands upon the decision from *Scottish Continuity Bill Reference,* identifying:

> As the judgment in the *Continuity Bill* case made clear, the Scottish Parliament cannot make the effect of Acts of Parliament conditional on decisions taken by other institutions, since to do so is to restrict Parliament's power to make laws for Scotland.[567]

UNCRC evidently develops this line of authority, suggesting that where a devolved legislature makes law which to *any* extent may impede Parliament's effectiveness, it will constitute a restriction upon Parliament's powers to make law for that jurisdiction and modify section 28(7) of the Scotland Act 1998.

Furthermore, analysing the similarities between the UNCRC Bill and provisions within human rights legislation (acknowledged at length by the court), the Bill's treatment of incompatible legislation in sections 19 and 21 are effectively identical to the framework within sections 3 and 4 of the HRA. It therefore becomes problematic as the reasons for which sections 19 and 21 offend parliament's sovereign power to legislate are also found within the operation of the HRA.[568] Suggesting that the provisions of human rights legislation give rise to a court modifying the meaning of legislation and qualifying Parliament's power is a remarkable instance of the modern court departing from well-established understandings of the HRA and how it interacts with sovereignty.[569]

Although the court's treatment of section 20 of the UNCRC Bill may be more expected due to its *drastic* nature (as the court suggests), it nevertheless reveals a shifting judicial attitude towards the balance of power between centralised and devolved lawmakers. In any event, Scottish Ministers and the Scottish Parliament possess the powers to repeal

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[566] Mark Elliott and Nicholas Kilford, 'The Supreme Court's Defence of Unqualified Lawmaking Power: Parliamentary Sovereignty, Devolution and the Scotland Act 1998' [2022] 81 CLJ 4.
[567] *UNCRC* (n 546) [30].
[568] ibid.
[569] ibid.

provisions of UK legislation where they relate to the jurisdiction of the Scottish government.[570] Rather than creating a new power wholly outside of existing principle, it builds upon existing legislation. While the Supreme Court rejected this argument finding it would nevertheless make statute conditional on judicial approval,[571] settled principle would allow for an alternative rationalisation, clarifying how the court's reformulated treatment of section 28(7) of the Scotland Act 1998 illustrates narrower and more unorthodox viewpoint towards the requirements of parliamentary sovereignty.

The implications of the approach taken by the court suggests a shift in judicial perceptions of parliamentary sovereignty may be visible. Upon first inspection, the court's decision may be perceived as a rejection of increased assertive judicial activity, signifying an orthodox formulation of principle returning to practice, however, the judicial use of devolution legislation to expand requirements for Parliament to be effective in the wake of any impediments whatsoever indicates a more dynamic interpretation. The reading of sovereignty examined in *UNCRC* provides an account which reformulates the applications of statutory authority, '*the Supreme Court [having] relied on an unorthodox and expansive notion of parliamentary sovereignty requiring Westminster to be free not only of legal, but also of practical constraints on its legislative power*.'[572] Additionally, on how the court had departed from understood constitutional principle, Elliott and Kilford provide:

> On the constitution more widely, this judgment represents an interesting, and perhaps unexpected, departure from orthodoxy. First, it views the HRA [...] as a piece of legislation that compromises parliamentary sovereignty – a characterisation of the HRA that may impact on the debate about its future. Second, it views parliamentary sovereignty as a concept sufficiently flexible as to be capable of tolerating such compromise. The HRA is widely understood to have been designed to preserve a more rigid, less forgiving conception of sovereignty.

[570] *UNCRC* (n 546) [44-45].
[571] ibid.
[572] McHarg, 'The contested boundaries of devolved legislative competence' (n 565).

> The Supreme Court, at least implicitly, suggests that such an attempt was neither successful nor necessary.[573]

This case presents an obscure image of the continuing formulation of sovereignty; the Supreme Court analyses devolved authority through an increasingly restrictive lens which rejects dynamic approaches towards the effective empowerment of devolved legislatures.[574] However, the court's approach towards human rights legislation suggests the court's authority in protecting rights may compromise orthodox formulations of sovereignty through the review Parliament's capability to legislate against HRA provisions. Throughout the Supreme Court's decision, there is a departure from settled authority, with the devolved democratic voice of Holyrood limited by a narrow reading of devolution legislation which reformulates the doctrine of sovereignty as devolved governments are left uncertain towards their limits.

5.6.2. *Scottish Independence Referendum Bill*

Secondly, the Lord Advocate made reference to the Supreme Court in relation to the Scottish Parliament's intention to enact legislation giving rise to a Scottish independence referendum in *Scottish Independence Referendum Bill, Re*.[575] Although a Scottish independence referendum was held in 2014, it significantly failed to answer how Scotland may trigger any subsequent independence referendum.[576] This initial referendum was legitimised by statute, ensuring its legal validity through explicitly-worded legislation to that effect.[577] Consequently, when the Scottish government expressed an intention to legislate to affect an advisory referendum within Scotland on continued UK membership, the Lord Advocate made reference to the court under the Scotland Act 1998 to reach a determination on whether Holyrood can unilaterally make arrangements for such a referendum.[578]

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[573] Elliott, Kilford, 'The Supreme Court's Defence of Unqualified Lawmaking Power' (n 566).
[574] Existing principle identifies ASPs as the '*highest legal authority*' in Scotland; *AXA* (n 100).
[575] *Re, Scottish Independence Referendum Bill* [2022] UKSC 31 (*SIRB*).
[576] See, Stephen Tierney, 'Direct democracy in the United Kingdom: Reflections from the Scottish independence referendum' [2015] 4 PL 633; Nicholas Aroney, 'Reserved Matters, Legislative Purpose and the Referendum on Scottish Independence' [2014] 3 PL 421.
[577] Scottish Referendum Independence Act 2013, s 34.
[578] *SIRB* (n 575) [1].

While there were multiple questions before the court in this case (including constitution of '*devolution issues'* and criteria for making a reference under devolution legislation), the element relevant to tracking parliamentary sovereignty is the Lord Advocate's suggestions that unilaterally legislating to hold a referendum on UK membership was beyond the competencies of the Scottish Parliament. The court responded with an analysis on reserved powers in relation arranging an independence referendum; although a referendum may only be advisory in its legal affect, it cannot be disregarded as constitutionally unimportant – as acknowledged by the courts following the Brexit referendum.[579]

In relation to matters reserved from devolved competencies, the Supreme Court identified two which were relevant in this case: the Union of England and Scotland; and the UK Parliament (which encompasses parliamentary sovereignty).[580] Upon making its decision, the court identified the potential for a referendum to relate to the Union, even where the result is not legally binding and the Bill specifies its advisory nature.[581] Ultimately, the court found that an advisory referendum would have more than a loose or consequential connection with the Union of England and Scotland due to its potential to prompt or indirectly bring about an end of the Union.[582]

The court's decision surrounded the realities of holding an extraordinary referendum; rather than consider an advisory referendum in a vacuum through suggesting its outcome would merely provide an insightful poll of Scottish attitudes. The courts alternatively suggest:

> A clear outcome, whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate. The clear expression of its wish either to remain within the United Kingdom or to pursue secession would strengthen or weaken the democratic legitimacy of the Union.[583]

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[579] ibid, [79]; Matthew Psycharis and Alistair Mills, The Scottish Parliament, the Supreme Court, and an Independence Referendum? [2023] 28(1) Judicial Review 43.
[580] *SIRB* (n 575) [76]; Scotland Act 1998, sch 5; Legal Continuity Bill (Scotland*)* [61].
[581] *SIRB* (n 575) [76-83].
[582] ibid [82].
[583] ibid [81].

These consequences cannot be dismissed in spite of attempts by the Scottish government to maintain an advisory narrative to the proposed referendum. Reanalysing the judicial approach towards statutory interpretation, the Supreme Court's view is generally consistent with *Imperial Tobacco,* both through its conservative attitude towards the extent of devolved authority and on its reading of the Scotland Act as any other, providing, '*This requires courts to interpret legislation according to the natural or ordinary meaning of the words. In reaching this determination, the context and purpose of the legislation is also important*.'[584] The context surrounding a potential referendum was further considered, with the legitimacy afforded to a referendum socially perceived to extend to its outcome. A referendum carries an '*official and formal character*', legitimised by statute and governed by a set of campaign regulations to ensure fairness.[585] Additionally, a referendum carries with it an expression of democratic purpose, holding more authority than an opinion poll and likely going so far as to prompt significant calls to end the Union should the result outline a clear mandate.[586]

Ultimately, academics consider the court's decision in relation to its determination that legislating to hold an advisory referendum on UK membership is reserved to the UK Parliament, finding the overall decision unsurprising considering the recent trajectory of judicial treatments of Parliament's authority and reactions to referendums.[587] Specific aspects of the court's treatment of devolved institutions are concerning; although the decision may be rooted in constitutional principle (albeit with narrow readings of principle), it leaves the Scottish government no effective means for triggering a course of action leading to independence without legislative consent from the UK Parliament.[588] While this may have been the case prior to the establishment of the Scottish Parliament,

[584] Andrew Sanger and Alison Young, 'An Involuntary Union? Supreme Court Rejects Scotland's Claim for Unilateral Referendum on Independence' [2023] 82 CLJ 1; Stephen Tierney, 'The Scottish referendum question: what might the Supreme Court decide?' (Cambridge, Bennet Institute for Public Policy 06 October 2022).
[585] *SIRB* (n 575) [78].
[586] ibid [82]; Chris Himsworth, 'Referendum Bill Consequentials' [2022] UK Const L Blog
[587] Sanger, Young (n 584); see *R v Luckhurst* [2022] UKSC 23.
[588] Aileen McHarg, 'The limits of legalism' in 'Indyref: Off limits for now' (Law Society of Scotland, 12 December 2022).

states such as Scotland in the modern international climate are entitled to the fundamental and inalienable right to self-determination within international law.[589]

Although the court found the right to self-determination does not need to be applied in this instance upon examining international precedent, this presents the precarious nature of powers relating to independence.[590] While it appears Scotland does not have an explicit legal right to unilaterally trigger its own independence, there are no explicit barriers preventing Holyrood from taking this course of action. This signifies that once again, where multiple approaches towards contemporary cases could be rationalised using existing constitutional principle, the court provides a narrow, restrictive reading of Holyrood's legislative capacity. This decision illustrates the contemporary Supreme Court's treatment of parliamentary sovereignty as an orthodox reaffirmation of Parliament's exclusive central authority pertaining to matters of constitutional importance and the fundamental requirement for statutory consent to affect change to constitutional arrangements.

However, the Supreme Court identifying barriers to Holyrood's legislative options pertaining to Scottish independence evidences a judicial engagement with highly political affairs using a narrow and restrictive interpretation of devolution legislation. This reading of statute has given rise to increased judicial engagement with democratic authority where it did not necessarily need to; the court acknowledge that the referendum would express the legitimate democratic view of the Scottish electorate, and subsequently curtail attempts to identify those views. With the expansive development of devolution legislation suggesting the significance of the democratic Scottish voice, the court's decision dynamically departs from broad perceptions of devolved competencies and assertively reaffirms the judicial role within the political domain.[591]

5.6.3. *Allister*

Finally, this chapter will examine the Supreme Court's treatment of parliamentary sovereignty in *Allister's Application for Judicial Review* (*Allister*).[592] Following the

[589] *SIRB* (n 575) [85].
[590] ibid [88-91].
[591] See text to n 289; *AXA* (n 100).
[592] *Allister's Application for Judicial Review, Re* (*Allister*) [2023] UKSC 5.

negotiations preceding the UK's exit of the European Union, Parliament enacted withdrawal legislation incorporating the terms of Brexit deal within domestic law.[593] Among the provisions within withdrawal legislation, the Northern Ireland Protocol outlines the arrangements for the UK-Ireland border following the finalisation of Brexit, and its provisions consequently became law.[594] However, a challenge was brought before the courts, suggesting that the implementation of the Northern Ireland Protocol would bring about a deprivation of the *rights of a constitutional character* provided within Article VI of the Acts of Union 1800.[595]

The 1800 legislation governed the terms which brought about the Union of Great Britain and Ireland, with provisions remaining in effect as one of the key historical statutes pertaining to the framework of shared rights between Northern Irish citizens and English/Scottish/Welsh citizens. Article VI of the Acts of Union specifically concerns the equality in trading opportunities and treaty privileges enjoyed between UK citizens, requiring all Northern Irish citizens be on '*equal footing'* to those in Great Britain. Due to the significance of the legislation, the Acts of Union are considered constitutional in their nature.[596]

Applicants brought a challenge before the Supreme Court in light of their rights enshrined within the Acts of Union, with it uncontested that the provisions of the Northern Ireland Protocol did contradict the historical terms of Article VI. However, within the provisions of withdrawal legislation, Parliament enacted section 7(a) which not only ensures all Brexit terms are directly applicable into domestic law [7(a)(2)], but additionally that '*every enactment is to be read and has effect subject to subsection (2)*' [7(a)(3)].[597] The implications of this provision suggest that the Northern Ireland Protocol within withdrawal legislation must be applied in spite of any prior statutory measures whatsoever.

However, as examined throughout this thesis, there have been reformulations of orthodox principle which identify statute equally in all cases; it has been subsequently

[593] European Union (Withdrawal) Act 2018; European Union (Withdrawal Agreement) Act 2020.
[594] ibid.
[595] Act of Union (Ireland) Act 1800; Union with Ireland Act 1800; *Allister* (n 592) [52].
[596] See, John Ford, 'The Legal Provisions in The Acts of Union' [2007] 66 CLJ 1 106.
[597] European Union (Withdrawal) Act 2018, s 7(a).

understood that among statutes there are *constitutional instruments* which are integral to the formulation of existing UK arrangements.[598] Examining dynamic readings of parliamentary sovereignty in relation to the repeal of constitutional statutes, the Supreme Court's approaches in Chapter 2 evidenced a requirement for explicit statutory wording affecting the removal of specific constitutional provisions.[599] Therefore, the provisions within section 7(a)(3) of the 2018 withdrawal legislation may be read to allow for the reversal of statute categorised as *constitutional instruments* (orthodox), while starkly the provision may fail to suffice as it did not explicitly give rise for the provisions of key constitutional instruments such as the Acts of Union to be reversed (assertive).

The applicants proposed that section 7(a) is not so specific as to require the courts to disregard the contrary provisions of the Acts of Union and apply the Northern Ireland Protocol, due to its general vagueness in relation to specific legislation balanced against the fundamental constitutional significance of the 1800 Acts.[600] The court in their response provided:

> The debate as to the [creation of] fundamental rights [...] statutes of a constitutional character, and as to the correct interpretative approach when considering such statutes or any fundamental rights, is academic. Even if it is engaged in this case, the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament. Furthermore, the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. The most fundamental rule of UK constitutional law is that Parliament [...] is sovereign and that legislation enacted by Parliament is supreme.[601]

This approach clarifies the contemporary court was satisfied that the provisions in section 7(a) were sufficient in conveying the express intentions of Parliament – to make provisions within withdrawal agreements directly appliable in spite of any pre-existing statutory barriers. Additionally, in any event, the court departs from assertive principle

[598] See, *Thoburn* (n 82); *HS2* (n 100).
[599] See text to n 361; *HS2* (n 100); *UNISON* (n 201).
[600] *Allister* (n 592).
[601] ibid [66].

through dismissing understandings that legislation which is integral within the UK's constitutional framework (e.g. Magna Carta 1215, Bill of Rights 1689, Human Rights Act 1998) is not in practice distinguishable from *ordinary legislation* when assessing their legal validity. Alternatively, the Supreme Court rejects assertive principle applied in *AXA and HS2* through affording Parliament a broad scope of authority to affect to implicit erosion of rights of a constitutional character - the usefulness of identifying constitutional statutes or their protection from implicit modification is confined to the academic legal field, allowing for the court to engage in more *pragmatic* discussion.[602]

Academics note how the pragmatic characteristics of this judgment have resulted in extremely limited engagement with fundamental constitutional issues that may arise, focusing on relevant statutory provisions alone.[603] Due to the lack of rationalisation offered, scholars may propose potential approaches to examine how this case effects the position of sovereignty.[604] With a perception of judicial activity seeming to comprehensively dismiss the constitutional statutes doctrine as *academic*, the end of EU primacy may illustrate a return to orthodox formulations of Parliament's will, with the assertive review of implicit legislation using an origin of authority separate from legislation no longer accommodated within domestic arrangements.[605] Alternatively, judicial attitudes in *Allister* may be an outlier, using a highly orthodox methodology to achieve fundamental goals of ensuring a successful exit of the EU. Admittedly, the court regarding the constitutional statutes issue as '*academic'* is considered deeply regrettable by academics due to the lack of '*normative richness'*, which decades of expansive judicial discussion had guarded against.[606]

It is difficult to expand upon the court's treatment of sovereignty in *Allister* to analyse the continuing approach towards assertive principle; the pragmatic approach cannot be too highly speculated upon, although it is clear the judicial approach in *Allister* illustrates a

[602] Kacper Majewski, 'Re Allister: The End of Constitutional Statutes' [2023] UK Const L Blog; see text to n 361.
[603] Mark Elliott and Nicholas Kilford, 'Nothing to See Here? Allister in the Supreme Court' [2023] Edinb L R 20.
[604] ibid; Majewski (n 602); CRG Murray and Niall Robb, 'From the Protocol to the Windsor Framework' [2023] 74 NILQ AD1.
[605] ibid.
[606] Elliott and Kilford, 'Nothing to See Here?' (n 603).

positive orthodox conceptualization of Parliament's legislative authority. Significantly, as there is considerable judicial authority pertaining to the constitutional statutes doctrine, it is entirely possible that the court could have taken an alternative approach in this case – highlighting the non-explicit nature of section 7(a) and the significance of constitutional statutes.[607] Once again, the Supreme Court resolves to vest within Parliament the authoritative power to legislate without restrictions, embracing core perceptions of static orthodoxy in places.

However, despite the court's clarification of Parliament's dominance within the constitution, the powers of interpretation exercised in *Allister* may have more considerable implications of dynamic sovereignty.[608] Supreme Court justices in this case utilised powers of statutory interpretation to a grand extent, reading an implicit provision to affect the reversal any enactment regardless of its constitutional significance. Examining the varying contemporary approaches towards sovereignty, this orthodox formulation of judicial authority is inconsistent with the dynamic judicial activity identified throughout this era, suggesting that this static account may signify in increased degree of deference to the orthodox understandings of Parliament's supreme authority with regards to the UK's cohesive separation from the EU. Indeed, *Allister* illustrates the Supreme Court is capable of using significant interpretative methodology to ensure Brexit legislation is enforced, departing from recent assertive barriers to Parliament's unlimited legislative capacity.

5.7. Conclusion

The decisions provided by the courts throughout this period have illustrated complex developments to the judicial application of parliamentary sovereignty. Examining the nature of the modern judiciary and its developing jurisprudence, it appears the wider judicial outlook of the court has shifted. Considering the frequency of dynamic applications of sovereignty in the early years of the court and the extent to which orthodox norms have been departed from, the court's decisions indicate an increased likelihood

[607] ibid.
[608] ibid.

for the assertive treatment of sovereignty when analysed alongside the historical judicial trajectory of sovereignty's treatment.

However, the complexity surrounding dynamic developments to sovereignty's conceptualisation has become evident. Cases such as *Miller 1* and *UNISON* signify how in the contemporary constitutional culture, a decision which appears to embrace orthodox aspects of sovereignty may in fact, provide implications for subsequent challenges to the historical account and develop judicial dynamism.[609] In such decisions, there is a visible judicial hesitancy to radically deviate from conventional approaches to sovereignty, with the court presenting itself independently in the constitutional sphere while not directly opposing the executive nor perceiving itself as inherently assertive.

Nevertheless, this chapter has evidenced the emergence of a Supreme Court which has increased confidence in providing assertive decisions which depart from orthodox norms where required, keen to balance the extent of dynamic activity alongside the decisions which are considered is absolutely necessary. It therefore appears that the outlook towards judicial decision-making has changed: the expansion to dynamism in practice examined in Chapters 2 and 3 have effectively situated dynamic reasoning around constitutional principle that when expanded upon by an assertive court, allows for a greater reformulation of sovereignty. While scholars note the removal of institutional restraints and enhanced transparency may have produced a judicial institution which is more effective at reviewing executive action in an assertive way which may have been previously off-limits,[610] these decisions build upon the developments which have been taking place for decades.

Furthermore, with the increasing appearance of assertive implications within decisions, there has been a shift away from the historical approach as such readings seem to be more assertive than holistic. Where previously, challenges to law-making bodies and attempts to constrain sovereignty's dominance would rely upon empowering legislation (e.g. ECA, HRA), challenges within the Supreme Court era tend to utilise non-legislative origins of authority. This application of non-legislative authority has given rise to the re-

[609] Elliott, 'In Search of Constitutional Principle' (n 133).
[610] Drewry G, 'The UK Supreme Court – A Fine New Vintage' [2011] 3 IJCA 2.

emergence of the common law as a process for imposing limitations upon law-makers,[611] and significantly, the absence of EU law to deter any executive efforts to undermine the rule of law appears to have acted as a catalyst for the judiciary to fill the consequential vacuum (although it is clarified that the common law cannot hold the same hierarchal status held by EU primacy).[612]

The Supreme Court through the 2010's appeared open to using this assertive activity to bring about reformulations to parliamentary sovereignty, with the *Miller* cases suggesting it had been expanded upon to create a constitutional requirement that Parliament be effective. This assertive reconceptualization of how sovereignty should be treated by the courts evidences that there must be constraints upon how the courts use this viewpoint to modify understandings of orthodox principle.

Ultimately, while this chapter illustrates an assertive repositioning of parliamentary sovereignty and its role in relation to judicial authority, further analysis of the judicial attitude is essential. As examined throughout this chapter, cases have been prompted by extreme and unique contexts (creation of the Supreme Court, Brexit, consideration of the court's own remit) which may have influenced judicial attitudes. Significantly, this will impact the extent to which these decisions illustrate a lasting change in the approach of the judiciary to its understanding and application of parliamentary sovereignty: where a principled and defensible assertive viewpoint can be applied in constrained instances, it may truly advance longstanding recalibrations of how parliamentary sovereignty is treated in practice.

[611] Masterman, Wheatle, 'Unity, Disunity and Vacuity' (n 79) 15.
[612] Elliott, 'The Rule of Law and Access to Justice' (n 469); Austin Chan, 'Protecting Rights under the Common Law: R(UNISON) v Lord Chancellor' (LSE Law Review Blog, 1 February 2020).

6. Chapter 5

Evaluating the dynamic change in judicial attitudes

6.1. Introduction

This thesis has tracked the treatment of parliamentary sovereignty by the judiciary, finding that the treatment of sovereignty has shifted from orthodox readings (which embrace historical Diceyan aspects of sovereignty and retain the *static* attitude that the judiciary are limited in their powers to curtail government policy) towards more dynamic approaches (an active stance which allows for the co-existence of parliamentary sovereignty and other constitutional principles, and may permit a more flexible understanding of judicial authority).

This has been visible through the assessment of the visible models of applying parliamentary sovereignty found within a spectrum ranging from static to orthodox. A series of examined key decisions provide dynamic approaches towards sovereignty which have been categorised under the following: the 'refinement approach', where judicial reasoning seeks to make minor modifications to orthodox aspects of parliamentary sovereignty in order to improve its suitability to meet contemporary requirements without compromising the core of Diceyan orthodoxy; the 'holistic approach' where sovereignty may be perceived dynamically within the wider constitutional ecosystem, operating alongside constitutional fundamentals such as the rule of law and separation of powers, rather than envisaging sovereignty as the dominant constitutional principle; and the 'assertive approach', irreconcilably deviating from orthodox fundamentals, such as displacing sovereignty in the constitutional hierarchy using authority separate from legislation or reviewing matters traditionally reserved as *democratic affairs*.

Ultimately, while this thesis has tracked the gradual development of judicial approaches towards parliamentary sovereignty from orthodox to dynamic, decisions which have provided dynamic authority have been often considered problematic, requiring a final evaluation of the spectrum of viewpoints. Therefore, this chapter will provide further

analysis into the lasting positions of the models identified and analysed through Chapters 1-4 and identify a position on the judiciary's use of dynamic outlooks in practice.

6.2. Findings on the position of dynamic viewpoints

Throughout this thesis, the viewpoints identified towards the judicial treatment of parliamentary sovereignty have developed and become something which would have seemed constitutionally alien some decades ago. Over time, the emergence of dynamic models for examining and applying sovereignty have incrementally brought about a broad spectrum of understandings allowing for its reformulation. Certainly, there has been a lasting departure to orthodox principle which has applied (to varied extents) constraints and qualifications to the formerly unlimited legislative capacity.[613]

Nevertheless, orthodox principle has not been replaced; indeed, the application of sovereignty has become less rigidly principled as dynamic viewpoints expand.[614] None of the dynamic models has been able to stabilise as the dominant approach towards sovereignty. Yet, they are all distinctly visible, sometimes between justices within a case.[615] Dynamic activity in its earliest forms allowed for minor refinement of doctrine, which has expanded into a viable assertive outlook which is capable of reformulating how sovereignty can be applied in practice.[616] These approaches do signal a gradual movement has taken place giving rise for a judiciary which is increasingly constitutionally capable and open to dulling some of the sharper edges of orthodox principle. Having effectively broadened the judicial toolkit pertaining to the treatment of sovereignty, the courts' ability to use constitutional principle as a means of expanding rather than limiting their ability to respond independently and effectively (although not always appropriately) requires a final evaluation; this concluding chapter will now examine the lasting state of each model and take a position on its role within understandings and continuing treatments of parliamentary sovereignty in this judicial era.

[613] See text to n 452.
[614] See text to n 542.
[615] *Jackson* (n 2).
[616] *Miller 1* (n 1); *Miller 2* (n 1).

6.2.1. The orthodox approach

While Chapter 1 established Diceyan orthodoxy once held prominence as a figurehead for understandings of parliamentary sovereignty, subsequent chapters have highlighted how the most static model for applying sovereignty has lost its dominance within judicial reasoning.[617] It no longer represents the ongoing conceptualisations of sovereignty, appearing partially unreliable in responding to constitutional developments which were unforeseeable when dicey crafted his account, built upon ancient principle.[618]

However, Dicey's orthodox model for applying sovereignty proves to be robust in its application; the thorough codification of sovereignty within Dicey's works has perpetually embedded the static viewpoint within understandings of the tenet – making it a permanently defensible approach regardless of ongoing reformulations.[619] Significantly, Diceyan orthodoxy provides the most principled approach towards sovereignty, with distinct aspects and rules which make the viewpoint identifiable.[620] Ultimately, Diceyan approaches are seemingly so intertwined with formulations of UK sovereignty that any comprehensive separation seems impossible.

In any event, parliamentary sovereignty remains at heart of the UK constitution, with no authority outright abandoning settled understandings of Parliament's law-making powers. There is no model of dynamic sovereignty which allows for the unilateral judicial strike down of sovereign legislation; dynamic judicial decisions illustrate a visible hesitance to depart from the explicit intentions of statute, suggesting that Parliament's sovereignty remains the most significant aspect of the constitutional hierarchy, yet no longer to an overriding extent.[621]

Additionally, the continuing role of orthodoxy is not only present where the courts assess their limitations; recent Supreme Court decisions such as *UNCRC* and *Allister* illustrate how judicial reasoning varies over time.[622] This continued presence of orthodox principle within the varying outlooks towards models of applying sovereignty evidence that

[617] *Jackson* (n 2).
[618] Dicey, *Law of the Constitution* (n 4).
[619] See text to n 77.
[620] See text to n 37.
[621] *Jackson* (n 2); *UNISON* (n 201); *Privacy international* (n 496).
[622] See text to n 544.

Diceyan orthodoxy cannot be perceived as entirely out of place in contemporary judicial reasoning. A static orthodox viewpoint remains a viable approach within discussion on sovereignty even where it does not dominate the courts' outlooks in practice.

6.2.2. The refinement approach

However, there has evidently been a shift away from static understandings of sovereignty through dynamic treatment of the tenet in practice. The gradual broadening of viable, legitimate outlooks when applying sovereignty created a space for the development of dynamic attitudes. Through the past century, expanding attitudes towards the application of sovereignty gave rise to the refinement approach, as static aspects of orthodox principle were perceived to require a recalibration to increase their suitability to respond to contemporary constitutional complexities (such as fundamental rights and the legislative hierarchy.[623] These incremental developments to judicial treatments of sovereignty have illustrated how the courts have become able to use common law principles as a means *proto-constitutional review*.[624]

The constitutional use of legality and the identification of *constitutional* statutes for example, highlight the judicial openness towards constraints upon the formerly overriding principle of sovereignty by the start of the 21st century. The static conceptualisation of sovereignty presented in *Ellen Streets Estates* had become too rigid as the role of the court shifts to allow for increased judicial scrutiny at the constitutional level. Without presenting any barriers to Parliament's express legislative capacity, the refinement of sovereignty provides the potential for the courts to constrain the absurd or unintentional derogation of principle which is integral to the constitutional framework.[625]

As this thesis has evidenced, parliamentary sovereignty is longer an overriding force which exists outside the scope of any judicial reformulation. Nevertheless, refining viewpoints retain the core of orthodoxy as the dominant constitutional characteristic and highlight a restraint to depart from orthodox principle assertively. While assertive statements in *Jackson* and *AXA* go so far as to suggest common law tools may override

[623] *Simms* (n 82); *Thoburn* (n 82).
[624] Masterman and Wheatle, 'Unity, Disunity and Vacuity' (n 79).
[625] *Simms* (n 82); *Thoburn* (n 82).

the legislative intention in extreme circumstances, *Thoburn* and *Simms* provide a refinement of principle which aligns with gradual, incremental changes to doctrine and is intertwined with respect to the legislative intent.[626] Upon analysis, refinement provides explicit deference to the core of orthodoxy, and can be distinguished from cases that have more consistently offended orthodox principle.

Having analysed all dynamic viewpoints at this stage, it is clear refining viewpoints have had a significant impact upon the greater trajectory of parliamentary sovereignty – situating dynamic attitudes which would be subsequently built upon to develop holistic and assertive outlooks in practice. This leaves the refinement approach in an uncertain space; it has served as a vehicle for the development of increasingly dynamic attitudes which have consequently created distance from the previously underpinned deference to the legislative intention. Therefore, whether refinement remains a defensible approach in its own right will require continued observation – as orthodox reasoning has resurged in recent years, there may be a lasting desire within the judiciary to reduce the polarisation between attitudes through channelling the core of orthodoxy into dynamic activity.

6.2.3. The holistic approach

Largely, the holistic approach emerged in response to the dynamic political themes of the late 20th century which prompted the judiciary to take an increasingly dynamic approach towards their role and reasonings. Building upon the gradual shift towards an increasingly flexible account of sovereignty (situated through refining attitudes and empowering legislation), the holistic approach illustrates a dynamic judiciary which is capable of reconceptualising sovereignty where it aligns with Parliament's legislation as a starting point. These themes (notably, EU membership, incorporation of human rights, and the establishment of devolved governments) provided a Parliamentary starting point for a greater shift towards dynamic viewpoints, with departure from orthodox approaches towards parliamentary sovereignty increasingly necessary to respond to modern constitutional imperatives.[627] The simple unilateral authority of parliament cannot

[626] McHarg, '50 Problematic Cases – A Comment JPP' (n 200)
[627] *Jackson* (n 2) [102], [105].

continue to be restated in the face of a UK with new demands both politically and socially; it would erode the modern constitutional framework if devolved legislatures were rendered ineffective for example.[628] Rather than sovereignty dominating the constitutional ecosphere, it was required to co-operate with new constitutional fundamentals as they become permanent (or longstanding in the case of EU primacy) aspects of the UK legal order.[629]

Significantly, while holistic viewpoints depart from orthodox principle, they are directed through empowering legislation – highlighting that holistic judicial activity originates from Parliament's authority. While this approach does not go so far in its departure from orthodoxy to displace the core of sovereignty, as these holistic developments exist within the explicit legislative expansion of the judicial role, the holistic model is sufficient in providing a consistent approach towards sovereignty which allows both incremental and more significant departures to orthodox principle in practice.[630]

Therefore, the holistic approach is the most defensible dynamic model as it may be applied in regular judicial adjudication. As the UK underwent some of its most substantial constitutional reform through EU membership and devolution, the holistic response allowed for the (reasonably) cohesive transition as they became longstanding concepts within constitutional understandings. As the only dynamic viewpoint visible through decades of developing judicial understandings in practice, the holistic approach presents a desirable continuing approach – the courts' can depart from static orthodoxy using a viable legitimacy provided by legislation, ensuring Parliament has the required space to fulfil its role at the heart of UK law-making while not assertively impugning upon its legislative capacity unduly.

While recent Supreme Court cases suggest that judicial viewpoints oscillate between static and assertive viewpoints, there remains space within understandings of sovereignty for holistic co-operation. Of the themes analysed in chapter 3, only one – the permanent role of devolved governments – has an assured place in domestic arrangements. The UK has left the European Union, and frontbench MPs increasingly call

[628] See text to n 299.
[629] ibid; *Jackson* (n 2); *Miller 1* (n 1).
[630] *Factortame No 2* (n 102).

for the repeal of human rights.[631] Nevertheless, with assertive viewpoints unsustainable in common, ordinary practice, as new themes change the constitutional landscape, an approach to sovereignty able to respond alongside the balanced role of orthodox principle is necessary for cohesive application of dynamic models of sovereignty.

6.2.4. The assertive approach

The incremental shift towards increasingly dynamic approaches in recent decades placed the judiciary on a trajectory whereby the emergence of an assertive approach was inevitable – departing from the core of orthodox principle through displacing sovereignty in the constitutional hierarchy using judicial authority separate from legislation or Parliament's domain. Preceding the establishment of the Supreme Court, dynamic attitudes within House of Lords' decisions illustrate a shift in judicial conceptualisations; the less dynamic viewpoints in practice have situated a greater departure to the core of orthodoxy.[632] Reaching a terminus in *Jackson*, an assertive approach became visible within judicial understandings of parliamentary sovereignty.[633]

The Supreme Court's decisions further prompt the trajectory of assertive activity; the assertive approach sufficed as a response to extraordinary circumstances within periods of turbulent executive-judicial relationships. Particularly in response to challenges to government action, there is a clear need for a judiciary which is able to effectively scrutinise independently. Unlike holistic viewpoints, assertive outlooks originate from the judiciary rather than Parliament and its empowering legislation.

It cannot be ignored that where the courts take an assertive viewpoint, there is an increased likelihood of provoking social controversy.[634] Nevertheless, the decisions are (although to varying extents) principled; rather than illegitimately abandoning constitutional norms, they build upon existing dynamic decisions to bring about a reformulation of how sovereignty is treated. they can be justified this thesis has evidenced a justification for the existence of the assertive approach to sovereignty within

[631] Although this is no longer executive policy; see Joanna Dawson, 'Research Briefing: Human Rights Act reform' (House of Commons Library 15 November 2022).
[632] *Simms* (n 82); *Thoburn* (n 82); *Jackson* (n 2); *AXA* (n 100); *HS2* (n 100).
[633] *Jackson* (n 2), [102], [163].
[634] Paul Craig, 'Judicial Review, Methodology and Reform' [2021] PL.

the spectrum of dynamic approaches: the effective application of the rule of law can require a dynamic approach towards parliamentary sovereignty which does not originate from Parliament's authority.

While holistic attitudes provide dynamic approaches in response to empowering legislation prompting the courts to engage with dynamic themes, space for assertive outlooks may appear where an increasingly dynamic viewpoint could be required which does not align with activity within Parliament, for example, the effective application of the rule of law through the protection of fundamental rights.[635] Ultimately, the courts should not be prevented from providing a greater degree of scrutiny where required to upholding the rule of law, and fulfilling the judiciary's contemporary constitutional and social role. It would therefore be undesirable to dismiss the assertive approach entirely in the wake of the historical prominence of Parliament's sovereign authority.

However, it must be clarified that it would be undesirable for this model, which is capable of creating qualifications upon sovereignty, to dominate understandings of the tenet. The Supreme Court's line of authority throughout the 2010's can be argued to rely upon its assertive reformulations to justify '*judicial activism in the constitutional arena*.'[636] It is clear that there has been an expansion to the judicial toolkit, the Supreme Court is able to provide an assertive reformulation of parliamentary sovereignty in practice where considered necessary, such as through the expansion of parliamentary effectiveness.[637] If the Supreme Court were continually expanding the capacity to create constitutional rules, it may entrench a constraint to the UK's constitutional flexibility.[638] Usefully, the assertive reformulation of sovereignty appears be confined away from regular adjudication; the presence of assertive decisions does not suggest justices will build upon this reasoning at every possible opportunity. For this approach to become the norm would be incompatible with the constitutional discretion parliament is entitled to.

Therefore, the assertive viewpoint towards the application of sovereignty falls within a very confined space in judicial reasoning: sovereignty can be applied assertively where

[635] *UNISON* (n 201); *Privacy International* (n 496).
[636] McHarg, 'Giving Substance to Sovereignty' (n 440).
[637] ibid; *Miller 1* (n 1); *Miller 2* (n 1).
[638] ibid,16.

necessary in response to *extraordinary* contexts without effecting a longstanding reconceptualising the tenet in practice which cannot be reversed. Assertive attitudes do not need to be carried through to subsequent decisions which may be made under more ordinary circumstances; the Supreme Court is no longer in its early years and there has been more variation between static and dynamic viewpoints in recent years.

Only in these extraordinary circumstances can the assertive approach resemble a defensible model of judicial reasoning. Nevertheless, while this viewpoint may be dormant in regular practice, it is now settled in UK law – to be relied upon at the discretion of the courts, balanced alongside deference to parliament. These constraints provide a safeguard against the indefensible abandonment of orthodox principle in perpetuity, while allowing for the courts to take an assertive role in their treatment of sovereignty where required.

7. Conclusion – Co-existing approaches towards sovereignty

Ultimately, the contemporary Supreme Court's decisions depart from previous identifiable approaches. The treatment of parliamentary sovereignty in recent years illustrates an unorthodox reformulation on how the principle may be effected. Indeed, Parliament is identified as constitutionally dominant, and in any (unrealistically absurd) outright test between it and the judiciary, the democratic institution is likely to prevail. However, the continuing variation of viewpoints within the courts' decisions illustrates that cannot be taken to suggest the continuing judicial attitude will reject dynamic principle and restore an orthodox legal order limiting engagement with statute.

Instead, there is increased space for co-operation between viewpoints; it has been a product of the investigation within this thesis that there a range of distinct approaches towards sovereignty and none is likely to assume dominance within understandings. Yet, these dynamic models do not appear confined to specific timelines, suggesting that each may have a defensible role where required. As examined above, where approaches are tightly confined to require their appropriate application, they can be defended as viable approaches which have empowered the judicial toolkit.

Using an interpretive methodology to re-examine normative understandings of principle within decisions, the trajectory of sovereignty through this thesis illustrates a lasting movement away from Diceyan sovereignty allowing for the expansive reconsideration of how legislation interacts with principles (such as the extent of HRA and devolved powers, but additionally common law doctrines).

Examining this inconsistent approach towards the judicial application of dynamic sovereignty in the contemporary era, context seems to direct the courts with regards to its use of assertive authority. The intended role of the judiciary allows for an effective and non-restrictive approach whereby a court can respond to extraordinary events with flexibility.[639] Significant orthodox or assertive decisions are prompted by their circumstances – responding to political contexts and provide messages surrounding

[639] Woolf, 'The Rule of Law and a Change in the Constitution' [2004] 63 CLJ 2, 317.

wider themes of constitutional regulation; the approaches must be confined in alignment with this. Political realities such as the social requirement for a cohesive and expeditious transition after Brexit might charge a decision, requiring more purposive interpretations which moving away from normative judicial activity. The courts are able to respond pragmatically to politically-charged events, allowing for an application of sovereignty which departs from existing principle without representing a broader shift to judicial attitudes which rejects expansive dynamic formulations of sovereignty altogether. In regular adjudication, less dynamic viewpoints become more desirable, with the holistic approach the most appropriate as allowing for expansive departure from Diceyan orthodoxy without direct opposition to Parliament or encroaching upon a constitutional reformulation in regular practice.

Therefore, no single case can illustrate a permanent reconceptualization of sovereignty; the Supreme Court may take a pragmatic, orthodox approach which does not represent the wider shift in judicial understandings of principle developed over recent decades. Alternatively, upon its requirement, an assertive outlook may emerge suddenly. While historically, a universal orthodox approach had sufficed for applying sovereignty, the contemporary application of parliamentary sovereignty allows for co-existing approaches, whereby the themes of a case may direct how dynamic principle make up parts of a court's decision. This account of dynamic sovereignty allows for wider ebb and flow within its interpretation, providing the judiciary flexibility in deploying models for reconceptualising sovereignty when responding to expandingly complex contexts.

Ultimately, this model of co-existing approaches to sovereignty highlights the extent of the departure from a universal orthodox outlook towards parliamentary sovereignty. It is not as principled or predictable. Contemporary contexts require variation in the application of principle to ensure the continuing effective operation of UK arrangements: where neither would otherwise suffice, orthodox and assertive applications of sovereignty are legitimate approaches underpinned by constitutional principle allowing for a more effective judicial system with more options when ensuring fair applications of parliamentary sovereignty and the rule of law. Whether the dynamic models are capable of being so tightly confined is currently uncertain, but their implications upon the treatment of Diceyan orthodoxy is somewhat more clear: there is a spectrum of

defensible viewpoints which are capable to varying extents of constraining and qualifying orthodox understandings of sovereignty.

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