The Accommodation of Parliamentary Sovereignty in the UK's Territorial Constitution

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Preface

Declaration

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text. It is not substantially the same as any work that has already been submitted, or is being concurrently submitted, for any degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

Abstract

This thesis asks whether, and if so, how parliamentary sovereignty can be satisfactorily accommodated in the UK's territorial constitution. This question means considering whether parliamentary sovereignty—a, if not *the*, central principle in the UK's constitution—can coexist intellectually coherently with the UK's contemporary devolution settlement in a way that accurately and meaningfully characterises both relevant phenomena. In other words, it considers whether the UK's territorial constitution can be considered consistent with parliamentary sovereignty, and what the implications of achieving that consistency are for devolution. It argues that parliamentary sovereignty *can* be accommodated in the UK's territorial constitution in a way that properly and fully reflects parliamentary sovereignty's nature and its doctrinal treatment, and which does not necessarily undermine devolution or have centralising implications.

The accommodation question is posed in light of some important contextual issues, three of which are illustrative: First, a growing trend of centralisation in the UK, wherein the devolved institutions are having their powers reduced (at least in *de facto* terms) and devolution is being perceptibly narrowly construed by the courts. Second, the traction exerted by a broader, more brittle account of parliamentary sovereignty, both in the courts and in political discourse. Third, the instrumentalization of the normative purchase of 'sovereignty' generally, and parliamentary sovereignty specifically, to justify or necessitate the recentralisation of constitutional power. The dominance of the sovereignty principle, this thesis argues, serves to some extent to determine what kind of territorial constitution is possible in the UK. It is therefore important to consider whether, and how, the current devolution framework can be meaningfully said to be consistent with parliamentary sovereignty, or whether that consistency can only be achieved in a way that undermines, or fails to properly reflect the fundamental character of, devolution.

The thesis presents two models that might potentially achieve this 'accommodation'. One—described as the 'reconciliatory approach'—recognises the flexibility of the sovereignty principle and argues that this enables sovereignty to be reconciled with a full recognition of the core components of devolution. The second model—described as the 'protective approach'—considers parliamentary sovereignty as a much broader, more brittle and dominant constitutional force, thus implying a far narrower construction of devolution. The thesis unpacks each of these approaches as categories of practices, that is, legal mechanisms and theoretical frameworks, primarily sourced in case law, academic work, and legislation. Each approach differs on what it considers necessary to provide an account of the territorial constitution which reflects what it identifies as the important aspects of the sovereignty principle.

This thesis argues that the former—the reconciliatory approach—is preferable, and that only it can provide 'satisfactory' accommodation. That approach provides a means to intellectually reconcile both phenomena in a way that accurately characterises parliamentary sovereignty, consistent with that principle's contemporary doctrinal treatment, and does so without necessitating the recentralisation of constitutional power in a way that undermines, or fails to recognise the fundamental character of, the devolution settlement. The protective approach, by contrast, fails to coherently reflect parliamentary sovereignty and cannot accurately account for some of the key aspects of the devolution settlement. The thesis argues that parliamentary sovereignty does not inevitably lead to centralisation, but the protective approach—which does—can be opposed on the basis of its inaccuracy as an account of the constitution.

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Further Notes

Portions of section 3*(b)* of chapter 5 have been published, with certain adjustments, in the following article: Nicholas Kilford, 'The Market Access Principles and the Subordination of Devolved Competence' (2024) 75 Northern Ireland Legal Quarterly 77. For their thoughts and comments on a previous draft of this article, many thanks are owed to Mark Elliott and Chris McCorkindale. For helpful discussion, thanks are also owed to Huw Williams, Robert Schütze and those who attended the conference at which those ideas were first presented: 'Undoing Devolution by the Back Door? The Implications of the United Kingdom Internal Market Act 2020', hosted by Swansea University in July 2022. Thanks are further owed to Tom Hannant and Karen Morrow for their work in organising that event, and to the anonymous reviewers for their comments and suggestions. I am also indebted to Anurag Deb for helpful discussions in developing some of the ideas in that paper. This work itself, including any errors or omissions, is entirely my own.

While developing the ideas in this thesis, I have published a number of other pieces, some of which have been published in collaboration. This thesis itself remains entirely my own work and appropriate attribution to such pieces has been provided where relevant.

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Chapter 1

Introduction

1. The Context

A, if not *the*, central pillar of the UK's constitution is the principle of parliamentary sovereignty. Its continuing importance within the constitutional order is frequently—and increasingly—confirmed in legislation and judicial dicta, and its purchase is significant. Although the meaning of this principle, its scope and its normative foundations are all the subjects of debate, an important question worth considering is what this principle, properly understood, means for *other* parts of the constitution which it inhabits.

One significant part of that constitution is often described as the territorial constitution. Thanks to the devolution of legislative power to institutions in Wales, Scotland and Northern Ireland, Westminster is not the only legislature competent to make laws (of the highest order) for parts of the UK. Indeed, these legislatures possess their own democratic mandates and can amend or set aside certain legislation enacted by the Westminster Parliament. The scope of their powers—their competences—are broad and far-reaching, and the 1998 settlement itself arguably reflects wider constitutional principles, giving effect to a desire to bring law-making power closer to those whom it affects.[1] Devolution,

[1] See generally, 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); Jo Hunt, 'Subsidiarity, Competence, and the UK Territorial Constitution' in Oran Doyle, Aileen McHarg and Jo Eric Khushal Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021); Aileen McHarg, 'The Contested Boundaries of Devolved Legislative Competence: Securing Better Devolution Settlements' (Bennett

emphasising popular sovereignty and moving the UK away from a unitary, centralised constitutionalism, might appear capable of 'undermining the sovereignty of Parliament,'[2] or challenging that principle's status as constitutional lynchpin.

Recently, parliamentary sovereignty has been the subject of renewed focus, with a bolder vision of that principle being increasingly emphasised. Language of asserting[3] or vindicating[4] parliamentary sovereignty, or Westminster's legislative authority, has become more prominent, and the courts have increasingly approached this principle in more substantive[5]—or even panacean[6]—terms. This arguably more dominant conception of the principle is one which has been observed to more readily abrase other parts of the constitution with which it interacts and is accompanied by a perceived narrowing of the interpretation of other principles, norms and phenomena, like devolution. This might manifest as a particular asymmetric approach in the courts, where they interpret other parts

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Institute for Public Policy and Institute for Government 2023) <https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2023/05/Contested-boundaries-devolved-legislative-consent.pdf> accessed 23 May 2023.

[2] Vernon Bogdanor, 'Devolving and Not Forgetting' in Richard Johnson and Yuan Yi Zhu (eds), *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart Publishing 2023) 304.

[3] E.g., Henry Hill, 'Putting Muscle behind the Union' [2021] *The Critic* <https://thecritic.co.uk/issues/november-2021/putting-muscle-behind-the-union/> accessed 10 January 2023; The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, *How Devolution Is Changing Post-EU* (5th Report, Session 6, SP Paper 453, 24 October 2023) para 56.

[4] Vernon Bogdanor, 'Our New Constitution' (2004) 120 Law Quarterly Review 242, 255.

[5] 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* (Hart Publishing 2021).

[6] Mark Elliott and Nicholas Kilford, 'Nothing to See Here? Allister in the Supreme Court' (2024) 28 Edinburgh Law Review 95.

of the constitution—like devolution—in terms that are far narrower and less substantive than the way they interpret sovereignty.[7] Or, in other instances, it might be reflected in a willingness on the part of central institutions to exercise Westminster's legislative power in a way that is less obviously conditioned or tempered by other constitutional principles or interests, like those that defend devolved legislative power. This can be evidenced, for example, in decline in the adherence to the legislative consent convention.[8]

An important question arises concerning the extent to which parliamentary sovereignty is a principle that *can* coexist alongside decentralisation of the type embodied by devolution, or whether there is a tension between these two phenomena that *cannot* be reconciled. This is a question analogous to one that was confronted in the context of the UK's membership of the European Union, where the extent to which parliamentary sovereignty was compatible with, or capable of tolerating, the exigencies of that membership—particularly, the primacy of EU law—was hotly disputed. Indeed, it is at least arguable that a perceived incompatibility between these two phenomena (a sense that membership *was* incompatible with parliamentary sovereignty) contributed to the UK's decision to leave the EU. Bogdanor, for example, argued that membership of the EU had impaired parliamentary sovereignty as a principle with meaningful descriptive purchase in the UK's constitution:

> [T]he doctrine of parliamentary sovereignty clearly means something very different from what it meant before Britain entered the European Community in 1973. It remains in form, but not in substance. In practice, therefore, if not in law,

[7] See McHarg (n 1).

[8] See e.g., The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, *The Impact of Brexit on Devolution* (5th Report, Session 6, SP Paper 223, 22 September 2022); The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee (n 3). See also James Mitchell, 'From Interdependency to Co-Dependency: Changing Relations in the UK and Devolved Governments Post-Brexit' 89 The Political Quarterly 2018.

> parliamentary sovereignty is no longer the governing principle of the British constitution.[9]

Considering what phenomena parliamentary sovereignty is compatible with casts light on—and requires an understanding of—what that principle actually means, as well as requiring and facilitating a close analysis of what these other phenomena themselves amount to, and their implications for the constitutional order in which they sit. To determine whether a certain phenomenon can be reconciled with parliamentary sovereignty in an intellectually coherent way is, therefore, to critically appraise parliamentary sovereignty and the other components of the constitution with which it interacts. In the EU example, for instance, the claim that membership was or was not compatible with parliamentary sovereignty depended on a parallel analysis of what the sovereignty principle consisted *of*, and what the implications of EU membership actually *were*. To an extent, however, it was only through their interaction that light could properly be cast on the meaning of these phenomena. The contours of parliamentary sovereignty, it might be said, are only properly revealed when it is put under significant pressure.

This question—whether certain phenomena are compatible with parliamentary sovereignty—is important because of parliamentary sovereignty's central role within the constitution. It is a principle which, at least to an extent, appears to serve a gatekeeping function: it determines *what* other phenomena can exist or operate sustainably in the UK's constitution, and *how* they can do so. Put another way, certain structures or phenomena are not constitutionally possible if, because and to the extent that they are incompatible with parliamentary sovereignty. Again, to draw on the EU example, EU membership *could only be sustainable if, and to the extent that,* its demands were consistent with parliamentary

[9] Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 283.

sovereignty (at least if parliamentary sovereignty was to continue to have any meaningful purchase).

This mode of thinking can be applied with similar force in the context of devolution. The power of the devolved legislatures to diverge from the centre, their necessary antithesis to a purely unitary conception of the UK, and their power to set aside Westminster legislation all appear to varying extents to be in tension, if not overtly incompatible, with parliamentary sovereignty as it might be traditionally understood. If it is right that such phenomena *are* incompatible with parliamentary sovereignty, they might not be constitutionally sustainable, and would have to be rejected because, to borrow Alison Young's language, they 'question the feasibility of classifying the United Kingdom constitution as one that does, or should, adhere to Dicey's conception of parliamentary sovereignty'.[10] Conversely, a traditional account of parliamentary sovereignty—which for example maintains that it is possible for Westminster, in the stroke of a draftsman's pen, to hollow out the devolution framework—might be incompatible with any meaningful account *of devolution*.

2. Approaching The Issue

Parliamentary sovereignty determines not only *whether* a particular phenomenon is constitutionally sustainable, but also (and at least) *how* that phenomenon needs to be constructed and understood. If that is accepted, then identifying whether, and the extent to which, a certain phenomenon is—or can be—compatible with that principle is an important task. Three obvious approaches to searching for that compatibility follow:

[10] Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Bloomsbury 2008) 5.

A first approach is to simply find a way to interpret, describe, or give effect to parliamentary sovereignty in a way that allows it to 'fit around' other relevant constitutional phenomena. This would be a convenient solution and would require rearticulating the sovereignty principle instrumentally or purposively, so that it is understood in a way that ensures it *is* compatible with other relevant phenomena. However, the problem with this approach is that considering parliamentary sovereignty in such malleable terms is, essentially, to deprive it of content, or at least to be unconcerned with reflecting the principle accurately. The result may be that the 'parliamentary sovereignty' that is compatible with the relevant phenomenon might bear little resemblance to sovereignty's true function, meaning and operation in practice. This approach, therefore, cannot determine *whether* parliamentary sovereignty is compatible with other phenomena; it is simply a way of reimagining that principle *so that it is*. This approach is therefore vulnerable to the criticism that it mischaracterises the sovereignty principle.

A second approach might to undertake a similar kind of exercise, but this time by reinventing the other relevant phenomenon; in this thesis' case, devolution. In other words, devolution could be rearticulated so as to only mean whatever a particular account of parliamentary sovereignty *allows* it to mean. The same criticism applies: this would also be a convenient solution, but reimagining devolution so that it conveniently fits around parliamentary sovereignty is to deprive *that* framework of its meaning, to assert instead that *it* means whatever it has to in order for it to fit around parliamentary sovereignty, and has no content upon which its meaning hangs that cannot be abandoned in pursuit of compatibility. This would be to mischaracterise or erode the substance of devolution, some aspects of which it *may* not be possible to accurately reflect in a way that is compatible with parliamentary sovereignty. The phenomenon that is left once it is made to fit around parliamentary sovereignty might not really be 'devolution' if it has been deprived of so much of its meaning in that process. To reinvent devolution to such an extent that whatever

remains is not *really* devolution is to accept that it is *incompatible* with parliamentary sovereignty, rather than to render them mutually consistent.

A third approach is more tempered, and perhaps more difficult: it asks whether it is possible, in an intellectually coherent way, for devolution and parliamentary sovereignty to coexist *meaningfully*, that is, without mischaracterising either. This means considering, accounting for, and having full regard to the core components of each phenomenon in this interaction. This exercise requires, as has already been suggested, determining *what* each phenomenon actually consists of, something that may only be properly revealed at their point of interaction with one-another.

This third approach does not consider compatibility a foregone conclusion but assesses whether it *might* be possible at all; it is therefore an approach that is open to the prospect that that compatibility might be unobtainable without depriving either phenomenon of its core characteristics. Considering the possibility of coexistence by reference to what each of the relevant phenomena actually demands is, nonetheless, a more satisfactory way of confronting this problem because it is concerned first and foremost with understanding the phenomena accurately; any compatibility it subsequently identifies is therefore meaningful. However, that is not to say that this approach is not still at least partially an exercise in 'rendering' each phenomenon compatible with the other. For example, there may be a particular *way* of giving effect to, or understanding, devolution (or primacy, in the case of EU membership) that is compatible with parliamentary sovereignty, but *also* remains an accurate reflection of the core components of that phenomenon. When we consider whether each phenomenon is compatible with the other, our focus necessarily fixes on what is important, essential and definitional to either phenomenon. Our approach, in order to accurately reflect the phenomena, will need to take *these* aspects into account, but perhaps not those *other* aspects of devolution or parliamentary sovereignty upon which either does not really depend. Considering whether these phenomena can be compatible,

and what needs to be done to ensure that they are, can help illuminate what is most important to devolution and parliamentary sovereignty, and what an account of either *needs* to be able to reflect in order to be considered accurate, as well as what aspects of the phenomena can be considered flexible or peripheral.

It follows from this focus that there are two metrics against which to appraise whether, on the third approach, compatibility has been obtained in a way that is 'satisfactory': (i) whether a particular way of achieving compatibility is consistent with the core aspects of parliamentary sovereignty, and (ii) whether that way of achieving compatibility is consistent with the core aspects of devolution.

To illustrate this reasoning in the analogous context of the primacy of EU law, consider Laws LJ's dictum in *Thoburn* that his approach to reconciling parliamentary sovereignty and primacy—his 'four propositions' including the constitutional statutes doctrine—was an accurate reflection of the two phenomena he was concerned with:

> I consider that the balance struck by these four propositions gives full weight both to the proper supremacy of Community law and to the proper supremacy of the United Kingdom Parliament. By the former, I mean the supremacy of *substantive* Community law. By the latter, I mean the supremacy of the legal *foundation* within which those substantive provisions enjoy their primacy.[11]

Without dealing with the substance of this argument, what is important for present purposes is the way that this argument is constructed. Laws LJ identifies what he considers to be the core components of each phenomenon (which he signals with his own emphasis) and contends that he has reconciled them *without* mischaracterising them. Indeed, he rejected certain alternative characterisations of this relationship which were put to him on

[11] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [70] (Laws LJ) (original emphasis).

the basis that they failed—in his view—to accurately reflect the important aspects of each phenomenon.[12]

Laws LJ asked in *Thoburn* whether—and if so, how—parliamentary sovereignty could coexist with the primacy of EU law, answered that question in the affirmative and presented his framework for achieving that compatibility intellectually satisfactorily, and consistently with the core aspects of each phenomenon. Importantly, of course, this judgment also demonstrates how the core components of each phenomenon can only be properly identified at their point of interaction.

3. The 'Accommodation' of Parliamentary Sovereignty

The research question this thesis asks is this: Can parliamentary sovereignty be satisfactorily accommodated within the UK's territorial constitution and, if so, how? Its answer is that parliamentary sovereignty *can* be satisfactorily accommodated in the UK's territorial constitution, and it identifies a particular model for achieving that accommodation which characterises both parliamentary sovereignty and the territorial constitution with a satisfactory degree of accuracy. Before exploring how that argument will unfold, it is worth at this juncture considering further what is meant by 'accommodation', why this framing is the focus of this thesis, and why it is an analytical lens that is useful and important.

The notion of accommodation is concerned with whether, to what extent, and how other constitutional phenomena—in this case devolution—can coexist alongside parliamentary sovereignty. Accommodation, therefore, focusses on *parliamentary sovereignty*, what is taken to be necessary to guarantee its preservation, and whether that guarantee can be provided

[12] 'Mr Shrimpton's argument is wrong because it would undermine the first supremacy; Miss Sharpston's because it would undermine the second.': ibid (Laws LJ).

in a way that accurately reflects—or also preserves—the core characteristics of other relevant phenomena. Put another way, this thesis enquires into whether, and how, the current devolution framework can be meaningfully said to be consistent with parliamentary sovereignty, or whether that consistency can only be achieved in a way that undermines, or fails to properly reflect certain fundamental aspects of, devolution.

This framing—'accommodation'—is adopted here because it is a way of thinking about the contemporary constitution that is implicit in many, and explicit in some, core doctrinal developments in this area. Given the central position occupied by parliamentary sovereignty, it is often an implicit concern for constitutional development whether certain changes, principles, norms or phenomena can be given effect without impairing or coming into conflict with parliamentary sovereignty. If a certain change is *incompatible* with parliamentary sovereignty, this might be grounds to reject that change, or might mean that it simply cannot be meaningfully effective within the UK's constitution. The UK's constitution, it can be argued, *requires* that certain developments are consistent with that principle and, where they are found to not be so compatible, demands that they must be revised to meet that requirement, abandoned, or will simply be ineffective to the extent that they are so incompatible.

Again, starting in the context of the UK's membership of the EU is instructive. Whether, and how, the primacy of EU law could be given effect in a way that was consistent with the sovereignty principle was the subject of some tortuous debate because it was *parliamentary sovereignty* that determined whether, and how primacy could have domestic effect. If the UK's membership of the EU would impair or undermine parliamentary sovereignty, this might mean that it would not be possible at all or would only be possible in a way that represented a significant constitutional fissure.

For example, the majority in *Miller I* said that 'the principle of Parliamentary sovereignty... is... fundamental to the United Kingdom's constitutional arrangements, and EU law *can*

only enjoy a status in domestic law which that principle allows'.[13] The point in this dictum is that it was parliamentary sovereignty which determined the possible status of EU law. The consequence, the majority explained, was that membership—and primacy—had to (or *could only*) be configured in a way that was consistent with that principle. On the majority's account, '[t]he 1972 Act effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it)'.[14] This reasoning purports, it is argued, to 'accommodate' parliamentary sovereignty: to find a way to think about, and give effect to, the domestic implications of the UK's membership of the EU in a way that is consistent or compatible with parliamentary sovereignty, or that provides sufficient intellectual reassurance that the UK's constitution is still one that meaningfully adheres to that principle.

The next question, which follows from this accommodative exercise, is whether it is possible, once that intellectual reassurance is provided, for the other relevant phenomenon—in this case the domestic effect of EU law—to *itself* be meaningfully and accurately reflected, too. In other words, once parliamentary sovereignty is accommodated, what is left, and is it an accurate picture of the other phenomenon? Laws LJ was addressing this point in his formulation of the relationship between EU and domestic law. He said, as on his view, '[i]f the force of EU law in the UK is *rightly* seen as a delegation of legislative power to the European institutions by the ECA, *it means that the sovereignty of Parliament*

[13] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 [67] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge) (emphasis added).

[14] ibid [68] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

was untouched by our membership of the EU.'[15] Laws LJ was implying that his account was *not only* consistent with parliamentary sovereignty as *that principle* is properly understood, but was also able to accurately account for the effect of primacy in practice.[16]

Put another way, for a particular element of the constitution (in this case, the domestic effect of the primacy of EU law) to be *sustainable*, it can only to be constructed—or, at the very least, understood or conceptualised—in a certain sovereignty-consistent way. The way that a phenomenon is conceptualised *will* affect the way that questions of constitutional law are answered (for instance, the actual effect of primacy in practice) but will also illuminate the contours *of* parliamentary sovereignty that enable—or prevent—that coexistence.

This way of understanding parliamentary sovereignty's interaction with other phenomena is important because, as has been suggested, that principle serves a gatekeeping function for constitutional reform, and provides the parameters within which other constitutional phenomena must—or can only—operate. These phenomena *can only exist* and be given effect to the extent that they are consistent with the sovereignty principle. In this way, considering whether, and how, a certain phenomenon can be compatible with parliamentary sovereignty is of significant constitutional importance.

This kind of analysis has also been prevalent in the context of the Human Rights Act 1998. The various provisions of the HRA have often been measured against their consistency with the sovereignty principle.[17] Leaving aside the substance of the relevant claims since this legislation is not the focus of the thesis itself, consider this passage from the Independent

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[15] John Laws, 'The Miller Case and Constitutional Statutes' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Hart Publishing 2018) 211 (emphasis added).

[16] See ibid 213.

[17] See e.g., Young (n 10).

Human Rights Act Review (IHRAR), which analyses the HRA using the same kind of framework as the *Miller I* majority and Laws LJ did when considering EU membership:

> [making Convention rights effective in the UK] was not, however, *intended to affect the constitutional principle of Parliamentary Sovereignty*. The Judiciary would not, *therefore*, be provided with the power to disapply or set aside Acts of Parliament on the basis that they were incompatible with Convention rights[.][18]

In this passage, the Panel describes how parliamentary sovereignty *prescribed* or *determined* the way in which Convention rights could be rendered domestically effective in the UK, and which options were open or closed off by compatibility with the principle. That requirement meant that the judiciary could be provided with some powers but not others. Indeed, the question of the compatibility of the HRA with parliamentary sovereignty flows throughout the Panel's report. In the IHRAR Panel's view, 'the HRA was carefully drafted to ensure that Parliamentary Sovereignty was not weakened',[19] saying that '[s]ection 4, like section 3, was intended to preserve the constitutional principle of Parliamentary Sovereignty',[20] and that these provisions 'ensur[ed] that the constitutional principle of

[18] Independent Human Rights Act Review, 'Independent Human Rights Act Review: Full Report' (Ministry of Justice 2021) CP 586 ch 1, para 25 (emphasis added). See also Christopher McCorkindale, 'Devolution in Scotland and the Supreme Court: A Question of Interpretation' (2020) 50 Materiali per una storia della cultura giuridica 67, s III.

[19] Independent Human Rights Act Review (n 18) ch 5, para 111. Continues: 'Sections 3 and 4 in no way challenge that aspect of Parliamentary Sovereignty concerned with the UK Parliament's ability to enact legislation.'

[20] ibid ch 5, para 24.

Parliamentary Sovereignty was retained'.[21] The same mode of thinking is detectable in case law, too. Lord Nicholls said in *Re S & Re W* that

> the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.[22]

The IHRAR Panel appears concerned with identifying whether, and how, the HRA can be considered compatible with parliamentary sovereignty, without mischaracterising the way that statute works in practice or its implications for the constitution. Alison Young makes the same point; she says that '[t]he Human Rights Act was intended to provide for a protection of human rights that did not challenge Dicey's conception of parliamentary sovereignty',[23] and that, as a consequence, various 'assurances' were provided within the Act and its surrounding discourse.[24] 'By protecting Convention rights in this manner', Young says, 'Dicey's conception of parliamentary sovereignty is maintained'.[25]

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[21] ibid ch 5, para 9. '[S]ection 3, together with section 4 of the HRA, was intended to ensure that the HRA was not taken as undermining one aspect of Parliamentary Sovereignty, i.e., not permitting UK Courts to set aside legislation, or as providing for the implied repeal of provisions in Acts of Parliament that were inconsistent with Convention rights': ibid ch 5, para 11. 'Section 3 was intended to play a part in ensuring that the HRA was consistent with the constitutional principle of Parliamentary Sovereignty. Specifically, it did not enable [the courts] to challenge the validity of or disapply legislation':: ibid 186. 'A declaration of incompatibility… respects the constitutional principle of Parliamentary Sovereignty': Independent Human Rights Act Review (n 18) ch 5, para 3.

[22] *Re S and Re W (Care Orders)* [2002] UKHL 10, [2002] 2 AC 291 [38]-[40] (Lord Nicholls).

[23] Young (n 10) 3.

[24] ibid 4.

[25] ibid 11.

The prescriptive and gatekeeping functions of parliamentary sovereignty are also sometimes expressly confronted in the context of devolution. McHarg suggests, for example, that certain kinds of devolution are inevitable, and others are not possible, by virtue of their consistency or inconsistency with the sovereignty principle: 'Because of the preservation of the sovereignty of the UK parliament, the devolution statutes can be freely amended to reduce as well as expand devolved autonomy, or they can simply be overridden by UK legislation on an ad hoc basis.'[26] This, of course, forecloses some forms of territorial constitutionalism that require more clearly (and legally) insulated spheres of authority. Similarly, '[many of the problems facing the UK's territorial constitution] cannot therefore be fully resolved without replacing parliamentary sovereignty with a constitutionally entrenched division of power.'[27] McHarg also enquires whether certain features of the devolution settlement are 'necessary to maintain parliamentary sovereignty,'[28] and notes that judges are constrained by the need to avoid 'directly challenging parliamentary sovereignty.'[29]

In its report, the IHRAR Panel, in the HRA context, approaches this by considering variously whether the HRA protects[30] or preserves[31] the sovereignty principle. Young considers whether the HRA might 'challenge' the principle,[32] or whether the UK's constitution, following its enactment, would still meaningfully 'adhere' to it.[33] McHarg

[26] McHarg (n 1) 5.

[27] ibid 17.

[28] ibid 19.

[29] ibid 6.

[30] E.g., Independent Human Rights Act Review (n 18) ch 9, para 14.

[31] E.g., ibid ch 5, para 24.

[32] E.g., Young (n 10) 12.

[33] ibid 5.

similarly talks, in the devolution context, in terms of 'preservation',[34] as well as considering what is 'necessary to maintain'[35] the principle and whether a particular reform or approach might replace it.[36]

This varied language is, in essence, capturing the same idea: the extent to which (or simply *whether*) a particular element of the constitution is compatible or consistent with parliamentary sovereignty; whether it maintains the accuracy of that principle, can be reconciled with it or, in other words, is able to 'accommodate' it. Accommodation, therefore, captures a full spectrum of different ways of identifying whether a certain phenomenon is compatible with parliamentary sovereignty, and what needs to be done to ensure that a certain phenomenon *is* so compatible (ideas about which may vary in intensity). It captures those approaches which simply seek to understand certain phenomena in a way that is consistent with sovereignty, as well as those that seek to protect the sovereignty principle from *any* perceived incursion, and those which seek to build parliamentary sovereignty into the architecture of constitutional reform itself. Such approaches might differ in the way they understand parliamentary sovereignty, and therefore differ on *how* to accommodate it, but they all participate in the same accommodative task.

Again, considering this question in this way is *only* useful if both phenomena—in this thesis' case, devolution and parliamentary sovereignty—are accurately characterised by the relevant accommodative approach. It is that accuracy which renders a particular approach to accommodation meaningful and satisfactory. An approach which *purports* to accommodate parliamentary sovereignty, but in fact simply mischaracterises it, does not

[34] McHarg (n 1) 5.

[35] ibid 19.

[36] ibid 17.

'accommodate' it at all, and an approach which accommodates parliamentary sovereignty but mischaracterises devolution is, equally, unsatisfactory.

4. Analysing Different Approaches

None of this means, however, that a single approach to 'accommodation' is a panacea. Different approaches to purportedly achieving this consistency are apparent, each of which reflects a different constitutional worldview. The IHRAR Panel, for example, incisively detected that not only did the HRA seek to accommodate parliamentary sovereignty in a general sense, but it more precisely adopted *a particular approach* to doing so. Certain proposals might or might not be 'consistent with *the approach* to the protection of Parliamentary Sovereignty adopted more generally in the HRA.'[37] That does not mean that a relevant proposal was inconsistent with parliamentary sovereignty but, rather, that it was inconsistent with *a particular approach* to achieving that consistency.

There are, therefore, different ways that accommodation can be achieved, and different approaches to attempting it. Which approach is adopted, and indeed whether it is considered possible *at all* for a particular element of the constitution to be consistent with parliamentary sovereignty, will depend largely on how that principle is itself understood. For example, the same component of the constitution might be considered consistent with the sovereignty principle on one account (perhaps a narrower, more flexible one), but *incompatible* with it on another (perhaps a broader, more brittle account). What might be sufficient to achieve meaningful accommodation on one account might be nowhere close to sufficient on another. Laws LJ's account might have rendered EU law's domestic status compatible with parliamentary sovereignty on *his* account, but might not satisfy a more

[37] Independent Human Rights Act Review (n 18) ch 9, para 14 (emphasis added).

stringent test like that adopted in *Treaty Incorporation,* where EU membership was considered to amount to a 'qualification' of parliamentary sovereignty.[38]

The IHRAR Panel, mindful of this, was keen to point out that some other proposals put to it did not, in its view, go far enough to ensure they were sufficiently consistent with the sovereignty principle, potentially even endangering it as a result. Even though it had been argued that such proposals *were* sufficiently accommodating, the Panel disagreed, being unsatisfied that their (implicit) account of parliamentary sovereignty would be meaningfully preserved if those proposals were implemented. In other words, such proposals might be consistent with *an* account of parliamentary sovereignty, but that was not an account that the Panel accepted was an accurate or meaningful reflection of the sovereignty principle itself:

> It was suggested… that there is a strong case for permitting UK Courts to set aside or invalidate legislation, *subject to a parliamentary override in order to preserve Parliamentary Sovereignty.*
>
> We note that it was believed at the time the HRA was enacted that if such a power had been provided for in it, *the legislation would not have been enacted*. If there is a case for such a reform it has not been made out to the Panel. We particularly consider, notwithstanding the suggestion that it be made subject to a parliamentary override, that *such a reform could call into question the continued existence of the UK's uncodified constitution and the principle of Parliamentary Sovereignty*.[39]

[38] *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106 [40].

[39] Independent Human Rights Act Review (n 18) ch 5, paras 149-50.

This passage demonstrates the gatekeeping function clearly. If the HRA were not sufficiently accommodating, it 'would not have been enacted'. This was because, absent sufficient accommodation, it would—on the Panel's view—call into question the sovereignty principle (and perhaps the very existence of the UK's constitution itself). Importantly, this passage also demonstrates that what amounts to satisfactory accommodation will vary depending on the account of the sovereignty principle that is accepted and its consequent boundaries and sensitivities. Although a majority of the Panel were satisfied that ss 3 and 4 of the HRA *did* sufficiently accommodate parliamentary sovereignty (given their view of that principle's demands), the majority were prepared to acknowledge that that conclusion was not universally accepted:

> Section 4… does, however, mark an in-road in one respect to the constitutional principle of Parliamentary Sovereignty as, while it deliberately does not permit UK Courts to disapply primary legislation, it permits them to review its compatibility with Convention rights, i.e., it permits (primary) legislation to be questioned even if not set aside. *On some views, such as those of one member of the Panel, this development ought to be rejected for that very reason, i.e., that it is straightforwardly incompatible with the principle of Parliamentary Sovereignty* and, as a consequence, it necessarily disrupts the constitutional balance. That Panel member also considered it provided an incentive to use litigation as 'politics by other means'. The majority of the Panel did not accept these views.[40]

[40] ibid ch 5, para 163 (emphasis added). Similarly: 'We consider there to be very considerable force in the idea that Parliament's role could be enhanced. A significant reason behind the suggested constitutional imbalance between the three Branches of the State stems, in our view, from the perception that sections 3 and 4 have weakened the UK Parliament in carrying out its role as the primary means of securing rights protection in the UK. That is so despite the HRA going to great lengths to preserve Parliamentary

Young similarly notes that '[d]espite these assurances [built into the HRA], doubts have been raised as to the compatibility of the Human Rights Act 1998 with Dicey's conception of parliamentary sovereignty.'[41] Whether a particular provision is understood as meaningfully accommodating, as opposed to being incompatible with, the principle of parliamentary sovereignty will turn on how broad and brittle the relevant conception of sovereignty is. The majority of the Panel accepted that s 4 did represent an 'in-road' into the principle but did not share that particular member's view that this in-road went to the core of the principle and thus fatally impaired it. Instead, the majority of the Panel were of the view that this was an in-road the principle could tolerate and survive, going to peripheral, rather than essential, definitional componentry of parliamentary sovereignty. The majority adopted a narrower, more flexible account of the sovereignty principle, the minority member adopted a broader, more rigid account.

How can these varying approaches be appraised? The answer, as was suggested above, is by reference to the accuracy of their characterisation of the phenomena with which each approach is concerned. If one approach characterises parliamentary sovereignty in terms that are *too* brittle and broad, unrepresentative of that principle's accepted demands in practice, then that approach can be objected to on the basis of its unorthodox or unsound interpretation of the principle. For example, interpreting parliamentary sovereignty as being sensitive to political conditions on the exercise of legislative power—a characterisation that is not an accurate analytical account of the principle[42] (even if it is

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Sovereignty and, as we have noted, sections 3 and 4 giving expression to Parliamentary Sovereignty': ibid ch 5, para 195.

[41] Young (n 10) 4.

[42] Parliamentary sovereignty 'does not purport to describe the scope of Parliament's likely desire and ability to enact statutes as a matter of practical politics': Jeffrey Goldsworthy, *Parliamentary Sovereignty:*

nascent)[43]—arguably mischaracterises the sovereignty principle, and can be criticised on this basis.[44] An accommodation, therefore, that sought to protect Westminster from these kinds of political constraints would, arguably, go too far, providing accommodation that poorly aligns with the principle itself. Similarly, if a particular approach purports to accommodate parliamentary sovereignty, but only in a way that mischaracterises the way that the HRA, the primacy of EU law or devolution (as relevant) operates, then it would be unsatisfactory, failing to reflect the other relevant phenomenon with sufficient accuracy.

This background provides useful framing for the thesis, which considers two approaches or models for accommodating parliamentary sovereignty, and appraises them in precisely this way. One—described as the 'reconciliatory approach'—recognises the flexibility of the sovereignty principle and seeks to reconcile it with a full recognition of some of the fundamental aspects and constitutional implications of devolution. The second model—described as the 'protective approach'—considers parliamentary sovereignty as a much broader, more brittle, and dominant constitutional force, accompanied by a far narrower construction of devolution. The thesis unpacks each of these approaches by considering them as categories of practices which purport to accommodate parliamentary sovereignty: that is, legal mechanisms and theoretical frameworks, primarily sourced in case law, legislation, and academic work, which seek to provide an account of the territorial constitution which is consistent with what each model identifies as the important aspects of the sovereignty principle.

Contemporary Debates (CUP 2010) 303; Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 31.

[43] *Treaty Incorporation* (n 38) [50].

[44] Graeme Cowie, 'The Power to Make Laws for Scotland: The Treaty Incorporation Bills Reference' [2022] Public Law 189, 196–7.

The thesis argues that the reconciliatory approach provides a way for parliamentary sovereignty and devolution to coexist, and does so in a way that characterises both phenomena with a sufficient degree of accuracy. Accordingly, that approach demonstrates that it *is* possible to accommodate parliamentary sovereignty in the UK's territorial constitution. The protective approach mischaracterises parliamentary sovereignty (as an overly-brittle and rigid principle) and fails to accurately reflect some of the core components of devolution (particularly its relationship with Westminster legislation); it is therefore not 'accommodative' in a meaningful sense, and is certainly unsatisfactory.

5. Why This Question is Important

This thesis' research question—whether parliamentary sovereignty can be satisfactorily accommodated in the UK's territorial constitution and, if so, how—is being considered for three key related reasons. The first is because, as has been noted, parliamentary sovereignty serves a gatekeeping function. It provides for what kind of constitution, and what kinds of constitutionalism, are possible. The assertion that a certain kind of constitutional architecture or a legal framework in a strand of case law is incompatible with parliamentary sovereignty is, in this sense, an argument against that architecture or framework, or that it should at least be altered (potentially significantly) to *make* it compatible with the principle. This can have important consequences for the relevant phenomenon. This is surely why the IHRAR Panel considered the accommodation of parliamentary sovereignty such an important question with which to engage: because concluding, as it did, that the current system *was* compatible with parliamentary sovereignty was an argument that it could be maintained. If it failed to make that case, or accepted instead that the HRA *was* incompatible with parliamentary sovereignty, the HRA might not be intellectually sustainable or constitutionally defensible (at least, without requiring reconfiguration or the confrontation of existential questions for the UK's constitution). The *Miller I* majority and

Laws LJ implicitly made this same point: if EU law could not be given domestic effect consistently with parliamentary sovereignty, *it could not be given effect*. The same argument can be made for devolution: the argument that it is or is not consistent with parliamentary sovereignty has implications for its constitutional defensibility. Accommodation is, in a sense, a question of constitutional survival.

Second, as will be seen, looking at the constitution in this way is important for understanding constitutional change. The trajectory of the territorial constitution since the UK's departure from the EU has, arguably, been an increasingly centralising one. The accommodation problem is a useful way of better understanding this trajectory, considering whether it is motivated by parliamentary sovereignty (or a recognised need to alter devolution to fit better with parliamentary sovereignty) and to consider whether that motivation is analytically sustainable, or intellectually sound.

Third, considering whether certain phenomena are compatible with parliamentary sovereignty is a critical vehicle through which to learn about that principle, its meaning, and the meaning of the other phenomena with which it interacts. Their interaction, and the way that interaction is understood, is telling as to their true nature. Furthermore, if phenomena are *not* so compatible, this invites a further, more normative question about which phenomenon, if that is the case, we would like to prioritise.

6. The Argument and Structure of the Thesis

This thesis argues that parliamentary sovereignty can be satisfactorily accommodated within the UK's territorial constitution. This means, in other words, that it *is* possible for devolution to coexist with parliamentary sovereignty in an intellectually coherent way that allows for each to be accurately characterised. This section of the introduction sets out the

devices that are used to make that argument, and the structure by which it is developed in the thesis.

This thesis considers two approaches or models for accommodation: 'reconciliatory' and 'protective'. As these names suggest, each approach is a different account of what is purportedly necessary to 'accommodate' parliamentary sovereignty; whether it is a principle which can be 'reconciled' with the territorial constitution, or one whose proper recognition requires it be 'protected' against devolution. The thesis uses these two approaches as categories, defined by their account of sovereignty's perceived flexibility or brittleness, and the extent to which its pre-eminence leaves intellectual space for other phenomena with which it interacts. The second chapter of the thesis considers where these two approaches come from, and what distinguishes and defines them.

The third chapter then considers the reconciliatory approach, looking in more detail at what defines and distinguishes *it*. Throughout the thesis, two metrics are used to assess whether a particular approach is an appropriate or satisfactory means of securing accommodation. Each of these metrics is a means of appraising each approach by reference to its capacity to accurately characterise parliamentary sovereignty and devolution. Thus, one metric is the extent to which a particular approach treats parliamentary sovereignty in a way that is coherent, consistent with its doctrinal treatment, whilst recognising that this is something that might change over time. The other metric is a particular approach's capacity to accurately reflect the fundamental character and nature of devolution; the things, in other words, that define it and give it its core meaning and essential content. This chapter considers some of the essential aspects that give devolution its character, the more flexible conception of parliamentary sovereignty at the core of this approach, and (finally) that more flexible conception's intellectual defensibility in light of its consistency with the approach to parliamentary sovereignty in the analogous context of EU membership. This chapter argues that the reconciliatory approach provides a satisfactory way of

accommodating parliamentary sovereignty because it is consistent with the contemporary treatment of the principle, and is compatible with—even facilitating—some of the core elements that define the contemporary devolution settlements.

The fourth chapter considers the first example of the 'protective' approach. This approach is doctrinaire, defined by its assertive, brittle and broad conception of parliamentary sovereignty. The example this chapter considers is 'unqualified legislative power', a notion developed in the Supreme Court's recent devolution jurisprudence. Unqualified legislative power purports to provide a means to 'protect' Westminster's legislative power against the exigencies of devolution, conditioning certain important elements of devolution which it implies are incompatible with the sovereignty principle. However, using the two metrics to appraise unqualified legislative power leads to conclusions that question the protective approach's capacity to satisfactorily accommodate parliamentary sovereignty. This chapter will argue that unqualified legislative power is at best a caricature of parliamentary sovereignty and reflects few—if any—of its characteristics. It is therefore a poor characterisation of the principle. Furthermore, unqualified legislative power is inconsistent with some of the most important and definitional components of devolution and, on that basis, is incapable of accurately reflecting the territorial constitution. Unqualified power, then, does not 'accommodate' parliamentary sovereignty at all, failing to accurately characterise either phenomenon with which this thesis is concerned; it reimagines the sovereignty principle in a way that is inconsistent with that principle's own meaning and treatment, and undermines devolution in the process.

The fifth chapter of the thesis, its final substantive chapter, considers a second instantiation of the protective approach and advances the same criticisms. It considers the notion of 'competence constriction', which it defines broadly as both reductions to the breadth of devolved competences, and more diffuse or structural changes which limit the potency, effectiveness, and freedom to exercise devolved legislative power. This chapter uses two

examples, the EU Withdrawal Act 2018 and the UK Internal Market Act 2020, to demonstrate that competence constriction—particularly of this more structural type—has the potential to sit very uncomfortably with some of the fundamental characteristics of devolution. As such, it can quickly fail the accommodative test, distorting, rather than reflecting, the territorial constitution. Furthermore, it fails to accurately characterise parliamentary sovereignty, a principle which is concerned with, and accommodated by, the delegative manner of decentralisation rather than the exclusion of other legislative bodies from certain subject areas. These weaknesses make competence constriction an inappropriate means of securing the accommodation of parliamentary sovereignty.

7. Recapitulation

This thesis is concerned with two phenomena: parliamentary sovereignty and devolution. It is interested in enquiring whether the latter can be consistent with the former in a way that characterises both accurately and intellectually coherently. It considers this by asking whether parliamentary sovereignty can be satisfactorily accommodated in the UK's territorial constitution and, if so, how. It answers this question in the affirmative, arguing that the reconciliatory approach provides a satisfactory route to rendering devolution consistent with parliamentary sovereignty, accurately reflecting the core elements of both sovereignty and the territorial constitution, deduced from doctrinal analysis. This argument is important because devolution's consistency with parliamentary sovereignty is a critical way to assess its defensibility in a constitution that remains dominated by parliamentary sovereignty. Furthermore, it provides a way to consider whether centralisation, an apparent trend in the UK's constitutional law, can be opposed on the basis that it has no foundation in, and offers no accommodation for, parliamentary sovereignty. The normative potency of that principle is such that arguing, as this thesis does, that centralisation is not necessary for parliamentary sovereignty's preservation may prove an

important conclusion. However, the accommodation problem also invites a careful introspection of the core elements of sovereignty and of devolution, which are interrogated in technical, analytical and doctrinal terms. The next issue, unpacked in the second chapter, concerns the two approaches which form the backbone of the thesis. These approaches help bring together debates about sovereignty and decentralisation more generally and set the stage for the analysis that follows.

Chapter 2

Identifying Two

Approaches to Accommodation

1. Introduction

This thesis asks how whether, and if so how, parliamentary sovereignty can be satisfactorily accommodated within the UK's territorial constitution. This thesis argues that it is possible to accommodate parliamentary sovereignty in a way that is consistent both with the core components of the sovereignty principle, and with the fundamental character of devolution. In order to advance this argument, this thesis presents two possible models for addressing the accommodation problem, that is, how parliamentary sovereignty can retain its place and purchase within the contemporary constitutional order. The first is 'reconciliatory', an approach which is defined by a more flexible treatment of the sovereignty principle. The second is 'protective', an approach which is defined by its defence of a broad, rigid and assertive conception of parliamentary sovereignty, which is more abrasive to other aspects of the constitution. This thesis argues that the first approach—the reconciliatory model—provides a satisafactory means of achieving accommodation on the grounds of both its capacity to properly and accurately make sense of, and tolerate, the fullness of the decentralisation of legislative power that is now a fundamental feature of the UK's contemporary constitution, and because it coheres more strongly with parliamentary sovereignty as it is contemporarily understood in practice, namely as a principle which exists in relation with other constitutional norms.

These two models differ in the way that they conceive of parliamentary sovereignty, and the way in which they understand its relationship with other constitutional phenomena,

including the principles and practices of multi-layered constitutionalism. Accordingly, each approach also has at its heart a different vision of what sovereignty requires of the constitution itself, and whether it is an inevitably unitarist concept. It is the purpose of this chapter to explore these distinctions, arguing that the reconciliatory approach is defined by its more flexible, tolerant account of parliamentary sovereignty which is consequently better able to accommodate the decentralisation of legislative power. This model is preferable because it provides a more coherent, and accurate, descriptive account of the constitution. It recognises that parliamentary sovereignty is a principle which is understood in practice *as sitting alongside,* rather than—as under the protective model—*in opposition to* other features of the constitutional order. The more rigid account of parliamentary sovereignty endorsed by the protective approach is brittle and fragile, is rooted in a purist approach to parliamentary sovereignty as a constitutional principle, and is a less accurate description of that principle's role in the constitution. Thus, each model differs in its capacity to accurately reflect the contemporary constitutional order. The reconciliatory model recognises that parliamentary sovereignty has come to be understood as a flexible principle, capable of tolerating and sustaining developments, like devolution, which apply pressure upon it. The protective account resists these developments and is therefore incapable of doing full justice to the constitutional order in front of it. It, as such, rests on a doctrinaire conception of the sovereignty principle. The reconciliatory approach is preferred, therefore, on doctrinal grounds which flow from its coherence and its capacity to explain contemporary constitutional reality.

This chapter's purpose is to identify these two models of accommodation, to explain them, and to explore their connections with different models of territorial constitutionalism. In particular, it links the protective model—with its focus on the monopoly of legislative power and the effective supremacy of Westminster legislation—with a unitary model of the UK's constitution. The reconciliatory model, by contrast, embraces sovereignty's innate

flexibility, and the limits to its scope, making it far more capable of coexisting with the demands of devolution. This chapter also connects these two approaches to broader questions about, and approaches towards, sovereignty as a wider, more general concept in constitutional law from which relevant insights can be drawn.

This chapter proceeds in the following way: in section 2 it considers two distinct ways of framing, or understanding, the accommodation problem: how to accommodate parliamentary sovereignty in the UK's territorial constitution. Section 3 then considers the distinct ways in which these two models go about addressing this problem, by reference to the extent of the perceived flexibility in the sovereignty principle and the way in which norms are valued. The chapter ends by considering some further criticisms of each model in more depth.

It will no doubt already be clear that criticising the protective model is an important part of this thesis' argument. That model's prioritisation of theoretical dogma over constitutional reality *should* be carefully evaluated. However, although this chapter will allude to these criticisms—among others—it is not *its* purpose to set them out in full. Rather, this chapter's function is to present these two models as ways of understanding different approaches to the UK's constitution and the challenge of resolving an important tension within it. It seeks simply to make the case that these two categories exist, and that viewing different ways of situating parliamentary sovereignty within the UK's multi-layered constitution by reference to these two categories is a helpful exercise. This chapter will inevitably alight upon certain criticisms. However, where it does so, it does not represent the full scope of this thesis' analysis of either approach, which is the focus of later chapters. This chapter's analysis of both approaches should therefore be considered as indicative rather than exhaustive. It would not be right, nor would it perhaps even be possible, to present each model in *completely* neutral terms, but nor can this chapter do complete justice

to the analysis that is offered later. This chapter's primary function is to identify these two categories and make the case that they are distinct and coherent, rather than that one is better than the other.

2. Two Approaches to the Accommodation Problem: Conflict or Compromise

The problem of accommodating sovereignty—whether in the narrow sense of *parliamentary* sovereignty, as is this thesis' emphasis, or the broader notion of state sovereignty[1]—within a constitutional framework alongside the allocation of legislative power to sub- or supra-national legislative institutions is a well-known one, and one which is far from unique to the UK. In fact, it is a problem which has sometimes been regarded as existential to sovereignty's place as a foundational concept of constitutionalism.

To some, (the wider notion of) sovereignty is incapable of tolerating, or of reflecting, the decentralisation of constitutional power which has become such a fundamental part of modern constitutionalism. As a result, it needs to be overcome or ossified, something which—again, by some—is considered good news. For MacCormick, 'Western Europe's successful transcendence of the sovereign state and of state sovereignty is greatly to be welcomed.'[2] Other accounts 'rest on firm descriptive ground by pointing to [soveriegnty's]

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[1] On which, see NW Barber, *The Principles of Constitutionalism* (OUP 2018) 23.

[2] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 133. Indeed, '[s]o contested is the concept that, rather than pursuing the contestation, many political theorists think we should give up so protean a notion.': Hent Kalmo and Quentin Skinner, 'Introduction: A Concept in Fragments' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (CUP 2010) 1. See also Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge 1995) 237.

"obsolescence". And good riddance, too.'[3] This 'descriptive ground' is often laid by decentralisation: a more interconnected world, along with the diffusion of constitutional power that accompanies it, erodes sovereignty's accuracy as a descriptive or analytical device, as well as its normative purchase.[4] As Kalmo and Skinner explain, '[t]his is far from being a new theme. Predictions of the demise of state sovereignty as a result of the "levelling effects of interdependence" have surfaced through the whole twentieth century and have come from all quarters'.[5] Yet, despite these claims—whether analytical or aspirational—it appears clear that sovereignty is, in its wider sense, here to stay, maintaining its place at the core of constitutionalism.[6] Indeed, '[u]nfortunately or not, such liberating calls "to ring finally the knell of sovereignty" have not been heeded',[7] with Auer going so far as to argue that '[t]he claim that sovereignty is outmoded is as fashionable as it is misguided'.[8]

It is possible that one of the reasons for sovereignty's longevity is the inherent flexibility in its requirements; its capacity, in other words, to tolerate, and reflect, the exigencies of the

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[3] Kalmo and Skinner (n 2) 1.

[4] '[M]any authors seek to buttress their conclusion that sovereignty is being "eroded" by a motley collection of observations regarding the increasingly intertwined character of social, economic and political processes, all lumped under the heading "interdependence"': ibid 5.

[5] ibid.

[6] Perhaps even as 'a byword of state theory' itself: Christian Calliess and Anita Schnettger, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2020) 352.

[7] Kalmo and Skinner (n 2) 2.

[8] Stefan Auer, 'Brexit, Sovereignty and the End of an Ever Closer Union' in William Outhwaite (ed), *Brexit: Sociological Responses* (Anthem Press 2017) 43.

constitutional order in which it finds itself.[9] However, to some, its resilience is instead because of its rigidity, and its resistance to constitutional change. Any flexibility within the principle, even where this allows it to recognise the requirements of multi-layered constitutionalism, simply represents a theory of sovereignty deficient in its fundamental character.[10] On that latter view, where multi-layered constitutionalism is incompatible with sovereignty properly understood, it erodes, or perhaps deforms, the principle in a way which might, in the manner above, be celebrated, or which might, to those more attached to the concept, be a reason to seek to reclaim or reassert what has been lost or damaged. This latter approach is described by Koskenniemi as the 'backlash': a desire to return to a more classical interpretation of, or to resuscitate, the sovereignty which decentralisation has purportedly weakened or impaired.[11]

Thus, even for state sovereignty, two ways of analysing its interaction with decentralisation are evident. On one account, decentralisation represents an existential challenge which questions or undermines sovereignty's explanatory and normative capacities in the world of interconnected constitutionalism. On another account, sovereignty is simply a principle

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[9] See for example Roland Bieber, 'The Lissabon-Urteil: "An Association of Sovereign States"' (2009) 5 European Constitutional Law Review 391.

[10] This approach to sovereignty is reminiscent of Bodin's: 'With the emergence of the nation state, based on the monopoly of force, sovereignty became a keyword of state theory. Dating back to the sixteenth century, Jean Bodin's theory of sovereignty defended an absolute an indivisible concept of sovereignty held by the kind in the context of monarchies and a few subsequent aristocracies': Calliess and Schnettger (n 6) 352.

[11] Martti Koskenniemi, 'Conclusion: After Globalisation: Engaging the "Backlash"' in Robert Schütze (ed), *Globalisation and Governance: International Problems, European Solutions* (CUP 2018). To MacCormick, it does not 'seem that mere nostalgia for lost sovereignties, or zeal for establishing new ones in the old mode, is necessarily a happy posture': MacCormick (n 2) 126.

which is capable of stomaching these qualifications, or perhaps even of changing to fit around them. On one account sovereignty is a brittle—but cardinal—principle; it cannot tolerate decentralisation without losing its fundamental character. On the other account, sovereignty's fundamental character is immune to these challenges, capable of sustaining despite significant qualifications or conditions. On this view, its capacity to do so is key to its longevity, allowing theories of sovereignty to fit within, rather than resist, the relevant constitutional environment.

In the UK, this challenge has a counterpart—or finds particular expression—in the perceived tension between *parliamentary* sovereignty and the decentralisation of constitutional power throughout the 20th Century. Throughout that period, the UK's constitution has undergone a significant transformation, one which has been perceived by some as posing a challenge to parliamentary sovereignty's accuracy as a description of constitutional reality, and its pre-eminence as a normative principle of constitutionalism.

In a similar fashion to state sovereignty, two approaches can be observed in this context: One considers that decentralisation simply represents or consists of a variety of conditions which parliamentary sovereignty, for the most part, can tolerate, and the other considers it a fundamental and existential threat. Exemplifying the first approach, for example, is the majority's judgment in *Miller I*. The majority was clear that the trials and tribulations of EU membership had not set aside parliamentary sovereignty; they did 'not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would

be varied by its repeal'.[12] Similarly, or perhaps consequently, the UK Government was able to claim that '[t]he sovereignty of Parliament is a fundamental principle of the UK constitution. [Even if w]hilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that'.[13] This demonstrates the capacity of the principle of parliamentary sovereignty, understood as the *Miller I* majority understood it, to accommodate constitutional phenomena that, on another view, might be viewed as threats to it.

Similarly, though with different emphasis, Lord Hope explained in *Jackson* that:

> Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute… It is no longer right to say that its freedom to legislate admits of no qualification whatever. 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.[14]

These qualifications were, to a large extent, the product of the diffusion of legislative power throughout, and beyond, the UK. As Lord Steyn explained in the same case:

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[12] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 [60] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[13] HM Government, *The United Kingdom's Exit from and New Partnership with the European Union* (Cm 9417, February 2017) para 2.1; Keith Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80 Modern Law Review 711.

[14] *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [104] (Lord Hope).

> '[T]he settlement contained in the Scotland Act 1998 also point[s] 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. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. 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. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution.'[15]

And yet, importantly, on both Lord Hope's and Lord Steyn's analyses, parliamentary sovereignty is not fatally damaged, nor fundamentally or critically undermined, because of these developments; it is, it seems, capable of accommodating them.[16] As Lord Steyn explains, it retains its place as 'the *general* principle of our constitution', even despite the qualifications he outlines. Lord Neuberger, reflecting on that judgment, has similarly confirmed that parliamentary sovereignty remains, despite the shifting constitutional landscape (and was not undermined by the *Jackson* judgment itself).[17]

However, the idea that parliamentary sovereignty is flexible enough to accommodate the decentralisation of constitutional (and, particularly, legislative) power stands in contrast to

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[15] ibid [102] (Lord Steyn).

[16] Although with this caveat: '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': ibid [102] (Lord Steyn).

[17] Lord Neuberger, 'Who Are the Masters Now?' (Second Lord Alexander of Weedon Lecture, 6 April 2011).

a different account of this phenomenon, one which considers decentralisation as posing an existential threat to parliamentary sovereignty. On this view, parliamentary sovereignty has, in contrast to the first approach, actually 'been *diminished* by our membership of the European Union, by the enactment of the Human Rights Act 1998, by devolution of powers to Scotland, Wales and Northern Ireland, and by the growth of judicial review' such that 'it is no longer the cornerstone of our constitution.'[18] Exemplifying this approach is a letter to the Prime Minister, Rishi Sunak, from May 2023, in which Andrea Jenkyns MP advocates 'to leave the jurisdiction of the ECHR with immediate effect and *return law making power to our Westminster Parliament.*'[19] She continues: '*If our sovereignty is to mean anything at all, it must mean that our Westminster Parliament is the primary law-making body of our land…*'[20] Ekins has similarly characterised the UK's obligations under the Convention as compromising parliamentary sovereignty, saying that 'membership of the ECHR and subjection to the jurisdiction of the Strasbourg Court means that Parliament's freedom to legislate is exercised under a cloud.'[21] On this view, decentralisation does not tolerably condition parliamentary sovereignty, it is fatal to it.

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[18] ibid para 32 (emphasis added).

[19] Andrea Jenkyns MP to Rishi Sunak MP, 'Withdrawal from European Convention of Human Rights (ECHR)' (17 May 2023) <https://www.andreajenkyns.co.uk/news/andrea-jenkyns-mp-writes-pm-regarding-echr-and-her-petition-leave-echr> accessed 18 May 2023 (emphasis added).

[20] ibid (original emphasis).

[21] In full: 'The doctrine of parliamentary sovereignty provides that whatever the King-in-Parliament enacts is law. Legislative freedom is the centrepiece of the Westminster model and it is for Parliament, in conversation with the people, to decide freely what the law should be. However, membership of the ECHR and subjection to the jurisdiction of the Strasbourg Court means that Parliament's freedom to legislate is exercised under a cloud: deliberation within Parliament is often distorted by reasoning not about the merits of proposed legislation but about its compatibility with the case law of the European

This approach, however, is predicated on a view of parliamentary sovereignty which is intolerant of, and is fatally impaired by, political as well as legal limitations on the exercise of Westminster's legislative freedom.[22] In other words, it is a hypersensitive account of parliamentary sovereignty, with the principle being compromised by conditions that, on a more flexible view, it might not even be sensitive to, or might in either case be able to endure.

Such an approach has become more prominent since the UK's departure from the EU, something which was 'presented as a project to "take back control of our money, laws and borders" and [an exercise in] re-affirming parliamentary sovereignty.'[23] As Sandford and Gormley-Heenan recognise, a conflation between national and parliamentary sovereignty is also detectable here.[24] They explain that

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Court of Human Rights.': Richard Ekins, 'The Case for Leaving the ECHR' (*UnHerd*, 11 August 2023) <https://unherd.com/2023/08/the-case-for-leaving-the-echr/> accessed 11 August 2023.

[22] The Supreme Court also recently said that 'political opprobrium' 'would plainly affect Parliament's power to make laws for Scotland': *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106 [52].

[23] Michael Keating, 'Taking Back Control? Brexit and the Territorial Constitution of the United Kingdom' (2022) 29 Journal of European public Policy 491, 492.

[24] For instance, it is not entirely clear whether state or parliamentary sovereignty is invoked in Jenkyns' letter: Jenkyns MP to Sunak MP (n 19). Similarly, in one notable example, the UK Government has considered that parliamentary sovereignty's inflexibility and pre-eminence frees the UK from its international obligations: HM Government, 'HMG Legal Position: UKIM Bill and Northern Ireland Protocol' (Cabinet Office 2020). This phenomenon is also noted in Mark Elliott, 'Legal Kryptonite? Parliamentary Sovereignty, International Law and the Internal Market Bill' (*Public Law for Everyone*, 10

> 'Taking back control' meshes neatly with traditional Anglo–British concepts of 'sovereignty'. These run deep in the institutional architecture of the UK: some evidence suggests that 'sovereignty' was a significant motivating factor for voting Leave, particularly amongst higher social classes… This corresponds to a popular understanding of the UK/English constitution built around the 'mother of Parliaments' (Westminster), independence and sovereignty—the latter two of which are perceived as being progressively ceded to the EU.[25]

Crucially, sovereignty on this model is seen as *necessitating* the recentralisation of constitutional power to Westminster.[26] Its pre-eminence, and rigidity, warrants its reassertion over those features of the constitution with which it is considered by some to be incompatible. Importantly, the phenomenon identified by Koskenniemi as a 'backlash'—a desire to restore power to national institutions because decentralisation has eroded the notion of (indivisible, unqualifiable) sovereignty—appears to marry with

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October 2020) <https://publiclawforeveryone.com/2020/10/10/legal-kryptonite-parliamentary-sovereignty-international-law-and-the-internal-market-bill/> accessed 27 November 2020. See also Mark Elliott, 'Legal Exceptionalism in British Political Discourse: International Law, Parliamentary Sovereignty and the Rule of Law' (*Public Law for Everyone*, 10 October 2021) <https://publiclawforeveryone.com/2021/10/10/legal-exceptionalism-in-british-political-discourse-international-law-parliamentary-sovereignty-and-the-rule-of-law/> accessed 12 July 2023.

[25] Mark Sandford and Cathy Gormley-Heenan, '"Taking Back Control", the UK's Constitutional Narrative and Schrodinger's Devolution' (2020) 73 Parliamentary Affairs 108, 109.

[26] See also Sir William Cash and others, 'The European Research Group's Legal Advisory Committee Opinion on the UK-EU Trade and Cooperation Agreement' (European Research Group 2020). This mirrors a particular view of *national* or *state* sovereignty: 'The doctrine of sovereignty was a doctrine of the unity of states and the unity of governmental functions within them': MacCormick (n 2) 129–30.

particular ease to a particular approach to *parliamentary* sovereignty. That latter concept is, when conceived in especially fragile or brittle terms, well-suited to the narrative of 'taking back control'. But that account of parliamentary sovereignty is more rigid, and wider in its implications, than that offered by (among others) Lords Hope and Steyn in *Jackson*, by Lord Neuberger and by the majority in *Miller I*.

Both this more rigid account of parliamentary sovereignty and the more flexible one offered by Lords Hope, Steyn, Neuberger and the *Miller I* majority recognise the challenge posed to parliamentary sovereignty by the decentralisation of legislative power. However, they diverge on whether that challenge should be conceived in zero-sum terms; whether parliamentary sovereignty should be reasserted against decentralisation, or can tolerate it. Indeed, those developments which might have been taken by their Lordships to represent mere conditions upon the principle are instead understood on the more rigid account as fundamentally impairing it. In other words, on the more flexible account, decentralisation is in *tension* with parliamentary sovereignty; on the more rigid account, it is *incompatible* with it.

Jenkyns' account, which reflects a wider political view, is focussed on, and clearly intolerant of, limitations on Westminster's sovereignty from *outwith* the state. However, Martin persuasively suggests that this approach can be similarly intolerant of the diffusion of legislative power *within* the UK,[27] viewing 'Britain, in this reading, [a]s a single nation and

[27] 'Just as Eurosceptics point out the Eurofederalists' solution to all of the EU's problems is more Europe, it seems that the solution to the Union's problems is more union, and, consequently, less devolution.': Ciaran Martin, 'Can the UK Survive Muscular Unionism?' [2021] *Political Insight* <https://journals.sagepub.com/doi/pdf/10.1177/20419058211066522?casa_token=DPcwB86qbS0AAAA

a unitary state.'[28] Devolution arguably poses a challenge to that account of the Union and it is apparent that the relationship between a unitarist account of the *Union* and the more rigid account of *parliamentary sovereignty* is an intimate one. That connection rests on the idea that the distribution of legislative power to institutions other than Westminster, and their capacity to interfere with Westminster legislation, is a fundamental threat to parliamentary sovereignty, and to its commensurately unitary constitution. Furthermore, devolution entails the imposition of political pressures and conditions which might temper Westminster's capacity to legislate as freely as the more rigid account might require.

The connection between a unitarist account of the constitution and a particularly fragile, rigid conception of parliamentary sovereignty has been noted in a number of different quarters. For example, Sheldon and Kenny argue that it is this account of parliamentary sovereignty which *is at the root of* the unitarist account of the Union, providing its justificatory foundation:

> One very notable aspect of Conservative thinking about the Union is the dominance of a 'unitarist' understanding of the Union. For many Conservatives uniformity across the whole of the UK, underpinned by Westminster parliamentary sovereignty, is seen as essential to ensuring that the Union remains together. Divergence between the UK's component parts is for many viewed with suspicion.[29]

A:EGQwHPO_biZDXYBIAW7oFd6odwZ4ot9zwQwx3IRlcLs2a8U6Nx79BrXQSTdRJj990a1ohmcJKxQ> accessed 10 January 2023.

[28] ibid.

[29] Jack Sheldon and Michael Kenny, 'Unionism and the Conservative Brexit Deal Rebellion' (*The Constitution Unit*, 1 February 2019) <https://constitution-unit.com/2019/02/01/unionism-and-the-conservative-brexit-deal-rebellion/> accessed 9 September 2019.

The unitarist account of the constitution therefore appears to rely on an especially brittle account of parliamentary sovereignty, which is intolerant towards internal divergence. Its pre-eminence as a constitutional principle, on this view, prescribes the UK's state architecture, leading to a narrow and limited (or minimal) view of devolution, as Martin explains:

> The sub-British national identities within the Union should amount to no more than mere cultural pageantry. *They are certainly not a basis for challenging Westminster's unfettered authority.* The devolved institutions are to be tolerated because of the present political climate, but their powers are to be checked and contested, and, should the opportunity arise, clipped.[30]

Thus, the choice, on this account, is *between* devolution and parliamentary sovereignty, which are seen—especially in the emphasised passage—as in conflict with one-another.

[30] Martin (n 27) (emphasis added).

Parliamentary sovereignty is seen as underpinning, animating and, arguably, necessitating, a unitary, 'muscular'[31] and 'aggressively unilateral' approach to the constitution.[32] 'This belief in the virtue of centralisation of power is clearly reflected in the notions of parliamentary sovereignty, the unitary state and unionism;'[33] each of which are intwined. Furthermore, it is not possible, on such a view, to simply suggest that a different view of parliamentary sovereignty should be preferred because of its capacity to recognise devolution. Devolution should, instead, be recognised and given effect *only to the extent* that it is compatible with this particularly brittle view of parliamentary sovereignty. On this account, the UK's constitutional architecture should be bent to fit the predetermined mould provided by a dogmatic theory of parliamentary sovereignty.

Similarly to how Jenkyns' view is of an irreconcilable conflict between the ECHR and parliamentary sovereignty, the account described by Sheldon, Kenny and Martin is one of a conflict between (on the one hand) devolution and (on the other) parliamentary

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[31] Michael Kenny and Jack Sheldon, 'Unionism, Conservative Thinking and Brexit' (*Centre on Constitutional Change*, 27 July 2020) <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/unionism-conservative-thinking-and-brexit> accessed 11 November 2020; Michael Kenny and Jack Sheldon, 'When Planets Collide: The British Conservative Party and the Discordant Goals of Delivering Brexit and Preserving the Domestic Union, 2016-2019' (2020) 69 Political Studies 965; Martin (n 27). A defence of this approach can be found in Henry Hill, 'Putting Muscle behind the Union' [2021] *The Critic* <https://thecritic.co.uk/issues/november-2021/putting-muscle-behind-the-union/> accessed 10 January 2023.

[32] House of Lords Select Committee on the Constitution, *Respect and Co-Operation: Building a Stronger Union for the 21st Century* (HL 2021-22 142) para 69, Q 81 (Mark Drakeford MS).

[33] M Hall, D Marsh and E Vines, 'A Changing Democracy: Contemporary Challenges to the British Political Tradition' (2018) 39 Policy Studies 365, 367–8; Mark Sandford, '"Muscular Unionism": The British Political Tradition Strikes Back' (forthcoming) Political Studies.

sovereignty which can, or must, only be resolved in favour of the sovereignty principle. Indeed, it is an account in which devolution poses a 'direct assault on the principle of parliamentary sovereignty',[34] such that 'affirmations of the continuing relevance of the doctrine of parliamentary sovereignty were therefore to be regarded as little more than a legal fiction.'[35] McHarg has recognised the same logic from a different perspective: that the most significant problems facing *devolution* 'cannot therefore be fully resolved without replacing parliamentary sovereignty with a constitutionally entrenched division of power.'[36] The incompatibility between a rich account of devolution and broad, inflexible view of parliamentary sovereignty, in other words, goes both ways.

However, that logic only works if parliamentary sovereignty is understood in inflexible terms such that that purportedly irreconcilable conflict can even arise in the first place. On an alternative account, devolution represents little more than an exercise *of* sovereignty by Parliament, which at best does not diminish 'its own powers',[37] or at worst only does so compatibly with flexibility inherent in, and definitive of, the principle; for instance because

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[34] Kevin Morgan and Richard Wyn Jones, 'Brexit and the Death of Devolution' (2023) 94 The Political Quarterly 625, 630.

[35] ibid.

[36] Aileen McHarg, 'The Contested Boundaries of Devolved Legislative Competence: Securing Better Devolution Settlements' (Bennett Institute for Public Policy and Institute for Government 2023) 17 <https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2023/05/Contested-boundaries-devolved-legislative-consent.pdf> accessed 23 May 2023.

[37] 'The United Kingdom Parliament is, and will remain, sovereign in all matters, but, as part of our resolve to modernise the constitution, Westminster will be choosing to exercise that sovereignty by devolving legislative responsibility to the Scottish Parliament, without diminishing its own powers': HC Deb 14 July 1997, vol 298, col 1042. See Barry K Winetrobe, 'The Scotland Bill: Some Constitutional and Representational Aspects' (House of Commons Library 1998) Research paper RP 98/3.

Westminster remains ultimately responsible for the delegation of legislative power to these other institutions, and retains the legal power to rescind them.[38] This is the picture painted by Lords Hope and Steyn in *Jackson*, and advanced by Lord Neuberger. Theirs is a vision which appears to be predicated on compromise rather than conflict. Instead of a zero-sum conception of the accommodation problem, in which the issue might be conceived as how to protect parliamentary sovereignty against limitations imposed upon it by devolution, their account is one in which the issue is about how to *reconcile* parliamentary sovereignty with those limitations, without mischaracterising or undermining either. The principle is, on their view, capable by its very nature of tolerating this kind of decentralisation, provided the latter is configured to leave that sovereignty meaningfully intact.

These two approaches to the accommodation problem do not differ on whether parliamentary sovereignty remains an important constitutional principle, but instead on whether the conditions inevitably contained within the devolution settlement are thought to fundamentally impair that principle, or whether it is capable of surviving them. In other words, a disagreement about the degree to which parliamentary sovereignty is innately 'flexible', or tolerant, or whether it is broad, rigid, sensitive and brittle, is what essentially demarcates these two approaches. The next section considers that distinction in more detail and argues that it has implications for how the accommodation problem might be addressed.

[38] As, in a more general context, 'theorists who hold fast to the idea of indivisible sovereignty are again tempted to invoke the distinction between the delegation of powers and their surrender': Kalmo and Skinner (n 2) 20.

3. Two Approaches to Accommodation: Protection or Reconciliation

Two different approaches to the tension between parliamentary sovereignty and devolution have been identified. One approach, as has been seen, considers the challenge posed to parliamentary sovereignty as existential, a zero-sum conflict from which sovereignty, by virtue of its pre-eminence, must emerge the victor. On the alternative approach, parliamentary sovereignty is far more flexible, capable of enduring the compromise necessitated by decentralisation. The difference between these two approaches is the degree to which they consider that parliamentary sovereignty is a 'flexible', tolerant concept. The purpose of the following section is to consider this flexibility in more detail and to argue that it has implications for the way that the accommodation problem might be addressed. This leads to the two approaches to accommodation which form the backbone of the analysis in the remainder of the thesis.

(a) Breadth, Flexibility and Fragility

Dicey's seminal definition of parliamentary sovereignty provided that Westminster had 'the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament.'[39] It has proved an enduring definition, and is still relied on by the Supreme Court as the most important account of the principle.[40] It consists of two components: a 'positive' and a 'negative':

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[39] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 3–4.

[40] See e.g., *Miller I* (n 12) [41]-[43] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

> The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English Constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.[41]

Although it might be argued that 'the positive and negative criteria are merely different formulations of the same principle',[42] the difference between these two components has proved important. The first, 'positive' aspect—described by Dindjer as the 'plenary authority rule'[43]—speaks to Westminster's capacity to lawfully enact legislation. The second, 'negative' aspect—described by Dindjer as the 'legal supremacy' rule[44]—is largely a qualification on the powers of *other* institutions, ensuring that they cannot be exercised in a way that impinges upon Westminster's legislative power.

One of the core differences between the more flexible and rigid or brittle accounts of parliamentary sovereignty, seen above in the different approaches to its interaction with devolution, is to be found more specifically in the 'negative' aspect of Dicey's definition.

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[41] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Reprint Originally Published: (8th edn Macmillan 1915), LibertyClassics 1982) 4.

[42] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001) 10.

[43] Hasan Dindjer, 'Prorogation as a Breach of Parliamentary Sovereignty' (*UK Constitutional Law Association*, 16 September 2019) <https://ukconstitutionallaw.org/2019/09/16/hasan-dindjer-prorogation-as-a-breach-of-parliamentary-sovereignty/> accessed 18 July 2023.

[44] ibid.

The more flexible account views parliamentary sovereignty as enduring even when other institutions *are* empowered to set aside Westminster's legislation, provided a number of conditions are met (such as any authority to set aside Westminster legislation being attributable to, or capable of being conditioned by, Westminster itself).[45] Such a system imposes, on that view, a *condition* on Westminster's legislative power, but does not fundamentally impair (or *qualify*) *parliamentary sovereignty* itself, leaving the core components of that principle intact. McHarg sets out this approach in the following way, explaining that, on this view

> the plenary rule may permit Acts of Parliament to be overridden or set aside (for example the 'disapplication' of statutes incompatible with EU law, or the ability of Ministers via 'Henry VIII powers' or the devolved legislatures to amend or repeal them) provided that the authority to do so may itself be traced to an Act of Parliament.[46]

This is an account which, therefore, takes a liberal, tempered approach to Dicey's negative aspect. Arguably, it is also an account which is pragmatic, being prepared to recognise the instrumentality of theoretical flexibility in the UK's constitution for confronting new problems.[47]

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[45] This is the focus of chapter 3.

[46] 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* (Hart Publishing 2021) 213.

[47] Described by Dicey as 'the most flexible polity in existence':. Dicey (n 39) 39; *Miller I* (n 12) [41] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

Secondly, this account of parliamentary sovereignty is one which is seen as compatible with practical, if not legal, constraints on its positive aspect, too. McHarg also explains that the Diceyan account 'has always recognised a distinction between Parliament's unlimited legislative authority, and the existence of a range of *de facto* constraints on its legislative capacity.'[48] Indeed, Dicey wrote that '[t]here are many enactments ... which Parliament never would and (to speak plainly) never could pass. If the doctrine of Parliamentary sovereignty involves the attribution of unrestricted power to Parliament, the dogma is no better than a legal fiction.'[49] Thus sovereignty, on this view, is also capable of tolerating practical constraints, such as political limitations, to the exercise of Westminster's legislative freedom,[50] *as well as*—provided its authority is traceable to Westminster—an institution's capacity to alter or repeal Acts of Parliament.

Other authors have similarly encouraged caution with reading parliamentary sovereignty, and the freedom from *legal* limitations it grants or necessitates, as freedom from *any* limitations. That doctrine might mean that Westminster can legislate to achieve anything as a matter of law, but it *does not* mean that Westminster's legislation is immune from practical, political or constitutional limitations. Legislative decisions can be measured against, and criticised on the basis of their tension with, political or constitutional norms

[48] McHarg (n 46) 209. See also Mark Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015); Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019).

[49] Dicey (n 41) 26.

[50] Such as 'forms of political entrenchment, such as the protections for devolved autonomy provided by the Sewel convention and pre-enactment referendums': McHarg (n 46) 213.

which Westminster should recognise when exercising its legislative power, and which might themselves sculpt the way its legislation is interpreted. For example:

> Devolution thus serves as a case study in the importance of contextualizing the notion of sovereignty. Accepted on its own terms, the doctrine concedes unfettered legal authority to the UK Parliament: but that concession does not imply an absence of constitutional standards that may operate both as benchmarks of constitutionality and as powerful interpretative constructs.[51]

The more flexible account, therefore, is pragmatic, able to recognise, reflect and respond to the realities of—and pressures imposed by—contemporary constitutionalism. This is because it is compatible with certain conditions on Westminster's legislative power, rather than rejecting them on the grounds that they are incompatible with theoretical dogma. These conditions often give life to *other* constitutional principles, which might to some extent resist statutory abrasion, or inform how Westminster's legislative choices are understood.[52] Parliamentary sovereignty, seen in this way, is unlikely to be antithetical to the development of such wider principles, so long as—whatever their constitutional or political weight—they do not cut to the *legal* heart of the sovereignty doctrine. The more flexible account provides a forum, therefore, in which these other principles are allowed to resonate, rather than necessarily excluding them as incompatible with the sovereignty principle.

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[51] Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 48) 39.

[52] See e.g., Mark Elliott and Nicholas Kilford, 'Nothing to See Here? Allister in the Supreme Court' (2024) 28 Edinburgh Law Review 95.

By contrast, the more rigid account is unbending in its attachment to Dicey's negative aspect, captured by Blackstone's analysis that 'what parliament doth, no authority upon earth can undo'.[53] Such a dogmatic attachment to Dicey's negative aspect is not only incapable of giving full weight to its positive aspect (in denying Westminster the authority to grant other legislatures the power to amend its own enactments in defined circumstances), but it is also an account which, as will be seen, is sceptical about even non-legal restraints on Westminster's legislative power. This rigid account is rooted in an ostensibly—though, in reality, illusorily—orthodox account of parliamentary sovereignty which has implications for its capacity to accommodate devolution.

The importance of the foregoing points in relation to devolution will be readily apparent. Devolution provides the devolved legislatures in Scotland, Wales and Northern Ireland with the power to amend or repeal Acts of the Westminster Parliament. It also consists of a range of political constraints, like the legislative consent convention which (although its implementation has varied) requires devolved consent for Westminster legislation within devolved areas and/or legislation which affects devolved competences.[54] These kinds of qualifications are compatible with a more flexible, tolerant account of parliamentary sovereignty, but are in tension with the more (overly) rigid account. As a consequence, the more rigid account is an account of parliamentary sovereignty which is closely bound up with (like Dicey's own analysis) a unitarist account of the UK's constitution,[55] incapable of

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[53] William Blackstone, *Commentaries on the Laws of England* (Childs and Peterson 1870) 160; Michael O'Neill, 'Great Britain: From Dicey to Devolution' (2000) 53 Parliamentary Affairs 69, 69.

[54] See Graeme Cowie, 'Brexit: Devolution and Legislative Consent' (House of Commons Library 2018) Briefing Paper CBP 08274. Both of these issues are discussed in more detail in later chapters.

[55] *C.f.* Neil Walker, 'Beyond the Unitary Conception of the United Kingdom' [2000] Public Law 384 esp 393-4.

recognising that a more flexible interpretation of sovereignty can give other norms, such as those important to decentralised constitutionalism, meaningful force.

(b) Contrasting Protective and Reconciliatory Approaches to Accommodation: Valuing Norms Differently

So far, two different approaches to the interaction between devolution and parliamentary sovereignty have been identified, approaches which mirror that principle's interaction with other components of the constitution (like membership of the EU and the ECHR). One account considers this interaction as a conflict, with the diffusion of legislative power necessarily—and intolerably—qualifying parliamentary sovereignty. This perceived incompatibility can, by virtue of sovereignty's pre-eminence, appear to necessitate the removal of those qualifications and the reassertion of Westminster's legislative freedom. The alternative account considers this interaction in terms of compromise, considering political constraints on Westminster's legislative freedom, and even—provided certain conditions are met—the capacity of other institutions to affect Westminster's legislation as mere conditions on Westminster's legislative freedom that, by virtue of that principle's flexibility, *do not* compromise the core of its sovereignty. Elliott sets out in useful terms the distinction between two such, or at least analogous, perspectives:

> The question might be thought of in terms of the doctrine's capacity to withstand, or accommodate, developments that may, at least at first glance, appear to be in tension with it. Such an analysis seems to follow naturally if we are wedded to an orthodox, and perhaps simplistic, account of parliamentary sovereignty, according to which the concept is understood in unyielding and absolutist terms: as something that is brittle, and which must either stand or fall in the face of changing circumstances. Viewed from a different angle, however, the developments of recent

> years and decades might be perceived as an opportunity to think about parliamentary sovereignty in a different, and arguably more useful, way—by considering how the implications of this still-central concept are being shaped by the changing nature of the constitutional landscape within which it sits.[56]

The next part of this chapter's analysis is to unpick how each of these approaches to framing the problem leads to different approaches to the *solution*: the accommodation of parliamentary sovereignty. These two approaches identify a tension between parliamentary sovereignty and decentralisation, but this thesis is interested in what each approach is capable of facilitating or necessitating in response to that tension; how parliamentary sovereignty can continue to meaningfully fit within that constitutional framework and what ensuring that it does fit in this way might mean for devolution. The more rigid, conflict-oriented approach, it is argued, is less capable than the more flexible approach of accurately reflecting either the fundamental character of devolution, or the contemporary treatment of parliamentary sovereignty. The two approaches to accommodation are framed in the following way:

The approach to accommodation from the 'rigid', conflict-oriented perspective is described in this thesis as 'protective'. This is because it seeks to defend parliamentary sovereignty *against* incursions and limitations that flow from decentralisation. The second approach to accommodation, from the perspective of compromise, which imbues sovereignty with a certain degree of flexibility, is described as 'reconciliatory', precisely because it implies that parliamentary sovereignty can be reconciled with its new context, something which requires leveraging the principle's capacity to tolerate certain limited conditions.

[56] Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 48) 29.

A useful illustration of the protective approach is provided by Adam Tomkins in his evidence before the House of Commons European Scrutiny Committee. He said: 'Parliamentary sovereignty is under considerable challenge from multiple sources' in response to which some might be justified in 'seek[ing] its robust defence and protection.'[57] Two things are clear from this example: first, that the protective approach, although starting from the position that parliamentary sovereignty is under threat, does not entertain the notion that, on that basis, it should be abandoned. Instead, it is an account which advocates for the assertion of parliamentary sovereignty as a principle, seeking to alter the UK's constitutional architecture to better suit and accommodate it. It, therefore, clearly ascribes priority and pre-eminence to the principle. Second, it is paradoxical. Although it purports to have at its core a robust and broad conception of the principle, the protective account also views parliamentary sovereignty in fragile and brittle terms. To be concerned with 'protecting' the principle, and to consider that protection necessary for its survival is to, in the first place, implicitly acknowledge its fragility. Without these protections, that logic suggests, the principle would not likely endure. By contrast, the reconciliatory approach is an account of parliamentary sovereignty which through its flexibility, is ultimately more resilient, being less sensitive to these kinds of limitations.

Both of these qualities mean that the protective approach has the capacity to frame parliamentary sovereignty as necessitating the recentralisation of constitutional power away from the devolved institutions. Parliamentary sovereignty, a dominant but fragile principle, needs to be defended—on this account—against the incoming tide of constitutional change. This aligns with what Sandford and Gormley-Heenan argued in

[57] House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty* (HC 2010-11, 633-1), Written Evidence from Professor Adam Tomkins, para 35.

2020: that 'a reassertion of Parliamentary sovereignty could be anticipated' in future,[58] and is at the root of the 'muscular unionism' observed above. In other words, and for the sake of parliamentary sovereignty, 'control', that argument goes, needs to be 'taken back' from the devolved institutions as much as the EU ones.[59] Tomkins, for example, suggests that the reassertion of parliamentary sovereignty is an exercise in 'dealing with' contemporary components of the constitution with which it is thought to conflict.[60]

The reconciliatory approach, by contrast, does not consider that parliamentary sovereignty either can or should necessitate a wider recentralisation of constitutional power. Instead, it is understood in terms that render its accommodation possible *alongside*, rather than necessarily at the expense of, devolution (and certain other constitutional developments). Certainly, that principle needs to be accommodated, but successful accommodation is not antithetical to, nor incompatible with, some of the core components of meaningful decentralisation, including the conditions it would—or might—impose upon

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[58] Sandford and Gormley-Heenan (n 25) 120. 'At present, the danger lies in the *contrast* between the previous pattern of generous concessions to the devolved administrations, and non-interference by the UK Government, and a future unilateral (even if temporary) reassertion of central sovereignty to accommodate the consequences of Brexit': ibid 117 (emphasis original).

[59] See Nicholas Kilford, 'The UK Internal Market Act's Interaction with Senedd Competences: The Welsh Government's Challenge' (*UK Constitutional Law Association*, 23 February 2021) <https://ukconstitutionallaw.org/2021/02/23/nicholas-kilford-the-uk-internal-market-acts-interaction-with-senedd-competences-the-welsh-governments-challenge/>.

[60] 'For Parliament to assert its legislative supremacy fully, *it would have to deal with these challenges* as well as with that posed by EU law. … Parliament addressing but one of the contemporary challenges to its sovereignty may be taken in some quarters as representing parliamentary acceptance (or even approval) of the other such challenges': House of Commons European Scrutiny Committee (n 57), Written Evidence from Professor Adam Tomkins, para 33 (emphasis added).

Westminster's legislative freedom. However, this does not mean it is a less orthodox account; such a view, as will be seen in the following chapters, is consistent with the dominant (and most coherent) way that sovereignty's interaction with the wider constitution has been understood.

What is it that informs the protective approach's failure to acknowledge, or rejection of, a less absolutist, more flexible account of parliamentary sovereignty? The answer is foreshadowed by Tomkins' suggestion that other components of the constitution should be dealt with: It is that these two approaches present different accounts of the weight and value of, and hierarchy between, *other* aspects of the constitution, in particular their relationship with parliamentary sovereignty. On the protective approach, they are to be set aside so far as they are incompatible with that principle; for the reconciliatory approach, a more nuanced balancing exercise is required (as the 'reconciliatory' label implies). The latter approach recognises the normative purchase of other norms such that they exert pressure on the sovereignty principle that leverages its innate flexibility. The reconciliatory approach necessarily implies, in other words, that there are certain aspects of the constitution which are significant enough to engage that flexibility. As such, it is also a less monocular or 'sovereigntist' account of the constitution in the broader sense that it identifies other norms *beyond* parliamentary sovereignty as possessing, or attributes to such norms, significant value and weight. It is, therefore, a richer, multi-faceted picture of the constitution rather than an account dominated by sovereignty in which that principle is seen as the only important constitutional principle.

The protective approach, by contrast, is a 'sovereigntist' account because, in rejecting that the principle can or should accommodate other values and norms, or should itself accommodate certain conditions, it implies that those principles and conditions lack significant (or at least, *sufficient*) normative purchase. In other words, this approach is one

in which the principles embodied in, or developed by, the territorial constitution can only exist, or at least exert normative force, *to the extent that parliamentary sovereignty leaves space for them*. This account is one which is reflected in recent jurisprudence. For example, McHarg says that

> the final contributing factor to the increasingly problematic nature of devolved boundaries has been the way in which the Supreme Court has approached recent devolution disputes. The key issue is the primacy the court has given to the sovereignty of the Westminster parliament in resolving those disputes, to the virtual exclusion of other constitutional considerations.[61]

This particularly sovereigntist account of constitutional litigation, predicated upon the centrality of the sovereignty principle as a constitutional rule, necessarily excludes other constitutional principles. On this view, parliamentary sovereignty cannot be understood, or have its 'implications…shaped by',[62] such other constitutional principles or considerations—like the conditions which might be imposed by devolution.

The prioritisation of parliamentary sovereignty to the exclusion of other considerations surfaces in case law in a number of different ways, some of which appear to give substance to the sovereignty principle itself in rich normative terms,[63] and some which rest simply

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[61] McHarg (n 36) 15.

[62] Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 48) 29.

[63] As was the case, for example, in *R (Miller) v The Prime Minister* [2019] UKSC 41, [2019] 9 WLUK 256; Mark Elliott, 'The Supreme Court's Judgment in Cherry/Miller (No 2): A New Approach to Constitutional Adjudication?' (*Public Law for Everyone*, 24 September 2019) <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/> accessed 23 February 2020.

on a more mechanical 'sovereigntist' reading of statutory language which fails to recognise the normative substance of other principles.[64] In particular, rather than adopting 'a more nuanced understanding of the constitutional issues at stake in devolution disputes beyond parliamentary sovereignty',[65] a desire to bolster or protect the sovereignty of the Westminster Parliament is rarely accompanied by an equivalent protection for devolved interests, as McHarg explains:

> What we see in these recent cases, then, is an overriding desire to preserve the autonomy and effectiveness of UK legislation against constraints imposed by devolution, but with no equivalent concern for the autonomy and effectiveness of devolved legislation, or for the wider constitutional principles at stake.[66]

Importantly for present purposes, however, this prioritisation of sovereignty *to the exclusion* of other principles also finds expression beyond case law. As Morgan and Wyn Jones put it: 'parliamentary sovereignty has been reasserted as *the* core constitutional doctrine of the state by a government impatient with any assertion of autonomous authority in Cardiff or Edinburgh.'[67] Again, the implication here is that the assertion of one is incompatible with the assertion of the other. Indeed, Sandford and Gormley-Heenan have argued that Brexit

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[64] As was the case, for example, in *In the matter of an application by James Hugh Allister and others for Judicial Review* [2023] UKSC 5; Elliott and Kilford (n 52); Nicholas Kilford, 'The Northern Ireland Protocol in The Supreme Court' (2023) 82 Cambridge Law Journal 200. Similarly, '[w]here political consensus has broken down, an approach to competence disputes which asserts the primacy of the statutory text inherently favours Westminster': McHarg (n 36) 16.

[65] McHarg (n 36) 20.

[66] ibid 17.

[67] Morgan and Wyn Jones (n 34) 8.

in particular appeared to present parliamentary sovereignty and devolution as a choice to prioritise one over the other:

> Extensive devolved self-rule in practice (permissive autonomy) has co-existed with UK-level parliamentary sovereignty. Brexit will subject this co-existence to unprecedented stress, as it will require a series of high-profile technical decisions on 'returning powers' that will prioritise one of these principles at the expense of the other. To extend the metaphor, this threatens to open the Schrodinger's box in which devolution is located, revealing that either Parliamentary sovereignty or permissive autonomy is paramount.[68]

To view matters this dichotomously is, however, to suggest that '[t]he concepts of self-rule and shared rule are both at odds, in principle, with Parliamentary sovereignty',[69] something which the reconciliatory approach rejects. Most obviously, as will be explored later, the UK Government and Parliament are increasingly demonstrating an assertiveness over devolved interests and a disregard for principles of devolved autonomy embodied, for example, in the Sewel convention (suggesting which of Sandford and Gormley-Heenan's dichotomy is becoming paramount).

On this analysis, three characteristics can be said to define the protective approach to accommodation. First, the protective approach invokes a *broad* conception of the principle. This is necessary for it to be seen, in the first place, as sensitive to—and ultimately

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[68] Sandford and Gormley-Heenan (n 25) 110.

[69] Although they do accept that some reconciliation has been achieved in *practical* terms: 'Since 1999, the UK has reconciled self-rule via strong legislative devolution with Parliamentary sovereignty by two means: an entirely informal IGR structure, based on goodwill in place of legality; and a sharp division between central and devolved competences ('hyper-dualism')': ibid 111.

incompatible with—non-legal limitations (such as those contained within the Sewel convention). Second, it is also a *brittle* account of parliamentary sovereignty, providing that this tension is intolerable to the principle itself, and not simply something it can accommodate. Finally, it is a view of parliamentary sovereignty in which it is *pre-eminent*; it is a principle to be prioritised regardless of whether this has deconstructive implications for other aspects of the constitutional order. The reconciliatory approach presents, by contrast, a narrower, more flexible account of parliamentary sovereignty which is capable of tolerating conditions imposed by norms which it recognises are of significant value.

4. Conclusion: Searching for Accommodation

So far, this chapter has, although indicating some of the arguments surrounding each of the models for accommodating parliamentary sovereignty, sought to steer a fairly neutral, descriptive path between them. It is important at this juncture to note, however, that there is clearly a normative case for and against each particular approach. One could argue, for example, that one account's view of parliamentary sovereignty is not a 'good' one, or that its prioritisation, or conditioning, of that principle is misguided because of an identified weakness in, or lack of, justifications for that approach. One could also argue that the better view of the constitution is one which is prepared to abandon the sovereignty principle, whatever its purchase in practice, in preference for these other principles. The case this thesis makes is, however, at its core doctrinal. It argues that the protective model is simply an inaccurate way of observing, and of seeking to make sense of, the UK's constitution. It fails to see, for example, how the flexibility of parliamentary sovereignty as a principle has sustained and embedded decentralised constitutionalism without needing to entertain the notion that it has itself been fatally impaired or set aside in consequence. The Supreme Court has, on numerous occasions—and in a range of contexts—been able to coherently assert *both* the sovereignty of the Westminster Parliament *and* the weight and value of other

constitutional rules and principles which condition the exercise of that sovereignty. It has not only done so intellectually defensibly, but also in a way that reflects the constitutional order more accurately than any more lopsided, monocular approach.[70]

Furthermore, the sovereignty principle has, in practice, demonstrated remarkable resilience, conceptually unbruised by political constraints on Westminster's law-making choices. Where conditions have been imposed by decentralisation upon Westminster's legislative freedom, which might engage its sovereignty, these have often been ameliorated—as Lord Neuberger persuasively argues—by taking a longer view of the *way* that these conditions are structured.[71] Ensuring, for example, Westminster's continuing power to unmake relevant limitations can render them compatible with the core of parliamentary sovereignty on a more flexible approach to the principle. The reconciliatory approach is more about making decentralisation *work* with parliamentary sovereignty, rather than abandoning it merely because of that tension. Goldsworthy advocates for a similar perspective, which he sets out in these terms:

> Defenders of parliamentary sovereignty cannot ignore constitutional change. Constitutional arrangements and understandings today are in many respects very different from those of the past. But the doctrine of parliamentary sovereignty has survived centuries of change, and has the capacity to survive many more. I will argue that the recent constitutional developments discussed by its critics are compatible with the doctrine.[72]

[70] Again, consider Elliott and Kilford (n 52).

[71] Lord Neuberger (n 17).

[72] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) 280.

Viewed in that way, the reconciliatory approach is more consonant with the UK's pragmatic constitutional tradition.[73] It is an exercise in accommodating the tension that necessarily exists within the UK's constitution, rather than abandoning, ignoring or mischaracterising it in pursuit of ideological dogma. It represents a preference to form a theory which recognises and reflects the constitutional reality before us, rather than downplaying or ignoring swathes of constitutional facts because they are uncomfortable, or do not fit a predetermined narrative. The reconciliatory approach is preferred, therefore, because it is the more coherent and accurate depiction of contemporary constitutional life. Indeed, only the reconciliatory approach satisfactorily accommodates parliamentary sovereignty because only it is able to characterise both that principle and devolution with a satisfactory degree of accuracy.

This is not to say that the protective approach is without any doctrinal support. Indeed—particularly after the UK's vote to leave the EU—a trend of purportedly, or implicitly, sovereignty-reinforcing centralisation has been observed in legislation, government action, and in the courts. There *are* examples of the protective approach in practice, and some are very recent, and exploring these examples is central to the task of this thesis. It is arguable, on that basis, that the protective approach has the momentum, and best reflects the trajectory the UK is on. However, it is, in part, in light of that concern that this thesis' argument is significant: it seeks to expose the flaw within the logic of the protective approach, demonstrating that the principle of parliamentary sovereignty *alone* cannot necessitate the recentralisation of constitutional power. The momentum that the protective approach is enjoying cannot be understood as being rooted in a proper

[73] On which, see Mark Elliott, 'Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Hart Publishing 2018).

understanding of what the sovereignty principle means, what it requires, and the space it occupies in the UK's constitutional order. There may be reasons to advocate for recentralisation, but the accommodation of parliamentary sovereignty is not one of them.

A chief component of that argument is that the broad and brittle conception of parliamentary sovereignty is doctrinally incoherent, representing a sharp, unwarranted shift from the more defensible, established reconciliatory position, and is difficult to square with a full and proper understanding of devolution. In particular, as McHarg has noted, it is rooted in an unconventional interpretation of the sovereignty principle demonstrated in case law by judicial reliance

> 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. [Such] decisions are also difficult to reconcile with the fact that Holyrood undeniably has the power to amend or repeal UK legislation in devolved areas, appearing to rely on a non-delegation doctrine of the sort that the court is not supposed to read into the devolution statutes.[74]

[74] McHarg (n 36) 16. McHarg suggests that similarly broad readings of parliamentary sovereignty in other cases are unorthodox for the same reason: 'Again, therefore, the Supreme Court appeared to be giving effect to an extended understanding of parliamentary sovereignty, as requiring that Westminster's legislative capacity be kept free from legal impediments, even ones that it is free to disregard. In other words, this appears to entail a move from the rule that Parliament *cannot* be prevented from legislating as it thinks fit, to a rule that there *must be no attempt* to impose such conditions, at least on the part of the devolved legislatures. However, this is no part of the orthodox understanding of parliamentary sovereignty, which has always recognised a distinction between Parliament's unlimited legislative authority, and the existence of a range of de facto constraints on its legislative capacity.': McHarg (n 46) 209.

McHarg's analysis—that the protective approach cannot accurately account for, or explain, some important aspects of the UK's constitution—is persuasive. Further, not only is its basis unconventional but, as will be seen in later chapters, the protective approach's manifestation in practice has extraordinary implications too, such as the insulation of Westminster's *unenacted* legislation from devolved interference.[75] The protective account, for all its traction, *remains* flawed, incoherent and unorthodox. Its failure to recognise and respond to devolution is indeed followed by its capacity to inhibit devolution from fulfilling 'its constitutional purposes'.[76] This is perhaps ironic given the devolution statutes themselves are an expression of Westminster's sovereignty, which should—consistent with that sovereignty—be given effect.

Nonetheless, there are two reasons that the protective approach might be attractive, beyond the circular argument that it justifies a pre-determined centralising narrative. First, the protective account appears to be clear in its requirements. It presents the accommodation of parliamentary sovereignty as a series of 'hard and fast' rules, tests that can be easily understood and can be readily answered. However, the protective account's simplicity is illusory. It is not clear when it is entirely satisfied, and what limitations on parliamentary sovereignty—at least *some* of which will surely be an essential component of contemporary

[75] '[Westminster] may decide to enact new legislation, or to amend or repeal existing legislation, or to allow existing legislation to continue in force unamended. As a matter of practical reality, the latter choice, as much as the other two, can reasonably be regarded as one of the ways in which Parliament exercises its power to make laws for Scotland': *Treaty Incorporation* (n 22) [42]. Similarly, '[i]n the *Continuity Bill Reference*, the Supreme Court also made *unexpected* use of what had previously been regarded as a purely declaratory statement of Westminster's ongoing sovereignty in s.28(7) of the Scotland Act to *create a new constraint* on devolved competence': McHarg (n 36) 16 (emphasis added).

[76] McHarg (n 36) 21.

constitutional reality—it is prepared to tolerate. As Elliott has argued, one of the problems with sovereignty 'fetishism' is that it is difficult to know when it is satiated, often with incoherent consequences.[77] For instance, matters which had historically been accepted as compatible with parliamentary sovereignty are recast, under the protective model, as incompatible with the principle.[78]

The reconciliatory account is, admittedly, more nuanced and nebulous in its requirements. It avoids the trap of simply prescribing a series of limitations, liberation from which will 'secure' Westminster's sovereignty. Instead, it requires the demands of parliamentary sovereignty and multi-layered constitutionalism to be balanced, according to each significant weight as valued components of the constitution. As such, it is more interested in the *way* in which decentralisation takes place and is understood, rather than rejecting it out of hand, and is more inclined to take a longer view of the constitution. Limitations

[77] Mark Elliott, 'The UK-EU Brexit Agreements and "Sovereignty": Having One's Cake and Eating It?' (*Public Law for Everyone*, 31 December 2020) <https://publiclawforeveryone.com/2020/12/31/the-uk-eu-brexit-agreements-and-sovereignty-having-ones-cake-and-eating-it/> accessed 1 January 2021.

[78] A notable example in this regard is section 4 of the Human Rights Act 1998. The Independent Review of the Human Rights Act noted that this provision was 'intended to preserve the constitutional principle of Parliamentary Sovereignty while enabling the HRA to give effect to Convention rights in UK domestic law': Independent Human Rights Act Review, 'Independent Human Rights Act Review: Full Report' (Ministry of Justice 2021) CP 586 ch 5, para 24. The Independent Review 'consider the careful, balanced approach taken to Parliamentary Sovereignty in the HRA was appropriate at the time of its enactment. That remains the case today:: ibid ch 5, para 151. That sentiment was echoed in House of Commons European Scrutiny Committee (n 57), Written Evidence from Professor Adam Tomkins, para 27. By contrast, the Supreme Court recently said that 'Parliament can itself qualify its own sovereignty, as it did when it conferred on the courts the power to make declarations of incompatibility with rights guaranteed by the ECHR, under section 4 of the Human Rights Act': *Treaty Incorporation* (n 22) [50].

accepted now may not necessarily spell the end of parliamentary sovereignty if they are constructed in the right way. This might be unsatisfactorily complex, but it is reflective of how the UK's constitution in practice works. Neither the pursuit of hard and fast rules nor seeking to satisfy a particularly rigid set of predetermined tests is in keeping with the UK's constitutional tradition, nor is either an accurate reflection of the place occupied by parliamentary sovereignty within that tradition.[79]

Second, the reconciliatory approach might be criticised on the basis that it is flexible without limits, and that the picture it paints of parliamentary sovereignty is of a principle which similarly has unlimited flexibility. In other words, it might be considered to *not* be a way of *accommodating* parliamentary sovereignty at all; at least, not in any meaningful sense. However, it is clear that, in practice, the reconciliatory view is *not* unlimited in its flexibility. It provides, at least as a floor, that the accommodation of that principle requires that Westminster continue to be ultimately responsible for the rules of the constitutional game, and that its freedom to legislate is ultimately free of legal limitations which are immovable or cannot be circumvented by even the express exercise of its legislative will. Qualifications to these core aspects of the principle would undermine its place as 'the cornerstone of our constitution'.[80] Parliamentary sovereignty, on this model, makes certain limited demands of

[79] Similarly, as Elliott explains: 'The reality of the contemporary UK constitution is that Parliament's legislative authority falls to be exercised within a normatively rich constitutional order and in the light of the restraining influences of multi-layered and common-law constitutionalism. The possibility that the constitutional values associated with those influences may possess irreducible cores that sit in tension with the notion of absolute legislative authority can neither be taken for granted nor rejected out of hand'.: Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 48) 57.

[80] Lord Neuberger (n 17) paras 14, 32.

the multi-layered constitution, but does not go so far as requiring the recentralisation of constitutional power.

None of this is to say that parliamentary sovereignty poses *no* challenge to devolution's place in the UK's constitution. It does, of course, provide the *legal* tools by which any dismantling of that scheme could be achieved. Further, it imposes limits on the permanence that devolution can be guaranteed.[81] However, to accept that parliamentary sovereignty is a powerful piece of legal machinery—or sometimes, perhaps, weaponry—is not to accept that its proper recognition is *necessarily* incompatible with other features of the constitution.

Equally, the reconciliatory approach is not perfect. The presence of the protective approach, to some extent, itself suggests that it is not universally accepted as providing a satisfactory answer to the accommodation problem. However, it is nonetheless important to critically examine whether other important aspects of the constitution can be preserved alongside the sovereignty principle. The reconciliatory approach demonstrates that they can. Further, the reconciliatory approach is able to properly recognise aspects of the constitution—like those noted by McHarg above—which are mischaracterised by the protective approach. Because of its capacity to accurately characterise the core components of both devolution and parliamentary sovereignty, the reconciliatory approach should be preferred. It

[81] 'So long as parliamentary sovereignty remains the central constitutional dogma of the state, there are limits to the extent to which any protections—whether "statutory" or not—may be relied upon': Morgan and Wyn Jones (n 34) 7. '[S]o long as (Westminster) parliamentary sovereignty remains the core principle at the heart of the UK's uncodified constitution, any protections for the devolved level will remain reliant on the centre exercising a degree of self-restraint that, in recent years, has been conspicuous only by its absence': ibid 8.

demonstrates that it *is* possible to accommodate parliamentary sovereignty satisfactorily in the UK's territorial constitution.

The remainder of this thesis is concerned with exploring each of these two accommodation approaches in turn. It argues that the reconciliatory approach is preferable on doctrinal grounds, and it seeks to argue that the presence of parliamentary sovereignty is not necessarily antithetical to a territorial constitution which vests significant power to territorial legislatures, and can instead be meaningfully accommodated within it.

Chapter 3

The Reconciliatory Approach:

Recognising Sovereignty's Flexibility and the Fundamental Character of Devolution

1. Introduction

This thesis concerns two different approaches to accommodating parliamentary sovereignty within the UK's territorial constitution, that is, two different ways of providing conceptual space for parliamentary sovereignty within the territorial constitution in a way that ensures that the latter is, in an intellectually coherent manner, consistent with that principle. This thesis argues that only one such approach—the reconciliatory approach—achieves that accommodation satisfactorily. It makes this case on two, primarily doctrinal, grounds: First, this approach adopts a coherent conception of parliamentary sovereignty, accurately reflecting the approach soundly, and prominently, endorsed by the UK's courts and political institutions and, second, it is compatible with the fundamental character of devolution, as well as its constitutional purposes, implications and practical demands. This approach recognises parliamentary sovereignty's flexibility, something which allows it to coexist *alongside* devolution. A second approach—described as 'protective'—rejects this flexibility and seeks to defend a broader conception of parliamentary sovereignty *against* the qualifications purportedly contained in the process of decentralising constitutional power. It, in contrast to the reconciliatory approach, does not accurately reflect a coherent—let alone compelling—doctrinal account of parliamentary sovereignty and is incompatible with some of the core aspects of devolution.

In practice, that approach's centralising implications are ultimately irreconcilable with some of the fundamental components of the UK's contemporary constitutional settlement.

Having unpacked each approach in general terms in the previous chapter, the remainder of this thesis is concerned with the ways in which these two approaches find expression in practice, and with critiquing them. This third chapter explores the reconciliatory approach. It argues that the reconciliatory approach satisfactorily accommodates parliamentary sovereignty (and is therefore preferable) for the two reasons given above: the strengths of its conception of parliamentary sovereignty (on the one hand), which is intellectually defensible, consistent with the most coherent, widely endorsed approach to the principle, and (on the other) its capacity to accurately characterise the core aspects and constitutional implications of, as well as the degree of autonomy necessitated by, devolution. Put another way, the reconciliatory approach facilitates satisfactory accommodation because it can accurately account for some of the most important aspects of the UK's territorial constitution.

Both the reconciliatory and protective approaches suggest that, for the territorial constitution to be consistent or compatible with parliamentary sovereignty, it must take a certain form, structure or shape, and be understood and given effect in a particular way. This is because, as has been discussed, parliamentary sovereignty to some extent serves a gatekeeping function, only being consistent with a certain range of constitutional 'options'. The reconciliatory approach, however, interprets parliamentary sovereignty in narrow, flexible terms, providing criteria for accommodation which can—as its name suggests—be reconciled with some of the core elements of devolution.

Accommodation is achieved, on this approach, through the satisfaction of two criteria. The first criterion is that the settlement itself represents an emanation, or reflection, of

Westminster's legislative will rather than an independent, self-executing phenomenon, or one based on an alternative hypothesis of constitutionalism. The reconciliatory approach is of devolution as a 'delegation' of constitutional power, rather than its 'transferral'. However, this account provides—perhaps counterintuitively—a pathway to realising a richer account of the constitutional significance of devolution. The second criterion required by the reconciliatory approach is the preservation of Westminster's legal power to legislate within devolved areas. Again, although this provides accommodation for the sovereignty principle, it is not a criterion which *necessarily* undermines devolution. This is because it does not foreclose the possibility of *political* qualifications to Westminster's power in devolved areas, nor does it prescribe that Westminster's legislation possesses supremacy, nor indeed does it rely on Westminster's *exercise* of its power in devolved areas. Thus, it allows significant divergence without impairing the core of the sovereignty principle.

This model is 'satisfactory' firstly because it is consistent with what will be identified as some of the fundamental characteristics of devolution, that is the 'dynamism' of the settlement, the normative status of within-competence legislation, the absence of a supremacy rule for Westminster legislation and the axiomatic nature of devolved competences themselves, which can be broad without impinging upon parliamentary sovereignty. These features are particularly important because the two accommodative models are distinguished by their capacity to recognise them. The reconciliatory approach, as will be seen, is instrumental in facilitating the development of these aspects of devolution. Secondly, it is satisfactorily accommodative because of its consistency with the treatment of the sovereignty principle by the courts and political institutions in the context both of devolution generally, and in other comparable contexts. This approach does not accept that devolution (or other relevant phenomena, such as EU membership) is

incompatible with, or amounts to a *repudiation* of, parliamentary sovereignty as the cornerstone of the UK's constitutional order. Rather, it uses these criteria to render a generous reading of devolved competences *compatible* with a meaningful account of sovereignty.

In order to advance the case for the reconciliatory approach, it is first necessary to explore the fundamental character, and core aspects, of devolution *per se* with which an accommodative approach will need to be compatible in order to be satisfactory. Section 2 accordingly considers relevant core aspects of the devolution settlement, and its constitutional recognition. Section 3 considers, at close-quarters, the first component of the reconciliatory approach: its more flexible treatment of sovereignty, seeking to illustrate precisely what that flexibility looks like in practice, and demonstrating how it facilitates the development of some of the characteristics that are definitive of devolution itself. In section 4, the limits of that flexibility are explored. Here, those mechanisms that are built into the settlement to provide sovereignty with its accommodation under this approach are considered. In section 5, before concluding the chapter, an excursus is made into a different, but analogous, example of decentralisation: the accommodation of parliamentary sovereignty alongside the primacy of EU law. This discussion is used to illustrate the reconciliatory approach's consistency with the wider treatment of parliamentary sovereignty beyond devolution, in particular the degree and specific nature of its flexibility, and the limits of that flexibility.

2. Some Core Aspects of Devolution

It is important at the outset to note that devolution, the system at the core of the UK's territorial constitution, is far from constitutionally innocuous. Rather, it is a 'generous

settlement of legislative authority',[1] bestowing 'plenary'[2] power on legislative institutions. Although this constitutional significance is in part demonstrated by gestures[3] such as legislative declarations of permanence,[4] it is more importantly indicated by—and reflected in—the generosity (both in scope, and in nature) of the competences bestowed on the devolved institutions, which have, as will be discussed, important implications for *Westminster*'s legislation. This significance is also importantly acknowledged, though to varying degrees, in the judicial treatment of those institutions. For example, the judicial approach to the devolved legislatures was, until recently, generally marked by relative generosity, indicated by a preparedness to immunise the devolved legislatures from 'judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness'[5] and deference to them as part of proportionality analyses.[6] These features are illustrative of

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[1] *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61, [2013] 1 AC 792 [51] (Lord Hope).

[2] *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 [147] (Lord Reed).

[3] James Cook, 'What Now for "the Vow"' (*BBC News*, 1 October 2014) <https://www.bbc.co.uk/news/uk-scotland-29443603> accessed 12 April 2022; Lord Smith of Kelvin, 'Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament' (The Smith Commission 2014).

[4] Government of Wales Act 2006 s A1 (inserted by section 1 of the Wales Act 2017); Scotland Act 1998 s 63A (inserted by section 1 of the Scotland Act 2016).

[5] *AXA* (n 2) [52] (Lord Hope).

[6] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] 2 WLR 481 [52] (Lord Mance), esp [118] (Lord Thomas); Adam Tomkins, 'Confusion and Retreat: The Supreme Court on Devolution' (*UK Constitutional Law Association*, 19 February 2015) <https://ukconstitutionallaw.org/2015/02/19/adam-tomkins-confusion-and-retreat-the-supreme-court-on-devolution/> accessed 15 November 2021; Rick Rawlings, 'Riders on the Storm: Wales, the Union, and Territorial Constitutional Crisis' (2015) 42 Journal of Law and Society 471; Nicholas Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (2021) 26 Judicial Review 321.

a constitutional significance, it has been argued, which has given life to a constitutional principle of devolved autonomy,[7] and distinguish the devolved institutions from local authorities or councils.[8] As Lord Reed has explained, devolution carries a heavy constitutional burden, being 'intended to sustain the integrity of the UK as well as to meet the desire for self-government in three of its constituent nations.'[9]

The Institute for Government sets out devolution's contribution to the life of the UK constitution in this way:

> The devolved institutions in Scotland, Wales and Northern Ireland are now established as permanent features of the UK constitution. There is no serious appetite for devolution to be abolished. This was not always guaranteed, particularly in Wales, but by 2011 almost two-thirds of voters voted in favour of full legislative powers for the Welsh Assembly. In Northern Ireland, despite the repeated

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[7] See e.g., Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019); Mark Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015). See also 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); Christopher McCorkindale, 'UKIMA as Red Flag Symptom of Constitutional Ill-Health: Devolved Autonomy and Legislative Consent' (2024) 75 Northern Ireland Legal Quarterly 45.

[8] Lord Reed, 'Scotland's Devolved Settlement and the Role of the Courts' (The Inaugural Dover House Lecture, London, 27 February 2019) 19; Andrew Marr, 'Blair Blunder Exposes Devolution Plan's Central Dilemma of Devolution Plan' *The Independent* (4 April 1997) <https://www.independent.co.uk/news/blair-blunder-exposes-devolution-plan-s-central-dilemma-of-devoution-plan-1265237.html> accessed 24 February 2021.

[9] Lord Reed (n 8) 18.

> collapse of power-sharing, devolved government remains far the most popular constitutional option.
>
> Devolution has allowed greater democratic expression in all three nations. Each can design policies and take public spending decisions that more closely align with local needs and preferences. Devolution has created space for greater policy experimentation, creating opportunities for the different governments to learn from each other.[10]

The political importance of devolution is significant, and the breadth of devolved competence is noteworthy. Each institution has a raft of powers over an impressive range of policy areas from housing and education, to transport and tax.[11] Further, these competences had, until the protective approach emerged, only become more generous over time in their breadth and in the way in which they were formulated. Wales, for example—a jurisdiction whose powers were initially set out in a conferred powers model—was shifted to a reserved powers model by the Wales Act 2017.[12] Although it is plainly feasible for a reserved powers model to be ungenerous, it is generally accepted that it is more generous in *spirit* than a conferred powers model, and the shift in Wales was also preceded by a shift from secondary to primary legislative authority on the part of the Senedd.

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[10] Institute for Government, 'Devolution at 20' (2019) 5.

[11] ibid 8.

[12] See Wales Act 2017; Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018).

The breadth of devolved competences is also complemented (often) by generous interpretation of those competences at the hands of the courts, who did not seem—until very recently—to consider an interaction with parliamentary sovereignty to qualify the significance of the devolved institutions, or the scope of their powers. A good example of this generosity can be found in the *Welsh Agricultural Wages Reference*. In that case, the Bill referred to the Court related to *both* devolved and reserved matters. However, the statutory test under the then-in-force conferred powers model was that, where a Bill related to a devolved subject under Schedule 7, such as agriculture, it would be within competence. The Supreme Court held that, despite relating to reserved matters, it would be within competence because the Bill *also* related to devolved matters,[13] reasoning which is perhaps surprising set against the arguably less generous spirit of the conferred powers model. The Supreme Court, in other words, was able and willing to read breadth into the settlement even where the relevant competence model appeared to suggest a more restrictive approach. Indeed, the Court has also used the fine distinctions between the different competence tests in order to preserve the maximum scope for devolved legislative freedom.[14]

Generosity is also arguably required by the statutory frameworks themselves: Each provides that, where possible, devolved legislation should be read and given effect to as within competence.[15] Although short of an assumption that such legislation *is* within

[13] *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622; Bingham Centre for the Rule of Law, 'A Constitutional Crossroads: Ways Forward for the United Kingdom' (2015) 63.

[14] See *In re The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1 [51] and [99]; Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 6).

[15] Scotland Act 1998 s 101; Government of Wales Act s 154; Northern Ireland Act 1998 s 83.

competence,[16] this represents a notable indicator that devolved law-making should be generously construed and that the institutions are worthy of respect.[17] The breadth of the competences of the devolved legislatures and the expansive approach to their interpretation, with or without statutory encouragement, are—it is argued—more important indicators of the constitutional significance of devolution than statements of permanence which are of legally uncertain value: the question whether the devolved institutions are constitutionally significant does not depend on whether they are (or are said to be) permanent. In fact, in the case of Northern Ireland temporariness is a key asset. In that instance it is arguable that the settlement's predication on the continuing will of the people of Northern Ireland[18] is a significant indicator of its constitutional value.

The Supreme Court has, at times (though somewhat inconsistently) endorsed a view of devolution which recognises the magnitude of its constitutional implications. At its highest, a devolved settlement has been recognised as 'in effect a constitution',[19] but even more modest positions, upon which the Court appears to have largely settled, still recognise its constitutional importance. For instance, in *AXA*, Lord Hope said this:

> Although section 28(7) provides that that section shall not affect the power of the United Kingdom to make laws for Scotland, in practice the Scottish Parliament enjoys the same law making powers for Scotland as the Westminster Parliament

[16] *Imperial Tobacco* (n 1) [13]-[15] (Lord Hope).

[17] ibid [51] (Lord Hope).

[18] Provided in Northern Ireland Act s 1.

[19] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 [11] (Lord Bingham).

> except as provided expressly for in section 29 which, in certain closely defined respects, limits its legislative competence.[20]

He continued:

> 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 United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence.[21]

Although the courts have stopped short of identifying a wider constitutional principle *of* devolution, they have (*generally*[22]) recognised that it is fundamentally important that the scheme is 'coherent, stable and workable'.[23] A key part of this recognition is to ensure that parts of the settlement are not undermined by, but sit comfortably with, its other parts,[24] and also that neither it, nor other legal tools, are wielded to unduly inhibit the devolved institutions from discharging their 'constitutional purposes'. This, McHarg suggests, characterises what the devolved institutions are *for*: 'to give effect to local democratic choices and to improve the quality of decision making in devolved policy areas by bringing it closer to the people it affects'. Furthermore, as McHarg explains, these practical elements

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[20] *AXA* (n 2) [45] (Lord Hope).

[21] ibid [46] (Lord Hope).

[22] See *Martin v Most* [2010] UKSC 10.

[23] *Inter alia: Imperial Tobacco* (n 1) [14] (Lord Hope); *Continuity Bill* (n 14) [13].

[24] Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 6).

are reinforced by certain more principled values: 'transparency and accountability, intelligibility and legal certainty.'[25] McCorkindale similarly notes that the purposes of devolution were subsidiarity and unity, as well as 'to bring about radical (in Blair's words, "necessary") change to the territorial distribution of power in the UK whilst at the same time preserving the indivisible sovereignty of the Crown-in-Parliament.'[26] The courts have similarly noted the important qualities of devolution:

> The intention underlying section 104 [of the Scotland Act] – and indeed the whole scheme of devolution – is, however, that the redistribution of powers should not impair but improve the government of the United Kingdom as a whole. It proceeds on the basis that both administrations can be expected to co-operate appropriately.[27]

McHarg rightly suggests that devolution, if it is to be given the effect purportedly intended in its foundational statutes, relies on or is at least strengthened by (among other things) 'policy effectiveness – a question of legislative capacity, rather than constitutional authority'; the 'transparency, stability and intelligibility of competence limits' and 'effective intergovernmental co-operation.'[28] The capacity of either the reconciliatory or protective approach to facilitate the practical demands of devolution, as much as its constitutional implications—the latter of which is surely to some extent a product of the former—is not,

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[25] Aileen McHarg, 'The Contested Boundaries of Devolved Legislative Competence: Securing Better Devolution Settlements' (Bennett Institute for Public Policy and Institute for Government 2023) 2 <https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2023/05/Contested-boundaries-devolved-legislative-consent.pdf> accessed 23 May 2023.

[26] McCorkindale, 'Devolution: A New Fundamental Principle of the UK Constitution' (n 7) 109.

[27] *Martin v Most* (n 22) [80] (Lord Rodger).

[28] McHarg (n 25) 3–4.

therefore, merely a normatively-laden question about a particular kind of constitutionalism. Rather, it is a question of each approach's capacity to give effect to a scheme which *exists*, forms a core part of the contemporary constitution and purports to give the devolved institutions a key primary role in government.[29] To ignore it, or to fail to take it into account, would be to neglect a considerable portion of the UK's constitution, and to fail to articulate an intellectual framework capable of making it 'workable'.

The devolution settlement grants the devolved territories significant latitude to diverge from Westminster on matters devolved to them and therefore should be recognised as having significant implications for the UK's constitution, and for Westminster in particular. The capacity of various accommodative approaches to recognise these implications (one of which is discussed next) and to allow the devolved legislatures the full breadth of law-making power accorded to them is an important point at which criticism of those approaches can be directed. If, for example, a particular attempt to accommodate parliamentary sovereignty does not accurately reflect those implications, or inhibits the law-making capacity outlined in the statutes, it fails to accurately reflect the constitutional order in which it operates.

Given that specific devolved competences are open to some degree of change, it is necessary to consider what defines the fundamental character of that settlement itself. This thesis considers that devolution, although liable to some modifications, possesses some fundamental characteristics that define the settlement, particularly as far as its relationship with parliamentary sovereignty and Westminster's legislation are concerned, and in addition to the existence of devolved institutions and the capacity of the devolved

[29] See The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, *How Devolution Is Changing Post-EU* (5th Report, Session 6, SP Paper 453, 24 October 2023) para 23.

legislatures to enact effective legislation within prescribed areas of competence. These characteristics are connected, and are subject to later discussion, but can be summarised in this way: First, the rules restricting Westminster's engagement in devolved areas do not amount to hard legal limits on its legislative freedom (as might be the case in a system where powers are legally divided between institutions). Second, there is no general supremacy rule which provides for the priority of Westminster legislation over devolved legislation, and for the disapplication of devolved legislation which is incompatible or inconsistent with it. Third, and consequently, devolved legislation enjoys the highest normative status. Fourth, (and similarly, relatedly) the system that describes the interaction between Westminster and within-competence devolved legislation is one of 'dynamism', a notion that will be unpacked below. Fifth, because of this system, it is the nature and limits of devolved competences that are axiomatic, determinative of the degree of legislative freedom that the devolved legislatures enjoy. Within the boundaries of their competences, their legislative freedom is considerable.

The reconciliatory approach's more flexible account of parliamentary sovereignty, it is argued, is not only compatible with these key characteristics of devolution in a way that the protective model is not, but actually goes so far as to facilitate them: these core aspects of the devolution scheme, definitive particularly of the interaction between devolved and Westminster legislation, might not be possible at all if a more flexible account were not embraced. The following section considers how the reconciliatory approach's more flexible view of sovereignty works in practice, and how it facilitates this interaction between devolution and Westminster legislation that, it is argued, is inherent in the settlement. This discussion will reveal the core components of that settlement in more detail, and more precisely locate the nature of the flexibility which the reconciliatory approach recognises

parliamentary sovereignty to possess. Indeed, it is through their interaction that these core elements of devolution and parliamentary sovereignty can be properly illuminated.

3. The More Flexible View in Practice: Recognising the Character of Devolution

The reconciliatory approach is defined in part by its more 'flexible' approach to parliamentary sovereignty. The previous chapter sought to locate this flexibility at a general, more theoretical level, arguing that it rested in Dicey's negative aspect: this approach essentially contends that parliamentary sovereignty is not repudiated simply by the ineffectiveness of Westminster's most recent legislative expression, especially where Westminster has *itself* provided for that outcome. But what does that flexibility look like in practice, especially in the context of devolution, and what does it mean *for* devolution? This section's purpose is to illuminate the nuances of the more flexible approach to parliamentary sovereignty which characterises the reconciliatory approach by reference to two key issues. The first is the phenomenon described as 'dynamism', and the second is the Supreme Court's confrontation of the flexibility of the sovereignty principle in the *Continuity Bill* case. It will be clear from this discussion that this flexibility is instrumental in facilitating the realisation of the core components of devolution considered above.

There has always been a question about whether—or the extent to which—devolution can be meaningful within a constitution dominated by parliamentary sovereignty. In parallel, there has also long been the question of whether parliamentary sovereignty is capable of withstanding devolution.[30] Lord Steyn, as already noted, indicated in the *Jackson* case that

[30] '[T]he thorny question of "sovereignty" […] has bedevilled attempts at major constitutional reform in the UK for many years (as seen recently, in addition to devolution, in the European and human rights

parliamentary sovereignty was challenged by devolution,[31] and it was not the first time that suggestion had been made. Dicey also confronted this question himself in response to the—to his mind concerning—assertion that his account of parliamentary sovereignty could provide the means of achieving Irish Home Rule, and survive that process untarnished:[32]

> In the vital distinction he drew between sovereign and non-sovereign law-making bodies which he developed in chapter 2 of the *Law of the Constitution*, Dicey placed the American congress in the same constitutional class as the legislatures of colonial dominions and the Great Western Railway Company as all exemplifying non-sovereign bodies endowed however with a degree of self-government. John Morley notes that Gladstone read this chapter with particular interest in 1886, for *it suggested that Westminster could bestow a substantial degree of autonomy on a newly created Dublin parliament without in any way impairing its own ultimate sovereignty*.[33]

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arenas), and in particular how power can be effectively dispersed within a fundamentally unitary constitution underpinned by the notion of "Parliamentary sovereignty" (or the "legal supremacy of Parliament")': Barry K Winetrobe, 'The Scotland Bill: Some Constitutional and Representational Aspects' (House of Commons Library 1998) Research paper RP 98/3 6.

[31] 'The settlement contained in the Scotland Act 1998 also point[s] 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.': *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [102] (Lord Steyn).

[32] Tulloch notes that 'it must have been especially galling for such a committed Unionist as Dicey to have his work quoted to justify and legitimise a policy he deplored': Hugh Tulloch, 'A. V. Dicey and The Irish Question: 1870-1922' (1980) 15 Irish Jurist 137, 142. See generally Nicholas Kilford, 'Divided We Stand: Decentralisation, Federalism and a Union-State' (Durham University 2019) ch 1.

[33] Tulloch (n 32) 141–2 (emphasis added).

The debate about whether parliamentary sovereignty was capable of tolerating devolution was raised again during the passage of the Scotland Bill in 1998. These tensions were primarily grounded in the concern that once established, a Scottish Parliament would be able to challenge parliamentary sovereignty by asserting an alternative constitutional hypothesis,[34] or would dislodge that principle as 'the cornerstone' of the constitution.[35] The fundamental point was a 'warning that devolution would put the UK constitution at peril by the undermining of existing sovereignty'.[36]

The reconciliatory approach is predicated on the view that there is nothing in the current form of devolution which is *necessarily* incompatible with what should properly be understood as the core of parliamentary sovereignty. This is the case even though the devolved institutions have power to diverge from, or qualify the effectiveness of, Westminster legislation.[37] This component, described as 'dynamism' (because it is a 'dynamic' legislative interaction) is one of the most significant constitutional implications of devolution, at least as far as sovereignty is concerned. Dynamism, however, is facilitated by, and compatible with parliamentary sovereignty only by virtue of, the reconciliatory approach's more flexible account of that sovereignty.

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[34] Language used in a different context, and borrowed from *Jackson* (n 31) [101]-[102]; Lord Neuberger, 'Who Are the Masters Now?' (Second Lord Alexander of Weedon Lecture, 6 April 2011) para 41; Lord Hope, 'Sovereignty in Question: A View from the Bench' (WG Hart Legal Workshop, 28 June 2011) 12. See also Jeffrey Jowell, 'Parliamentary Sovereignty under the New Constitutional Hypothesis' [2006] Public Law 562.

[35] Lord Neuberger (n 34) paras 14, 32.

[36] Winetrobe (n 30) 11.

[37] See ibid.

(a) Dynamism: A Core Characteristic of Devolution Made Possible by a Flexible Conception of Parliamentary Sovereignty

Dynamism[38] describes the process by which the devolved legislatures (on the one hand, and only so far as within devolved competence) and the Westminster Parliament (on the other, absent that legal limitation) can modify and repeal one another's enactments.[39] It is through this process that devolution's intrusive impact on Westminster's legislation is most obvious, but it is also the framework which enables devolution to provide for meaningful divergence. Westminster having legislated on a particular matter which falls within devolved competence does not occupy that field, or pre-empt future devolved legislation on that matter. Furthermore, devolved legislation is not outside competence solely due to its interaction with Westminster's legislation, *even if* it has the effect of setting aside the laws enacted by the Westminster Parliament. It is for this reason that the boundaries of devolved competences, set out in the relevant statutes (as amended) are axiomatic: although Westminster's legislation in devolved competences can affect any devolved legislation already extant in that area, it does not *by that fact alone* alter devolved law-making power in that area.

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[38] See e.g., Anurag Deb and Nicholas Kilford, 'The UK Internal Market Act: Devolution Minimalism and the Competence Smoke Screen' (*UK Constitutional Law Association*, 4 July 2022) <https://ukconstitutionallaw.org/2022/07/04/anurag-deb-and-nicholas-kilford-the-uk-internal-market-act-devolution-minimalism-and-competence-smoke-screen/> accessed 4 July 2022; Nicholas Kilford, 'The UK Internal Market Act and the Power to Make Effective Laws' (*The Institute of Welsh Affairs*, 27 September 2022) <https://www.iwa.wales/agenda/2022/09/the-uk-internal-market-act-2020-and-the-power-to-make-effective-laws/> accessed 27 September 2022.

[39] Graeme Cowie, 'The Power to Make Laws for Scotland: The Treaty Incorporation Bills Reference' [2022] Public Law 189, 196.

On the reconciliatory approach, there is nothing in this account of the interaction between devolved and Westminster legislation that necessarily impugns parliamentary sovereignty. This is because, on this approach, although this process affects the capacity of Westminster's legislation to remain effective, it does not go to the core of the sovereignty principle. Instead, this process interacts with aspects of Westminster's legislative freedom which, at most (and if at all), reflect only peripheral and flexible aspects of the sovereignty principle. Instead, under this approach it is the fact that this process is conceived as an expression of Westminster's own legislative intention (and ultimately subject to its continuing will to that effect), as well as its legal power to legislate in devolved areas, that ensure this interaction is innocuous to parliamentary sovereignty itself. In other words, the architecture of dynamism ensures that the devolved institutions' power to modify or repeal Westminster's legislation does not go to parliamentary sovereignty. In one sense, this is unorthodox: such an approach is in direct contradiction of Dicey's negative aspect. However, in another sense, it represents the full realisation of his *positive* aspect: that Westminster can, if it chooses to do so, effect a scheme of 'dynamism' and have the courts enforce it.[40] Furthermore, it is Westminster which can determine the fields in which this system is operable, and it can shrink those fields if it wishes to do so, or bring this system itself to an end.

Importantly, on this view, parliamentary sovereignty does not necessitate limiting devolved competences to only areas in which Westminster has not legislated, nor does it necessitate providing Westminster legislation with legal primacy or supremacy (such that devolved legislation must be read *subject to* it). It is an account which facilitates a rich and muscular interpretation of devolution, especially its interaction with Westminster legislation,

[40] For an analogous argument, considered in a different context, see Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Bloomsbury 2008) ch 1.

extending its practical reach and its normative potency, allowing the devolved institutions to make law even where Westminster legislation already exists in a certain area, and to repeal that legislation if it is within competence to do so. In this sense, dynamism is a useful illustration of the way in which the more flexible interpretation of the sovereignty principle enables a more potent view of devolution. Indeed, the more flexible (and pragmatic) approach to sovereignty which defines the reconciliatory approach has the consequence of facilitating this key characteristic of devolution. If a more rigid account of sovereignty were endorsed, with which dynamism would be incompatible, devolution would be significantly hollowed out in consequence.

Dynamism is a key practical component of devolution, extending the reach and purchase of devolved competences themselves, and ensuring that they are not inhibited merely by extant legislation in that area, but it also has normative implications. Devolved legislation is law of the highest order such that, as Lord Reed has explained, 'the UK has to be understood as having four legislatures that enact primary legislation.'[41] Again, this is something which is rendered consistent with parliamentary sovereignty (and therefore perhaps only *possible* in the UK's constitution) because the reconciliatory approach's more flexible account of that principle enables a normatively richer account of devolution. The capacity of the devolved legislatures to amend or repeal Westminster legislation is an important reflection of, and contributors to, the constitutional significance of devolution itself, and of its institutions.

The starting point for 'dynamism' is the legal proposition that the devolved legislatures can amend or repeal Westminster legislation within devolved areas. In a passage mirrored

[41] Lord Reed (n 8) 19.

(though only by implication) in the other two devolution schemes, the Northern Ireland Act 1998 expressly provides that 'an Act of the [Northern Ireland] Assembly may modify any provision made by or under an Act of [the UK] Parliament in so far as it is part of the law of Northern Ireland'.[42] The Scotland Act 1978 had contained similarly explicit provision that, however, was never implemented.[43] Although this proposition is not explicit in the other settlements as they currently exist, the courts have not failed to give effect to it, despite the absence of an express instruction to do so.[44]

The consequence of this is plain: the devolved legislatures can, so far as within the parameters of their competences, amend or repeal Acts of the Westminster Parliament.[45] Indeed, the existence of this power is why some competence restrictions take the form of 'protected enactments'[46] or exclude from devolved competences the particular 'subject-

[42] Northern Ireland Act s 5(6).

[43] See Winetrobe (n 30) 7. Scotland Act 1978 s 17(2): 'A Scottish Assembly Act may amend or repeal a provision made by or under an Act of Parliament.'

[44] '[W]hilst the Scotland Act 1998 does not directly confer on the Scottish Parliament the power to amend British statutes, this power is implied by the scheme of the Act… It is surprising that the statute-altering power is made explicit in the Northern Ireland Act, but left implicit within the Scotland Act.': NW Barber and Alison L Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003] Public Law 112, 122. See also Scottish Office, *Scotland's Parliament* (Cm 3658, 1997) para 2.3.

[45] Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 7) 36. See also Mohamed Moussa, 'The "Absent Word" Canon and Asymmetrical Sovereignty' (*UK Constitutional Law Association*, 20 December 2022) <https://ukconstitutionallaw.org/2022/12/20/mohamed-moussa-the-absent-word-canon-and-asymmetrical-sovereignty/> accessed 20 December 2022.

[46] See, e.g., Scotland Act 1998 1998, Schedule 4.

matter' of certain enactments[47] (as well as wider policy areas or 'reserved matters',[48] and protections for the law on reserved matters).[49] Such restrictions insulate certain areas and—importantly—(parts of) pieces of Westminster legislation from devolved interference. But they are exceptions which prove the rule that Westminster's legislation otherwise within devolved areas is exposed to devolved interference. Such restrictions do demonstrate Westminster's control over the extent to which the devolved legislatures can interfere with its legislation, but the narrowness of these restrictions demonstrate that it is generally content to allow it.

Dynamism, in allowing Westminster's legislation to be set aside, might appear to represent a repudiation of parliamentary sovereignty. The reconciliatory approach, however, rejects that account. It suggests that devolved legislative interference with Westminster legislation is compatible with the core of parliamentary sovereignty because of the accommodations that are otherwise in place in the devolution framework: (i) Westminster's power to determine the scope of dynamism, and (ii) its power to—itself—legislate in devolved areas and to amend or repeal devolved legislation.

The consequence of these accommodations is that dynamism can, if at all, interfere only with those aspects of sovereignty which the reconciliatory approach considers are inessential or peripheral—and in either case flexible—components of the principle. Consider the following passage, offered by Scoffield J in the *Re SEAT* case, in which that

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[47] See, e.g., ibid, Schedule 5, Part II.

[48] See, e.g., ibid, Schedule 5, Part I. Different terminology is used in Northern Ireland, where there is an additional category of powers, but the language of the reserved matters model is adopted here for clarity. See Northern Ireland Act 1998, s 4(1).

[49] Scotland Act 1998 1998, Schedule 4 para 2(1).

reconciliation—the balance accorded to these different elements of the territorial constitutional order—can be observed at close quarters:

> When acting within competence, the legislative autonomy granted to the Assembly under the Northern Ireland devolution settlement is considerable … The sovereignty of the Westminster Parliament to legislate for Northern Ireland, even in relation to devolved matters, is therefore preserved (although that Parliament will normally only do so after a legislative consent motion has been sought from, and passed by, the Assembly). However, within its sphere of competence, the Assembly is entitled to pass laws modifying any provision made by an Act of Parliament in so far as it is part of the law of Northern Ireland. By section 98(1), 'modifying' is defined, in relation to an enactment, to include amendment or repeal. Thus, provided the Assembly is not acting beyond its competence as defined by sections 6–8 of the NIA, it may repeal any provision made by an Act of the Parliament of the United Kingdom as a matter of the law of Northern Ireland.[50]

As this passage suggests, the reconciliatory model enables a broad interpretation of devolution's constitutional implications and facilitates a significant degree of divergence. Yet, this approach also maintains its commitment to parliamentary sovereignty. Westminster's position as the institution responsible for the devolution system in the first place is emphasised; indeed, in facilitating this dynamic process the courts are, in essence, giving potent effect to the competences granted in Westminster's own legislation. Similarly, the retention of Westminster's competences within devolved areas is considered significant

[50] *Safe Electricity A&T Ltd & Anor, Re Application for Judicial Review* [2021] NIQB 93 [43]-[44] (Scoffield J).

for the accommodation of its sovereignty, and a definitive characteristic of devolution itself.[51]

Arguably, the requirement that Westminster be able, as a matter of law, to legislate within devolved areas does not *of itself* undermine the scope or significance of devolution, the scale of divergence it permits, or the other core aspects fundamental to the settlements, as these are identified in this thesis. The relevant issue, in that respect, is how this power is used. Such a power can be used consistently with the principles of institutional respect and devolved autonomy, perhaps being used at the request of the devolved institutions or in cases to which they are sympathetic,[52] or it can be used in a way that accepts that the *primary* (if not *only*) responsibility for devolved matters lies with the devolved institutions.[53] That power's mere existence is not necessarily troubling for devolution if it is wielded consistently with that framework, and is not necessarily antithetical to the development of a collaborative or 'federal' institutional culture.

Dynamism in the devolution context, as a consequence of this power, is a two-way street: Westminster can repeal or amend devolved legislation in the very same way[54] that the devolved legislatures can repeal or amend Westminster legislation within their

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[51] Further discussion on these provisions, and on this point, is offered later.

[52] 'It has been useful at times for the UK Parliament to legislate for the devolved jurisdictions on devolved matters with consent; indeed, sometimes the devolved administrations have relied on Parliament to do so.': House of Lords Select Committee on the Constitution, *Respect and Co-Operation: Building a Stronger Union for the 21st Century* (HL 2021-22 142) para 121.

[53] The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee (n 29) para 23.

[54] Albeit subject to the legislative consent convention.

competences. Importantly, *both* Westminster and a relevant devolved legislature can engage in what has been described as 'legislative ping-pong'.[55] However, Westminster, by virtue of its sovereignty, possesses broader legislative power than the devolved institutions, being subject to none of the same legal competence limits that devolved legislation is subject to. Westminster retains the power to unmake any modifications to its legislation and to protect against them in future, and dynamism does not itself foreclose Westminster's power to alter the settlement or override the changes made by a devolved institution.[56] As Scoffield J noted in the *Re SEAT* case:

> In short, [the Westminster] Parliament can always assert its will against a devolved legislature such as the [Northern Ireland] Assembly even in relation to a devolved matter; but, in order to avoid the prospect of legislative "ping-pong" over a contested provision, with successive amendments made by the Assembly and undone by Westminster, an intrusion into the current devolved settlement would likely be required.[57]

Thus, dynamism represents a finely-tuned balance. Westminster retains the power to shift that balance, but doing so would be an alteration of the settlement itself, being as Scoffield J described it, an 'intrusion into the current devolved settlement'. Thus, dynamism and the 'legislative ping-pong' it permits are expressions of a balance struck between parliamentary sovereignty and devolution. It might be possible for some evolution of, or intrusions into, that system, and therefore alterations of that balance, to be broadly consistent with this

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[55] This phrase appears in A Bradley and D Christie, *The Scotland Act 1978* (Green 1979) quoted in; Winetrobe (n 30) 7.

[56] See Cowie, 'The Power to Make Laws for Scotland: The Treaty Incorporation Bills Reference' (n 39) 196.

[57] *Safe Electricity* (n 50) [45] (Scoffield J).

system itself,[58] but dynamism is an important, if not essential and definitive, characteristic of the devolution settlement. To fatally undermine *that* system (by, for example, introducing a rule of legislative primacy, pre-emption or field-occupation) *would* be inconsistent with that characteristic of devolution and would fundamentally reconfigure the relationship between Westminster and devolved legislation at the core of contemporary devolution.

The vulnerability of its legislation to devolved interference does, nonetheless, always operate against this backdrop of Westminster's ultimate power to subtly, or drastically, alter the settlement. Counsel for the Counsel-General for Wales made submissions to this effect in *Continuity Bill*, paraphrased by the Court in this way:

> there is no reason in principle why the Welsh Assembly cannot legislate to the effect of adding a requirement (for example, for consultation), although no such requirement appears in the legislation enacted by Parliament. The devolution legislation recognises this, and deals with the situation by giving the UK Parliament the option of entrenching legislation by protecting it from modification. It is, he submits, inconsistent with that structure to say that legislating to add to or detract from what Westminster had enacted (or might wish to enact in the future) was itself outside legislative competence.[59]

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[58] For example, s 11(1) of the Scotland Act 2012 added Antarctica to the list of reserved matters (retrospectively: s 11(2)). This might not fairly be considered incompatible with the core of the devolution framework because it does not alter the nature of the interaction between Westminster and devolved legislation (as well as the fact that its devolution 'was clearly an oversight'): David Torrance, 'Reserved Matters in the United Kingdom' (House of Commons Library 2019) Briefing Paper CBP 8544 3, 14–15.

[59] *Continuity Bill* (n 14) [44].

This passage aptly captures the balance accorded by dynamism. Westminster's sovereignty is accommodated by the maintenance of its power to protect its legislation from devolved interference. Leaving that option open to Westminster does not, of itself, undermine the fundamental character, or wider significance, of devolution. Indeed, it is Westminster's power to determine which pieces of its legislation are exposed to devolved interference and which are not that renders dynamism consistent with parliamentary sovereignty (and therefore, if that principle's gatekeeping function is accepted, possible). This is because, in ensuring dynamism only operates within parameters (negatively) defined by Westminster itself, devolved interference with Westminster's legislation is, and can be properly understood as, either a direct expression of Westminster's legislative intention in enacting the devolution settlements, or at least an expression of its continuing tacit acceptance of the resultant framework. Consequently, it is right to argue that the areas that remain open to devolved interference do so (only) because Westminster is content for them to be so open. Within those areas, the scope for divergence is significant and potent. It is the provision of this accommodation which arguably *facilitates* the dynamic system which is so important to devolution. Because Westminster is in ultimate control of that system, meaningful divergence remains nonetheless consistent with parliamentary sovereignty.

In *Continuity Bill* itself, the arguments that dynamism was contrary to legal certainty (as a component of the rule of law), or to the devolution settlement itself, were roundly rejected.[60] In this sense, devolution appears to rest on the assumption that this interpretation of parliamentary sovereignty—compatible as it is with devolved interference with Westminster's legislation—despite its tension with Dicey's negative aspect, is the right, and most intellectually defensible one. That view of parliamentary sovereignty, as a flexible

[60] ibid [25] and [35].

principle whose core is not impugned by this kind of prescribed interference (provided certain accommodations are in place), is implicit within the dynamism framework itself.

In previous incarnations of devolution, by contrast, it *was* considered necessary to go much further, and subordinate devolved legislation. Such an approach is indicative of a far more rigid, protective attitude to the principle of parliamentary sovereignty, far less tolerant of the vulnerability of Westminster's legislation under dynamism. The Government of Ireland Act 1920, for example, contained material restrictions which purported to protect Westminster's legislation from interference by the relevant devolved institutions. Section 6(1) provided that

> Neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall have power to repeal or alter any provision of this Act (except as is specially provided by this Act), or of any Act passed by the Parliament of the United Kingdom after the appointed day and extending to the part of Ireland within their jurisdiction, although that provision deals with a matter with respect to which the Parliament has power to make laws.

Section 6(2) similarly provided:

> Where any Act of the Parliament of Southern Ireland or the Parliament of Northern Ireland deals with any matter with respect to which that Parliament has power to make laws which is dealt with by any Act of the Parliament of the United Kingdom passed after the appointed day and extending to the part of Ireland within its jurisdiction, the Act of the Parliament of Southern Ireland or the Parliament of Northern Ireland shall be read subject to the Act of the Parliament

> of the United Kingdom, and so far as it is repugnant to that Act, but no further, shall be void.

In other words, under the 1920 Act, devolved legislation was pre-empted by, and was to be read *subject to* Westminster legislation enacted after the appointed day. Such a framework grants legal primacy to subsequent Acts of the Westminster Parliament which cannot then be impliedly or expressly altered or repealed by the relevant devolved legislature. The framework under the 1920 Act, therefore, implies a more rigid vision of the demands of parliamentary sovereignty, the effect of which is to subordinate devolved legislation itself and to give far less oxygen to divergence, with any later Westminster legislation effectively incrementally narrowing the scope of devolved competences.

Similarly, clause 31 of the earlier Government of Scotland Bill 1913 provided that

> (1) The Scots Parliament shall not have power to repeal or alter any provision of this Act (except as is specially provided by this Act), or of any Act passed by the Parliament of the United Kingdom after the passing of this Act and extending to Scotland although that provision with a matter with respect to which the Scots Parliament have powers to make laws.
>
> (2) Where any Act of the Scots Parliament deals with any matter with respect to which the Scots Parliament have power to make laws which is dealt with by any Act of the Parliament of the United Kingdom passed after the passing of this Act and extending to Scotland, the Act of the Scots Parliament shall be read subject to the Act of the Parliament of the United Kingdom, and so far as it is repugnant to that Act, but no further, shall be void.

Again, in this scheme subsequent Westminster legislation would enjoy legal supremacy, with devolved legislation being *subject to* and *void so far as it is inconsistent with* Westminster

legislation passed after this Act (even if earlier enactments would have been vulnerable to devolved interference). The current devolution framework is not, however, constructed in this image. It is prepared to tolerate the repeal or amendment by the devolved institutions of Acts of the Westminster Parliament passed *after* devolution, while appearing to maintain that doing so is nonetheless compatible with Westminster's sovereignty.

Evidence that such an approach is indeed considered consistent with the sovereignty principle is found in the Supreme Court's recent jurisprudence, in which it has directly confronted the question of the degree to which parliamentary sovereignty should be understood in these more flexible terms. Even in its *very* recent case law—in a period arguably dominated by the protective approach considered in later chapters—it is clear that the Court has been comfortable with the suggestion that *parliamentary sovereignty* does not necessarily require, or imply, a blanket rule of legal priority for Westminster legislation. In fact, the Supreme Court has been keen to ensure that Acts of the Westminster Parliament which are *prima facie* within devolved competence *are* exposed to interference by the devolved legislatures *unless* expressly provided otherwise.[61] Further, as will be seen, the Court has even set out in clear terms that it views parliamentary sovereignty as being, under the current devolution framework, *immune* to devolved interference. This is an account of that principle which, because it is not impugned by devolved interference with Westminster legislation, is far less fragile than the one offered by the protective approach.

Dynamism is a key, definitional characteristic of the devolution framework. However, a second, more normative, but equally essential characteristic also follows from it: implicit

[61] For discussion, see Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 6).

within the dynamism phenomenon outlined here is the normative equivalence of within-competence devolved legislation and Westminster legislation. Dynamism, as well as being a practical tool through which meaningful divergence can be mechanised by devolution, has normative implications for the constitutional *status* of the devolved institutions themselves. Lord Hope explained in *AXA* that this process results in all relevant legislation operating on the same normative plane:

> The Scottish Parliament[62] 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*. [63]

This authority renders the Scottish Parliament, on this example, an institution of the utmost constitutional significance—especially within devolved areas—and even despite Westminster's undiminished legal authority within those areas of its competence that are devolved. At dynamism's core, therefore, lies the premise that neither Westminster's parliamentary sovereignty, nor its possession of a number of exclusive competences, renders the devolved legislatures themselves constitutionally insignificant, nor emasculates the normative character of their within-competence legislation. It is the boundaries of competence, historically at least, which are therefore axiomatic, determinative of the

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[62] Lord Hope's comments here are equally applicable to the other devolved institutions because, as he explained, 'while there are some differences of detail between the Scotland Act 1998 and the corresponding legislation for Wales and Northern Ireland, these differences do not matter for present purposes. The essential nature of the legislatures that the legislation has created in each case is the same': *AXA* (n 2) [43] (Lord Hope).

[63] ibid [45]-[46] (Lord Hope).

freedom those legislatures possess. Within those boundaries, autonomy is considerable, outside of them it is non-existent.

Dynamism, it is argued, is one of the most important and definitional characteristics of devolution. It is not only a pathway by which the full scope of divergence under devolution is made available, but it is also the framework from which many other key aspects of devolution, as these are understood in this thesis, follow (for example, the normative status of within-competence devolved legislation and the axiomatic nature of competences). Although dynamism is arguably a practical framework through which meaningful divergence can be facilitated, it also has important constitutional implications. Through dynamism, the constitutional significance, and implications, of devolution are realised: It is a system that is symbiotic with the normative status of devolved legislation and, consequently, of the devolved institutions themselves. Furthermore, it is a system by which devolved legislation can have potent effects upon, and implications for, Westminster's own legislation.

The reconciliatory approach (and *only* the reconciliatory approach) *is* nonetheless capable of recognising dynamism because, like that framework, it too is predicated upon a more (but not unboundedly) flexible conception of parliamentary sovereignty. The kind of interference with Westminster legislation that dynamism facilitates (or is defined by) is not, under the reconciliatory approach, necessarily incompatible with parliamentary sovereignty *provided that* certain other accommodations are built into that system. Those accommodations—the preservation of Westminster's power to enact law within devolved areas, and its power to reshape the scheme—*are* both evident in the dynamism framework. As such, on the reconciliatory approach, this framework can be considered compatible with parliamentary sovereignty. This is an important conclusion because dynamism is a system

that would not, arguably, be possible *at all* if such a more flexible view—where the repeal or amendment by the devolved legislatures of laws enacted by Westminster is considered compatible with parliamentary sovereignty—were not accepted. Recalling the gatekeeping function of parliamentary sovereignty, if this more flexible account were rejected, dynamism would not be constitutionally possible. Devolution would, as a consequence, be hollowed out considerably. Indeed, dynamism demonstrates that a more flexible approach to parliamentary sovereignty is vital for, or essential to, the realisation of some of the most important aspects of devolution rather than undermining or inhibiting them, as a more rigid account of that principle might do.

The reconciliatory approach's more flexible account of parliamentary sovereignty, therefore, allows it to properly and fully recognise dynamism as an aspect of devolution in the process of accommodating parliamentary sovereignty. Its more flexible conception means that this aspect of the settlement does not necessarily need to be abandoned for the territorial constitution to be considered intellectually consistent with the sovereignty principle. The reconciliatory approach's capacity to recognise some of the most important aspects of devolution is a significant advantage, and a reason that it can—and should—be considered a satisfactory approach to achieving accommodation. However, in order to argue that, in the process, the reconciliatory approach does not simply hollow out *parliamentary sovereignty*, it is also necessary to consider whether this particular kind of flexibility is consistent with that principle's treatment in the courts. The Supreme Court's judgment in *Continuity Bill* offers precisely such support. In this judgment, which is unpacked in more detail next, the Court reveals at close-quarters how, in its view, it is best to reconcile devolution's interaction with parliamentary sovereignty, lending support for the reconciliatory approach's specific, and more flexible, approach to that principle.

(b) Continuity Bill*: Flexibility Confronted*

Continuity Bill presented the Supreme Court an opportunity to reveal precisely how it made sense of devolution's interaction, and compatibility, with parliamentary sovereignty. Its answer expressly endorsed the more flexible approach offered by, and characteristic of, the reconciliatory approach and is worth examining in some depth.

In this case, it was argued by the UK Government's Law Officers that the Scottish Parliament had legislated, in section 17 of its UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, in a way which '"relates to" the reserved matter of "the Parliament of the United Kingdom", set out in paragraph 1(c) of Part 1 of Schedule 5 to the Scotland Act, to which effect is given by section 29(2)(b).'[64] Section 17 of the Bill, the UK Law Officers said, was intended 'to achieve what the Scottish Government failed to achieve during the passage of the UK Withdrawal Act through Parliament.'[65] In particular, the argument of the UK Law Officers was that s 17

> would give the Scottish Ministers the power to prevent subordinate legislation made by a Minister of the Crown from having effect in Scotland by withholding their consent. Section 17 thus seeks to impose on a power to be granted by

[64] *Continuity Bill* (n 14) [51].

[65] ibid [57]. This passage continues: 'namely the enactment of a requirement that subordinate legislation made under the Act, affecting matters devolved to Scotland, would be subject to a requirement that the consent of the Scottish Government must be obtained.'

> Parliament a limitation that Parliament itself had chosen not to impose. It is inconsistent with the power of a sovereign Parliament.[66]

The account of parliamentary sovereignty offered by the UK Law Officers is a broad, brittle one which ostensibly protects Westminster's legislative decisions from devolved interference, and which implies that divergence is to be seen as incompatible with that principle. The Lord Advocate, by contrast, argued that the reservation—'the Parliament of the United Kingdom'—'is narrower in scope than the argument advanced on behalf of the UK Law Officers assumes. It comprises such matters as the existence of Parliament, its composition and its procedures.'[67] In the Lord Advocate's submission, 'it is not, in general, outside the legislative competence of the Scottish Parliament to amend or repeal legislation enacted by the UK Parliament.'[68] This proposition is, given the discussion above, certainly the correct one.

In its unanimous judgment, the Court drew attention to the heading of the relevant paragraph providing the reservation: 'The Constitution.'[69] The Court explained that, indeed, this reservation 'encompasses, amongst other matters, the sovereignty of Parliament, since that is an attribute of Parliament which is relevant - indeed, fundamental - to the constitution.'[70] This is notable in itself, indicating the Court's view of that principle's continuing importance. Indeed, despite what was to come next in its reasoning, the Court was unwavering in its certainty that sovereignty's place within the constitution was not

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[66] ibid [58].

[67] ibid [59].

[68] ibid [59]: 'Similar submissions are also made on behalf of the Counsel-General for Wales and by the Attorney General for Northern Ireland.'

[69] Applying *Imperial Tobacco* (n 1) [17].

[70] *Continuity Bill* (n 14) [61].

questioned or undermined by the exigencies of devolution, despite the role played by dynamism within it. Nonetheless, the Court then went on to endorse an approach to that principle which is *overtly* flexible:

> the reservation in paragraph 1(c) cannot have been intended, ordinarily at least, to protect legislation enacted by Parliament from the effects of legislation passed by the Scottish Parliament, since that purpose is effected by other provisions of the Scotland Act, which reserve matters to the UK Parliament and thereby prevent the Scottish Parliament from legislating on those matters, or which protect enactments made by the UK Parliament from modification by legislation passed by the Scottish Parliament.[71]

In this passage the Court is clearly mindful that the architecture of the devolution framework itself necessarily bestows upon the Scottish Parliament the power that the UK Law Officers were arguing it could not have. The Court's account of devolution accepts dynamism (even though it is only implicit within the text of the relevant settlement) and the more flexible account of sovereignty dynamism implies, and holds that both elements should be accounted for to give and an accurate account of the constitutional realities of devolution. Furthermore, it is clear from this passage that, in the Court's view, the *structure* of the devolution settlement itself provides parliamentary sovereignty any necessary accommodations: if Westminster wished to cordon off a particular matter of policy, it could (have) legislate(d) to do so. Having not done so—and, in fact, having legislated to *expose* certain policy areas to devolved interference (in its conferral of competence)—it is the duty of the courts to give effect to its will. Thus, the Court's approach to this question is consistent with the reconciliatory approach: a flexible approach to sovereignty, the core of

[71] ibid [61].

which is accommodated elsewhere in the structure of the settlement, and a fuller, more accurate account of devolution and its constitutional implications.

The Court was also clear that '[i]t follows that, if the Scottish Parliament legislates in order to give effect in Scotland to a policy which has been rejected by the UK Parliament, it does not, as a general rule, thereby infringe the reservation created by paragraph 1(c). Neither the purpose nor the effect of such legislation impinges upon the constitutional functions, powers or privileges of [the Westminster] Parliament.'[72] In other words, the core of parliamentary sovereignty (reflected in that paragraph) is not engaged or infringed merely by legislative divergence. Interestingly, the Court does not consider that the absence of any express power to alter Westminster legislation (like that contained in s 5(6) of the Northern Ireland Act 1998) affects this analysis. In fact, the Court drew on a previous case—the *Agricultural Sector Reference*—to illustrate the fact that precisely this had been done before,[73] and has historically drawn on the 'relevant commonality'[74] between the different

[72] ibid [62].

[73] *Re Agricultural Sector (Wales) Bill* (n 13). 'The Bill was challenged by the Attorney General on the ground that it did not relate to the devolved matter of agriculture, and was therefore outside the legislative competence of the Assembly. No challenge was brought on the ground that, since the Bill gave effect to a policy which had been rejected by the UK Parliament, the Bill therefore related to the reserved matter of the UK Parliament. Nor was there any suggestion in the judgment that such a challenge might have been brought. Similarly in the present case, the fact that section 17 of the Bill gives effect to a policy rejected by the UK Parliament does not mean that it relates to the reserved matter of Parliament.': *Continuity Bill* (n 14) [62].

[74] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 [128] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge); Torrance (n 58) s 1.3.

devolution schemes to justify adopting a (broadly) uniform analytical position to devolution despite its variation in the different territories.[75]

In these passages the Court is expressly accepting the dynamism explored above: the devolved legislatures can reverse decisions of the Westminster Parliament so far as that would be within their competences, even where doing so means making law in a vacuum *intentionally* left by Westminster, amending Westminster legislation, or repealing it altogether. The Supreme Court, consistently with that interpretation and taking a more flexible view of the principle than the UK Law Officers, noted that parliamentary sovereignty cannot be understood as being infringed simply by a devolved legislature enacting legislation to overturn, repeal or disapply Westminster's legislation within its competences, because Westminster has provided those competences. Instead, what matters, consonant with the reconciliatory approach, is that the devolved legislature does so only within the limits of its powers, and that Westminster's power to unmake any such changes remains unaffected. The Court explains this in a helpful passage:

> Nor are we persuaded that section 17 impinges upon the sovereignty of Parliament. Section 17 does not purport to alter the fundamental constitutional principle that the Crown in Parliament is the ultimate source of legal authority; nor would it have that effect. Parliament would remain sovereign even if section 17 became law. It could amend, disapply or repeal section 17 whenever it chose, acting in accordance with its ordinary procedures.[76]

[75] Lord Reed (n 8) 18.

[76] *Continuity Bill* (n 14) [63].

This is clear support for the more flexible approach of parliamentary sovereignty. The core of that principle—Westminster's continuing possession of a power to repeal the relevant enactments—is satisfactorily accommodated within the settlement itself; it is not infringed by dynamism.

The Supreme Court's account of parliamentary sovereignty is, in this case, a *tour de force* of the reconciliatory approach. The Supreme Court takes the view that parliamentary sovereignty is a flexible principle, capable of withstanding significant intrusion by the devolved legislatures, even where this means embracing a more lenient approach to Dicey's negative aspect. Yet, it also views the principle in robust terms, clarifying that it would not be possible for the Scottish Parliament, in the ordinary course of its legislative business, to affect or undermine parliamentary sovereignty which remains, nonetheless, the 'cornerstone'—in Lord Neuberger's language—of the constitution.[77] This is true so long as the Scottish Parliament enacts legislation within its competences, and those competences do not need to be interpreted by a court more narrowly than their prescription in the statutes so as to preserve that sovereignty, nor does a court need to read down the settlement's dynamism in that principle's defence. Nowhere in this judgment does the Court suggest or accept that its more flexible approach to parliamentary sovereignty is in any way a 'weaker' approach, or undermines that principle's potency or importance. Indeed, its capacity to endure, despite devolved interference with Westminster legislation, demonstrates its strength. Yet, at the same time, sovereignty's continuing occupation of that dominant constitutional position is seen as perfectly compatible with a broad and muscular account of devolution; Westminster's constitutional position is not affected by the normative status of the devolved institutions. Indeed, it is not necessary, on this model, for devolution to contain a pre-emption or field-occupation mechanism, or a mechanism

[77] Lord Neuberger (n 34) paras 14, 32.

which ascribes primacy to Westminster's legislation, even where the absence of these mechanisms grants devolved legislation the highest normative status. Of course, the Court did not in *Continuity Bill* end up giving full force to this (arguably more accurate) account of the devolution settlement because of its interpretation of s 28(7) of the Scotland Act, but this outcome—it is argued—was effected by a concept considered later in this thesis under the protective approach, and not a natural or defensible reading of parliamentary sovereignty.

4. The Limits of Flexibility: Accommodating the Core of Parliamentary Sovereignty under the Reconciliatory Approach

The approach to parliamentary sovereignty observed above is clearly a flexible one. This flexibility has an important strength, allowing some of the most important characteristics of devolution to be properly accounted for, especially as these relate to the interaction between devolved legislation and Westminster legislation. However, it might be considered so flexible as to be essentially meaningless. The concern might be justifiably levelled against the reconciliatory approach that it accommodates sovereignty in only an illusory sense, paying lip-service to a principle that it casts in indefensibly pliable terms which are without clear limits. However, this concern is misplaced. The reconciliatory approach does recognise that there are core aspects of the sovereignty principle that are *not* so flexible. In this way, the flexibility the reconciliatory model recognises the sovereignty principle possesses *does* have limits, and the flexibility observed above only operates in the peripheral or penumbral aspects of the principle. Under the reconciliatory model, certain criteria need to be satisfied in order for the irreducible core of the sovereignty principle to be meaningfully accommodated. It is this section's purpose to explore these criteria. Importantly, it *is* possible to accommodate the core of the principle as it is understood under the

reconciliatory approach in a way that is consistent with the core aspects of devolution observed above.

The first criterion is perhaps best understood as a (legal, intellectual or theoretical) framework: that devolution must ultimately be contingent upon, and flow from, Westminster itself. This can be described as the 'delegative' model of devolution, conceiving of, or describing, devolution as a statutory enumeration of competences and rejecting the account that sees it as an expression of an alternative constitutional hypothesis (one that rejects parliamentary sovereignty). The delegative model is an account of devolution that is consistent with parliamentary sovereignty, but it also, perhaps counterintuitively, is a vehicle through which to realise a *more* generous account of that settlement than might otherwise be possible, considering the gatekeeping function of parliamentary sovereignty. The second criterion necessary for accommodation under the reconciliatory approach is the preservation of Westminster's power to legislate within devolved areas. Hard, unsurmountable legal limits need to be avoided if parliamentary sovereignty is to be meaningfully accommodated. Together, these two criteria ensure that the reconciliatory approach accommodates parliamentary sovereignty *meaningfully*, rather than merely illusorily through the presentation of an account of parliamentary sovereignty which is unrelentingly (and inaccurately) flexible.

(a) An Expression of Westminster's Legislative Will: Statutory Enumeration of Competences and The Delegative Model

The first criterion necessary for accommodating the core of parliamentary sovereignty under the reconciliatory approach is that devolution must be understood as an expression of Westminster's legislative will, and dependent on Westminster's continuing tacit acceptance. In other words, it must be accepted that Westminster has responsibility *for*

devolution itself, and for the scope of the devolved legislatures' competences. Although there was a significant role played by expressions of popular will in facilitating (or justifying) devolution,[78] and a significant role played by ministers in amending competences,[79] the scheme of devolution *itself* at a fundamental level depends on primary enactment by the Westminster Parliament. Under the reconciliatory approach, devolution must be understood as an *expression* or an *extension* of Westminster's legislative power. It cannot be understood a free-standing or self-executing feature of the constitution independent of, rather than flowing from, parliamentary sovereignty.

This core criterion does not require the protection of Westminster's legislation against modification by the devolved institutions, but instead refers to the way in which devolution is structured at a foundational level. Devolution needs, on this view, to be properly understood as an extension of the UK's constitutional norms (of which sovereignty is one), rather than amounting to a stark rupture or departure from them. For Winetrobe, explaining the significance of this in a House of Commons research paper, different models of devolution serve to illustrate, or perhaps are determinative of, the extent to which devolution is compatible with the sovereignty principle:

> The more the method of creation resembles existing enactment procedures, the more likely, it is argued, that the new arrangements can be regarded as a development of, rather than a radical break with, the present constitutional system. The more the method of creation is distinct from existing enactment procedures,

[78] See McCorkindale, 'Devolution: A New Fundamental Principle of the UK Constitution' (n 7).

[79] See, e.g., Scotland Act 1998 1998, s 30.

> the more likely that the new system can be seen as intended to be a radical break with the past, and its traditional principles, such as Parliamentary supremacy.[80]

Gordon explains that 'in principle the devolution of legislative and executive power to Scotland, Northern Ireland and Wales was designed specifically so as to be compatible with the doctrine of parliamentary sovereignty',[81] and, under the reconciliatory approach, this consistency is maintained by continuing to view devolution as an expression of parliamentary sovereignty, rather than—even as it has matured—taking on a life independent, or in refute, of it. Rahmatian, for example, says that although this view might be '[u]npopular' in some quarters,

> the Scotland Act that introduced devolution is the product of parliamentary sovereignty from the British Parliament in Westminster, and this Act, as well as the Scottish Parliament through it, are sustained by this parliamentary sovereignty and based on an Act of the [UK] Parliament.[82]

The same logic extends to the other legislatures as well. In particular, the preeminent model, which conceives of the devolved legislatures as 'delegates' of the Westminster Parliament, is set out by Lord Hope in these terms in *AXA*:

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[80] Barry K Winetrobe, 'The Constitution: Principles and Development' (House of Commons Library 1996) Research paper RP 96/82 42.

[81] Michael Gordon, 'The UK's Fundamental Constitutional Principle: Why the UK Parliament Is Still Sovereign and Why It Still Matters' (2015) 26 King's Law Journal 229, 242.

[82] Andreas Rahmatian, 'Brexit and Scotland: Centralism, Federalism or Independence' (2018) 26 European Review 616, 629.

> Devolution is an exercise of its law-making power by the United Kingdom Parliament at Westminster. It is a process of delegation by which, among other things, a power to legislate in areas that have not been reserved to the United Kingdom Parliament may be exercised by the devolved legislatures…[83]

In this way, the devolved legislatures are not exercising legislative power which *transgresses* parliamentary sovereignty; they are exercising a power which is *a function* or extension of it on behalf of Westminster. This view is of a piece with one of the narratives of devolution observed by Masterman, in which 'devolution can be viewed as something akin to a statutory act of decentralisation, through which powers were allocated – by a central, sovereign, institution – to expressly limited, subordinate, institutions.'[84] Although the extent to which the devolved institutions are 'subordinate' in this way can be disputed, this framework goes some way to explaining why the dynamism described above can be considered compatible with parliamentary sovereignty: In the same way that Westminster can repeal its own legislation, or fill vacuums it has previously left intentionally empty, so too can its delegates. Conceived as custodians of Westminster's legislative power, the limits of devolved competences merely reflect the extent of the delegation of that legislative power.

This framework has been endorsed across the UK's jurisdictions and into the political sphere. In the *Allister* case, McCloskey LJ noted that the notion of delegation is fundamental to the compatibility of the scheme with sovereignty, emphasising the latter's unique possession by Westminster: 'The central theme emerging is, to borrow Lord Hope's

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[83] *AXA* (n 2) [45] (Lord Hope).

[84] Roger Masterman, 'Brexit and the United Kingdom's Devolutionary Constitution' (2022) 13 Global Policy 58, 60.

language, that devolved Parliaments have delegated powers which are not untrammelled and do not enjoy the Parliamentary sovereignty of Westminster.'[85] In being founded in ostensibly 'ordinary' Acts of Parliament,[86] even devolution's more potent constitutional implications are rendered compatible with the sovereignty principle.

During the passage of the Scotland Bill, Donald Dewar MP similarly argued that devolution, far from antithetical to sovereignty, was an expression of it:

> In previous exchanges in the House, I have stressed that we propose devolution and reform within the United Kingdom. Let me take the opportunity to do so once again. We accept that sovereignty within a devolved system lies with the United Kingdom Parliament. That sovereignty can be exercised in a number of different ways. The choice that we are asking Parliament to make is to pass some of its practical day-to-day power to a directly elected Scottish Parliament representing the people of Scotland.[87]

Lord Reed has expressed a view of devolution in case law and extrajudicially[88] which is consistent with this model, emphasising that '[t]he Scotland Act is not a constitution, but an Act of Parliament.'[89] It seems, therefore, that one of the core ways to render devolution

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[85] *Allister (and others) v Secretary of State for Northern Ireland* [2022] NICA 15 [357] (McCloskey LJ).

[86] The statutes are not 'ordinary' in the sense of Laws LJ's 'ordinary' or 'constitutional' statutes distinction. However, this is neither something that Westminster can unilaterally attribute to its legislation (being applied by the courts), nor is it any guide to the statute's enactment processes or interpretation: *Imperial Tobacco* (n 1) [15] (Lord Hope).

[87] HC Deb 24 July 1997, vol 298, col 1042.

[88] Lord Reed (n 8).

[89] *Imperial Tobacco Ltd v The Lord Advocate* [2012] CSIH 9 at [71] (Lord Reed).

compatible with parliamentary sovereignty (at least under the reconciliatory approach) is by constructing devolution as a delegation of Westminster's law-making power. This helps preserve parliamentary sovereignty's hegemony, while enabling the full realisation of some of devolution's core aspects in practice.

However, at first glance it might appear that the delegative framing undermines some of the core aspects of contemporary devolution. This is because to accept the delegative model is to accept that devolution is ultimately *contingent*. Westminster can, on this view, undermine or disassemble devolution with a stroke of the draftsman's pen, something which runs counter to the legislative declarations of permanence which purport to reflect, and contribute to, the constitutional position occupied by devolution.[90] As Keating explains, 'according to the Westminster doctrine, these [the devolved legislatures] merely enjoy power lent by the centre, which can take them back at any time.'[91] Further, the delegative frame might not be considered to be 'reconciliatory' because it implies an institutional hierarchy which normatively subordinates the devolved institutions, poorly reflecting their—and their legislation's—*actual* normative position, set out above.

In order for the reconciliatory approach to meaningfully accommodate parliamentary sovereignty (mechanised through the delegative framework), it is indeed necessary to reject that legislative declarations of permanence are immune to repeal and/or immunise the devolved institutions themselves from the same. However, devolution's temporariness—at least through this *de jure* lens—should not necessarily be taken as rendering them

[90] See Scotland Act 1998 1998, s 63A (inserted by the Scotland Act 2016, s 1); Government of Wales Act, s A1 (inserted by the Wales Act 2017, s 1).

[91] Michael Keating, 'Taking Back Control? Brexit and the Territorial Constitution of the United Kingdom' (2022) 29 Journal of European public Policy 491, 492.

constitutionally insignificant (or failing to accurately reflect their significance) for four reasons.

First, these provisions reflect—but arguably do not create—the forms of (at least partial) entrenchment that the devolution system does enjoy. Westminster would certainly face *constitutional* hurdles if it sought to abolish the devolved institutions. Those challenges, though perhaps not unsurmountable, would themselves be expressions, and more accurate and contemporaneous reflections, of the constitutional importance of devolution. It might therefore be technically possible to abolish them, but that is not to say that it would be constitutionally acceptable (or easy) to do so. Fittingly, it is the acceptability of that abolition which is a better, if more diffuse, metric against which to measure their significance. Indeed, the environment in which abolition might be contemplated is not an environment in which statutory declarations would likely be determinative, and their significance is not a consequence *of*, but has a life independent of, those declarations. Similarly, the devolution statutes do benefit from interpretive protection from the courts, being recognised as constitutional statutes for which express language is required if the overturning of their 'quasi-entrenchment' is to be achieved.[92] Thus their abolition will require express language to that effect (arguably, a threshold that will be set to some extent depending on the constitutional significance of the norms recognised as reflected in, and accorded to, the devolution statutes).[93]

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[92] See Christopher McCorkindale, 'Devolution in Scotland and the Supreme Court: A Question of Interpretation' (2020) 50 Materiali per una storia della cultura giuridica 67, 8 (pre-publication); Adam Perry and Farrah Ahmed, 'Are Constitutional Statutes Quasi-Entrenched?' (*UK Constitutional Law Association*, 2 November 2013) <https://ukconstitutionallaw.org/2013/11/26/adam-perry-andfarrah-ahmed-are-constitutional-statutes-quasi-entrenched/> accessed 11 March 2024.

[93] See Mark Elliott and Nicholas Kilford, 'Nothing to See Here? Allister in the Supreme Court' (2024) 28 Edinburgh Law Review 95.

Second, permanence is not necessarily (alone) a guarantee or reflection of constitutional importance, and it certainly does not provide a complete picture. Some of the most important institutions might well be those which are *most* vulnerable or temporary.

Third, and relatedly, these provisions do not protect the substance of the settlement: it might well be possible to hollow out devolved competences *completely* without engaging them. Such a course *would* severely undermine devolution's effectiveness and importance, and no protection against that course would be provided by guarantees of the permanence of the institutions themselves.

Fourth, as this suggests, it is the *function* of the devolved institutions which matters in constitutional terms, and which gives rise to their constitutional significance *in the first place*. Thus, the proper analysis is to consider which competences they possess and how effective they are; their constitutional significance follows from, and is a function of, that prior analysis. Indeed, one of the most potent constitutional aspects of devolution for parliamentary sovereignty—dynamism—is a manifestation of a broader account of the nature of devolved competences and their practical scope and limits, rather than being the product of more, or merely, symbolic provisions. In this way, the constitutional importance of devolution flows from its practical impact upon the constitution.

Considered from another angle, then, if the contingency of devolution is what renders it compatible with parliamentary sovereignty, that may well be a price worth paying in order that the devolved institutions might be able to possess wider and more potent competences. Those competences *will* go to the effectiveness and consequent constitutional significance of devolution in more real terms than an abstract permanence which cannot be easily tested

might. Indeed, the courts have adopted this kind of approach, paying limited interpretive regard to these provisions,[94] while—as has been discussed—often giving broader, more meaningful, effect to devolved competences. In this way, the reconciliatory model's acceptance of the contingency of devolution, arguably necessarily implied by the Diceyan conception of parliamentary sovereignty, does not of itself misrepresent, or undermine, its constitutional position, its implications for the constitution, or its core characteristics.

The argument that the delegative model nonetheless implies an inaccurate normative subordination of the devolved institutions is one which is also apparent in the literature. For instance, Keating contrasts the delegative and self-executing[95] accounts of devolution *on the basis of* their capacity to reflect and respect the normative status of the devolved institutions:

> There are two interpretations of the devolution settlement. One is based on the traditional doctrine of parliamentary sovereignty and suggests that Westminster has merely lent powers to the three devolved territories, which can be reclaimed at any time. *The other is that devolution represents a substantial constitutional change* and requires a modification of our understandings of parliamentary sovereignty and supremacy. The former view has been generally sustained by the courts, including

[94] 'In fact, neither statutory recognition of the Sewel Convention, nor the statutory guarantees of permanence of Scottish and Welsh devolution have had any impact on the way in which the Supreme Court approaches devolution disputes': McHarg (n 25) 15.

[95] See, for example, the 'born unfree' argument discussed in Winetrobe (n 80) 36–7.

> the Supreme Court. The latter has been expressed by many academic commentators as well as by some judges in writings, lectures and obiter dicta.[96]

The implication here is that arguing that devolution does not represent a moment of constitutional rupture (and a departure from orthodox understandings of sovereignty) is to either fail to accurately recognise its seismic implications, or to ignore them. Couching devolution in the language—or perhaps more cynically, concealing it behind the façade—of continuity, as the delegative framework does, is on this view misguided. However, this is not necessarily the case. Although it is certainly clear that the first account set out by Keating finds the strongest doctrinal support, Keating's binary distinction is perhaps a simplification, neglecting the third, intermediate, position into which the reconciliatory approach arguably fits. It is possible to base a view of the constitution—consistently with doctrine—on an orthodox reading of parliamentary sovereignty *while also* recognising that devolution represents a substantial constitutional change that, though perhaps not requiring a 'modification' of the sovereignty principle, requires its flexibility to be leveraged. This flexibility can, nonetheless, be leveraged in a way that is consistent with, rather than a departure from, the judicial (and wider) treatment of the principle. Indeed, it is this thesis' argument that precisely this reconciliation is the most accurate way to describe the interaction between devolution and parliamentary sovereignty.

The delegative model, or the 'constitutionally formalist' or 'statutory decentralisation approach'—as Masterman describes it—*is* capable of respecting and giving full effect to the constitutional significance of devolution:

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[96] House of Lords Select Committee on the Constitution (n 52), Written Evidence from Professor Michael Keating, para 83 (emphasis added).

> This statutory decentralisation approach does not deny the constitutional importance of establishing devolved institutions, rather it seeks to position those institutions within the existing constitutional framework. As a result, this constitutionally formalist approach to devolution seeks to minimise the effect of devolution on the doctrines and operation of the UK constitution[…][97]

Such a view emanates from the jurisprudence which, while preferring the delegative model, has *also* proved capable of reflecting the constitutional significance of the scheme, and the normative status of the relevant institutions and their legislation. That there *are* institutional distinctions between Westminster and the devolved institutions does not mean that the latter are normatively insignificant, nor that the normative distance between them is vast. This balance is apparent (though inverted) in Lord Reed's extrajudicial writing, where he notes that it is no paradox to recognise 'the status of the Scottish Parliament as a democratic legislature' *and* to accept that the powers of the Scottish Parliament 'are subject to limitations'.[98] These two components can, and do, coexist. In fact, the delegative model has not prevented Lords Hope and Reed from basing their

> reasoning on the constitutional nature of the Scottish Parliament and of ASPs. Lord Hope emphasised the similarity between the devolved legislatures and the UK Parliament, saying that although only the UK Parliament was sovereign, it shared with the devolved legislatures the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate.[99]

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[97] Masterman (n 84) 60.

[98] 'The emphasis placed in *AXA* on the status of the Scottish Parliament as a democratic legislature does not, however, detract from the fact that its powers are subject to limitations': Lord Reed (n 8) 11.

[99] ibid 10.

Lord Reed has explained that, in *AXA,* his further reasons, 'focused on the nature and width of the powers conferred on the Scottish Power', that they are 'plenary' and that

> the Scottish Parliament, and also by implication the other devolved legislatures, was not an ordinary public body, but a democratically elected legislature with plenary powers, whose legislation could not be judicially reviewed on ordinary common law grounds, but only for a breach of the statutory limits on its powers, or in exceptional circumstances for a violation of fundamental rights or the rule of law.[100]

Thus, the delegative account simply represents a middle-road, consistent with a significant and intellectually compelling body of the courts' jurisprudence.[101] It does not deny the significance of devolution, but situates it, with nuance, within the UK's constitutional order. It is what Lord Reed has characterised

> as a balanced approach, accepting that the devolution legislation has established democratic legislatures with very wide powers, whose judgment should be treated by the courts with great respect, and also that those powers are subject to limits[102]

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[100] ibid 11. 'In the absence of any specific purposes which were to guide it in its law-making, or any specific matters to which it was to have regard, common law grounds of review based on having an improper purpose or taking account of irrelevant considerations could not be applied. Review on the basis of irrationality was constitutionally inappropriate, since law-making by a democratically elected legislature was the paradigm of a political activity, and the review of political judgments by a legislature did not fall within the constitutional remit of the courts': ibid 10–11.

[101] See Bingham Centre for the Rule of Law (n 13).

[102] Lord Reed (n 8) 18.

Where distinctions between Westminster and the devolved institutions have been made in case law, they are often not based upon, or the result of, the delegative structure of the framework itself. Instead, such distinctions have been derived from, for example (and *inter alia*), article 9 of the Bill of Rights,[103] or the fact that Westminster did not legislate with sufficient clarity to grant the devolved institutions the capacity to abrogate fundamental principles of the rule of law.[104] But some judgments have rejected *any* meaningful difference between the devolved and central legislatures,[105] and have not been impeded from doing so by the delegative model, nor have had to reject it.

Indeed, some of the core characteristics of devolution (like dynamism), as well as its wider constitutional significance,[106] have been realised despite—or perhaps even *because* of—the delegative model. The delegative model ensures devolution is compatible with parliamentary sovereignty, partly by rendering it contingent, but also by framing devolution as an expression of Westminster's legislative will and an extension of, rather than a departure from, orthodox principles (like parliamentary sovereignty itself). In so doing, the delegative model enables a more generous settlement: if sovereignty is accommodated satisfactorily by its delegative framing, it becomes unnecessary and superfluous to narrow the scope of the settlements *in order to* achieve that accommodation. Accommodating parliamentary sovereignty at a foundational level means that the settlements built *upon*

[103] *Recovery of Medical Costs* (n 6) [56] (Lord Mance).

[104] *AXA* (n 2) [149]-153] (Lord Reed).

[105] *Recovery of Medical Costs* (n 6) [122] (Lord Thomas).

[106] The Institute for Government for example notes that 'devolution that began 20 years ago is one of the biggest experiments that the UK has chosen to perform on itself. The scale and speed of the change in its internal government confound its international reputation as a country bound by tradition'.: Institute for Government (n 10) 2.

those foundations can be more generous without impinging upon the core of parliamentary sovereignty itself.

Indeed, if devolution is *an expression* of parliamentary sovereignty, it cannot be necessary to *additionally* reduce devolved competences so as to render them compatible with parliamentary sovereignty; they already have consistency with that principle "baked in". The scope of those competences, however broad, is the result of Westminster's legislative intention and should not be understood as a repudiation of its sovereignty. Put another way, the exposure of certain subject-matters or statutes to devolved legislative interference is extremely potent but only extends so far as Westminster has, in the first place, permitted it to.

Similarly, because no devolved legislation is capable of being legally effective further than the extent to which it is permitted to by Westminster,[107] any amendment of any statute by any devolved institution has Westminster as its final legitimator. If it is accepted that '[a]ny authority the devolved legislatures have to deviate from UK legislation is therefore nothing more than a reflection of the authority of the UK Parliament itself as the author of those legislatures' powers;'[108] even devolution's most potent implications for Westminster legislation can be understood as being consistent with, rather abrogating, parliamentary sovereignty. As Elliott explains: '[t]he devolved legislatures can enact legislation modifying or otherwise asserting priority over UK legislation *only because the UK Parliament has, in the first place, authorized the devolved legislatures to do so*.'[109] If the devolved institutions were not

[107] E.g., Scotland Act 1998 1998, s 29(1).

[108] Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 7) 36.

[109] ibid (emphasis added). He continues: 'It has done that by including in the devolution legislation so-called Henry VIII powers.'

accurately conceived as delegates of Westminster's legislative authority, equipped with that (in some cases tacit) authorisation, that kind of interference might not be consistent with parliamentary sovereignty and thus constitutionally uncomfortable (or impossible).

Indeed, further evidence for this delegative framing is found in more subtle forms in the case law, with the Supreme Court confirming, for example, that some of the limits upon devolved law-making power are the logical consequence of Westminster's responsibility for devolution. The devolved legislatures cannot, for instance, lawfully outsource their power to interfere with the legal effect of Westminster legislation, or provide other institutions with a similar power to do so, because that supplementation cannot be traced back to Westminster in the way that the powers provided in the devolution statutes that allow the devolved legislatures to do so can be. 'Decisions to repeal Westminster's legislation must be traceable to Westminster itself through, for example, the Scotland Act.'[110]

Accommodating parliamentary sovereignty at the foundational, architectural level of the settlement means, at least in theory, that a broader interpretation of devolution is possible than would be the case if parliamentary sovereignty required (for example) the legal

[110] Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: Legislative Supremacy, Parliament's "Unqualified" Power, and "Modifying" the Scotland Act' (*UK Constitutional Law Association*, 15 October 2021) <https://ukconstitutionallaw.org/2021/10/15/mark-elliott-and-nicholas-kilford-devolution-in-the-supreme-court-legislative-supremacy-parliaments-unqualified-power-and-modifying-the-scotland-act/> accessed 15 October 2021: 'Parliament [purportedly qualifies its sovereignty] by listing authorities competent to amend or repeal its legislation in the Scotland Act and this list is taken by the Court to be exhaustive. The UNCRC Bill, however, purports to add the Scottish courts to it without Westminster's consent. The Court explains that, "[a]s 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*"'.

primacy of Acts of the Westminster Parliament, or that only particular (narrow) competences could be devolved *at all*. If it is accepted that the structure of devolution is *itself* consistent with sovereignty, then it becomes far more difficult to argue that the devolved possession of particular competences is in tension with parliamentary sovereignty, given that these competences are only possessed so long as Westminster is content to allow their possession. In theory, therefore, this allows for *more* devolution. More importantly for present purposes, however, it also allows for devolution *as it actually operates in practice* to be properly and fully recognised. There is no need, on this view, to minimise the effect of certain devolved competences, or to read down certain aspects of the relevant settlements so as to render them compatible with sovereignty (like, as will be seen, as has emerged under the protective account). The delegative model does have certain consequences (for, for example, the permanence provisions) but these consequences do not fatally impair, or countermand, the core characteristics of devolution as these have been recognised in the courts and in this chapter.

Finally, the delegative model also means that the constitutional propriety of the devolved possession and/or exercise of certain competences becomes a policy question, or an analysis at most about wider questions of constitutionalism, for *Westminster*. The lawfulness of devolved exercise of certain competences is not a question that the courts should, on this view, answer by reference to parliamentary sovereignty. As Lord Hope explained in *Imperial Tobacco*, '[i]t is not for the courts to say whether legislation on any particular issue is better made by the Scottish Parliament or by the Parliament of the United Kingdom at Westminster: *Martin v Most* 2010 SC (UKSC) 40, para 5.'[111] Plainly, consistency with parliamentary sovereignty *could be* a basis upon which that question could be answered,

[111] *Imperial Tobacco* (n 1) [13] (Lord Hope).

but the delegative model essentially leaves it up to the Westminster Parliament to determine which competences it is content to devolve and makes it the role of the courts to determine the limits of Westminster's intention to that effect. Westminster is not, on this view, prevented by the courts from effectively devolving a certain matter because to do so would be inconsistent with its sovereignty.

The delegative model is a useful example, or perhaps microcosm for the way the reconciliatory approach works in practice. The courts, even in the context of Scotland and Wales—where there is no express statutory instruction to do so—have adopted a flexible conception of parliamentary sovereignty which more fully recognises the constitutional implications of devolution, and ensures that its core characteristics (and its constitutional significance) can be respected. And yet, although it is a *more* flexible conception of parliamentary sovereignty, the delegative model ensures that parliamentary sovereignty is also meaningfully accommodated, with Westminster itself serving as the 'cornerstone' of devolution itself, upon which that system depends.[112]

The devolution settlements also provide a second accommodation for parliamentary sovereignty which, similarly, can be understood as taking a 'reconciliatory' approach to providing that accommodation: they formally (and meaningfully) preserve Westminster's power to legislate in devolved areas. This is a criterion for the accommodation of parliamentary sovereignty to be meaningful and it, along with its reconciliatory qualities, is considered next.

[112] Again, adopting Lord Neuberger's helpful language: Lord Neuberger (n 34) paras 14, 32.

(b) The Preservation of Westminster's Power to Legislate in Devolved Areas

The second criterion, essential for the accommodation of the core of parliamentary sovereignty under the reconciliatory approach, is the preservation of Westminster's *de jure* competences in devolved areas.[113] This preservation, like the delegative frame explored above, clarifies that devolution is a *sharing* of constitutional power, not its movement from one institution to another, and its forfeiture by the former. In each of the contemporary devolution settlements there is a provision clarifying that the devolution of legislative power does not affect Westminster's power to make law in devolved areas.[114] As Cowie explains:

> All three of the original devolution statutes tacitly acknowledge this principle [of parliamentary sovereignty]. They state that the granting of legislative powers to devolved legislatures in no way diminishes the power of the UK Parliament to pass legislation regarding Scotland, Wales or Northern Ireland. Legislative power has been delegated, rather than ceded or divided.[115]

However, although these provisions might be conceived or understood as sovereignty clauses, in keeping with the reconciliatory approach they only reflect, and preserve, a fairly narrow conception of the core of parliamentary sovereignty. For example, these provisions do not go so far as to confirm or guarantee Westminster's supremacy as an *institution*, nor the supremacy of its *legislation*. Furthermore, they are, properly understood, limited and

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[113] See Winetrobe (n 80) 36, 38.

[114] Scotland Act 1998 1998, s 28(7); Government of Wales Act 2006, s 107(5); Northern Ireland Act 1998, s 5(6).

[115] Graeme Cowie, 'Brexit: Devolution and Legislative Consent' (House of Commons Library 2018) Briefing Paper CBP 08274 10.

inflective: these provisions provide that *possession of devolved law-making power* leaves Westminster's sovereignty intact, they do not provide a wider additional limit on the devolved legislatures' competences to legislate consistently with parliamentary sovereignty (although, as will be seen, this is the effect that these provisions have been given under the protective approach).

When these provisions are interrogated, it becomes clear that they do not accommodate parliamentary sovereignty in a way which is incompatible with, or which undermines the core tenets of the devolution framework. These provisions should, therefore, properly be considered as sitting within the reconciliatory approach: they represent a meaningful accommodation of one of the core aspects of sovereignty but interpret that principle narrowly, and in line with that principle's doctrinal treatment, so that this accommodation is minimally intrusive to the devolution system. They are 'reconciliatory' because, glibly, they purport to 'reconcile' sovereignty *with* a full account of devolution, rather than undermining the latter in pursuit of the former. The Supreme Court in *Continuity Bill* helpfully explained the position in this way:

> That provision makes it clear that, notwithstanding the conferral of legislative authority on the Scottish Parliament, the UK Parliament remains sovereign, and its legislative power in relation to Scotland is undiminished. It reflects the essence of devolution: in contrast to a federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved.[116]

The preservation of Westminster's power to legislate in devolved areas does not *of itself* impair the other core aspects of devolution, or lead to an inevitably inaccurate reading of

[116] *Continuity Bill* (n 14) [41].

the scope and significance of those settlements. Were these sovereignty clauses to reflect or codify a far broader, or more rigid, view of parliamentary sovereignty and protect (for example) Westminster's legislation from any devolved interference, this would be, by contrast, to interpret the sovereignty principle too broadly, and in a way that would diminish (and fit uncomfortably with) contemporary devolution. Similarly, a sovereignty clause which asserted or emphasised a normative hierarchy between Westminster and the devolved institutions would be in tension with the normative proximity entailed in the dynamism of the settlement, explored above, and to attribute to sovereignty a characteristic that it has not in practice been observed to possess. Instead, these clauses are limited to preserving Westminster's competence in devolved areas, reflecting the core of the sovereignty principle and doing so—like the delegative model—in a way which does not undermine the important elements of devolution.

The focus of statutory 'sovereignty clauses' on competence rather than institutional status contrasts with previous devolution schemes in the UK where, in *addition* to the delegative structure of the settlement, it *was* considered necessary to embody in statutory provisions Westminster's broader supremacy as an institution, and, in some cases, to grant its legislation primacy. The distinction between these perhaps more invasive or potent models and the more moderate ones adopted contemporarily is important because the focus on legislative competences *alone*, as in the contemporary settlements, is a narrower, but more accurate, account of the core of parliamentary sovereignty, consistent—as will be seen—with that principle's treatment in other contexts. In contrast to the assertion of Westminster's *supremacy*, which emphasises a broader notion of normative superiority, the mere assertion that Westminster retains competences in devolved areas simply reinforces the dynamism of the settlement, observed as one of its key characteristics above. The *Miller I* majority noted that Westminster's capacity to legislate in devolved areas might be

constructive, rather than necessarily corrosive, for devolution[117] and, as Lord Reed explained in *AXA*, these provisions simply reflect the fact that each devolved territory has two legislatures:

> As a result of the Scotland Act, there are thus two institutions with the power to make laws for Scotland: the Scottish Parliament and, as is recognised in section 28(7), the Parliament of the United Kingdom… Within the limits set by section 29(2), however, its power to legislate is as ample as it could possibly be: there is no indication in the Scotland Act of any specific purposes which are to guide it in its law-making or of any subject matters to which it is to have regard.[118]

In this paragraph, Lord Reed *does* consider that the Scottish Parliament is 'subordinate'. However, it appears that this is meant in only a very narrow sense, and to essentially describe the theoretical framework better captured by the delegative model. The Scottish Parliament is not, on his account, normatively inferior to Westminster within its competences but, rather, subject to Westminster sustaining the devolution scheme itself, and subject to some further conditions that flow simply from the fact that it does not possess the sovereignty of the Westminster Parliament. The normative relationship between these institutions is the product of the delegative model, or of constitutional orthodoxy, rather than of these provisions themselves. Importantly, Lord Reed's analysis here is that whatever normative

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[117] 'The practical benefits of achieving harmony between legislatures in areas of competing competence, of avoiding duplication of effort, of enabling the UK Parliament to make UK-wide legislation where appropriate, such as establishing a single UK implementing body, and of avoiding any risk of legal challenge to the vires of the devolved legislatures were recognised from an early date in the devolution process': *Miller I* (n 74) [137] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[118] *AXA* (n 2) [146] (Lord Reed).

distinctions, hierarchy or institutional qualities might be deduced from the devolution framework more broadly, these are not *emphasised* or deepened by these competence provisions, and—in any case—the picture of devolution that can be painted, even taking all of this into account, remains an extremely generous one.[119]

Some similar or analogous clauses have, by contrast, taken an arguably broader approach than that adopted in the contemporary settlements. For example, s 75 of the Government of Ireland Act 1920 (as amended by the Northern Ireland Constitution Act 1973) was titled '[s]aving for supreme authority of the Parliament of the United Kingdom' (an ostensibly broader notion than its power to make laws in devolved areas). That provision provided:

> Notwithstanding... anything contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things in Ireland and every part thereof.[120]

'Sovereignty clauses' of different kinds are endemic; after the Home Rule Bill of 1886, most 'subsequent Home Rule and devolution bills for Ireland, Scotland and Wales included

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[119] ibid [146] (Lord Reed): 'The Scottish Parliament is subordinate to the United Kingdom Parliament: its powers can be modified, extended or revoked by an Act of the United Kingdom Parliament. Since its powers are limited, it is also subject to the jurisdiction of the courts… Even if it might be said, at the highest level of generality, that the Scottish Parliament's powers had been conferred upon it for the purpose of the good government of Scotland, that would not limit its powers… The Act leaves it to the Scottish Parliament itself, as a democratically elected legislature, to determine its own policy goals. It has to decide for itself the purposes for which its legislative powers should be used, and the political and other considerations which are relevant to its exercise of those powers.'

[120] See also Brigid Hadfield, *The Constitution of Northern Ireland* (SLS Legal Publications 1989) 108.

assertions of the continued sovereignty and supremacy of Westminster.'[121] The contemporary equivalents, however, are more precise, not going so far as to assert Westminster's 'supreme authority', but simply its continuing competence in devolved areas. This latter approach does itself have precedent, though: Section 4(4) of the Northern Ireland Constitution Act of 1973 provided that its provision of the power of the Northern Ireland Assembly to pass 'measures' 'does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland.'[122]

On one view, these kinds of provisions (whatever their breadth or precision) are unnecessary: they *appear* to possess no substantive legal content and only serve to symbolically confirm what could only anyway be the case. They therefore seem to add nothing that would not exist without them.[123] Indeed, when considering an analogous provision for inclusion in the Scotland Bill in the late 1970s, it was argued that '[o]n the Diceyan view that Parliament may not bind its successors, the clause was in law unnecessary because Parliament would retain full power to legislate for Scotland, whether or not an Assembly had been created with legislative powers.'[124] Inversely, their inclusion might *not*

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[121] Michael Keating, *State and Nation in the United Kingdom: The Fractured Union* (OUP 2021) 53. 'With the exception of the Scotland Bill introduced in 1926, 1927 and 1928, which provided for Dominion status.': ibid 53, n 1.

[122] The provision continues: '…but, subject to the said section 17, a Measure may amend or repeal any provision made by or under any Act of Parliament in so far as it is part of the law of Northern Ireland.' See Winetrobe (n 30) 6.

[123] ibid 6: 'As Hadfield noted, the inclusion of this provision was not legally necessary given Westminster's inherent sovereignty, but its exclusion may have been regarded as significant, especially following the debates over the 19th century Home Rule legislation and the inclusion of a similar provision in the 1920 Act.' See Hadfield (n 120) 108.

[124] Winetrobe (n 30) 7; Bradley and Christie (n 55).

be sufficient to assuage a constitutional worldview which rejected parliamentary sovereignty outright. The SNP have argued, for instance, that 'it is irrelevant what is said in the Scotland Bill.'[125] They claimed instead that:

> The supremacy of Westminster is supposed to be implicit in everything that it says and does, so putting such a clause in the Bill in this irrelevant and clumsy fashion actually raises the whole issue of Scottish sovereignty, rather than reinforcing a claimed but non-existent parliamentary sovereignty over Scotland.
>
> If the people of Scotland want to move on to Independence, then they will not be stopped by an irrelevant clause in a UK act of parliament.[126]

Just such a provision was included in the Scotland Act 1998, however. Section 28(7) provides that the provision setting out the powers of the Scottish Parliament (s 28) 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.' This, as noted above, is mirrored in the Government of Wales Act 2006 (s 107(5)) and in the Northern Ireland Act 1998 (s 5(6)).[127]

Although these provisions might be considered legally superfluous, they appear to have two effects. First, they add some credence to the argument that, despite devolution, parliamentary sovereignty remains the relevant hypothesis upon which the constitution is based, unaffected by constitutional decentralisation. Indeed, this provision was intended as

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[125] Cited in Winetrobe (n 30) 11. It also said: 'If Westminster MPs want to peddle the fiction of their sovereignty over Scotland in order to mask the reality of London's diminishing power, then that is a matter for them.'

[126] Cited in ibid 12.

[127] See Cowie, 'Brexit: Devolution and Legislative Consent' (n 115) 10.

a response to concerns raised about where sovereignty would 'lie' after devolution (anticipating Lord Steyn's later remarks in *Jackson* about a divided sovereignty[128]), and whether devolution would erode the (at least political) tenor of parliamentary sovereignty. For example, Bernard Jenkin MP in the House of Commons expressed the concern that, in proposing the devolution statutes, 'the Government [were] pressing through legislation that could pave the way for the separation of Wales from the rest of the United Kingdom.'[129] His view was that these pieces of legislation might 'enable' the 'overthrow [of] the sovereignty of parliament…. by mistake or by constitutional sleight of hand.'[130] Similarly Michael Ancram MP claimed that, on the basis of devolution, 'a Scottish Parliament would argue… that sovereignty rests not with Westminster, as the Secretary of State said, but with the people of Scotland.'[131] These clauses, like the delegative model above, are a refutation of that worldview, and a statutory reassurance of continuity, and of alignment with orthodoxy. Indeed, although the prospect of an analogous clause in the Government of Wales Bill was similarly objected to on the grounds that it was 'constitutional nonsense' and 'absolutely meaningless',[132] it found the following support during the passage of the Bill:

> The Government are technically correct in saying that the legal supremacy of Parliament is not affected by the Bill, but it may be affected by the events which follow as a result of the legislation. Sovereignty has a political quality. At a time when the Government are pressing through legislation that could pave the way for

[128] *Jackson* (n 31) [102] (Lord Steyn).

[129] HC Deb, 9th December 1997, vol 302, col 883 883; Cited in Winetrobe (n 30) 9.

[130] HC Deb, 9th December 1997, vol 302, col 883; Cited in Winetrobe (n 30) 9.

[131] HC Deb, 31 July 1997, vol 299, cols 472-3; Cited in Winetrobe (n 30) 11.

[132] HC Deb 8 December 1997, vol 302, cols 684-5 684; Cited in Winetrobe (n 30) 8. This was so because 'any statutory assurance to that effect by this or any other Parliament can be set aside by any future Parliament.': ibid 8.

> the separation of Wales from the rest of the United Kingdom, *a clause reinforcing the ultimate supremacy of Parliament would cost nothing but would make the intentions of Parliament absolutely clear*. If the Government believe so strongly in the Union, why should they be reticent about having that expressed in the Bill?[133]

These kinds of clauses therefore go *some* way to, symbolically at least, allaying concerns that devolution would undermine parliamentary sovereignty, or that principle's importance.

Second, however, they also add credence to the view that the core of parliamentary sovereignty should be understood in narrow terms, the accommodation of which necessitates (merely) the preservation of Westminster's *competences*, without necessarily asserting the dominance of Westminster as an institution, nor the commensurate subordination of the devolved institutions. In fact, they merely serve to illuminate the fact that, although '[t]he UK system has conventionally been described as one in which shared or concurrent competence is eschewed in favour of a binary approach to competence, so

[133] HC Deb, 9th December 1997, vol 302, col 883 883 (emphasis added); Cited in Winetrobe (n 30) 9. also Oonagh Gay, 'The Scotland Bill: Devolution and Scotland's Parliament' (House of Commons Library 1998) RP 98/1 15.

much so that it has been defined as "hyper-dualist";[134] the reality is that Westminster and the devolved institutions are *joint partners* in legislating for each its devolved parts.[135]

In recognising that '[a]s a matter of strict *law*, the UK Parliament's powers may be undiminished by devolution',[136] this framework results in a system which in federal terms is more analogous to cooperativism than dualism.[137] Despite some early suggestions to the contrary,[138] the UK's legal competence framework does not employ a 'method of dividing powers so that the general and regional governments are each, within a sphere, coordinate

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[134] Jo Hunt, 'Subsidiarity, Competence, and the UK Territorial Constitution' in Oran Doyle, Aileen McHarg and Jo Eric Khushal Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021) 22; Mark Sandford and Cathy Gormley-Heenan, '"Taking Back Control", the UK's Constitutional Narrative and Schrodinger's Devolution' (2020) 73 Parliamentary Affairs 108. The dangers of over-centralisation which might have flowed from a more formally membranous model were noted during the passage of the Scotland Bill: 'Although "Clause 27(7) of the Bill [as it was] allows for the UK Parliament to make legislation for Scotland if it wishes," the framers of the Scotland Act have been at pains to ensure a straightforward transfer of functions from the UK to the Scottish level, and the provision for concurrent exercise of functions is limited, which should reduce the temptation to poach.': Select Committee on Scottish Affairs, *The Operation of Multi-Layer Democracy* (2nd Report of Session 1997-8, HC Paper 460-I) para 40.

[135] See *Continuity Bill* (n 14) [41].

[136] Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 7) 37.

[137] See Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009).

[138] In one case, the Welsh Assembly (as it then was) was described as having 'sole primary legislative competence' over the matters devolved to it: *Recovery of Medical Costs* (n 6) [122] (Lord Thomas).

and independent.'[139] Instead, it allows the different spheres of legislative authority to bleed into one another. There are two parliaments capable of legislating within devolved competences for each of the devolved territories (although only one for England), and the devolved institutions have been seen to interpret their authority to legislate in devolved areas as 'primary,' rather than sole.[140] Even the statutory language for policing the boundaries of devolved competence 'was informed by principles that were applied to resolve questions that had arisen in federal systems, where the powers of various legislatures tend to overlap.'[141] Consistent with this view, Keegan LCJ has explained that '[t]he constitutional reality remains that the sovereign UK Parliament retains the power to make laws in relation to all matters, whether devolved or reserved'[142] and Elliott has acknowledged that 'one of the hallmarks of devolution is that the national legislature, far from *transferring* legislative competence, merely *shares* such competence with devolved institutions.'[143] Thus, it is at least arguable that these kinds of competence retention clauses actually (can) pave the way for cooperative, rather than insulated, siloed or adversarial

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[139] KC Wheare, *Federal Government* (4th edn, OUP 1963) 11. This understanding of federalism has been described by Tierney as the 'classical test': Tierney (n 12) 107. It is not dissimilar to the models of Dicey or Bryce and has found favour with Finer, Bogdanor and Rudden, among others. See AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1920) 134–167, 476–480; James Bryce, *The American Commonwealth* (Macmillan 1914) i, 432; Samuel Finer, Vernon Bogdanor and Bernard Rudden, *Comparing Constitutions* (Clarendon Press 1995) 6, 372–376; Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (CUP 2009) 17; Kilford, 'Divided We Stand: Decentralisation, Federalism and a Union-State' (n 32) 18.

[140] The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee (n 29) para 23.

[141] *Imperial Tobacco* (n 1) [13] (Lord Hope).

[142] *Allister (NICA)* (n 85) [361].

[143] Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 7) 32.

territorial arrangements. They are not *de facto* corrosive to the devolution framework but arguably portray a reality which—as noted earlier—according to the Supreme Court, reflects 'the essence of devolution'.[144]

These provisions should not, of themselves, be interpreted as sitting uncomfortably with the wider devolution framework. They do little to inhibit the constitutional or practical significance or purposes of that system, and nor do they run counter to the core elements of devolution's relationship with Westminster as these are understood in this chapter.[145] Yet they also tell us something important about the limits of the flexibility that the sovereignty principle can attain even under the reconciliatory model. Although able to intellectually reconcile the amendment or repeal of Westminster's legislation with parliamentary sovereignty—so long as Westminster itself can set the terms of those processes—even the most flexible approach to that principle must, if it is to accurately characterise it, remain wedded in its endorsement of Dicey's positive aspect, as reflected in these provisions.

These provisions are, it is argued, in their nature reconciliatory by virtue of their capacity to accurately reflect the fullness of devolution. However, they also demonstrate that the preservation of Westminster's power to legislate within devolved areas is a key aspect of its sovereignty which needs to be guaranteed if that principle's accommodation is to be meaningful. The White Paper to the Scotland Bill captures this point aptly:

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[144] *Continuity Bill* (n 14) [41].

[145] That is, (i) that the rules restricting Westminster's engagement in devolved areas do not amount to hard legal limits on its legislative freedom, (ii) the absence of a general supremacy rule, (iii) devolved legislation's enjoyment of the highest normative status, (iv) 'dynamism', and the axiomatic nature of *competences*, within the boundaries of which, devolved legislative freedom is considerable.

> The UK Parliament is and will remain sovereign in all matters: but as part of the Government's resolve to modernise the British constitution Westminster will be choosing to exercise that sovereignty by devolving legislative responsibilities to a Scottish Parliament *without in any way diminishing its own powers.*[146]

Indeed, the reconciliatory approach requires Westminster's legislative power is free from hard legal limitations which would have this diminishing effect. Under even the most flexible account of the sovereignty principle, Westminster's power to legislate in devolved areas must, if accommodation is to be meaningful, be preserved as a matter of law. Crucially, the devolution settlement recognises that, although '[i]t is possible to use legal constraints on devolved institutions to create an "exclusive" legal domain for the UK Parliament;'[147] it is not possible to do the same for the devolved legislatures: 'To impose legal limits on the law-making powers of the UK Parliament would be incompatible with the constitutional principle that it is "sovereign" or "legislatively supreme".'[148]

Nevertheless, as the distinction between the kinds of competence retention provisions in the contemporary settlements and those which assert the *wider* superiority of Westminster as an institution demonstrate, the reconciliatory model is one which can preserve the core elements of Westminster's sovereignty in a way that *also* reflects the normative weight of devolution. In the same way that '[i]t does not, however, follow' from the devolved institutions' power to repeal or amend Westminster legislation within competence 'that the devolved legislatures, or their legislation, enjoy hierarchical superiority over the UK

[146] Scottish Office (n 44) 12 (emphasis added).

[147] Cowie, 'Brexit: Devolution and Legislative Consent' (n 115) 8.

[148] ibid 10.

Parliament, or its legislation, in a presently relevant sense',[149] nor does it follow that *Westminster's* hierarchical superiority is entrenched or emphasised merely by its capacity to legislate within devolved areas. In this way, these clauses do not necessarily paint a picture of devolution which is *necessarily* constitutionally subordinate, in a way that would be in tension, or incompatible, with the core assumptions underpinning the settlement.

These provisions, in other words, simply preserve the full scope of *both* devolved and Westminster law-making power,[150] rather than interpreting the latter widely at the expense of the former, or interpreting the sovereignty principle as necessitating a deeper institutional hierarchy than that which flows naturally from the delegative model. The constitutional place of the devolved institutions can, on this interpretation, be generously understood.

Preserving Westminster's competences within devolved areas represents an important reconciliation. It identifies and accommodates a core component of parliamentary sovereignty but in a way which leaves space for the full enjoyment of devolved competences *by* the devolved legislatures within an environment in which the normative subordination of the devolved institutions is minimised. But it does have a further important consequence: it is only possible, consistently with the reconciliatory approach, to regulate Westminster's intervention or involvement in devolved areas by *political* rather than *legal*

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[149] Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 7) 36.

[150] *Safe Electricity* (n 50) [48] (Scoffield J).: 'There is no limitation on the Assembly's power to legislate for transferred matters, other than those relating to legislative competence more generally'. Similarly, '[t]he Scottish Parliament is a legislature of unlimited legislative competence subject to the limitations in sections 28 and 29 of the Scotland Act, and in particular the five exclusions from its competence specified in section 29(2)': *Continuity Bill* (n 14) [25].

means, something which, arguably, leaves the door ajar for Westminster to undermine the devolution settlement.[151]

However, there are several reasons to contend that the absence of enforceable legal limits on Westminster's power to legislate in devolved areas does not necessarily undermine the workability and constitutional purposes of devolution. Importantly, the Sewel (or, more accurately, legislative consent)[152] convention provides a significant protection for devolved law-making power,[153] without impinging upon parliamentary sovereignty. As McHarg has argued before the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, before Brexit at least, the convention struck an appropriate balance, protecting devolved interests while guaranteeing that 'parliamentary sovereignty still existed in principle, but its operation in practice was constrained.'[154]

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[151] For the argument for further legal protection against Westminster's engagement in devolved areas, see McHarg (n 25). See also McCorkindale, 'UKIMA as Red Flag Symptom of Constitutional Ill-Health: Devolved Autonomy and Legislative Consent' (n 7).

[152] Cowie, 'Brexit: Devolution and Legislative Consent' (n 115) 3.

[153] ibid. Institute for Government (n 10) 6, 65–66.

[154] Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, 'Official Report, 23 March' (The Scottish Parliament 2023) Session 6 para 2 <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15225>; The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee (n 29) para 127.

The courts' somewhat minimalist interpretation of that convention,[155] despite its codification for Scotland and Wales,[156] is regrettable because a richer reading of its constitutional purchase would arguably still be consistent with the reconciliatory approach, so long as this did not go so far as to present unsurmountable legal limits on Westminster's legislative power.[157] Indeed, some scholars have noted that a convention (like this one) can reflect deeper constitutional norms which might indirectly resist legislative abrasion or inform statutory interpretation[158] (although the latter has not been forthcoming in treatment of the legislative consent convention in the case law).[159]

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[155] *Miller I* (n 74) [148] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[156] See Scotland Act 1998 1998, s 28(8); Government of Wales Act 2006, s 107(6). See The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee (n 29) paras 124–151.

[157] 'Neither the absence nor the deliberate withholding of legislative consent presents a legal barrier to the UK Parliament presenting a Bill for Royal Assent': Cowie, 'Brexit: Devolution and Legislative Consent' (n 115) 6. Similarly, legislative consent 'is not a legal requirement before the relevant Act of the UK Parliament is passed': *Miller I* (n 74) [150] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[158] Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' (n 7) 39. On the purchase of norms which might condition Westminster's legislative power, and a criticism of a hard distinction between law and politics, see TRS Allan, 'The Limits of Parliamentary Sovereignty' [1985] Public Law 614; Winetrobe (n 80) 39.

[159] Aileen McHarg and Christopher McCorkindale, 'The Supreme Court and Devolution: The Scottish Continuity Bill Reference' (2019) 2 Juridical Review 190, 195–6.

More importantly, though, the Sewel convention again represents a recognition of the absence of 'watertight compartments'[160] in the UK's territorial constitution, and the disadvantages that would flow from an overly rigid division of constitutional authority.[161] It recognises that there can be occasions when Westminster's legislative engagement in devolved areas is constructive and supports devolved interests.[162] In this way, a 'hard' legal restriction on Westminster's engagement in devolved areas might not always bolster devolution's capacity to 'improve the government of the United Kingdom as a whole' especially as far as the devolution framework 'proceeds on the basis that both administrations can be expected to co-operate appropriately.'[163] Such restrictions would, however, certainly make the accommodation of parliamentary sovereignty more difficult, and would require certain caveats to ensure that accommodation were meaningful.

Finally, the suggestion that the rules regulating Westminster's engagement in areas within the competences of the devolved legislatures must, in order to be meaningful, be a function of *law* is anomalous within a constitution which is, in important respects, a political constitution. Governing the exercise of power by *political* means is common within the UK's constitutional system, and doing so in the devolution context is consistent with that pattern in a way that legal constraints might not be. Such legal restraints might also be unsuitable, or too rigid, to recognise the changing relationship between devolved and

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[160] See *Canadian Western Bank v Alberta* [2007] 2 SCR 3 [29]; Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 92.

[161] See Gay (n 133) 14.

[162] See Andrea Batey and Alan Page, 'Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution' [2002] Public Law 501, 522.

[163] *Martin v Most* (n 22) [80] (Lord Rodger).

reserved matters,[164] or might otherwise become detached from the actual practice of devolution. Were these rules to become concretised in this way, this detachment could, arguably, be problematic in a system that, as the courts have *generally*[165] noted, emphasises 'workability'.[166]

Notably, it is in the political forum that Westminster's sovereignty is much less of a trump card than it can be in a litigious one,[167] and the legislative consent convention had, until recently, historically been adhered to,[168] often having a material effect on legislation enacted by Westminster.[169] Some have indeed argued that the convention 'has played a

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[164] See, e.g., McHarg (n 25).

[165] Although, see generally *Martin v Most* (n 22).

[166] See, *inter alia*, *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106 [7].

[167] As McHarg explains, in *Continuity Bill* 'the UK government was able to win a legal dispute about devolved competence, and a political dispute about the post-Brexit status of EU law, by unilaterally shifting the statutory goalposts'.: McHarg (n 25) 16.

[168] See generally Institute for Government (n 10) *65–66*: 'The normal pattern since 1999 has been for Westminster to respect the Sewel Convention, and for the devolved bodies to grant consent to UK bills where required, often after concessions by UK ministers over the terms of the legislation.'

[169] See Graeme Cowie, 'Legislative Consent and the European Union (Withdrawal) Bill (2017-19)' (House of Commons Library 2018) Briefing Paper BP 08275. 'For example, the Public Pensions Act 2013 as originally introduced would have applied to certain pension schemes under devolved control. The Scottish Government argued that it had not been consulted sufficiently and informed the UK Government that it would not recommend consent. The bill was amended to take out the Scottish provisions, and no consent motion was ever debated. Also in 2013, the UK Government had the Marriage (Same Sex Couples) Act amended to remove Northern Ireland from certain provisions, in light of

central role in facilitating good relations between the UK and devolved legislatures'.[170] A phenomenon does not need *legal* protection for its *constitutional* value to be apparent[171] (especially if competences could be indirectly hollowed out or circumvented[172] without engaging, or through restrictive interpretation of, that protection), and the Sewel convention certainly provides a useful metric by which to analyse the state of intergovernmental relations[173] consistently with the political aspects of the UK's constitution. As Cowie explains, '[t]he legislative consent convention recognises that legal constraints on the behaviour of Parliament are impossible, but uses non-legal constraints to condition the behaviours of the UK Parliament and Government'.[174] The Supreme Court majority in *Miller I*, although again taking a narrow approach to the convention, held that its lack of *legal* force did not necessarily undermine its *constitutional* significance:

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opposition at the devolved level. The Scotland Act 2016 and Wales Act 2017 were also held up by threats to withhold consent, until agreement was reached on the financial implications of the legislation': Institute for Government (n 10) 65.

[170] Institute for Government (n 10) 66.

[171] See *Miller I* (n 74) [151] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[172] On the provision and exercise of secondary legislative powers within devolved areas, and their relationship with, and engagement of, devolved consent, see The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee (n 29) paras 124–197.

[173] House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 2014-15 1022) para 45. However, it should be noted that the are ways to circumvent the convention, for example by using Orders in Council, which are outside its scope, to amend competences. See Cowie, 'Brexit: Devolution and Legislative Consent' (n 115) 22.

[174] Cowie, 'Brexit: Devolution and Legislative Consent' (n 115) s 2.

> In reaching this conclusion [that the convention is without legal force] we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.[175]

Nonetheless, this argument is certainly open to the criticism that the Sewel convention's political protections have proven insufficient in the face of an activist and assertive centre. Mick Antoniw, the Welsh Government's Counsel General and Minister for the Constitution, explained this position in this way:

> Despite our efforts to work collaboratively, the UK government has chosen a centralised, unilateral and destructive approach to the devolution settlement… It has repeatedly pushed ahead with legislation in devolved areas without the consent of the Senedd. In doing so it disrespects a democratically elected body and denies the people who elected its members of accountability. We have never seen this level of strain in the devolution settlement during the entire 24 years of its existence.[176]

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[175] *Miller I* (n 74) [151] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge). Lord Reed also accepted the majority's analysis of the convention at [243]. The other judges, Lord Carnwath and Lord Hughes, did not disagree with that analysis.

[176] Mick Antoniw, 'Press Release: Criticism of "Destructive" Approach to Devolution' (*Welsh Government*, 1 July 2023) <https://www.gov.wales/criticism-of-destructive-approach-to-devolution> accessed 15 March 2024; The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee (n 29) para 142.

The legislative consent convention, it seems, provides scant protection in the face of these factors and might, as the Brown Commission suggested, need to be given legal bite.[177] There are, however, two responses to this issue. The first is to recognise that the limits of legal protections—in any context—are the inevitable consequence of engaging with the accommodation problem meaningfully. Unless parliamentary sovereignty is abandoned or interpreted in terms so flexible as to render it vacuous, then constitutional norms are inevitably vested with a *certain* degree of fragility. Devolution is not the only context in which that argument bites. Second, and the reason that engaging with the accommodation problem remains worthwhile, the position represented by the reconciliatory approach, and the argument advanced in this thesis, serves to demonstrate that such an assertive approach is not necessitated *by* parliamentary sovereignty itself. Any assertion of central institutions against their devolved counterparts is not warranted purely on the basis of parliamentary sovereignty because, as this section has sought to argue, that sovereignty is accommodated within that settlement in the first place, a reconciliation which permits a *more* generous settlement. Antoniw's complaint should be properly understood as being directed at a particular approach to the wielding of parliamentary sovereignty, with the corrosive implications for devolution that follow from that, rather than the legislative consent convention's lack of legal 'bite'. Indeed, in this passage Antoniw is able to use the

[177] '[T]here should be a new, statutory, formulation of the Sewel convention, which should be legally binding. It should apply both to legislation in relation to devolved matters and, explicitly, to legislation affecting the status or powers of the devolved legislatures and executives. It should not be restricted to applying "normally", but should be binding in all circumstances': Labour Party Commission on the UK's Future, 'A New Britain: Renewing Our Democracy and Rebuilding Our Economy' (2022) 103 <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf> accessed 15 March 2024.

infringement of that convention as a metric against which to challenge the constitutional propriety of central institutional conduct.

A strength of the reconciliatory approach is, it is argued, its capacity to balance the accommodation of parliamentary sovereignty *with* an accurate account of devolution, reflective of the constitutional space it should properly be understood as occupying. It is true that accommodating parliamentary sovereignty does necessarily expose the devolution framework to certain fragilities. However, this chapter has sought to argue that these fragilities neither diminish devolution's recognised constitutional status, nor its fundamental components. This approach also has a second strength: not only is it consistent with the judicial and political treatment of devolution, but it is also consistent with the approach adopted by the courts and political institutions in other analogous contexts. Because of that, it is possible to argue that it has pedigree as a coherent and intellectually sound approach to parliamentary sovereignty's relationship with multi-layered constitutionalism. The parallels between these contexts, demonstrating the intellectual strengths of the reconciliatory approach as an account of parliamentary sovereignty, are considered next.

5. Primacy Parallels: The Reconciliatory Approach in Another Context

One of the core strengths of the reconciliatory approach is that it coheres well with the way that parliamentary sovereignty has been understood in the contexts of, and has been reconciled with, other kinds of multi-layered constitutionalism. This means that, rather than being unorthodox, untested, or *sui generis*, the reconciliatory approach presents an intellectually compelling account of that principle, being an extension of a wider, more deeply-rooted approach within constitutional law. Several other examples of multi-layered constitutionalism have posed the same or similar questions to those raised in the context

of devolution, but perhaps the most obvious, and significant, is the treatment of the primacy of EU law. The way in which parliamentary sovereignty was accommodated alongside primacy bears a striking resemblance to the reconciliatory approach in the devolution context, and these parallels demonstrate that certain features of the reconciliatory approach are not unprecedented or anomalous, and its treatment of parliamentary sovereignty is, in fact, more orthodox than might be immediately obvious.

In particular, the accommodation of parliamentary sovereignty alongside primacy shares four parallels with the reconciliatory approach in the context of devolution, which are explored in this final section. First, the nature of its more flexible treatment of parliamentary sovereignty. In this context, as in the devolution context, the courts were content that the ineffectiveness of Westminster's most recent legislative expression did not necessarily compromise its sovereignty, especially when this was to give effect to a statutory scheme. Second, the limits to this flexibility mirrored those observed in the devolution context: this framework was constructed in terms of 'delegation'. This meant that this framework could be given effect without repudiating the sovereignty principle. Third—another similar limit to the principle's flexibility—Westminster's ultimate legislative power remained intact. It could, as in the devolution context, legislate incompatibly with that framework, or to 'rebottle' it, provided it made its intention sufficiently clear to that effect. The fourth similarity the domestic effect of primacy shared with the reconciliatory approach in the devolution context is the pragmatic balance it struck between the demands of the two components of the constitution in play. It adopted, in other words, a view which ensured that the two *could* be compatible, and pursued workability and accurate characterisation over ideological dogma.

These similarities demonstrate that the reconciliatory approach is not unprecedented, and represents an instantiation of, rather than a departure from, a widely (if not universally) accepted approach to parliamentary sovereignty and multi-layered constitutionalism. Its more flexible conception of the sovereignty principle is less an about-turn in constitutional theory and more an extension of contemporary orthodoxy. Each of these similarities can be taken in turn.

(a) A More Flexible Account of Parliamentary Sovereignty

That giving domestic effect to the primacy doctrine of EU law was a challenge for parliamentary sovereignty is, no doubt, trite.[178] By the time the UK joined the European Community, the supremacy of the law of the latter—even over the *constitutional* law of member states—had already been asserted by the Court of Justice.[179] Westminster sought to give effect to that membership (and primacy) by way of the European Communities Act 1972 (ECA) which purported to give EC (and, later, EU) law primacy in the domestic system.[180]

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[178] Scholarship has been concerned with 'the UK constitution's attempts over the last five decades to accommodate EU law and, specifically, a primacy doctrine that was taken by some to have sounded the death-knell of parliamentary sovereignty'.: Mark Elliott, 'Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Hart Publishing 2018) 224. For discussion of the relationship between the primacy of EU law, the ECA and parliamentary sovereignty: Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) ch 10, esp pp 288-9.)

[179] *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603 658–9 (Lord Bridge); *Costa v ENEL* (1964 Case 6/64) 393–4; *Simmenthal II* (1978 Case 106/77).

[180] Section 1 ECA provided that '[a]ll such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time

Giving effect to the primacy of EU law meant either giving effect to these provisions as a function of domestic law, or by applying the primacy doctrine of EU law itself directly. Either way, it also meant, or required, a more flexible approach to parliamentary sovereignty. The more rigid, dogmatic approach of the past[181] gave way to a more flexible account wherein the more recent expression of Westminster's legislative will did not always unconditionally prevail.[182]

Although several different formulations of primacy's interaction with Westminster's legislation, and its normative foundations, are available,[183] they each in different ways adopted a more flexible conception of the principle. Some cases, for example, considered

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to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly…' Section 2(4) provided that 'any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section'. Section 2(4) is, in Allan's view, an 'attempt to entrench section 2(1)': TRS Allan, 'Parliamentary Sovereignty: Lord Denning's Dexterous Revolution' (1983) 3 OJLS 22, 25.

[181] *Ellen Street Estates v Minister of Health* [1934] 1 KB 590 597 (Maugham LJ). See also Allan (n 180) 25; Elliott, 'What Has EU Membership Taught Us?' (n 178) 226.

[182] Allan (n 180) 25.

[183] See Nicholas Kilford, 'The Supremacy of Retained EU Law: "We're Lost, but We're Making Good Time!"' (*UK Constitutional Law Association*, 27 July 2021) <https://ukconstitutionallaw.org/2021/07/27/nicholas-kilford-the-supremacy-of-retained-eu-law-were-lost-but-were-making-good-time/> accessed 27 July 2021.

sovereignty to have been qualified or (merely) conditioned by Westminster itself,[184] where in other cases the courts considered sovereignty to have been modified by the common law.[185] Either way, a more flexible account of sovereignty was required if the scheme envisaged by the ECA was to be effective as a matter of domestic law. The same is, of course, true of devolution, in which the dynamism of the settlement is predicated on just such a flexible conception, with a less dogmatic attachment to Dicey's negative aspect permeating both examples (and potentially persisting in the context of the UK's new relationship with the EU).[186]

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[184] Lord Bridge made it clear that it was 'by virtue of' section 2(4) ECA that the relevant provisions of the Merchant Shipping Act 1998 had effect 'subject to' relevant EU law rights: *R v Secretary of State for Transport, ex p Factortame Ltd (No 1)* [1990] 2 AC 85, 140 (Lord Bridge); Elliott, 'What Has EU Membership Taught Us?' (n 178) 224. In *Factortame (No 2)* he said that the primacy rule had been established 'long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.' But it was '*[u]nder the terms of the Act of 1972* [that] it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.': *Factortame (No 2)* (n 179) 658–9 (Lord Bridge) (emphasis added). *Cf* Gavin Drewry, 'Euroscepticism and Parliamentary Sovereignty: The Lingering Shadows of Factortame and Thoburn' in Alexander Horne and Andrew Le Seur (eds), *Parliament: Legislation and Accountability* (Hart Publishing 2016) 295; Gavin Drewry, 'The Jurisprudence of British Euroscepticism: A Strange Banquet of Fish and Vegetables' (2007) 3 Utrecht Law Review 101.

[185] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [59] (Laws LJ).

[186] See Kilford, 'The Supremacy of Retained EU Law: "We're Lost, but We're Making Good Time!"' (n 183); Anurag Deb and Colin Murray, 'The Dillon Judgment, Disapplication of Statutes and Article 2 of the Northern Ireland Protocol/Windsor Framework' (*EU Law Analysis*, 8 March 2024) <https://eulawanalysis.blogspot.com/2024/03/the-dillon-judgment-disapplication-of.html?m=1> accessed 15 March 2024.

(b) A 'Delegative' Model: Evolution Rather than Revolution

Nevertheless, and similarly to the devolution context, to accept that parliamentary sovereignty possesses a certain degree of flexibility which can tolerate these conditions is not necessarily to accept that its flexibility is unlimited. One such limit to that flexibility, shared by both approaches, which is perhaps a firm criterion within an otherwise flexible approach, is the use of the 'delegative' model to make sense of the relevant framework. The dominant (but not only) conception of devolution, as seen above, is that it is derived from, and remains an expression of (and subject to), Westminster's legislative will, rather than an independent or self-executing phenomenon. This is a key mechanism through which it is rendered, or understood, consistently with parliamentary sovereignty.[187]

An analogous approach was deployed in the context of primacy. In particular, in order to render, or make sense of, primacy consistently with parliamentary sovereignty, the courts maintained (aside a few early dicta from which the courts appeared to retreat)[188] that primacy was to be understood as a function of *domestic* law,[189] rather than an incorporation of EU law's own doctrine.[190] Again, different accounts of how this primacy was accorded

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[187] For a different view, see Welsh Government, 'Reforming Our Union: Shared Governance in the UK' (2nd Edition 2021) <https://www.gov.wales/sites/default/files/pdf-versions/2021/6/2/1624957096/reforming-our-union-shared-governance-in-the-uk-2nd-edition.pdf>.

[188] E.g., *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418 (Lord Denning MR); Cited in Elliott, 'What Has EU Membership Taught Us?' (n 178) 227.

[189] Elliott, 'What Has EU Membership Taught Us?' (n 178) 227: 'the effect of EU law within the domestic legal order turned upon domestic law itself.'

[190] This approach is mirrored elsewhere in the EU too: See, René Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism' (2009) 5 European Constitutional Law Review 421;

exist, but these tended to be united by this core theme. As Lord Sumption has recently explained:

> as a matter of the domestic law of Member States, the reception of the [EU] treaties into the domestic legal order depends on its domestic law, whose interpretation is exclusively a matter for national courts.[191]

For instance, the account offered by Laws LJ in *Thoburn* has probably become, though not necessarily universally accepted, the most influential account with policymakers, judges and academics because of its capacity to reconcile domestic constitutional norms—including parliamentary sovereignty—with the practical effect of primacy.[192] Key to that reconciliation was Laws LJ's rejection of the argument that '[s]o long as the UK remains a member state, the pre-accession model of parliamentary sovereignty is of [merely] historical significance' and that '[s]o long as the United Kingdom remains a

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House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty* (HC 2010-11, 633-1) para 82.

[191] Jonathan Sumption, 'The European Union and the Nation-State' (2023) 69 Irish Jurist 1, 1.

[192] *Thoburn* (n 185) [68]-[70] (Laws LJ); *Miller I* (n 74) [65]-[67] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge); European Union Act 2011 s 18; *R (HS2 Action Alliance Limited) v The Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324; Mark Elliott, 'Reflections on the HS2 Case: A Hierarchy of Domestic Constitutional Norms and the Qualified Primacy of EU Law' (*Public Law for Everyone*, 23 January 2014) <https://publiclawforeveryone.com/2014/01/23/reflections-on-the-hs2-case-a-hierarchy-of-domestic-constitutional-norms-and-the-qualified-primacy-of-eu-law/> accessed 18 February 2020; House of Commons European Scrutiny Committee (n 190) para 23; House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty: Government Response to the Committee's Tenth Report of Session 2010-11* (HC 2010-11, 723) paras 5–6; House of Lords Select Committee on the Constitution, *European Union Bill* (HL 2010-11, 121) para 76.

member state, Parliament exercises its sovereign powers within the altered framework that continuing membership entails'.[193] Instead, he said that

> …there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands.[194]

Such an account was endorsed by the Supreme Court (albeit in slightly modified form) in *HS2* and also in *Miller I*. In the former, Lord Reed said that the relevant question before the Court, including about how to accord priority to legislation, was a matter of domestic law.[195] In the latter, although the majority accepted that 'unlike other rules of domestic law,

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[193] *Thoburn* (n 185) [53] (Laws LJ).

[194] ibid [59] (Laws LJ).

[195] Lord Reed said that the relevant question could not 'be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the [ECA]. If there is a conflict between a constitutional principle, such as

EU law cannot be implicitly displaced by the mere enactment of legislation which is inconsistent with it',[196] the majority did 'not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.'[197] The Supreme Court, indeed, denied that 'the efficacy of EU law in the UK is due to any autonomous, supervening status enjoyed by EU law itself'.[198]

Importantly, the majority in *Miller I* described the position in this way: 'The 1972 Act effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it).'[199] Lord Reed went further in that case, making the comparison with the devolution framework that is invited here:

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that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom.': *HS2* (n 192) [79] (Lord Reed).

[196] *Miller I* (n 74) [66] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[197] ibid [60] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[198] John Laws, 'The Miller Case and Constitutional Statutes' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Hart Publishing 2018) 208.

[199] *Miller I* (n 74) [68] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge). Although the majority in *Miller I* was not comfortable with the describing the EU institutions in the language of 'delegates', this seems to be because of the equivocation that language invites with delegated *legislation*, rather than a dispute about the framework that renders the implications of EU law in the UK subject to Westminster's statutory intention: ibid.

> As a source of law, EU law, like legislation enacted by the devolved legislatures, or delegated legislation made by Ministers, is entirely dependent on statute (which is not, of course, to say that EU law has the same effects, as devolved or delegated legislation). It derives its legal authority from a statute, which itself derives its authority from the rule of recognition identifying Parliamentary legislation as a source of law. The recognition of its validity does not alter any fundamental principle of our constitution.
>
> The fact that the 1972 Act has a prospective effect, in giving effect to laws made from time to time by the EU institutions, does not affect this analysis. Nor does the limited primacy given to EU law by the 1972 Act alter the position, since that primacy itself derives from the 1972 Act.[200]

The consequence was that this framework, in Lord Reed's view 'has to be interpreted and applied in the wider context of the constitutional law of the UK.'[201] The same picture emerged from statute too, with s 18 of the European Union Act 2011 providing that EU law was only recognised and available in the law in the UK *because of* domestic law.[202]

Rendering primacy a creature of, and therefore subject to, domestic law had an important upshot: it helped assuage concerns that its advent amounted to a 'revolution' which *had* varied the rule of recognition underlying the UK's constitutional order, or had otherwise

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[200] *Miller I* (n 74) [225]-[226] (Lord Reed).

[201] ibid [228] (Lord Reed).

[202] Similarly, see European Union Withdrawal Agreement Act 2020 s 38: 'It is recognised that the Parliament of the United Kingdom is sovereign'; 'its sovereignty subsists notwithstanding [inter alia] directly applicable or directly effective EU law continuing to be recognised and available in domestic law…'

undermined parliamentary sovereignty.[203] Such criticisms were made most notably by Wade,[204] but have also been outlined by Barber,[205] and by Ewing,[206] and evidenced in the early case law.[207] Wade, for example, considered that *Factortame* should be treated 'in effect, as having extinguished sovereignty in the sense that he took it to have existed prior to the UK's having joined the EU.'[208]

By denying that primacy was self-executing,[209] and confirming that it was a function of domestic constitutional law, primacy was *subject to* the principles *of* domestic constitutional law, of which parliamentary sovereignty is an important member. Thus, to accept primacy was not *necessarily* to accept that parliamentary sovereignty had been toppled or

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[203] Lord Bridge had rejected the self-executing hypothesis in *Factortame (No 2)* (n 179) 658 (Lord Bridge): 'Some public comments on the decision of the European Court of Justice… have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception.'

[204] HWR Wade, 'Sovereignty: Revolution or Evolution' (1996) 112 Law Quarterly Review 568; HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 Cambridge Law Journal 172.

[205] NW Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 ICON 144.

[206] Who considered that this judgment in particular have raised certain 'uncertainties, equivocations and qualifications' about the status of sovereignty within the domestic system. Keith Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80 Modern Law Review 711, 712.

[207] '[T]he Treaty [of Rome] is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute': *Bulmer v Bollinger* (n 188) 418 (Lord Denning MR).

[208] Elliott, 'What Has EU Membership Taught Us?' (n 178) 229.

[209] Allan (n 180) 25–6: Allan argues that '[a]ttractive though the argument is, it must not be allowed to obscure the reality'.

undermined.[210] Ensuring that 'the effectiveness of EU law within the UK legal system is ultimately attributable to, and a function of, the European Communities Act 1972;'[211] was, therefore, a key reconciliatory mechanism, and a pathway to accommodating parliamentary sovereignty. As Lord Reed explained in *Miller I*, 'section 2(1) [of the ECA 1972] enables EU law to be given direct effect in our domestic law, but within a framework established by Parliament, in which Parliamentary sovereignty remains the fundamental principle.'[212]

As with devolution, constructing the role played, and constitutional position occupied, by EU law within the domestic constitution as ultimately subject to Westminster's legislative power was a key vehicle through which parliamentary sovereignty was accommodated without undermining, or fatally mischaracterising, the relevant system itself.

(c) Preserving Westminster's Ultimate Legislative Power

A third way in which the accordance of primacy mirrored the reconciliatory approach in the context of devolution was in its preservation of Westminster's legislative competences. Both devolution and the primacy of EU law are (or, as relevant, were) protected by political-constitutional bulwarks, and could not be unmade or overcome by statutory language that was insufficiently express. Yet, both confirm(ed) that it is (or was) ultimately legally *possible*

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[210] Lord Denning later made it clear 'that he did not consider the domestic constitutional order generally, or the doctrine of parliamentary sovereignty in particular, to have been overwhelmed': Elliott, 'What Has EU Membership Taught Us?' (n 178) 227; *Macarthys Ltd v Smith* (1979) 3 ER 325. *C.f., Felixstowe Docks and Railway Co v British Transport Docks Board* [1976] 2 CMLR 655.

[211] Elliott, 'Reflections on the HS2 Case: A Hierarchy of Domestic Constitutional Norms and the Qualified Primacy of EU Law' (n 192).

[212] *Miller I* (n 74) [183] (Lord Reed).

for Westminster to do so provided its clarity of expression was sufficient and it was prepared to face any political costs involved in doing so.

During the UK's membership of the EU, Westminster's capacity to expressly derogate from EU law was confirmed by the courts. In Lord Denning's judgment in *Macarthys*, for example, 'it followed that if Parliament deliberately sought to override EU law and said so "in express terms", it would be "the duty of our courts to follow the statute of our Parliament"'.[213] This was so *even though*, as Allan rightly points out, '[t]he [EC] Act itself does not stipulate that express wording is required to legislate inconsistently with current Community law.'[214] Indeed, Allan explained that 'Lord Denning's interpretation of section 2(4) of the European Communities Act results in… [a] principle of interpretation: Parliament must state expressly that inconsistent Community law is not to prevail if the presumption against conflict between Community law and national legislation is to be rebutted.'[215] The consequence of that framework was that Westminster's power to legislate to overcome this framework and abrogate EU law was not foreclosed, and such a Bill was, in fact, introduced into Parliament in 2005.[216] The Supreme Court's majority emphasised this in *Miller I* in these terms:

> EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign: so, no new source of law could come into

[213] Elliott, 'What Has EU Membership Taught Us?' (n 178) 227; *Macarthys Ltd v Smith* (n 210) 329.

[214] Allan (n 180) 26.

[215] ibid 31.

[216] 'A bill to this effect was introduced in Parliament in 2005 (the Food Supplements (European Communities Act 1972 Disapplication) Bill)': House of Commons European Scrutiny Committee (n 190) Written Evidence from Professor Adam Tomkins, para 20.

> existence without Parliamentary sanction - and without being susceptible to being abrogated by Parliament.[217]

Similarly, although a slightly different point, the majority also explained that constructing primacy as a system of domestic law meant that it was subject to certain limits:[218] 'legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law', with the consequence that '[i]n the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law'.[219] Indeed, primacy was explained in both *HS2* and *Thoburn* in terms that rendered it qualified by domestic constitutional norms.[220]

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[217] *Miller I* (n 74) [61] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[218] Lord Reed expressly described the system under the ECA as one of 'limited primacy': ibid [226] (Lord Reed).

[219] ibid [67] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge). '[T]he *Miller* majority never actually go as far as to say that the ECA is immune from implied repeal', instead 'the better approach [is] to ask whether, taken in constitutional context, Parliament has done enough to make clear its intention to override or displace whatever norm appears to be in tension with a given statutory provision.': Elliott, 'What Has EU Membership Taught Us?' (n 178) 235.

[220] *Thoburn* (n 185) [69] (Laws LJ): 'in the event… that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the 1972 Act were sufficient to incorporate the measure and give it overriding effect in domestic law'. See also Elliott and Kilford (n 93).

Furthermore, this model also meant that Westminster could, as indeed it did, go further and 're-bottle' the primacy 'genie': primacy was ultimately 'contingent'. As the *Miller I* majority maintained, while the 'constitutional effect of the 1972 Act was unprecedented', this 'unprecedented state of affairs' 'will last only so long as Parliament wishes' and the ECA 'can be repealed like any other statute'[221] (though with the caveat that it required a particular clarity of expression). It was this component that had rendered the primacy scheme compatible with parliamentary sovereignty in the view of Lawton LJ in *Macarthys*. He said that he could 'see nothing in [that] case which infringes the sovereignty of Parliament'.[222] On his account, this was because 'Parliament's recognition of European Community Law and of the jurisdiction of the European Court of Justice by one enactment can be withdrawn by another'.[223] Tomkins, similarly, has argued that it was this component—primacy's revocability—that ensured it was not a threat to parliamentary sovereignty,[224] as has the UK Government.[225]

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[221] *Miller I* (n 74) [60] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[222] *Macarthys Ltd v Smith* (n 210) para e (Lawton LJ).

[223] *Macarthys Ltd v Smith* (n 210) para e (Lawton LJ); Cited in Allan (n 180) 24.

[224] House of Commons European Scrutiny Committee (n 190) Written Evidence from Professor Adam Tomkins, para 19: 'Parliament retains its ultimate sovereignty as long as it has the power to terminate the application of EU law in the United Kingdom (and its overriding force) by repealing or further amending the European Communities Act 1972.'

[225] House of Commons European Scrutiny Committee (n 192) paras 18–9: 'We also disagree with the suggestion that there is something unconstitutional about giving primacy to EU law, or that the principle of primacy or supremacy of EU law somehow undermines the sovereignty of the UK Parliament.'

The Supreme Court's majority judgment in *Miller I* demonstrates aptly how primacy could be reconciled with parliamentary sovereignty in a way that mirrors the same approach in the context of devolution. The majority did not accept that EU membership had repudiated parliamentary sovereignty at an abstract level,[226] nor that it had brought about a 'transfer of sovereignty [which] seemed permanent and irrevocable, [with] conditionality appearing… to be a convenient fiction to deal with an awkward fact'.[227] Further the majority appears to suggest not only that Westminster could remove EU law from the system, but that it could also 'assert its sovereignty while Britain[/the UK] remained a member of the EU'.[228]

In this way, as with devolution, confirmation that Westminster's power to derogate from EU law, to remove the effect of primacy from the domestic system (its 'contingency'), and its subjection to domestic constitutional norms—including sovereignty—were important accommodations for that principle.

(d) Workability and Constitutional Significance: Pragmatic and Polylithic

The fourth similarity is that the accommodation of the primacy of EU law was approached by constitutional actors—especially courts—as an exercise in pragmatism, and of meaningfully and accurately characterising the relevant phenomena in play.[229] The

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[226] *Miller I* (n 74) [60] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[227] Ewing (n 206) 714.

[228] ibid.

[229] See Mark Elliott, 'Embracing "Constitutional" Legislation: Towards Fundamental Law?' (2003) 54 Northern Ireland Legal Quarterly 25 esp 30.

flexibility of the sovereignty principle was accepted and leveraged, without repudiating it, so as to make sense of the contemporary constitution in terms which recognised and gave effect to its multi-layered componentry. A different, more dogmatic approach would have fallen either side of this difficult balance: either by giving effect to primacy in a way that was uncomfortable—or incompatible—with the UK's constitution, or by approaching sovereignty in terms that would make EU membership unworkable (and likely put the UK in breach of its obligations under EU law).

The approach to primacy made the system proposed in the ECA 1972 *work* practically, and ensured it was sustainable as a matter of constitutional law. Flexibility in the approach to sovereignty (within certain limits) was a key part of that process, so that EU membership was viewed as something 'capable of being accommodated by, rather than constituting an existential threat to, the doctrine of parliamentary sovereignty.'[230] Elliott expresses this view this way: '[*Thoburn*] elegantly ascribes a pragmatic form of primacy to Community law without, for the time being, displacing the doctrine of parliamentary sovereignty.'[231] Laws LJ similarly said, rightly, that his formulation represented a 'balance struck' which 'gives full weight both to the proper supremacy of Community law and to the proper supremacy of the United Kingdom Parliament.' 'By the former,' he said, 'I mean the supremacy of *substantive* Community law. By the latter, I mean the supremacy of the legal *foundation* within which those substantive provisions enjoy their primacy.'[232]

Further still, where the reconciliatory approach in the devolution context recognises and gives full effect to the core aspects of devolution, and the significance of its institutions

[230] Elliott, 'What Has EU Membership Taught Us?' (n 178) 229.

[231] Elliott, 'Embracing "Constitutional" Legislation: Towards Fundamental Law?' (n 229) 40.

[232] *Thoburn* [70] (Laws LJ)

(thereby resisting a monocular 'sovereigntist' analysis of the constitution) the primacy framework (at least on one account) *expressly relied upon* the recognition of the normative richness of the constitution: the priority accorded to legal principles and their resistance to legislative abrasion was based, at least in part, on their normative purchase.[233] Thus the accommodation of primacy was able to recognise the weight and value of constitutional norms *beyond* sovereignty. The reconciliatory model is able to *recognise* devolution's constitutional significance, but in the context of primacy—in relying on the normative weight of norms and principles—the constitutional value of other norms and principles is *foundational*. Viewing the constitution *only* in terms of what Westminster happens to have enacted, and to view sovereignty as the only principle worth anything in constitutional terms, is to fail to reflect the legal reality, and to mischaracterise the constitution within which that sovereignty falls to be understood. Primacy, like the reconciliatory approach in the context of devolution, encourages a polylithic (as opposed to monolithic), or binocular (as opposed to monocular) view of the constitution which gives weight to sovereignty *as well as*, and at the same time as, other important norms.

This discussion of primacy serves one critical purpose: It demonstrates that the reconciliatory model adopted in the context of devolution is consistent with the wider treatment of parliamentary sovereignty in the context of other kinds of decentralisation in which similar challenges were confronted. The consistency of the reconciliatory model with the wider approach of the courts and political institutions is significant in advancing that model. It demonstrates that, as a matter of doctrine, it fits well with the wider approach to decentralised constitutionalism and is, itself, an intellectually sound and compelling

[233] David Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 Law Quarterly Review 343; *Thoburn* (n 185) [62] (Laws LJ); Elliott and Kilford (n 93) 101–2.

account of the constitution which, rather than mischaracterising parliamentary sovereignty, is the most accurate account of that principle. Its accommodations for parliamentary sovereignty, in mirroring those in the primacy context, should therefore be considered meaningful rather than illusory.

6. Concluding the Reconciliatory Approach: A Pragmatic Account of a Rich Constitutional Settlement

The reconciliatory approach is an attempt to traverse a difficult tight-rope. It is a balancing exercise which supplies an intellectual framework that allows devolution to be meaningfully effective and which, simultaneously, continues to recognise, and give credence to, parliamentary sovereignty. It is this balance which permeates much of the devolution framework. For example, as Lord Reed suggests: '[a]s enacted, the Scotland Act 1998 sought to reconcile two political objectives: maintaining the integrity of the United Kingdom and the sovereignty of Parliament, and accommodating demands for self-government.'[234] In adopting a more flexible conception of parliamentary sovereignty, it is also a pragmatic enterprise, ensuring theoretical dogma is not allowed to inhibit the development of meaningful devolution. Yet, it is also an account which mirrors the approach taken to parliamentary sovereignty, and its demands, in other analogous contexts. Indeed, this more flexible approach has been advanced by commentators for various conceptual[235] or more practical reasons[236] in those contexts too.

[234] Lord Reed (n 8) 4.

[235] E.g., Goldsworthy (n 178) 289–90.

[236] E.g., Allan (n 180) 24, 30.

This chapter has sought to argue that the reconciliatory approach represents a satisfactory way to accommodate parliamentary sovereignty within the UK's territorial constitution. This is because of its capacity to accurately characterise devolution—to facilitate its realisation of its constitutional purposes and to recognise its commensurate significance—as well as the coherent, and well-supported nature of its account of parliamentary sovereignty. This chapter has unpacked some different qualities of this approach in order to make this case: it considered the core aspects and implications of devolution in order to properly examine the extent to which these are fully appreciated by this approach; the flexibility of its approach to parliamentary sovereignty, and its support in case law; the limits of, and criteria for sustaining, that flexibility; and, finally, the parallels between this approach and those in the example of the primacy of EU law.

This is, however, principally an analytical, rather than a normative, case. Devolution is an important part of the UK's constitution, whose core componentry and implications should be recognised by any account of the UK's constitutional law. An account which did not appreciate devolution's core components would be unsatisfactory as a means of accommodating parliamentary sovereignty, because it would mischaracterise that system. Equally, the (limited) flexibility of the sovereignty principle is the product of case law and of political discourse. Whether either of these elements of the constitution are 'good' or 'bad', too strong or not strong enough, is neither here nor there for present purposes. The point is simply that to recognise these important elements is to do justice to constitutional reality, at least as it currently exists, rather than to seek to distort it to fit a pre-determined theoretical template. The reconciliatory approach's capacity to do this is why it is a satisfactory approach to accommodation.

Yet, the 'reconciliatory approach' is, in reality, simply a way of understanding a particular set or category of practices. The kind of realism that informs it permeates the (traditional) judicial approach to devolution more generally (from which the reconciliatory approach has been drawn). For example, the courts have never entertained the notion that Westminster legislating incompatibly with devolved *legislation* would impliedly repeal the relevant sections of the devolution *statutes* which set out devolved competences themselves. Neither is later legislation taken to impliedly reduce the scope of devolved competences by pre-empting a particular area of policy—although such a concern was certainly noted in the early literature.[237]

Nonetheless, this approach does have at least one normative upshot. If it is persuasively argued—as the House of Lords Constitution Committee accepts—'that the doctrine of parliamentary sovereignty has successfully accommodated the process of devolution and will continue to do so',[238] then devolution is rendered compatible with parliamentary sovereignty, and acceptable to the UK's constitution. The consequence is that the devolved institutions' powers do not need to be reduced, or that settlement more widely undermined, for parliamentary sovereignty to be guaranteed, accommodated or assured. This analysis has hopefully demonstrated that to go further than the reconciliatory approach does in defence or protection of parliamentary sovereignty would be unnecessary. Further, to do so would also conflict with the most compelling approach to sovereignty in other contexts of multi-layered constitutionalism, and would fail to reflect the reality of devolution. The reconciliatory approach might accept that Westminster's continuing

[237] See Bradley and Christie (n 55); Winetrobe (n 30) 7. See also Robert Schütze, 'Supremacy without Pre-Emption? The Very Slowly Emergent Doctrine of Community Pre-Emption' (2006) 43 Common Market Law Review 1023.

[238] House of Lords Select Committee on the Constitution (n 52) paras 16, 98.

possession of sovereignty renders devolution ultimately contingent and reliant on political or constitutional sensibility, but it also contends that the weaponization of sovereignty in a more centralising way is simply unnecessary, at least to the extent that that would purport to accommodate that principle.

However, the reconciliatory approach does not command a monopoly on doctrine, theory or practice. A new approach, most vivid in the run up to, and especially since, the UK's decision to leave the EU, is defined by its recentralising tendencies, in some cases appearing to suggest precisely what is refuted here: that more is needed to accommodate parliamentary sovereignty satisfactorily. This is a constitutional worldview that values sovereignty and devolution differently, prioritising the former at the expense of the latter—despite the doctrinal support for a more balanced approach—and identifying in that principle a demand for centralised, unitary constitutionalism. This chapter has sought to demonstrate that it is unnecessary to read such a demand into the principle, and its core components can be satisfactorily accommodated alongside a richer, more meaningful account of devolution. And yet, as the following chapters will demonstrate, this 'protective' account is gaining traction. Indeed, as Keegan LCJ recently explained in the Court of Appeal of Northern Ireland, a 'review of recent UKSC jurisprudence demonstrates a greater emphasis than ever on the sovereignty of the Westminster Parliament',[239] even where this emphasis mischaracterises the principle and overstates its incompatibility with sovereignty conventionally understood. This approach is, however, misguided, and it is the purpose of the next chapters to illustrate why.

[239] *Allister (NICA)* (n 85) [363].

Chapter 4

The Protective Approach (I):

Unqualified Legislative Power as an Inappropriate Means of Accommodating Parliamentary Sovereignty

1. Introduction to Chapters 4 and 5

(a) The Protective Approach

This chapter and the following one consider the alternative approach to the accommodation problem to the one considered in chapter 3. Chapter 3 demonstrated that it is possible to satisfactorily accommodate parliamentary sovereignty in the UK's territorial constitution, that is, in other words, that it is possible to ensure that the devolution settlement is consistent with parliamentary sovereignty without mischaracterising the essential characteristics of both phenomena. It can, therefore, be said that parliamentary sovereignty and devolution can meaningfully coexist in an intellectually coherent way. Primarily, this is achieved by recognising that parliamentary sovereignty possesses a certain degree of flexibility. In practice, although certainly not unlimited in its flexibility, that principle has been soundly approached in a way that is less dogmatic in its attachment to Dicey's negative aspect. The reconciliatory approach is one which accepts, as has been observed in a number of contexts, that Westminster's legislation can be set aside in certain prescribed circumstances, provided particular criteria are met. This system under the reconciliatory approach is one which, it has been argued, is able to recognise, and indeed even facilitate, some definitional features of devolution. Among the most important of these features, recognition of which divides the two approaches, are (i) that devolution is a

'cooperative' model of competence allocation, with Westminster's power to legislate in devolved areas being conditioned only by political, but not legal, mechanisms (ii) the absence of a primacy rule for Westminster's legislation, (iii) devolved legislation's highest normative status (and the relative—although somewhat fluctuating—normative proximity of the devolved legislatures to Westminster), (iv) the dynamic nature of the interaction between devolved and Westminster legislation and (v) the axiomatic nature of devolved competences (which are essentially determinative of the scope of devolved law-making power, and provide the devolved legislatures with broad powers).

Nonetheless, the reconciliatory approach does acknowledge, consistent with its treatment in practice, that parliamentary sovereignty's flexibility possesses limits, and that it contains an important and inflexible core. The reconciliatory approach ensures that this core is meaningfully accommodated by the delegative model of devolution and in the preservation of Westminster's *de jure* freedom to legislate on any matter, ensuring that any conditions on its legislative power are not those to which its sovereignty is sensitive, even where those conditions help realise the 'constitutional purposes' of devolution.[1] Chapter 3 also demonstrated that the flexibility of the sovereignty principle, the accommodations necessitated by its core, as well as the reconciliatory approach's capacity to give meaningful effect to decentralised architecture, were all consistent with the judicial treatment of analogous questions in the context of the primacy of EU law. That context demonstrated that the reconciliatory model's purchase in the context of devolution was not anomalous, but an extension of—or at least consistent with—a wider and intellectually sound approach

[1] Aileen McHarg, 'The Contested Boundaries of Devolved Legislative Competence: Securing Better Devolution Settlements' (Bennett Institute for Public Policy and Institute for Government 2023) 2, 21 <https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2023/05/Contested-boundaries-devolved-legislative-consent.pdf> accessed 23 May 2023.

to the interaction between parliamentary sovereignty and decentralisation. In this way, the treatment of the sovereignty principle in the context of devolution implicit in the reconciliatory model can be seen as a reflection of the orthodox treatment of that principle.

The protective approach, by contrast, is far more defensive of Westminster's legislation, and is not (or is at least *less*) prepared to tolerate it being set aside by the devolved institutions. As chapter 2 explained, this dogmatic attachment to a more rigid conception of parliamentary sovereignty has centralising, unitarist underpinnings reflected in its prioritisation of that principle *at the expense of* other constitutional phenomena with which it interacts. It is argued that this approach, in contrast to the reconciliatory approach, implies that due and proper accommodation of parliamentary sovereignty is necessarily incompatible with certain elements of devolution, particularly its most potent constitutional implications (like dynamism).

Together, this chapter and the next seek to advance two arguments about this protective approach, based on the two metrics used throughout the thesis: first, its implications are not simply or merely 'centralising'; rather, they are incompatible with some of the fundamental assumptions that underpin, and which reflect the core characteristics of, devolution. Unlike the more flexible approach under the reconciliatory model, this protective approach is incapable of accurately reflecting the devolution settlement as it actually operates. Its implications extend *beyond* the mere narrowing of devolved competences: they undermine and mischaracterise the established status and function of the devolved institutions (for example, by way of normative subordination) and are incompatible with important aspects of its basic structure and fundamental character.

The second criticism is that this more protective approach offers very little *actual* contribution to the accommodation of *parliamentary sovereignty*, that is, ensuring that the

territorial constitution is consistent with that principle. The relationship between 'protective' strategies and *sovereignty* itself is at best unclear, often illusory, and arguably often absent entirely. Where, upon scrutiny, it becomes apparent that devices or mechanisms which fall into the protective category possess only a flawed or insubstantial connection to the sovereignty principle, or only protect inaccurate caricatures of that principle, it is difficult to accept that they 'accommodate' *parliamentary sovereignty* in any meaningful way. They might preserve a phenomenon that *resembles* sovereignty in some way, but it can be argued, under examination, that such a phenomenon should not be conflated *with* parliamentary sovereignty. Strategies that fall under the protective approach can, and should, therefore be opposed on the basis that they are inappropriate and ineffective means of securing that principle's accommodation. Such strategies are constitutionally unnecessary: they seek to defend parliamentary sovereignty but misunderstand the nature of that principle and misconceive what is necessary to render, or make sense of, the constitution in a way that is consistent with it.

(b) The Nature and Structure of the Analysis

The protective approach describes, and is animated by, a category of phenomena which rely on a more brittle, rigid and pre-eminent interpretation of the sovereignty principle. These chapters consider two instantiations of this approach, and their purpose is to argue that each, the focus of its own chapter, is not an appropriate means by which to secure the accommodation of parliamentary sovereignty. This chapter considers the notion of 'unqualified legislative power'. This concept was developed by the Supreme Court in its

Continuity Bill[2] and *Treaty Incorporation*[3] judgments. This chapter argues that this concept's connection to parliamentary sovereignty does not survive detailed scrutiny and that it is a concept which is incompatible with fundamental aspects of devolution, despite being derived from *within* that framework itself. These weaknesses lead to the conclusion that unqualified legislative power is not a necessary and effective means of accommodating parliamentary sovereignty.

The second example, the focus of chapter 5, is the notion of 'competence constriction'. This idea is a broad one which captures both the reduction in the scope of devolved competences *per se*, *and* more structural changes which diminish devolved legislative power and freedom. It is perhaps obvious that competence constriction has *some* centralising impact on the territorial constitution: it is defined by the diminution of devolved law-making power. However, this chapter explores the depth of that impact, demonstrating that, similarly to unqualified legislative power, it is a phenomenon that can be difficult to reconcile with some of the core assumptions underpinning, and fundamental components of, devolution. It will be argued that competence constriction can readily—particularly when it involves a more structural reconfiguration of devolved legislative power—have deeper implications for the territorial constitution, undermining some of its defining aspects.

An appropriate means of securing parliamentary sovereignty's accommodation needs—in order to accommodate that sovereignty *within* the territorial constitution, rather than at its expense—to accurately reflect the territorial constitution. Its inconsistency with core

[2] *In re The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1.

[3] *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106.

aspects of devolution, however (especially in its more structural guise) impairs competence constriction's capacity to do so, rendering it an inappropriate means of accommodating parliamentary sovereignty.

Furthermore, competence constriction is not actually *necessary* to preserve, protect, or accommodate parliamentary sovereignty. Although it may not be wielded explicitly as an accommodative mechanism, there is clearly a school of thought that considers accommodation to only be achievable where the sovereign institution possesses certain exclusive competences. The argument that the possession of certain competences by the devolved institutions, or the very structure of devolution, is incompatible with parliamentary sovereignty is apparent, and constriction can be framed as an accommodative response to this argument. Chapter 5 will seek to demonstrate, however, that excluding the devolved legislatures from certain matters can do little to accommodate parliamentary sovereignty and should be considered a pure question of policy. Further, competence constriction, where it is achieved through Westminster's legislation, demonstrates the *exercise* of parliamentary sovereignty in a way that pays apparently little attention to devolved interests, corroborating the asymmetrical, sovereigntist account of the constitution offered by the protective approach more generally.

Both of these instantiations capture the assertion or protection of Westminster's legislative authority at the expense of devolved legislative freedom. This can be because of an increase—or increased legitimation—of Westminster's engagement in devolved areas, or because the legislative doorways through which the devolved institutions may pass are narrowed. Each is therefore an example of the protective approach's monocular, 'sovereigntist' account of the constitution, adopting a needlessly brittle and domineering conception of the sovereignty principle and, and a lopsided view of its role in the constitution. Unqualified legislative power and competence constriction are symptoms of,

and themselves exacerbate, an account of the constitution which emphasises Westminster's legislative freedom without seeking to balance the demands *of* that freedom with those of devolution, or to fully recognise the normative purchase of the latter. Each reflects an approach in which the exercise of Westminster's legislative power is not, and should not be, conditioned by other phenomena (like devolution) with which it interacts. And each, unlike the reconciliatory approach, implies that the accommodation of parliamentary sovereignty should not be an exercise which is concerned with accurately reflecting the definitive aspects of devolution, with the consequence that each is difficult to square with the established dynamics of that system.

Each of these instantiations is 'protective' because of (i) their brittle conception of sovereignty's requirements, and (ii) their prioritisation or assertion of Westminster's legislative freedom (at the expense of other elements of the constitution). Unqualified legislative power, for example, suggests that (i) the repeal of Westminster legislation cannot be easily tolerated by that principle, and (ii) that any other, more flexible or balanced readings of the relevant provisions from which it is derived are not intellectually sound. The same formula can be applied to competence constriction: competence constriction is a reflection of the argument that (i) *de jure* protections for Westminster's capacity to legislate in devolved areas are insufficient when there are political qualifications in place to limit its exercise of that capacity, and (ii) that Westminster's sole, or primary, exercise of power within certain otherwise-devolved areas is a natural extension of the sovereignty principle. Often the direct link between these examples and the protection of parliamentary sovereignty might be opaque, unclear or even denied by relevant actors. However, their *prima facie* connection with—at least a particular version of—sovereignty will be explored in order to make the case that this is an inappropriate and unsatisfactory approach to securing accommodation.

These chapters seek to demonstrate that the brittleness of the conception of sovereignty at the core of the protective account is incapable of reflecting some of the most important aspects of the territorial constitution. The protective approach is not, like the reconciliatory approach, an exercise in pragmatically resolving the tension between devolution and sovereignty in a way that recognises the core characteristics of each. Instead, it is argued, it provides an inaccurate lens through which to observe the constitution, failing to reflect how the courts and political institutions have both long understood parliamentary sovereignty, and the way they have situated that principle *alongside* other components of a rich constitutional order rather than allowing it to simply overwhelm them.

This chapter focusses on unqualified legislative power and unfolds in the following way: First it introduces the concept, situating it alongside more widely recognised centralising phenomena, then it analyses in turn the two cases in which this concept is developed, before finally considering the reasons that its connection with parliamentary sovereignty should be challenged. This chapter seeks to demonstrate the discomfort with which unqualified legislative power sits within the constitutional order, its incompatibility with some of the core features of devolution, the incoherence of its purported relationship with sovereignty and, ultimately—on these bases—its inappropriateness as a means by which to secure the accommodation of parliamentary sovereignty.

2. Introducing Unqualified Legislative Power in the Context of a Centralising Approach to the Constitution

The protective approach is defined by two characteristics: first, a more rigid and brittle account of the sovereignty principle and, second, the pre-eminence which it attaches to that principle. The result is what might be described as a zero-sum conception of the accommodation problem. Rather than parliamentary sovereignty's interaction with

another phenomenon being something that necessitates the leveraging of that principle's flexibility in order that the important aspects of that phenomenon might be recognised, the protective approach's inflexible treatment of that principle renders any tension between parliamentary sovereignty and other relevant phenomena as an exercise in conditioning or rejecting those phenomena to the extent of that tension. This is amplified by the protective approach's *broader* reading of parliamentary sovereignty, encompassing matters that are not considered, under the reconciliatory (and orthodox) approach, to form part of the core of that principle (such as sovereignty necessitating Westminster's freedom from political limitations on the exercise of its power).

It is this framing of the interaction between parliamentary sovereignty and, in this case, devolution that renders the protective approach a difficult accommodative model to accept. This is because, following the two metrics used in this thesis, (i) it presents an unorthodox and doctrinally incoherent account of parliamentary sovereignty, inconsistent with the proper meaning and qualities of that principle observable in practice, and (ii) it is incapable of doing full justice to, or properly characterising, some of the core features of devolution.

One core feature of that settlement, it has been argued, is the normative proximity of the devolved legislatures to their counterpart at Westminster. This proximity is not outright equivalence, but is a product partially of the (perhaps more concrete) normative position occupied by within-competence devolved legislation, which the courts have accepted sits on the same normative plane as Westminster legislation. The reconciliatory approach broadly acknowledged a normative hierarchy between Westminster and the devolved legislatures at a general level, but tended to appear capable of ameliorating it, and it certainly accepted the normative equivalence of Westminster and within-competence devolved legislation. The protective approach, however, appears to *exacerbate* the normative hierarchy between Westminster and the devolved legislatures.

Such an exacerbation, and a failure to condition the *exercise* of parliamentary sovereignty or central governmental power by reference to the demands of devolved autonomy or in recognition of the normative position occupied by the devolved legislatures appears to be a more widespread phenomenon, manifesting in more centralising, interventionist and assertive approaches towards the territorial constitution, absent strong concern for the boundaries of devolved competences.[4] For example, McHarg suggests that:

> In contrast to the early years of devolution, recent developments in both the political and judicial spheres have tended to constrain devolved legislative competences in new and problematic ways.
>
> The net effect of these changes… has been to threaten the ability of the devolved legislatures to discharge their central constitutional purposes effectively: to give effect to local democratic choices and to improve the quality of decision making in devolved policy areas by bringing it closer to the people it affects. A range of other constitutional values relevant to devolved law making have also been undermined,

[4] See, e.g., Ciaran Martin, 'Can the UK Survive Muscular Unionism?' [2021] *Political Insight* <https://journals.sagepub.com/doi/pdf/10.1177/20419058211066522?casa_token=DPcwB86qbS0AAAAA:EGQwHPO_biZDXYBIAW7oFd6odwZ4ot9zwQwx3IRlcLs2a8U6Nx79BrXQSTdRJj990a1ohmcJKxQ> accessed 10 January 2023; Mark Sandford, 'The British Political Tradition and the Erosion of "Permissive Autonomy": "muscular Unionism" in the UK' (*Bennett Institute for Public Policy: Review of the UK Constitution*, 12 July 2023) <https://www.bennettinstitute.cam.ac.uk/blog/muscular-unionism/> accessed 14 July 2023; McHarg, 'The Contested Boundaries of Devolved Legislative Competence' (n 1); The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, *How Devolution Is Changing Post-EU* (5th Report, Session 6, SP Paper 453, 24 October 2023).

> particularly process values such as transparency and accountability, intelligibility and legal certainty. [5]

There are many dimensions to this wider phenomenon which have been analysed elsewhere, and it is this thesis' contribution to consider its expression as the accommodation of a particularly rigid approach to the sovereignty principle, especially as it has emerged in a recent turn in Supreme Court jurisprudence. This was something observed by McCloskey LJ in *Allister*, whose

> review of recent UKSC jurisprudence demonstrates a greater emphasis than ever on the sovereignty of the Westminster Parliament. This has unfolded in the context of an examination of the relationship between the constitutionally sovereign and supreme legislature, situated at the apex of the UK constitutional arrangements, and the devolved legislative assemblies, with the added ingredient of the constitutional impact of Brexit.[6]

Arguably, this kind of approach—a renewed but asymmetrical or 'monocular' focus on the demands of parliamentary sovereignty—was obvious in *Miller I* where the strength enjoyed by the sovereignty principle was not matched by a similarly, or correspondingly, bold vision of the constitutional implications of the Sewel convention, even where, conceptually, it was not in tension with parliamentary sovereignty or Westminster's legislative freedom (and where, therefore, the strength of that principle could not be considered to necessitate a

[5] McHarg, 'The Contested Boundaries of Devolved Legislative Competence' (n 1) 2.

[6] *Allister (and others) v Secretary of State for Northern Ireland* [2022] NICA 15 [363] (McCloskey LJ).

corrosive approach to other matters with which it interacted).[7] Indeed, although it would have been possible for the Court to recognise the constitutional purchase of the convention, even short of enforcing it, the Court instead adopted an approach which, it has been argued, exposed the 'lack of constitutional security' for the devolved institutions, and undermined the convention itself.[8] This imbalance, a bolder vision of sovereignty which is accompanied only by a narrower view of the principles governing or deriving from devolution, can also be observed in the Supreme Court's *Allister* judgment.[9] In that case the Court considered that regard to deeper background constitutional principles deriving from, or reflected in, the devolution statutes (and elsewhere) had been rendered 'academic' by Westminster's legislative expression.[10]

As McCloskey LJ noted above, this approach has seen particular growth since, and in the context of the legal questions arising from, the UK's departure from the EU. There are two such cases which stand out because of their treatment of parliamentary sovereignty and its interaction with devolution. This is because, rather than simply interpreting the sovereignty

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[7] See Keith Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80 Modern Law Review 711, 722: The Court could have, for example, recognised the political or constitutional importance and implications of the convention.

[8] Aileen McHarg, 'Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention' in Mark Elliott, Jack Williams and Alison L Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (1st edn, Hart Publishing 2018) 19.

[9] *In the matter of an application by James Hugh Allister and others for Judicial Review* [2023] UKSC 5.

[10] See Mark Elliott and Nicholas Kilford, 'Nothing to See Here? Allister in the Supreme Court' (2024) 28 Edinburgh Law Review 95; Nicholas Kilford, 'The Northern Ireland Protocol in The Supreme Court' (2023) 82 Cambridge Law Journal 200.

principle broadly or substantively,[11] the Supreme Court here, in giving effect to an otherwise innocuous statutory provision, mobilises a particularly brittle conception of Westminster's legislative power in a way that sits uncomfortably with some of the core characteristics of devolution. This is achieved through the notion of unqualified legislative power, an instantiation, it is argued, of the protective approach.

The first of these cases is the Supreme Court's judgment in *Continuity Bill.* The context for this judgment is significant, because it fell against the background of the abovementioned 'muscular' centralising conduct towards devolution by the UK's central institutions. Set against that background, and rather than counterbalancing or mitigating that centralising approach, the Supreme Court contributed further to this asymmetry: emphasising Westminster's legislative freedom *at the expense* of devolution.

The background to the case, 'the first legislative competence dispute between the UK and Scottish Governments to reach the courts',[12] was this: The Scottish Parliament, taking issue with the way that the proposed European Union (Withdrawal) Bill affected devolved competences, withheld its consent to that legislation and, '[o]n the assumption that this would mean that the Withdrawal Bill would be amended so as not to apply to devolved matters in Scotland, the Scottish Parliament intended to fill the resulting lacuna by enacting its own Brexit legislation.'[13] The resulting legislation, the UK Withdrawal from the

[11] See 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* (Hart Publishing 2021).

[12] Aileen McHarg and Christopher McCorkindale, 'The Supreme Court and Devolution: The Scottish Continuity Bill Reference' (2019) 2 Juridical Review 190, 190.

[13] ibid 190.

European Union (Legal Continuity) (Scotland) Bill was passed, while the UK Parliament did not amend the UK Bill to satisfy the Scottish Parliament's concerns. The UK Government's Law Officers challenged the Scottish legislation:

> Although the Scottish Continuity Bill was passed by the Scottish Parliament before the Withdrawal Act was enacted, the UK Law Officers exercised their power under s.33 of the Scotland Act 1998 to refer the Bill to the Supreme Court for a ruling on its competence. This had the effect of halting the granting of Royal Assent, and ultimately proved to be fatal to the validity of many of the Bill's provisions—and indeed to the Bill itself, as the Scottish Ministers eventually decided not to proceed with the enactment of its remaining provisions.[14]

In one sense, the context of *Continuity Bill* is illustrative enough of what might justifiably be described as a more proactive and protective approach towards parliamentary sovereignty: The UK Government strategically weaponised Westminster's sovereignty to render a piece of devolved legislation, otherwise largely within competence, outwith that competence, and did so by immunising it from devolved interference:

> The decisive issue was that the [UK] Withdrawal Act amended the Scotland Act so that it itself became a 'protected statute' which the Scottish Parliament was unable to modify. The Supreme Court held that this meant that any provisions of the Scottish Continuity Bill which were inconsistent with the Withdrawal Act were 'not law' under s.29(2)(c) of the Scotland Act, although it also held that the Bill would mostly have been within competence had it been enacted before the

[14] ibid.

> Withdrawal Act. In fact, most of the (numerous) objections that the UK Law Officers had raised were rejected.[15]

This weaponization itself can be approached through the lens of the protective model: muscular unionism, suspicious of divergence, is able to rely on parliamentary sovereignty at least as a practical means by which to reduce the scope of devolved competences, and does so unimpeded by, or at least ignorant of, any aspect of devolution which this legislative exercise might abrase. Indeed, the tenor of this practice is one which seeks to 'protect' Westminster's legislative will by securing the legislation it enacts or has enacted from devolved divergence. The failure to have regard to the constitutional 'weight' of devolution in the exercise of, or to put a brake upon, the exercise of legislative power is notable, as is the pursuit of cordoning off particular areas of policy—otherwise, and previously, within devolved competence—from devolved interference, even though Westminster as a matter of law always retained power to legislate within these areas. Although parliamentary sovereignty did not provide the explicit *justification* for these events,[16] a unitary view of the way in which that principle can and should be deployed, and of the constitutional vision it appears to warrant (in which Westminster's legislation is the final word on an increasing number of policy issues, from which devolved deviation is to be discouraged), might be said to underscore this approach.

Nonetheless, for present purposes it is the Court's construction and use of unqualified legislative power that is most worthy of examination through the lens of the protective model because it concerns the precise question of what legal consequences follow from, or

[15] ibid 190–1.

[16] In fact, *no* justification for protecting the 2018 Withdrawal Act from devolved modification is given in the Act's explanatory notes.

are necessary to ensure, parliamentary sovereignty's accommodation and preservation within the UK's territorial constitution. It might be recalled that in *Continuity Bill* the Supreme Court adopted a notably flexible conception of the principle of parliamentary sovereignty. This sovereignty is, of course, reflected—at least as far as it concerns the competence to enact legislation within areas of devolved competence—in s 28(7) of the Scotland Act. However, and paradoxically, the Supreme Court's interpretation of this *provision* did not mirror its flexible interpretation of the sovereignty *principle* elsewhere in the judgment (despite the embodiment of that principle apparently being that provision's only function).[17] Section 28(7), the Court said, by virtue of its protection from modification, embodied something it described as 'unqualified legislative power'.[18]

The extent to which the Court itself recognises this concept to be distinct from parliamentary sovereignty is not entirely clear; nor is it entirely clear whether the Court's references to one concept are intended to capture both ideas, or what the nature is of their proposed relationship. One concern, therefore, is the extent to which unqualified legislative power is intended to be synonymous with, or a description of, parliamentary sovereignty and what the implications of that conflation—or distinction—are. Before that question can be fully addressed, however, the nuances of unqualified legislative power and the nature of its interaction with devolution needs to be unpacked. Indeed, a prior concern is the impact

[17] See, e.g., Chris McCorkindale and Aileen McHarg, 'Continuity and Confusion: Towards Clarity? – The Supreme Court and the Scottish Continuity Bill' (*UK Constitutional Law Association*, 20 December 2018) <https://ukconstitutionallaw.org/2018/12/20/chris-mccorkindale-and-aileen-mcharg-continuity-and-confusion-towards-clarity-the-supreme-court-and-the-scottish-continuity-bill/> accessed 12 November 2023.

[18] *Continuity Bill* (n 2) [52].

this concept has on *devolved* legislative power, independent of whether unqualified legislative power is distinct to, flows from, or is an extension of parliamentary sovereignty.

It is argued that unqualified legislative power, reflective of the protective model, mischaracterises devolution and is, therefore, an inappropriate means by which to secure the accommodation of parliamentary sovereignty. This is because it excessively subordinates the devolved institutions, and presents Westminster's legislative power (and its sovereignty) as unduly brittle and broad, all matters which are incompatible with the text of, and established approaches to, the devolution scheme. Unqualified legislative power is not only *born out of* a narrow view of devolution (which could be easily assuaged by reference to the wider statute of which it forms part),[19] but also *exacerbates* that narrow view further by (potentially dramatically) undermining devolution in practice. The purpose of this discussion is to demonstrate that protective responses to the accommodation problem, which are incapable of tolerating devolved interference with Westminster's legislation, fail to accurately reflect either of the two constitutional phenomena with which they are engaged.

Throughout this thesis it has been argued that it is essential to appraise an accommodative approach on the basis of whether it accurately characterises parliamentary sovereignty and devolution. This is because it is that accuracy that gives accommodation, in this context, its meaning as an intellectual enterprise, rather than being an exercise in redefining phenomena so that they conveniently, but not genuinely, fit together. If it does not accurately reflect parliamentary sovereignty, such an approach cannot be considered to

[19] See Nicholas Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (2021) 26 Judicial Review 321; Nicholas Kilford, 'Interpreting the Devolution Statutes' (*UK Constitutional Law Association*, (forthcoming)).

accommodate it. Similarly, if it does not accurately reflect devolution, such an approach cannot be said to accommodate parliamentary sovereignty *within* the territorial constitution because, in presenting a flawed account of that aspect of the constitution, it deprives that settlement of its content. This thesis is concerned with whether parliamentary sovereignty can be accommodated *within* the UK's territorial constitution, not *at the expense of it*; if a protective approach can only accommodate parliamentary sovereignty by mischaracterising or distorting the meaning of the territorial constitution, then it answers that question in the negative.

The discussion of unqualified legislative power in this chapter will demonstrate that the protective approach, of which it is an instantiation, suffers from precisely these flaws and should be opposed on that basis. Rather than accurately and coherently reflecting either phenomenon, unqualified legislative power distorts them, and fits incoherently with the way both have been understood in practice. It is therefore path-altering, inviting or requiring a novel and incoherent account of the constitution, rather than reflecting it as it exists. It implies that parliamentary sovereignty *cannot* be accommodated *within* the UK's territorial constitution.

In the next section, unqualified legislative power will be examined at close-quarters to consider its impact upon—and mischaracterisation of—devolution, and the incoherence of its relationship with parliamentary sovereignty. Each of the two cases in which this idea is considered are taken in turn because they naturally build upon one-another.

3. Illustrating Unqualified Legislative Power's Mischaracterisation of Devolution and its Doctrinal Incoherence (I): *Continuity Bill*

The first signs of unqualified legislative power are found in the following passage in *Continuity Bill*:

> …rules delimiting [the Scottish Parliament's] legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect. *And the UK Parliament also has power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot affect: section 28(7) of the Scotland Act.*[20]

Section 28 of the Scotland Act provides the Scottish Parliament with its power to make laws and s 28(7) provides that '[t]his section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.' Because of that provision's inclusion in schedule 4, the Scottish Parliament is not competent to lawfully 'modify' s 28(7). Section 28(7) merely recognises *Westminster's* legislative power; it does not *itself* condition devolved competences (any work in that regard being done by schedule 4). The 'modification' test is a fairly narrow one, although the Court has broadened its definition.[21] It is this

[20] *Continuity Bill* (n 2) [12]. The language of 'affect' immediately suggests an expansive interpretation of the relevant competence test the Court appears to be referring to, which uses the narrower language of 'modify': Scotland Act 1998 sch 4, para 1(1).

[21] 'Without attempting an exhaustive definition, a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as

combination—s 28(7) and the broader 'modification' test that applies to it—which purports to form a restriction on devolved competences: an obligation upon the Scottish Parliament to legislate consistently with what the Court describes as the 'continued recognition' of Westminster's 'unqualified legislative power'.[22] A provision of a Scottish Bill which is (merely) 'inconsistent' with that 'continued recognition' would, on the Court's analysis, modify s 28(7)—a provision protected from modification—and, on that basis, be outwith competence.[23]

One provision of the Scottish Continuity Bill, s 17, purported to make the effect of certain subordinate legislation within devolved competence conditional on the consent of Scottish Ministers. It provided, in s 17(2):

> The subordinate legislation, to the extent that it contains devolved provision,[24] is of no effect unless the consent of the Scottish Ministers was obtained before it was made, confirmed or approved.

This was a provision with limited, and importantly only *prospective*, effect.[25] However, the relevant question before the Court was whether this provision of the Scottish Continuity Bill modified s 28(7) of the Scotland Act. The Court said that 'the power of the UK

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before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.': *Continuity Bill* (n 2) [51].

[22] ibid [51].

[23] See ibid [52].

[24] UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018 s 17(4): 'For the purposes of this section, "devolved provision" means provision that would be, if it were contained in an Act of the Scottish Parliament, within the legislative competence of the Scottish Parliament.'

[25] ibid s 17(1).

Parliament to make laws for Scotland' embodied in s 28(7) 'includes the power to make laws authorising the making of subordinate legislation by Ministers and other persons.'[26] In the Court's view

> [a]n 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. The imposition of such a condition on the UK Parliament's law-making power would be inconsistent with the continued recognition, by section 28(7) of the Scotland Act, of its unqualified legislative power. Thus, in order for section 17 of the Bill and section 28(7) of the Scotland Act to operate concurrently, the former would have to be treated as impliedly amending the latter…[27]

This reasoning was sustained despite the fact that the provision in question 'would not affect the formal validity of any subordinate legislation made in the exercise of such powers, but is directed merely at the legal effect of such legislation.'[28] It was also despite (and synchronous with) the Court's more flexible reading of the *sovereignty principle* itself explored previously. The Court was clear that

> a provision which made the effect of laws made by the UK Parliament for Scotland conditional on the consent of the Scottish Ministers, unless it [the UK Parliament]

[26] *Continuity Bill* (n 2) [52].

[27] ibid.

[28] ibid [49].

> disapplied or repealed the provision in question, would for that very reason be inconsistent with the continued recognition of its unqualified sovereignty, and therefore tantamount to an amendment of section 28(7) of the Scotland Act.[29]

It is immediately fairly difficult to square this reasoning with the more flexible reading of parliamentary sovereignty also provided by the Court in this judgment. Indeed, 'contrary to the orthodox view that s 28(7) amounts to no more than a symbolic – and, for that, an unnecessary – restatement of the UK Parliament's continuing legislative supremacy, the Court seems to have read into that provision a justiciable limit on Holyrood's law-making powers.'[30]

One way around this apparent inconsistency is to accept that unqualified legislative power and parliamentary sovereignty are distinct constitutional phenomena. In fact, the Court does to some extent appear to consider that unqualified legislative power and parliamentary sovereignty are different, and fall to be analysed differently. For instance, the Court was not

> persuaded that section 17 impinges upon the sovereignty of Parliament. Section 17 does not purport to alter the fundamental constitutional principle that the Crown in Parliament is the ultimate source of legal authority; nor would it have that effect. Parliament would remain sovereign even if section 17 became law. It could amend,

[29] ibid [53].

[30] Christopher McCorkindale, 'Devolution in Scotland and the Supreme Court: A Question of Interpretation' (2020) 50 Materiali per una storia della cultura giuridica 67, 7 (pre-publication); McCorkindale and McHarg (n 17).

> disapply or repeal section 17 whenever it chose, acting in accordance with its ordinary procedures.[31]

Instead, the Court's position was that

> The preferable analysis is that although section 17, if it became law, would not affect Parliamentary sovereignty, it would nevertheless impose a condition on the effect of certain laws made by Parliament for Scotland, unless and until Parliament exercised its sovereignty so as to disapply or repeal it.

In these passages the Court appears to be accepting that a provision which is inconsistent with unqualified legislative power might not necessarily also be inconsistent with parliamentary sovereignty.[32] As such, it appears to recognise that unqualified legislative power is a more brittle standard against which to measure devolved law-making. Parliamentary sovereignty, on the Court's account, is unaffected where Westminster retains the power to unmake any limitations on its legislative power imposed by a devolved legislature. However, where sovereignty might be flexible enough to tolerate these kinds of transient limitations (as, indeed, chapter 3 argued) unqualified legislative power is not so able. The Court suggests that unqualified legislative power requires a more static, short-term analysis of Westminster's legislative power, rather than the longer-term, more dynamic way in which parliamentary sovereignty is understood in the judgment as operating. This is akin to what McHarg describes 'as requiring that Westminster's legislative capacity be kept free from legal impediments, even ones that it is free to disregard' and 'a move from the rule that Parliament *cannot* be prevented from legislating as it thinks fit, to a rule that

[31] *Continuity Bill* (n 2) [63].

[32] See also McHarg and McCorkindale (n 12) 195.

there *must be no attempt* to impose such conditions, at least on the part of the devolved legislatures.'[33] Indeed, inconsistency with unqualified legislative power renders a provision outwith competence *here and now* and '[i]t is therefore no answer… to say that it could be disapplied or repealed'[34] in future by a Westminster which retains its sovereignty.[35]

However, *if* as the Court is apparently suggesting, these *are* different standards, it is not clear why unqualified legislative power exists at all, emanating as it does from a provision intended merely to reflect parliamentary sovereignty. Why, for example, does that provision also give life to a far more brittle and restrictive principle *as well*?

Yet, this distinction is, in places, not solidly or coherently maintained. For example, the Court considers that s 17 of the Bill would 'be inconsistent with the continued recognition of [Westminster's] unqualified *sovereignty*, and therefore tantamount to an amendment of section 28(7) of the Scotland Act.'[36] Similarly, the Court says in the same paragraph that '[a] provision which imposes a condition on the legal effect of laws made by the UK Parliament,

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[33] McHarg, 'Giving Substance to Sovereignty' (n 11) 209.

[34] *Continuity Bill* (n 2) [53].

[35] It is arguable that this more static view of the operation of unqualified legislative power is symptomatic of the Court's task in answering these kinds of devolution questions (or, at least, its approach to that task). The Court has been clear that such questions need to be resolved by reference not to the long-term, but to the instant in which those questions fall to be answered, despite the elements of devolution that such an approach might obscure, or which might indicate otherwise: Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 19). Nonetheless, that the Court's suggestion that unqualified legislative power and parliamentary sovereignty should not be analysed in the same way remains noteworthy, and is indicative of their distinctness.

[36] *Continuity Bill* (n 2) [53] (emphasis added).

in so far as they apply to Scotland, is *in conflict with the continuation of its sovereign power to make laws for Scotland*'.[37] The line between parliamentary sovereignty and this novel phenomenon is certainly blurred, and becomes even more so given that this conflation is inconsistent with what the Court says elsewhere *about* that sovereignty, which it imbues with a flexibility that is wholly at odds with the brittleness of unqualified legislative power.

Unqualified legislative power, therefore, appears to lack coherent constitutional foundations. Its relationship with, or distinctness from, the sovereignty principle is not entirely clear, let alone whether it is merely an artificial, legislative, or a more organic, authentic or intrinsic phenomenon. On this basis it is possible to argue that unqualified legislative power represents a caricature of sovereignty, more protective of Westminster's legislation, and of its legislative freedom, than—on the Court's own analysis—that principle itself would be. Yet, it also certainly possesses at least a *prima facie*—if not a deeper—connection with the sovereignty principle: it emanates from a provision understood as reflecting an aspect *of* parliamentary sovereignty, is occasionally conflated with it, and itself appears to partially reflect a core component of that sovereignty (Westminster's power to legislate within devolved areas) even if it is ultimately a more rigid phenomenon. Nonetheless, the necessity, and defensibility, of unqualified legislative power remains unclear, especially if they *are* to be conflated, refer to the same idea or are thought to serve the same function. If they are not the same or analogous principles, it is similarly unclear why this principle has emerged so late in the devolution jurisprudence and on what basis it can have significant practical implications for the settlement from which it purportedly emanates. It is, in other words, an anomaly.

[37] ibid [53] (emphasis added).

Whatever its relationship with parliamentary sovereignty, this interpretation of s 28(7) and its protection from modification severely undercuts, and is inconsistent with, the dynamism upon which the settlement is largely predicated. It is a defining component of the devolution framework that the devolved institutions can amend Westminster legislation within their competences, and they can even legislate *in the same area as* (so long as consistently with) protected enactments. Many other important aspects of devolution depend upon, or are symbiotic with, this dynamism, such as the normative status of the devolved institutions and the absence of a primacy rule for Westminster legislation. The vulnerability of Westminster legislation to devolved interference is, accordingly, an important cornerstone of the settlement itself. This interpretation of section 28(7)—that its protection from modification protects Westminster's 'unqualified legislative power'—in practice cuts against that basic assumption. As the Court explains, '[a] provision which imposes a condition on the legal effect of laws made by the UK Parliament, in so far as they apply to Scotland, is in conflict with the continuation of its sovereign power to make laws for Scotland, and is therefore equivalent to the amendment of section 28(7) of the Scotland Act.'[38]Although the Court's reasoning is focussed on the role of Scottish Ministers, it nonetheless appears that the Court's view that 'Parliament cannot meaningfully be said to "make laws" if the laws which it makes are [in certain circumstances] of no effect'[39] is in tension with dynamism because being able to deprive Westminster legislation, in certain circumstances, of effect is *precisely* the foundation upon which that dynamism is predicated. Unqualified legislative power protects legislation which *should*—by virtue of an accepted interpretation of Westminster's *own* enactment of the devolution statutes—be vulnerable to devolved interference. Indeed, it is a vulnerability which Westminster can already expressly control by protecting enactments. And yet the Court limits the competences

[38] ibid [53].

[39] ibid [52].

conferred by the devolution statutes with logic rested upon the pedestal of a provision intended, or at least in orthodoxy *taken*, to reflect a sovereignty principle which the Court itself *accepts* is exceptionally flexible and tolerant of precisely this kind of vulnerability.

At this juncture, the two particular characteristics of unqualified legislative power that situate it within the protective approach should be apparent. First, the inflexibility of its conception of parliamentary sovereignty (or, given what is said above, of Westminster's legislative freedom) and of what is necessary to secure its accommodation; and second, its failure to have regard to, or to temper that interpretation of sovereignty (or something akin to it) by reference to a recognition of any core aspects of devolution. It is an approach according to which adequate accommodation for Westminster's legislative freedom is irreconcilable with other core aspects of the constitution and, where this is the case, necessitates their overcoming.

Similarly, the two criticisms levelled against the protective approach will also be apparent in the context of unqualified legislative power. The first is its inaccurate characterisation of devolution. Unqualified legislative power is certainly a phenomenon that has centralising implications: it significantly reduces the scope for the lawful exercise of devolved legislative power which would *without it* be within the statutory boundaries of devolved competences, and compatible with relevant background constitutional principles (which might also condition devolved law-making),[40] including (on the Court's own reasoning) parliamentary sovereignty. More than merely limiting devolved competences in a way that is nonetheless fundamentally consistent with the character of the devolution framework, however, unqualified legislative power is a concept which is difficult to reconcile with some

[40] See *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 esp [153] (Lord Reed); Kilford, 'Interpreting the Devolution Statutes' (n 19).

of the core features of that settlement, most notably its dynamism, the orthodox interpretation of the meaning and function of s 28(7) and Westminster's extant power to determine which of its statutes are and are not vulnerable to devolved conditions. Unqualified legislative power is also notion which *emerges* from an asymmetrical account of the constitution—the Court being unconcerned to interpret s 28(7) in a way that preserves other parts of the devolution framework—but it also further *entrenches* that account, emphasising the normative distance between Westminster and the devolved institutions that dynamism (and the courts) had to some extent ameliorated.

The second criticism is that unqualified legislative power appears to possess only an illusory and incoherent connection with the sovereignty principle itself, sharing or mirroring few of its defining characteristics, and playing a very different role in the constitution. The Court itself recognises that parliamentary sovereignty is a more flexible notion than unqualified legislative power and, indeed, parliamentary sovereignty is not (even in this judgment) understood as being affected by the scope or exercise of devolved law-making power, even where this involves depriving certain pieces of Westminster's legislation of practical effect. This is because, as the Court explains, Westminster can always disregard any conditions imposed by a devolved legislature. This means, under the reconciliatory approach, at least, that Westminster's legislative freedom—captured *by* the idea of its sovereignty—is not impacted by the extension of devolved law-making power and would not be accommodated by its reduction. Rather than being satisfactorily accommodated by Westminster's retention of power in devolved areas and the delegative model, unqualified legislative power, by contrast, implies a zero-sum relationship between Westminster's legislative power and the legislative powers of the devolved legislatures: the latter, on this view, must be qualified in order to properly accommodate the former. This is precisely the logical process the Court followed in *Continuity Bill,* limiting devolved legislative power so as to fully preserve Westminster's unqualified legislative power. The establishment of a

novel phenomenon which is far more rigid than parliamentary sovereignty implies that the scope and exercise of devolved legislative power *is* relevant for the proper accommodation of Westminster's legislative freedom (even if not formally or nominally its 'sovereignty'). The qualities that give unqualified legislative power its force in this judgment are the same qualities that mark it out as distinct to parliamentary sovereignty and limit its capacity to properly accommodate that principle.

In order to properly understand the extent to which unqualified legislative power represents an alteration, rather than a reflection, of some of the core aspects of devolution, intrinsic to its practical and constitutional implications, the Supreme Court's later *Treaty Incorporation*[41] judgment is considered next. In this case, the Court expands upon its passing glance at an extraordinarily protective approach to Westminster's legislative freedom in *Continuity Bill*, and develops it. This brings its implications for devolved legislative freedom, and its incoherence, into sharper relief.

4. Illustrating Unqualified Legislative Power's Mischaracterisation of Devolution and its Doctrinal Incoherence (II): *Treaty Incorporation*

Before dealing with the relevant issues in depth, it is worth briefly setting out the context of this case. The Scottish Parliament, pursuant to its and the Scottish Government's apparent interest in incorporating international rights treaties into its domestic law,[42] in

[41] *Treaty Incorporation* (n 3).

[42] See Kasey McCall-Smith, 'The Devil Is in the Details: Entrenching Human Rights Protections in the UK's Devolved Nations' (2023) 74 Northern Ireland Legal Quarterly 95. See also Aileen McHarg, 'Unity and Diversity in the United Kingdom's Territorial Constitution' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018).

2021 passed both the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ('UNCRC Bill') and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill ('ECLSG Bill'). These two Bills contain several notable provisions which mirror, and in some cases go slightly further than, the Human Rights Act 1998. In particular, they contain provision to empower the Scottish courts to interpret legislation compatibly with those treaties 'so far as possible to do so', and (on a discretionary basis) to make 'incompatibility declarators' where legislation is incompatible, and cannot be interpreted compatibly, with those treaties. In the UNCRC Bill, this power was only available where relevant legislation was passed after its coming into effect. The UNCRC Bill also provided the Scottish courts with a power to strike down (on a discretionary basis) prior legislation that was incompatible with the UNCRC, and imposed a public authority duty to act compatibly with the incorporated treaty.[43]

In considering whether, among other things, the relevant provisions were inconsistent with the continued recognition of Westminster's unqualified legislative power, as in *Continuity Bill*, the Supreme Court relied heavily on the expansive definition of modification offered in that judgment, as well as considerations of legal certainty emanating from *inter alia* the 'pre-enactment safeguards'.[44] The Court, in a unanimous judgment, considered the UNCRC Bill at length, noting that relevant provisions might engage 'the unqualified power of Parliament to make laws for Scotland', 'preserved' by s 28(7) of the Scotland Act,[45] and later considered its analogues with the ECLSG Bill. It is worth considering three provisions which were the subject of the Court's analysis in turn, in order to demonstrate the

[43] The essential provisions are all considered in detail below.

[44] See Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 19).

[45] *Treaty Incorporation* (n 3) [21].

mischaracterisation of devolution under unqualified legislative power and its incoherent relationship with parliamentary sovereignty.

(a) The First Provision: The Interpretive Obligation

When considering the interpretive obligation found in s 19(2)(a)(ii) of the UNCRC Bill, the Court was taken to the analogical provision in the Human Rights Act 1998: s 3. The Court said the accepted position was that 'section 3 required, where necessary, that the courts, and other public authorities, should give to provisions in statutes, including statutes enacted subsequent to the Human Rights Act, a meaning and effect that conflicted with the legislative intention of the Parliaments enacting those statutes.'[46] The relevant question was 'whether the Scottish Parliament has a similar power to subject Acts of Parliament to the modification of their intended meaning at the hands of the courts.'[47]

In what might be considered a broad-brush application of that case, the Court said simply that '[t]he answer to that question can be found by applying the reasoning of this court in the *Continuity Bill* case.'[48] It concluded, accordingly, that '[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. The qualification would be lesser in degree than in the *Continuity Bill* case, but equally inconsistent with section 28(7) of the Scotland Act.'[49] To the extent that it *is* treating parliamentary sovereignty and unqualified power as equivalent, the Court appears to be implicitly suggesting that there is some

[46] ibid [26].

[47] ibid [26].

[48] ibid [27].

[49] ibid [28].

purchase in the argument, ordinarily rejected, that *s 3 HRA* is also incompatible with that sovereignty.[50]

In a similar fashion to *Continuity Bill*, this time in response to the argument that 'section 19 of the Bill would not modify section 28(7) of the Scotland Act because it would remain within the power of [the Westminster] Parliament to disapply section 19, or to repeal it altogether', the Court again said that the standard contained in s 28(7) by virtue of its protection from modification is a different—and higher—standard than that provided by parliamentary sovereignty itself:[51] devolved legislation can be outwith competence because of its incompatibility with the notion of unqualified legislative power, even where that legislation does not interact, or is at least not incompatible, with parliamentary sovereignty. Unqualified legislative power again appears, on this basis, to present a noticeably more brittle standard than the sovereignty principle, providing a powerful bar on devolved legislation.

The important point here is that the Court's protection of Westminster's legislation—whether through parliamentary sovereignty or something closely analogous to it—is not a compelling constitutional analysis because it fails to reflect, and actively undermines, the core assumptions upon which devolution's 'workability' is partly predicated.[52] Indeed, it is a difficult line of reasoning to square with the text of the

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[50] For examples of that rejection, see Independent Human Rights Act Review, 'Independent Human Rights Act Review: Full Report' (Ministry of Justice 2021) CP 586 ch 5, paras 9, 11, 18, 24, 111-2, 149-51, 195.

[51] *Treaty Incorporation* (n 3) [29]; *Continuity Bill* (n 2) [53].

[52] See *Treaty Incorporation* (n 3) [7]; Stephen Dimelow, 'The Interpretation of "Constitutional" Statutes' (2013) 129 Law Quarterly Review 498, 501; *Re Local Government Byelaws (Wales) Bill 2012*

devolution settlement itself which, in encouraging a broad approach to devolved competences,[53] appears not to warrant these kinds of restrictions. As Cowie explains, this 'judgment creates a structural anomaly in the devolution settlement.'[54]

Unqualified legislative power appears, once again, to flow from and exacerbate a restrictive reading of devolution and of devolved law-making power, even where this leads to surprising conclusions. For instance, it is not entirely convincing that the Scottish Parliament's amendment or repeal of relevant Westminster legislation would be *consistent* with unqualified legislative power but *its* empowering of the courts to merely *interpret* that legislation in the relevant way would not. For instance, the Scottish Parliament could have legislated to amend all relevant Westminster legislation (restricted, as this provision was, to legislation that would be within the competence of the Scottish Parliament to make) to render it compatible with the treaties, limited its effect to circumstances in which it was so compatible, or repealed it to the extent that it was incompatible. Thus, the *potency* of the interference with Westminster legislation does not seem to be the relevant question.[55]

[2012] UKSC 53, [2013] 1 AC 792 [80] (Lord Hope); *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61, [2013] 1 AC 792 [14] (Lord Hope); *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622 [68] (Lords Reed and Thomas); Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 19) para 13; *Martin v Most* [2010] UKSC 10.

[53] See generally e.g., Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 19); Scotland Act 1998 s 101.

[54] Graeme Cowie, 'The Power to Make Laws for Scotland: The Treaty Incorporation Bills Reference' [2022] Public Law 189, 198.

[55] ibid 194–5.

Instead, some of this reasoning does not appear to rely, overtly or solely, on unqualified legislative power, looking instead to questions about which powers can be delegated by the Scottish Parliament to other institutions (particularly, the Scottish courts). As McHarg suggests, however, '[t]he[se] decisions are also difficult to reconcile with the fact that Holyrood undeniably has the power to amend or repeal UK legislation in devolved areas, appearing to rely on a non-delegation doctrine of the sort that the court is not supposed to read into the devolution statutes.'[56] In this way, this reasoning again appears to sit uncomfortably with the devolution settlement, especially given that Scottish courts can undoubtedly be involved in identifying pieces of Westminster legislation which, within competence, *are* amended or repealed by the Scottish *Parliament*.[57] Further, as Cowie explains, not only is it 'the Scottish Parliament, not the courts, that would have altered the meaning and effect of UK Acts. Section 19 "delegates" only enforcement' but the Scottish Parliament also 'can and does confer Henry VIII powers, routinely, on Scottish Ministers [i.e., other institutions] to modify (thus "alter the meaning and effect of") UK Acts.'[58]

(b) The Second Provision: Striking Down vs Repealing Legislation

This same, arguably tortuous, reasoning emerges in the Court's treatment of s 20 of the UNCRC Bill. Section 20(2) provided that '[i]f the court is satisfied that [a] provision [of other domestic law] is incompatible with the UNCRC requirements, it may make a

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[56] McHarg, 'The Contested Boundaries of Devolved Legislative Competence' (n 1) 16.

[57] Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: Legislative Supremacy, Parliament's "Unqualified" Power, and "Modifying" the Scotland Act' (*UK Constitutional Law Association*, 15 October 2021) <https://ukconstitutionallaw.org/2021/10/15/mark-elliott-and-nicholas-kilford-devolution-in-the-supreme-court-legislative-supremacy-parliaments-unqualified-power-and-modifying-the-scotland-act/> accessed 15 October 2021.

[58] Cowie (n 54) 195.

declarator stating that the provision ceases to be law to the extent of the incompatibility (a "strike down declarator"). Section 20(10) extended its effect to (only pre-existing, not future) Acts of the Westminster Parliament, and only so far as the relevant provision was 'an enactment that it would be within the legislative competence of the Scottish Parliament to make.'[59] Again, *the Scottish Parliament* has the power to amend and repeal Acts of the Westminster Parliament that meet this requirement but, again, the Court found that its delegation of that power to the Scottish courts would be inconsistent with, and therefore modify the protection provided by, s 28(7) of the Scotland Act. It is difficult to see why direct, or perhaps even rolling, repeal of relevant Westminster legislation *by the Scottish Parliament* would be compatible with unqualified legislative power—even where the burden fell on the Scottish courts to inevitably identify legislation so repealed—but the *Scottish courts*' possession of this power would not. That position does not significantly depart from Westminster's will, expressed in the Scotland Act, to render some of its legislation vulnerable to decisions of the Scottish Parliament, especially when McHarg's and Cowie's point about non-delegation above is considered. Indeed, there is nothing in the text of the Scotland Act, or parliamentary sovereignty or the rule of law, that prevents this kind of delegation *other than* unqualified legislative power, whose foundations in that statute, and its consistency with its other parts, are questionable.

Again, the vulnerability of Westminster legislation to this kind of interference—in this case repeal within devolved competence—is an inherent feature of the devolution settlement; its compatibility with parliamentary sovereignty has been well-established and is, it seems, accepted by the Court itself. Although the Court narrowly avoids making the claim that, in fact, the repeal of Westminster legislation within devolved competence *is* incompatible

[59] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2021 s 10(a)(ii).

with sovereignty, when explaining why the Scottish Parliament cannot delegate its power in this way, the Court's response nevertheless appears to conflate unqualified legislative power with parliamentary sovereignty. The Court says that it is its source that renders the devolved legislatures' repeal of Westminster legislation compatible with sovereignty, explaining that 'the fact that the Scottish Parliament has the power to repeal an Act of Parliament does not entail that it has the power to authorise the courts to declare that unrepealed Acts of Parliament have ceased to be law.'[60] It offers this fairly remarkable analogical justification:

> It is true that a qualification of Parliamentary sovereignty was introduced by the European Communities Act 1972, but Parliament itself effected that qualification of its sovereignty in order to meet the requirements of membership of the European Communities.[61]

Again, this is a difficult dictum to follow: first, the Supreme Court's own view—explicated in the *Miller I* case—was that the ECA did *not* introduce a 'qualification of parliamentary sovereignty' for, among other things, the very reason that the Court accepts (here and in *Continuity Bill*) that some of the relevant provisions here do not qualify parliamentary sovereignty: Westminster could (and did) simply repeal the relevant limitation. The claim that Westminster can qualify its own sovereignty, and had in fact done so, is therefore surprising. Indeed, the passage the Court quotes to support this claim[62] does not sit

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[60] *Treaty Incorporation* (n 3) [44].

[61] ibid [40].

[62] 'The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution': *Pickin v British Railways Board* [1974] AC 765, 782 (Lord Reid).

comfortably with the developments in legal thinking as EU membership and devolution have matured. That thinking at best accepted that EU membership conditioned Westminster's *legislative power*, but did not accept (because, *inter alia*, of that framework's contingency and subjection *to* core principles of UK constitutional law) that this meaningfully qualified its *sovereignty*. Further, contrary to the Court's position, and as discussed in chapter 3, it is not (or at least not *merely*) because limitations on sovereignty are *self*-imposed that they are rendered compatible with the principle's continuing accommodation; conditions of this type are rendered consistent with parliamentary sovereignty because of the way they are structured and limited, not simply because of their source.

Second, it is the Court's own assertion that the relevant question is not whether the provisions in the UNCRC Bill interact impermissibly with *sovereignty* but, instead, whether they are inconsistent with *unqualified legislative power*. The Court said in *Continuity Bill*, in a passage relied on in this case, that such provisions do not—and cannot—impinge upon parliamentary sovereignty because they can always be repealed by Westminster,[63] a view that was considered a noteworthy example of the more flexible approach to that principle. Accordingly, it is not clear why recourse to what is or is not compatible with *that principle*, rather than unqualified legislative power, is relevant unless the Court is suggesting—as it therefore seems to be—that unqualified legislative power and parliamentary sovereignty are references to the same idea.

What follows, however, is perhaps even more extraordinary. In its reasoning for finding this provision outwith competence the Court presents a view of s 28(7) which is plainly incompatible with devolution, and is worth excerpting in full:

[63] *Continuity Bill* (n 2) [53], [63]; *Treaty Incorporation* (n 3) [29].

Counsel for the Lord Advocate argued, however, that the fact that the scope of section 20(10)(a)(ii) is restricted to Acts of Parliament enacted before section 20 comes into force renders it within competence. *This argument assumes that "the power of the Parliament of the United Kingdom to make laws for Scotland", within the meaning of section 28(7) of the Scotland Act, is confined to the future enactment of Acts of Parliament*, as from a date which can be selected by the Scottish Parliament or the Scottish Ministers. So understood, *section 28(7) provides no protection to the body of legislation which Parliament enacted prior to the selected date, and permits such legislation to be deprived of effect* by the Scottish courts.

It is difficult to accept that section 28(7) was intended to be given such a narrow interpretation. In the first place, each successive Parliament inherits the body of legislation enacted by its predecessors. Those statutes form the starting point of its exercise of its power to make laws for Scotland. *It may decide to enact new legislation, or to amend or repeal existing legislation, or to allow existing legislation to continue in force unamended. As a matter of practical reality, the latter choice, as much as the other two, can reasonably be regarded as one of the ways in which Parliament exercises its power to make laws for Scotland.* If, for example, Parliament ignored calls to repeal a controversial Act of Parliament which applied in Scotland, it might well be considered unrealistic for it to deny that, in doing so, it was exercising its power to make laws for Scotland. *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 in order to ensure the continuing effect of the body of statutes which were enacted before section 20 came into force, 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 [the

Westminster] Parliament itself. Either way, it would be reasonable to conclude that Parliament's power to make laws for Scotland would be affected.

Secondly, and decisively as a matter of law, counsel's argument proves too much. If it were correct, the Scottish Parliament could enact a provision such as section 20 of the Bill at regular intervals, so as to enable the courts to strike down Acts of Parliament enacted during the intervening period. *Parliament would then be confined to enacting legislation for Scotland with a limited life expectancy*, unless it received the approval of the courts. The Scottish Parliament could, for example, re-enact section 20 every year, thereby imposing a 12 month "sunset clause" on legislation enacted by Parliament, unless it complied with the courts' assessment of the UNCRC requirements. That would plainly be a modification of Parliament's "unqualified legislative power", as it was described in the *Continuity Bill* case at para 52 (para 27 above).

For the Scottish Parliament to make the continuation in force of Acts of Parliament enacted prior to section 20 of the Bill conditional on the courts' decision that they were compliant with the UNCRC requirements would therefore affect Parliament's power to make laws for Scotland, resulting in a modification of section 28(7) of the Scotland Act. The situation is analogous to that in the *Continuity Bill* case, where the effect of subordinate legislation authorised by Acts of Parliament was made conditional on the consent of the Scottish Ministers. In the present case, section 20 of the Bill makes the effect of Acts of Parliament conditional on the courts' being satisfied as to their compatibility with the UNCRC requirements.[64]

[64] *Treaty Incorporation* (n 3) [41]-[45] (emphasis added).

Two points can be made in response to these passages, the most straightforward of which can be taken first: the provisions in the Bill do *not* render 'the continuation in force of Acts of Parliament enacted prior to section 20 of the Bill conditional on the courts' decision that they were compliant with the UNCRC requirements'. Rather, the courts would, were this provision to become law, simply possess a *discretionary* power to strike down legislation within that category: '[B]ecause the powers bestowed on the courts are discretionary, compatibility with the UNCRC is *not* a condition of the continuing effect of Acts of Parliament. Rather, *incompatibility* is merely the precondition for the *potential* exercise of these judicial powers.'[65] Importantly, in other words, it appears to be the Court's view that the *non*-exercise of this power is nonetheless problematic, and 'it is the mere spectre of impugnment that is said to have implications for Parliament's legislative power and, therefore, to modify section 28(7).'[66] If that is so, this would represent a very brittle standard indeed.

The second response is that the exposure of pre-existing legislation or legislative vacuums to devolved interference, where this interference is within competence, is the foundation of devolution and the divergence it facilitates. Without that component the devolved legislatures' powers within devolved areas would be astonishingly thin, certainly far thinner than they have generally been accepted to be. In order to be compatible with that framework, and the normative status the devolved institutions consequently enjoy, neither s 28(7), nor the broader framework of which it forms a part *can* provide 'protection to the body of legislation which Parliament enacted prior to the selected date'; nor can they unconditionally 'allow existing legislation to continue in force unamended' within devolved competence*;* nor can they be repugnant to the Westminster 'Parliament['s]

[65] Elliott and Kilford (n 57).

[66] ibid.

confine[ment] to enacting legislation for Scotland with a limited life expectancy'. All of this is *fundamental* to the devolution scheme itself, and indeed reflects the practice of devolution.[67] The Court's interpretation of s 28(7)'s protection from modification has the effect, in these passages, of hollowing out that settlement, whether by recourse to unqualified power as a separate principle, or one which is connected with parliamentary sovereignty. Where Westminster *does* seek to protect its legislation in this way, it can protect enactments; where it seeks to preserve legislative vacuums, it can reserve matters.[68] Furthermore, this cannot be isolated as an issue purely of delegation. The courts might often have an inevitable role in determining the meaning of legislation and, therefore, whether certain pieces of Westminster legislation have been repealed or amended by the Scottish Parliament in the course of its within-competence legislative activity. Although, in such instances, the courts would not be *striking down* legislation, 'the continuation in force of Acts of Parliament enacted prior to [such a provision] would be conditional on the courts' decision that they were compliant'. Relying upon judicial assessment of compatibility or consistency is inevitable and cannot itself, on this logic, render Acts of the Scottish Parliament outwith competence.

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[67] Cowie (n 54) 196.

[68] The Supreme Court recognised this in *Continuity Bill*: 'the reservation in paragraph 1(c) [the Parliament of the United Kingdom] cannot have been intended, ordinarily at least, to protect legislation enacted by Parliament from the effects of legislation passed by the Scottish Parliament, since that purpose is effected by other provisions of the Scotland Act, which reserve matters to the UK Parliament and thereby prevent the Scottish Parliament from legislating on those matters, or which protect enactments made by the UK Parliament from modification by legislation passed by the Scottish Parliament'.: *Continuity Bill* (n 2) [61]. This appears to reflect orthodoxy; the Court does not here suggest that s 28(7) is a provision that can protect Westminster legislation from devolved interference either.

The Supreme Court has, as chapter 3 illustrated, been clear previously that the exposure of Westminster legislation to this kind of interference is compatible with parliamentary sovereignty. It has also been equally clear that the devolved legislatures *can* fill gaps that are *intentionally* left by Westminster, even if that is to pursue in their own legislation what they had failed to achieve at Westminster.[69] It is therefore canonical that 'the idea that Parliament has a monopoly over legislation forms no part of the orthodox understanding of parliamentary sovereignty'.[70] The dictum above, however, especially in protecting even legislative voids as well as Westminster legislation from devolved interference, flies in the face of orthodox understandings of devolution.

(c) The Third Provision: Political Limitations on Legislative Freedom

It is apparent that unqualified legislative power appears to sit at least uncomfortably with the way in which the devolution framework is supposed to—and in reality *does*—work, as well as the role played by, and the characteristics of, the sovereignty principle within the UK's constitutional system. There is no sense, however, that the Court's treatment of the questions before it in this case is affected by a pragmatic recognition of these facts, or of the principled values underpinning devolution. Illustrative of this is the Court's analysis of the third relevant provision in which, on McHarg's account, unqualified legislative power morphs into an 'unorthodox and expansive notion of parliamentary sovereignty requiring

[69] '[I]f the Scottish Parliament legislates in order to give effect in Scotland to a policy which has been rejected by the UK Parliament, it does not, as a general rule, thereby infringe the reservation created by paragraph 1(c) [of Schedule 5]', a reserved matter that 'encompasses, amongst other matters, the sovereignty of Parliament': ibid [62] and [61] respectively.

[70] McHarg, 'Giving Substance to Sovereignty' (n 11) 206; Mark Elliott, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (2017) 76 Cambridge Law Journal 257, 267.

Westminster to be free not only of legal, but also of practical constraints on its legislative power.'[71]

Section 21(2) of the referred UNCRC Bill provided that '[i]f the court is satisfied that the provision is incompatible with the UNCRC requirements, it may make a declarator stating that incompatibility'. This power was applied to future, rather than historic, legislation,[72] 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is made', and 'is not binding on the parties to the proceedings in which it is made'.[73] These provisions mirror s 4 HRA and apply to Acts of the Westminster Parliament[74] 'that it would be within the legislative competence of the Scottish Parliament to make'.[75]

Similarly to those provisions already considered, the power granted to the courts by this Bill is discretionary (and therefore might never be exercised) and is confined only to Acts of the Westminster Parliament which are otherwise vulnerable to devolved interference thanks to the Scotland Act 1998. Importantly, however, this provision—like s 4 HRA—has primarily political implications for engaged legislation (with *separate* provisions providing remedial powers, which were challenged independently). Given that this provision has no impact on the legal validity or effect of an Act of the Westminster Parliament, it is difficult to see how either its sovereignty—on the orthodox view that parliamentary sovereignty is not sensitive to the political conditions surrounding the enactment of legislation—or its unqualified legislative power might be engaged. Westminster's unqualified power to make

[71] McHarg, 'The Contested Boundaries of Devolved Legislative Competence' (n 1) 16.

[72] The UNCRC Bill s 21(1).

[73] ibid s 21(4).

[74] ibid s 21(5)(b).

[75] ibid s 21(5)(a).

laws for Scotland, even in the face of a declarator would, it seems, be unaffected. However, in the Court's view unqualified legislative power is a concept broad enough to capture—and to guard against—political limitations on the exercise of Westminster's legislative power. Further, the Court considers, in an inversion of orthodoxy,[76] that *parliamentary sovereignty* itself is engaged.

First, and in contradistinction to *Continuity Bill*, the Court suggests that there is something constitutionally dubious about a devolved legislature's power to make *different* choices to Westminster; something which is plainly not foreclosed by the devolution settlement, and is in fact facilitated by it:[77]

> Section 21 would therefore confer on the courts the power to pass judgment on the compatibility of Acts of Parliament with provisions of an international treaty to which the Scottish Parliament, but not Parliament itself, has chosen to give domestic effect.[78]

Unless the Court's implication is that such a system would be outwith competence by virtue of relating to the reserved matter of international relations (provided in paragraph 7 of Schedule 5), or some other relevant limitation, it is not immediately obvious why *Westminster's* decisions should be taken to affect the scope of devolved law-making power.

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[76] Elliott and Kilford (n 57).

[77] 'Parts of the argument of the UK Law Officers appear to suggest a wider objection that separate Scottish legislation about the consequences of withdrawal is legally untidy, politically inconvenient or redundant in the light of the corresponding UK legislation. But we are not concerned with supposed objections of this kind, which go to the wisdom of the legislation and not to its competence': *Continuity Bill* (n 2) [33].

[78] *Treaty Incorporation* (n 3) [49].

Second, the Court said that 'the object and effect of section 21, so far as it concerns Acts of Parliament, is to subject legislation enacted by Parliament to judicial condemnation if it fails to meet a legal standard embodying international obligations to which Parliament has not chosen to give domestic legal effect.'[79] Further, the Court considered that even a declarator of this kind, which does not affect the legal validity of an Act of Parliament, was incompatible with 'the ordinary principle… that the courts cannot question or impugn an Act of Parliament.'[80] And, again blurring the line between parliamentary sovereignty and unqualified legislative power, the Court finally said that

> Parliament can itself qualify its own sovereignty, as it did when it conferred on the courts the power to make declarations of incompatibility with rights guaranteed by the ECHR, under section 4 of the Human Rights Act. The Scottish Parliament, on the other hand, cannot qualify the sovereignty of Parliament, which is protected by a number of provisions of the Scotland Act, including, as counsel for the Lord Advocate acknowledged in his written submissions, section 28(7).

It is at its lowest unorthodox to view s 4 HRA as a 'qualification' of parliamentary sovereignty,[81] and the relevance of that principle when the Scottish Parliament is not delegating its power to interfere with the *legal effect* or validity of Acts of the Westminster Parliament is unclear. This passage also, in suggesting that s 28(7) protects *parliamentary sovereignty* from devolved qualification, implies a conflation between that principle and

[79] ibid [52].

[80] ibid [50]: 'As Lord Hope observed in *AXA*… "[a] sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty".

[81] See Independent Human Rights Act Review (n 50) ch 5, paras 24, 28, 111-2, 149-51.

unqualified legislative power. Although that provision *reflects* parliamentary sovereignty, it *protects*, on the Court's own reasoning, unqualified legislative power from incursions that are *compatible* with the sovereignty principle. It was the Court's own position in *Continuity Bill* that the protection of s 28(7) from modification engaged the former concept and not the latter,[82] but that logic appears here to have been set aside, with the sovereignty principle itself being engaged. It is possible that the implication of the Court's language is that s 28(7) does indeed serve a dual-purpose (reflecting parliamentary sovereignty and, separately, protecting its unqualified legislative power) but again that is not clarified in the judgment itself, and the context certainly suggests a conflation between these two ideas.

In *Continuity Bill* the fact that Westminster could simply repeal the relevant limitation was protection enough for its sovereignty, even where that provision *did* go to the legal effect of its legislation in the meantime, and even if that reasoning could not save a provision from unqualified legislative power.[83] However, in *Treaty Incorporation*, despite the fact that 'an incompatibility declarator would not in itself affect the validity of an Act of Parliament… That does not, however, exclude the possibility that section 21 would affect Parliament's power to legislate for Scotland, as guaranteed by section 28(7) of the Scotland Act.'[84] In this way, the brittleness of Westminster's unqualified legislative power to make laws for Scotland can be seen at close quarters. It is incapable of tolerating political qualifications to legislative power in the way sovereignty (at least on its orthodox conception) could (even if that orthodox conception is rejected here). Further, the Court appears to be reimagining parliamentary sovereignty, either through its conflation with unqualified legislative power or in its own right, as sensitive to political limitations on Westminster's legislative power.

[82] See e.g., McHarg and McCorkindale (n 12) 195.

[83] *Continuity Bill* (n 2) [63]-[64].

[84] *Treaty Incorporation* (n 3) [51].

This is a conclusion that would have significant implications for the devolution framework and the wider constitution: if it were accepted that the imposition of political pressure upon Westminster's legislative choices were incompatible with parliamentary sovereignty, this would certainly call into question the constitutional acceptability or viability of the Sewel convention, which is a vehicle for precisely this kind of pressure.

Yet, this is precisely what the Court *is* suggesting. In its judgment, the Court explains that the exposure of Acts of Parliament to 'judicial condemnation' is incompatible with unqualified legislative power—and potentially with parliamentary sovereignty—even though the devolution settlement enables the devolved legislatures to set aside Acts of Parliament or enact their own legislative schemes and frameworks in response to identified problems which may differ from Westminster's. In fact, merely the *possibility* of such condemnation is incompatible: 'The *possibility* - and, a fortiori, the actuality - of such a finding would plainly affect Parliament's power to make laws for Scotland, since *it would impose pressure on Parliament* to avoid the opprobrium which such a finding would entail.'[85]

Clearly, however, the devolution settlement, and the different legislative choices it enables, by necessity exposes the Westminster Parliament to a degree of political pressure. Indeed, a devolved institution's choice *to* or *not to* introduce a legislative scheme which is different from Westminster's own legislative choices facilitates a policy laboratory, the success or failure of which has very real political implications. In some cases, it may encourage Westminster to change course.[86] This is in either case precisely what devolution *is*.

[85] ibid [52] (emphasis added).

[86] The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, 'UK Internal Market Inquiry' (2022) SP Paper 113, 1st Report 2022 (Session 6) para 28: 'the ban on plastic stemmed

Furthermore, to suggest, as the Court appears to, that *sovereignty* is incompatible with 'political opprobrium' is to fail to recognise that that principle is not ordinarily understood as sensitive to political limitations on the exercise of legislative power. It is that element of the principle which, as noted above, enables political mechanisms, like the Sewel convention, to provide meaningful protections for devolved spheres of authority in a way that is compatible with orthodox conceptions of sovereignty.

Arguably, parliamentary sovereignty's insensitivity to these kinds of political conditions or protections is instrumental in important threads of judicial reasoning across several quarters of public law and is accepted as orthodox doctrine. Disputing that insensitivity deprives much of that reasoning of its purchase, and would also suggest that *any* kind of—even political—protection for devolution is intolerable to, and needs to be dismantled in pursuit of the accommodation of, the sovereignty principle. That would be to render sovereignty's reconciliation with any meaningful kind of devolution—let alone many other aspects of the UK's largely political constitution—virtually impossible.

It is argued that the development of, and the meaning given to, unqualified legislative power, its purchase in these cases, and its impact upon the functioning of devolution all demonstrate that it is a notion that is overtly inconsistent with the UK's territorial constitution. It distorts some of the fundamental assumptions underpinning that settlement and paints many of its core features as legally—and constitutionally—intolerable or impossible. It is not a phenomenon that can be reconciled with devolution (or, indeed, many aspects of constitutional law more widely) as it actually operates in practice and cannot itself form part of a coherent, meaningful or accurate

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cotton buds and the single use carrier bag charge [are] two useful examples of policy being developed and implemented at a devolved level and then subsequently implemented across the UK.'

account of that settlement. Unqualified legislative power is inconsistent with the wider statute from which it emerges (and accepted interpretations of that statute) and reflects an interpretation of parliamentary sovereignty that caricatures that principle, misrepresenting *its* meaning and role in the constitution, and flying in the face of orthodox constitutional theory.

For these reasons, unqualified legislative power is not an appropriate means by which to secure the accommodation of parliamentary sovereignty. It is a phenomenon that, rather than retaining the meaning of devolution, deprives it of much of that meaning and fails to recognise many of its core characteristics. To fail to recognise the core components of devolution, and to be flatly incompatible with that settlement, is not to achieve accommodation in a way that is 'satisfactory' as this thesis has approached that question. This is because it is not to 'accommodate' parliamentary sovereignty *within* the UK's territorial constitution, but at the expense of it. There is a further reason to reject unqualified legislative power's accommodative potential, however: its mischaracterisation of parliamentary sovereignty, and the absence of a coherent connection between it and that principle. This issue is considered next.

5. Justifying Unqualified Legislative Power's Detachment from Parliamentary Sovereignty

At various junctures it has been suggested that the connection between parliamentary sovereignty and unqualified legislative power is opaque or unconvincing. It must, however, be accepted that it is a concept which possesses a *prima facie* relationship with that principle, deriving as it does from a provision designed to reflect parliamentary sovereignty. Further, it is, like sovereignty, concerned with Westminster's legislative freedom, and it has been taken by some authors as an expansive and somewhat incoherent interpretation of the

sovereignty principle itself.[87] The Court is not always clear whether it is the sovereignty principle which is engaged, unqualified legislative power, both, or whether they are even distinct principles at all. However, this section argues that the connection between these two phenomena should be rejected on the basis that it is doctrinally unsound and incoherent. Indeed, unqualified legislative power fits into a category described by McHarg as a set of 'constitutional doctrines' which although they 'may *look like* they involve deriving substantive implications from parliamentary sovereignty, they may not in fact be incidences of sovereignty at all.'[88] Because of the weakness of the link between unqualified legislative power and parliamentary sovereignty, and the incapacity of the former to accurately reflect the latter, unqualified legislative power should not be considered an appropriate means of accommodating parliamentary sovereignty.

First, as may be clear, unqualified legislative power is distinct from parliamentary sovereignty in its brittleness: it is incapable of tolerating the kinds of stresses or pressures that the sovereignty principle itself can accommodate (like the attempt to impose restrictions on Westminster's legislative power that it is free to disregard). Second, unqualified legislative power is broader in its scope than sovereignty, rendering it sensitive to political pressures to which the sovereignty principle is not itself sensitive. Third, the two principles are distinguished by their source: unlike sovereignty, unqualified legislative power originates in, and owes its existence to, the text of the devolution settlement. It is, in this sense, an 'artificial' or 'synthetic' construct, rather than an emanation of first principles, constitutional lineage,[89] or having a life beyond the language of that text. Indeed, the

[87] McHarg and McCorkindale (n 12) 195–6.

[88] McHarg, 'Giving Substance to Sovereignty' (n 11) 214.

[89] McHarg describes this view of parliamentary sovereignty as based on 'a purely institutional or historical claim': ibid 219.

suggestion here is that 'the "unqualified" law-making power that is supposedly vouchsafed by section 28(7) of the Scotland Act is a wider concept than parliamentary sovereignty'[90] and, importantly, an inaccurate reflection of it.

The first and most obvious distinction between parliamentary sovereignty and unqualified legislative power, even despite the absence of any concrete distinction between them drawn by the Court, is that the latter concept is far less tolerant of pressures exerted upon it by decentralised constitutionalism. Where the sovereignty principle might, for example, be capable of tolerating the effects the referred Scottish Bills purported to have on Westminster legislation (provided those effects were subject to Westminster's power to remove them) unqualified legislative power would 'break' under, and is incompatible with, those same pressures. As noted, the Court at various points accepts that parliamentary sovereignty is not impugned by legislation which, nonetheless, *is* inconsistent with unqualified legislative power. Thus, the way in which these pressures affect the relevant concepts is quite different.

Second, the scope of unqualified legislative power is far broader than that of parliamentary sovereignty, meaning that the category of matters which do exert this pressure upon it is larger. For example, as the dynamism of the settlement implies, parliamentary sovereignty is not incompatible with the repeal or amendment of Westminster legislation by the devolved legislatures so long as this takes place *within* the devolved competences expressly set out by Westminster in the devolution statutes. Unqualified legislative power, by contrast, protects Westminster's ability to 'allow existing legislation to continue in force unamended.'[91] In fact, that Westminster's legislation should be *effective,* McHarg suggests,

[90] Elliott and Kilford (n 57).

[91] This, the Court says, 'can reasonably be regarded as one of the ways in which Parliament exercises its power to make laws for Scotland.': *Treaty Incorporation* (n 3) [42].

has never been considered a key part of the sovereignty doctrine.[92] Unqualified legislative power also extends as far as protecting *unenacted* legislation—or legislative vacuums—over which parliamentary sovereignty makes no provision, and which is necessarily exposed to devolved interference by devolution, reflective of 'the purpose of devolution… to enable the devolved nations and regions to legislate according to their own local needs and political preferences.'[93] Once again, it remains difficult to reconcile this feature of unqualified legislative power with the devolution statutes themselves, the enactment of which *is* an expression of Westminster's sovereignty and to which effect should, accordingly, be given.

Similarly, it is a concept which is engaged by *political* limitations on Westminster's legislative power, such as those contained in an incompatibility declarator and, presumably therefore, by the Sewel convention. The Court does suggest that these kinds of pressures, illustrated most obviously by its treatment of s 4 HRA, *do* qualify parliamentary sovereignty too, perhaps indicating that the two phenomena can be elided. But this is an eccentric interpretation of the interaction between parliamentary sovereignty and s 4 HRA and the distinction between them should for that reason be maintained. It is a better reflection of doctrine to consider that, in the HRA, parliamentary sovereignty's accommodation is successfully secured 'by providing that a declaration of incompatibility was not to affect the validity of legislation.'[94] Such an undertaking is not, however sufficient to avail any

[92] McHarg, 'Giving Substance to Sovereignty' (n 11) 212.

[93] Michael Dougan and others, 'UK Internal Market Bill: Devolution and the Union' (Centre on Constitutional Change, UK in a Changing Europe and Wales Governance Centre 2020) 7–8.

[94] Independent Human Rights Act Review (n 50) ch 5, para 24: 'Section 4, like section 3, was intended to preserve the constitutional principle of Parliamentary Sovereignty while enabling the HRA to give effect to Convention rights in UK domestic law. Section 4 was intended to strike "a careful compromise" between the two. It was intended to secure the former by providing that a declaration of incompatibility

interference with unqualified legislative power. Likewise, to the extent that the Sewel convention operates merely in the political forum, it similarly is not typically understood as exerting pressure on, or being in tension with, *sovereignty.* It is consistent with doctrine to continue to treat that principle as immune to, and unconcerned with, political conditions on the exercise of legislative power. Nonetheless, there is a danger that the failure to fully distinguish between sovereignty and unqualified legislative power will, as it might be said to in *Treaty Incorporation*, appear to affect the way that sovereignty's interaction with the constitution, and its qualities, are understood.

Perhaps even more remarkably, the Court suggests the mere prospect of a declarator goes to unqualified legislative power (and/or sovereignty), logically including situations where one has *not* been made at all. This is significant because it shifts the analysis from a material assessment of the practical impacts of a declarator, to the hypothetical or conceptual problems entailed merely by an institution's possession of the power to issue a declarator. The courts have sometimes, by contrast, considered the effects s 4 HRA's use might have on the legislative process as a relevant issue when determining whether a declaration of incompatibility is warranted, necessary or justified.[95] The assumption of such an analysis, therefore, is that those effects might not subsist because of the power's *mere existence*, particularly when it is not exercised (or at least can be ameliorated *by* its non-exercise). Indeed, it is not unreasonable to suggest that the Scottish courts might similarly have

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was not to affect the validity of legislation.' HC Deb 2 June 1998, vol 313, col 459: '[Section] 4(6) expressly provides that a declaration does not affect the validity, continuing operation or enforcement of the relevant legislative provision. This is because we think that any decision to change primary legislation should be reserved for the consideration of Parliament. Again, the Government are upholding the sovereignty of Parliament and are not in any way breaching that principle.'

[95] See generally, e.g., *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38.

tempered their exercise of s 21(2) of the UNCRC Bill by reference to the sovereignty implications of its use.

Third, unqualified legislative power, being derived entirely from statute, is a synthetic, or legislated, phenomenon, unlike parliamentary sovereignty, and does not, as the sovereignty principle does, possess a meaning or normative foundation beyond the text in which it is reflected. Without s 28(7), parliamentary sovereignty would persist despite, and would not have been extinguished by the creation of, the devolution settlement, but unqualified legislative would simply not exist *at all*. Further, its statutory foundations are tenuous: it is not merely that provision, but *its protection from modification* (and the Court's wide reading of that restriction) which brings unqualified legislative power into existence, given that s 28(7) is not *itself* a limitation on competence (its protection from modification in Schedule 4 being the relevant competence limitation). An amendment of the Scotland Act could, it seems, swiftly abolish the concept. Unqualified legislative power owes its existence, and its widespread impact on devolution, to the breadth of the curial interpretation of the modification test.

Parliamentary sovereignty is, by contrast, accommodated and affirmed by a number of provisions in the devolution legislation[96] as well as by the structure of devolution itself, which—where Westminster can unmake the relevant interference—makes it difficult (though not impossible)[97] for the devolved institutions to even purport to affect

[96] *Treaty Incorporation* (n 3) [50]; *REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31.

[97] E.g., *Lord Advocate's Reference* (n 96) [82].

parliamentary sovereignty.[98] In any case, parliamentary sovereignty's existence[99] does not depend upon s 28(7) or that provision's protection from modification in the way that unqualified legislative power's does.

The absence of secure, deep, and rich historical and doctrinal support—like that possessed by the sovereignty principle—means that unqualified legislative power is a more incoherent, unpredictable and far less refined concept, and its effects on devolution are more difficult to justify. Importantly, where the accommodation of parliamentary sovereignty does not appear, at least on the reconciliatory approach, to necessitate the cutting down of devolved competences or the undermining of dynamism, unqualified legislative power, in ostensibly accommodating Westminster's legislative freedom, appears to have precisely those effects.

It is, on these bases, difficult to accept that unqualified legislative power represents an appropriate mechanism for securing the accommodation of parliamentary sovereignty. It is distinct from that principle in a number of important ways and appears to lack the coherent connection with, or defining characteristics of, parliamentary sovereignty. Unqualified legislative power is perhaps best understood as a caricature of parliamentary sovereignty, misrepresenting that principle's meaning and its role in the contemporary constitution, and making demands of devolution which are incompatible with that settlement. Although it purports to preserve Westminster's legislative freedom, it does not contribute appropriately to the accommodation of its *sovereignty* and, in the process, impedes the legislative freedom bestowed upon the devolved legislatures *by* Westminster.

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[98] See above *Continuity Bill* (n 2) [63]-[64].

[99] See generally McHarg, 'Giving Substance to Sovereignty' (n 11).

Furthermore, it appears to have a distorting effect on the way that sovereignty is itself understood and operationalised by the Court. Indeed, viewing the constitution through the lens of unqualified legislative power leads to perplexing results, pointing to a brittle and broad conception of that principle which is at odds with orthodox doctrine. And devolution viewed through this lens is both largely incompatible with parliamentary sovereignty and appears, in certain aspects at least (such as its facilitation of legislative divergence), to be presented as constitutionally dubious. Unqualified legislative power is a reflection of the protective approach: it represents a rigid and brittle account of Westminster's law-making power and purports to defend it against other aspects of the constitution with which it is in tension. It is an ineffectual, and unsatisfactory, way of accommodating parliamentary sovereignty.

6. Concluding Unqualified Legislative Power

Unqualified legislative power is difficult to square with orthodoxy on a number of fronts and, viewing it through the lens of the protective approach, some significant observations can be offered. First, unqualified legislative power represents a competence test that sits uncomfortably with the devolution settlement more widely. It is in tension with the power devolved institutions clearly possess to legislate in vacuums left (intentionally or otherwise) by Westminster, as well as Westminster's exposure to political pressure. It does not, as such, appear easy to reconcile with a settlement predicated on facilitating the enactment of different legislative choices within the UK. Second, to the extent that the Court's account of unqualified legislative power also purports to be, or tells us anything about, an account of parliamentary sovereignty, it is similarly problematic, inverting orthodoxy and painting that principle as, again, largely irreconcilable with the devolution scheme (as well as with the HRA and EU membership). Third, it is the result of an extremely narrow reading of the constitutional significance and implications of devolution. The Court's reasoning did not

suggest that the autonomy of the devolved institutions is protected by any principles or considerations of the sort from which *Westminster* clearly benefits. Neither did the Court appear to accept that anything in the devolution settlement requires a more tempered reading of s 28(7), a view that neglects important parts of that framework.[100] This narrow reading extends throughout these judgments and expresses itself in other ways too.[101] Indeed, despite the good practical—as well as principled—reasons to *avoid* reading s 28(7) in such an expansive way , and despite the clear problems with its course-altering approach, the Court does not seem minded to interpret that provision in a way that offers Westminster's legislation less 'protection' in exchange for a richer (and more coherent) account of devolution, perhaps because it does not consider that unqualified legislative power *can* be balanced in this way, or perhaps because of the asymmetrical account of the constitution unqualified legislative power necessarily implies.

In sum however, unqualified legislative power serves as an important warning. That concept demonstrates that an accurate account of the territorial constitution, necessary for the satisfactory accommodation of parliamentary sovereignty, is only possible if the flexibility inherent in the sovereignty principle is recognised. A more flexible view of parliamentary sovereignty—and the aversion to constructing analogous principles which do not share that flexibility—is important for devolution to realise its 'constitutional purposes'[102] within a 'constitution [that] is dominated by the sovereignty of Parliament.'[103] A more inflexible, brittle conception of sovereignty, or the construction of other principles—like unqualified

[100] Kilford, 'Interpreting the Devolution Statutes' (n 19).

[101] Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 19).

[102] McHarg, 'The Contested Boundaries of Devolved Legislative Competence' (n 1) 2, 21.

[103] *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [104] (Lord Hope).

legislative power—which protect Westminster's legislation from devolved interference can undermine the devolution framework, flatten its normative credentials and inhibit the exercise of law-making power under it.

Treaty Incorporation also demonstrates why approaching s 28(7) (or similar 'sovereignty' or 'competence' clauses) as dormant, largely symbolic or affirmatory, but legally innocuous, provisions is necessary. Reading them as specific, additional competence limitations has damaging implications, undermining the rest of the devolution statutes, even when the *grant* of competence is an expression of legislative sovereignty which should be given effect by the courts. Adopting a dogmatic approach to Westminster's legislative power, as the Court clearly does in *Treaty Incorporation* leads to an inaccurate, flawed and problematic account of devolution, as well as deviating from established legal principles.

If parliamentary sovereignty is to be accommodated *within* the UK's territorial constitution, devices for achieving that accommodation must reflect constitutional reality. Accordingly, such accommodations cannot be constructed as brittle, unbending rules with which the devolution framework cannot survive interaction. For them to be constructed in this way undermines Westminster's intention in enacting the devolution statutes in the first place and suggests that accommodation *within* the territorial constitution is impossible. The alternative, under the reconciliatory approach, is not only a principled approach—rooted in giving effect to the legislative scheme itself and respecting the devolved institutions it creates—but it is a pragmatic one too. Viewing parliamentary sovereignty in flexible terms is necessary, as the Court demonstrates, for EU membership and the HRA to be viewed as compatible with constitutional orthodoxy and, on that basis, sustainable. The exigencies of contemporary government, and that desire to give effect to the sovereign Parliament's expression, require that these schemes are sustainable and constitutionally palatable. To view the European Communities Act 1972 (even though it is no longer in force) or the

HRA as overtly incompatible with sovereignty not only calls such schemes (and their analogues) into question in the eyes of certain critics, it also calls their workability *at all* into question (particularly jarring given that 'workability' is one of the few principles of devolution the Court *have*, though inconsistently, recognised in the devolution context).[104] If Westminster *cannot* have legislated in the way it was thought to have, then these kinds of frameworks appear to be absent foundation.

Even, however, beyond the pragmatic argument, there is a deeper one: the approach adopted in *Treaty Incorporation* has no real roots in doctrine. Any argument, aside from workability and pragmatism, that the Court's depiction of sovereignty in *Treaty Incorporation* is the *right* one will face the difficult task of reconciling that view with the UK's constitutional law as it has been for some time. As previous chapters have demonstrated, whereas the reconciliatory approach's intellectual defensibility was bolstered by the weight of recent history, the protective approach is novel, unconventional and a departure from orthodoxy. That might be welcome, but in that case its incoherence with constitutional law canon should be acknowledged, rather than ignored or misrepresented.

In a way, these cases—*Treaty Incorporation* especially—are microcosms for the protective approach in practice, and its dangers. They construct a rigid protection for Westminster's legislative authority, and goes on to secure it against devolved interference. This emphasis on Westminster, and the absence of symmetrical attention to the principles of devolution is significant enough. But the result is an unconvincing scheme which is incompatible with orthodoxy, and which appears to misrepresent much of the devolution framework. *Treaty*

[104] Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 19). *C.f.*, *Martin v Most* (n 52).

Incorporation, viewing the constitution through the protective approach, gives credence—particularly as far as its conflation of sovereignty and unqualified legislative power is concerned—to the view that divergence should be viewed with suspicion or opposed if parliamentary sovereignty is to be meaningfully accommodated: Either sovereignty directly justifies this aversion to divergence, or provisions intended to reflect it do, and there is nothing in devolution that can point to any other conclusion.

Not only is this an inaccurate account of constitutional practice, but it is also a mischaracterisation of the normative interplay between devolution and parliamentary sovereignty. This kind of asymmetrical constitutional reasoning serves to subordinate the devolved institutions, exacerbating the normative distinctions between the devolved and central institutions which are otherwise acknowledged but ameliorated in the text of the devolution framework and its judicial interpretation. The House of Lords Constitution Committee has pithily recognised that 'the Supreme Court [has] used section 28(7) *to draw a clear distinction between the sovereignty of the UK Parliament and the limited authority of the Scottish Parliament.*'[105]

There is another example of this protective approach, with similar consequences: competence constriction. Like unqualified legislative power, competence constriction is not necessarily a direct invocation *of sovereignty*. What renders competence constriction a recognisable member of the protective category, however, is its approach to the relationship between Westminster's legislative freedom and that of the devolved legislatures, which it views in brittle, zero-sum terms. Competence constriction can be framed as an attempt to preserve the former against incursions entailed in the latter, and as a response to arguments

[105] House of Lords Select Committee on the Constitution, *Respect and Co-Operation: Building a Stronger Union for the 21st Century* (HL 2021-22 142) para 79.

that the scope, potency or structure of devolved law-making power undermines Westminster's sovereignty. Such a view fails to recognise that parliamentary sovereignty's flexibility can be embraced to facilitate a richer and more accurate account of devolution, and conceives of parliamentary sovereignty as a principle that is overtly intolerant of divergence, rather than (more appropriately) concerned with—and accommodated by—the devices explored in chapter 3. To consider the exclusion of the devolved legislatures from certain matters, or the diminishment of their legislative power, as necessary to secure parliamentary sovereignty is, it will be argued, misguided. As the next chapter will argue, competence constriction is an inappropriate means to secure the accommodation of parliamentary sovereignty.

Chapter 5

The Protective Approach (II):

Competence Constriction as an Inappropriate Means of Accommodating Parliamentary Sovereignty

1. Introduction

Unqualified legislative power has illustrated some of the features of, and problems with, the protective approach to accommodating parliamentary sovereignty. In place of the reconciliatory approach's more pragmatic balancing exercise between the demands of parliamentary sovereignty and of devolution, unqualified legislative power offers an asymmetric and brittle conception of Westminster's legislative power which is difficult to reconcile with core elements of devolution as it functions in the contemporary constitution. At worst, it is a mechanism through which devolution can be significantly misrepresented and undermined. Further, unqualified legislative power's connection to, and equivocation with, parliamentary sovereignty is misconceived. These observations called into question unqualified legislative power's appropriateness as a means to secure the accommodation of parliamentary sovereignty.

This chapter considers a second instantiation of the protective approach: a phenomenon described as competence constriction. Its argument mirrors that levelled against unqualified legislative power in the previous chapter: that competence constriction has the potential to undermine, and is difficult to reconcile with, the core components of devolution, and possesses only an illusory connection with parliamentary sovereignty. Its mischaracterisation of the constitution in which it sits means competence constriction

cannot be understood as an appropriate means of accommodating parliamentary sovereignty within the UK's territorial constitution.

By way of introduction, it is worth reiterating some important matters. First, Westminster possesses, as a matter of law, competence over every policy area, whether devolved or not. Legislative 'devolution' describes the conferral upon other legislatures of *supplementary* (but not exclusive) powers in certain policy areas. The rules restricting Westminster's continuing engagement in these devolved areas are political in character and do not, therefore, abrase, qualify or even engage the sovereignty principle (as that principle is properly understood). These rules (principally the legislative consent convention) might go to the *wisdom* or political responsibility of legislating in devolved areas, but they do not condition Westminster's legal *power* to do so. It is that *power* which is relevant for parliamentary sovereignty, as well as the consequent contingency of devolution itself.

Second, there is no general rule that Westminster's *legislation* has legal supremacy or primacy. In other words, devolved legislation is not disapplied, repealed or otherwise conditioned by Westminster legislation enacted beforehand. The presence or absence of Westminster legislation in a devolved area has no effect *per se* on devolved competences in that area. When the devolved legislatures legislate in an area covered by Westminster legislation, the ordinary rules of implied and express repeal apply and Westminster legislation is not, in general, protected against devolved interference. Westminster's choice to legislate within a certain policy area does not pre-empt or oust devolved competences in that same area.

Third (and relatedly), the devolved legislatures can make law of the highest order. Westminster *is* constitutionally supreme in the sense that it possesses parliamentary

sovereignty, but within their competences the devolved legislatures can make law of the same normative status as Westminster legislation.[1]

Fourth (and consequently) the devolution settlements rest upon a system of 'dynamism', a term which describes the way in which Westminster and devolved legislation interacts. It is, in particular, the capacity of the devolved legislatures to repeal and amend Westminster legislation—so far as to do so is within their competences—which allows the full breadth of the devolved institutions' competences to be realised.

Finally, it is therefore the *scope* of devolved competences, provided by Westminster in the devolution statutes, that is axiomatic for the settlement, providing the limits of this dynamism, and the boundaries within which the devolved legislatures can make law.[2] The important role played by the competence limits is emphasised in the case law by the pre-eminence of legal certainty and mechanisms of accountability.[3]

These facts, it is argued, describe some of the most important features of devolution, and illuminate the distinctions between the two accommodative approaches explored in this

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[1] *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 [46] (Lord Hope): 'Acts that the Scottish Parliament enacts which are within its legislative competence enjoy… the highest legal authority.'

[2] Although subject also to exceptional common law limitations, the Court in *Continuity Bill* said that such limitations did not represent *competence* limitations, having different implications: *In re The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1 [26]; Aileen McHarg and Christopher McCorkindale, 'The Supreme Court and Devolution: The Scottish Continuity Bill Reference' (2019) 2 Juridical Review 190, 196.

[3] See Nicholas Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (2021) 26 Judicial Review 321.

thesis, which vary in their capacity to acknowledge them. These facts are themselves reflected in (among other things) the (somewhat variably recognised) constitutional significance of devolution, the institutional respect which those institutions are owed, and they represent the essential componentry necessary for ensuring devolution's workability as an effective and meaningful scheme of government.[4]

Competence constriction describes the ways in which legislative power allocated to the devolved institutions is narrowed or tightened, or—where the formal scope of competences remains the same—where the exercise of those competences is obstructed, impeded or inhibited. Competence constriction therefore has two dimensions. The first refers to a reduction in the *scope* of devolved law-making power, meaning the narrowing of the areas in which the devolved institutions are competent to enact legislation. The second concerns the architecture, and structures, by which legislative competences are secured and given effect. This second dimension refers, for instance, to the relationship between devolved legislation and Westminster legislation, and the rules governing the *exercise* of devolved competences or the guarantees *for* their effectiveness. An alteration in the status of devolved legislation, conditions with which it would need to be consistent in order to be effective, restrictions upon the routes by which to vindicate the lawfulness of devolved legislation or the introduction of a UK ministerial veto, would not necessarily go to the bare *scope* of devolved legislative power, but would have implications for the ways, and extent to which,

[4] See e.g., 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); Jo Hunt, 'Subsidiarity, Competence, and the UK Territorial Constitution' in Oran Doyle, Aileen McHarg and Jo Eric Khushal Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021); House of Lords Select Committee on the Constitution, *Respect and Co-Operation: Building a Stronger Union for the 21st Century* (HL 2021-22 142).

that power is secured and the freedom with which it can be exercised. Some forms of competence constriction, rather than merely narrowing areas in which the devolved legislatures can make law, might *cut across* their competences or more conceptually restructure the allocation of legislative power in a way that—as the name suggests—'constricts' devolved law-making power.

These two dimensions are worth analysing as part of the same phenomenon because they represent different sides of the same conceptual coin: that is, devolved legislative power. An analysis of devolved legislative power concerned only with its extent, rather than also its potency or the conditions upon its exercise would be incomplete. A *power* to enact legislation within a certain area, but which is exercisable, or effective, only where certain demanding conditions are met, is a less potent competence than one which is not subject to those kinds of (architectural) limitations.

Further, this broader analytical lens also facilitates the observation of practices and devices which might be neglected if a narrower definition of competence constriction were adopted. As will be seen, it is possible to argue that devolved law-making power is left undisturbed so long as the *scope* of that power is unaltered. That view, however, is predicated on a narrow lens rejected here because it is unable to recognise alterations to the structure of the settlement which have implications for the *reality* of competences, even where their scope remains technically unchanged.

Constriction therefore does not merely refer to the limiting of *de jure* competences available to the devolved legislatures (for example through the addition of further 'reserved matters' or 'protected enactments'). This is because there are ways in which devolved legislative freedom can be restricted *without de jure* competences appearing to be directly affected.

Some forms of constriction inhibit the *de facto* legislative freedom of the devolved institutions *within* their competences.

Neither can competence constriction refer to the 'growth' of legislative power by Westminster. As has already been noted, Westminster's *de jure* competences within devolved areas remain unlimited. The important definitional question for competence constriction is the effect a certain measure has on devolved legislative freedom. On that basis, removing constitutional or political rules or principles (like the legislative consent convention) which condition Westminster's exercise of its powers in devolved areas—or narrowing the instances in which such principles are accepted as engaged—*might* be captured by constriction where that has a meaningful diminishing effect on devolved law-making power. Similarly, constriction is alert to the growth of UK *executive* powers within devolved areas, where this has that same consequence.

Competence constriction is, accordingly, a broad concept. Sometimes it might simply refer to an additional restriction on devolved competences, but it also captures (for example) a reduction in the occasions on which devolved legislation can be effective, an alteration in the way that it can interact with Westminster legislation, or the imposition of additional burdensome obligations which make the exercise of legislative power more difficult.

Competence constriction is also, by definition, a 'centralising' phenomenon: it inhibits the scope or exercise of devolved law-making power, without necessarily conditioning the scope—because it *cannot*—or exercise of Westminster's law-making power. It therefore shifts the constitutional balance, at least subtly, in favour of the centre and at the expense of the periphery. Because it is a broad phenomenon, even if it is generally 'centralising,' competence constriction may capture certain phenomena or developments which are nonetheless compatible with the fundamental characteristics of devolution set out above.

It is possible for Westminster to legislate within devolved areas consistently with the core character of the settlement (and, again, devolved institutions have requested such legislation).[5] Similarly, it must be possible for certain areas of policy to be added to the list of reserved matters, or for certain enactments to be 'protected' without necessarily undermining basic structure underpinning devolution.[6] These undertakings might be *in tension* with devolution's fullest operation, or in tension with devolved interests, but will not always and invariably be incompatible with the very nature of devolution itself.

In light of this, the argument of this chapter is two-fold. First, although competence constriction is not *invariably* incompatible with the fundamental character, or basic structure, of devolution, two examples demonstrate that, in practice, it can—and is likely to—be. The two examples that are discussed to illustrate this are (i) the European Union (Withdrawal) Act 2018 (EUWA), and (ii) the United Kingdom Internal Market Act 2020 (UKIMA). These two examples are expressions of the deeper kind of competence constriction which, rather than merely reallocating legislative competences, *reconfigure* the way that those competences work, and do so in a way that *is* incompatible with the core assumptions underpinning the devolution framework. Each of these statutes (to differing degrees) alters the relationship between the devolved legislatures and the UK's central institutions in a way that is—like unqualified legislative power—simply difficult to reconcile with the essential assumptions which underpin, and define, devolution. These

[5] See House of Lords Select Committee on the Constitution, *Respect and Co-Operation: Building a Stronger Union for the 21st Century* (n 4) para 121.

[6] An example of this can be found in s 11 of the Scotland Act 2012, which retroactively (s 11(2)) added Antarctica to the list of reserved matters in Schedule 5 to the Scotland Act 1998. 'The devolution of Antarctica… was clearly an oversight': David Torrance, 'Reserved Matters in the United Kingdom' (House of Commons Library 2019) Briefing Paper CBP 8544 15.

examples demonstrate that competence constriction is not an appropriate means of accommodating parliamentary sovereignty within the UK's territorial constitution, being irreconcilable with the latter.

Second, this chapter argues that it is unnecessary to engage in competence constriction in order to accommodate parliamentary sovereignty because the scope of devolved competences (whether broad or narrow) do not, in the first place, threaten parliamentary sovereignty as that principle is properly understood. Again, like unqualified legislative power, it appears at first glance that competence constriction protects Dicey's negative aspect and might appear to augment Westminster's legislative freedom. However, in reality, competence constriction has at best an illusory connection with parliamentary sovereignty. Furthermore, parliamentary sovereignty does not necessitate the normative subordination of the devolved institutions in the way that competence constriction sometimes provides.

The argument presented here is that parliamentary sovereignty does not necessitate, nor does its accommodation supply a justification for, competence constriction. Where it *is* seen as doing so, that observation is merely a function of an inappropriately protective approach to parliamentary sovereignty. Parliamentary sovereignty can only necessitate or justify competence constriction if it is viewed in overly broad, brittle and fragile terms, and if care is not taken to accurately reflect the territorial constitution within which that sovereignty can be accommodated.

This chapter, therefore, mirroring the approach of the previous chapter, argues that competence constriction is an inappropriate means of securing the accommodation of parliamentary sovereignty within the territorial constitution for two reasons: First, it is inconsistent *with* the territorial constitution itself. It fails to recognise the fundamental character of devolution, normatively subordinating the devolved legislatures incompatibly

with the basic structure, constitutional purposes and practical assumptions which underpin that settlement. It therefore does not accommodate parliamentary sovereignty *within* but, rather, at the expense of the UK's territorial constitution. Second, it is doctrinally incoherent: parliamentary sovereignty makes no claim to the exclusive possession of competences and is capable of tolerating legislative divergence in a way that does not call for competence constriction.

Despite these weaknesses, it is necessary to consider competence constriction as a potential means of accommodating parliamentary sovereignty for two principal reasons: the first reason is that, as was seen in earlier chapters (and will be reiterated here) there is a school of thought that elides, or closely associates, parliamentary sovereignty with a unitary conception of the constitution. Although the latter is a broad category of state-forms,[7] it is clear that it is one in which *meaningful* devolution fits uncomfortably. Competence constriction, like unqualified legislative power, possesses a *prima facie* connection with parliamentary sovereignty and purports to augment Westminster's legislative freedom. Second, this connection is implicit, following as a natural solution to the threats some argue devolution presents for parliamentary sovereignty. Even if that connection does not survive scrutiny, the claim or perception that devolved competences necessarily have a corrosive effect on parliamentary sovereignty (a claim that will be explored) implies that competence constriction is a suitable mechanism for repairing that damage. Further, constricting competences through Westminster legislation is at the very least a reflection of a more activist or assertive way in which that sovereignty can be wielded within the constitution, unconditioned by devolution, a hallmark of the monocular approach under the protective model. The question explored by this chapter, therefore, is whether competence

[7] Neil Walker, 'Beyond the Unitary Conception of the United Kingdom' [2000] Public Law 384.

constriction *is* a necessary and effective means of accommodating parliamentary sovereignty within the territorial constitution. It is argued that it is not.

This chapter is set out in the following way. Its task in section 2 is to illustrate how a rigid account, at the core of the protective approach, sees certain structural elements of devolution, and the distribution of particular competences to devolved institutions, as incompatible with parliamentary sovereignty. Then, in section 3, this chapter considers, through an analysis of the two examples noted above, what competence constriction—the natural resolution for that perceived incompatibility—means for the territorial constitution. It will be recalled that the two metrics used to measure whether a given device, such as competence constriction, is an appropriate or satisfactory means by which to secure the accommodation of parliamentary sovereignty within the UK's territorial constitution are (i) the extent to which it reflects the fundamental character of devolution, and (ii) the coherence of its depiction of, and connection with, the sovereignty principle itself. This section considers the first of these metrics, arguing that competence constriction paints an inaccurate, altered picture of the UK's territorial constitution, failing to reflect the core characteristics of devolution and exaggerating the normative distance between the relevant legislatures. The second metric is then examined in the final part of the chapter—section 4—which argues that competence constriction makes no contribution to the accommodation of parliamentary sovereignty because its adoption presupposes a doctrinally unsound and unorthodox conception of that constitutional principle.

2. The Perceived Tension Between Devolved Law-making Power and Parliamentary Sovereignty

Neil Walker writes that '[t]he unitary conception… [of the UK] is parasitic upon the doctrine of parliamentary sovereignty'.[8] Indeed there is a school of thought that the decentralisation of competences to the devolved institutions is *per se* inconsistent with parliamentary sovereignty or that, at the very least, the scale and significance of those competences has some bearing on Westminster's sovereignty. The proper accommodation of that sovereignty, on this view, therefore requires (or at least benefits from) the constriction of devolved competence. On this view, the retention of Westminster's legislative power in devolved areas coupled with the 'delegative' model of devolution, advanced under the reconciliatory approach, are insufficient and unsatisfactory accommodations for the sovereignty principle.[9]

This perspective can have different emphases: for example, it might depend on the claim that parliamentary sovereignty is *in practice*, if not *in theory* undermined by devolution[10] (for instance, because of the creation of different centres of political power or devolution's offering support for alternative constitutional hypotheses). Or it might focus on the capacity of devolved legislatures to set aside Westminster's legislation, even though they are empowered to do so *only* in ways acceptable to Westminster. In either case it is, to some

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[8] ibid 387.

[9] 'Constitutionally, then, the Scottish Parliament will be subordinate. Politically, however, unlike other statutory bodies such as local authorities or public corporations, it will be anything but subordinate. For the Scotland Act creates a new locus of political power.': Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (2008) 70 The Political Quarterly 185, 185.

[10] See generally, Robert Hazell, 'Westminster: Squeezed From Above and Below' in Robert Hazell (ed), *Constitutional Futures: A History of the Next Ten Years* (OUP 1999).

critics, the core and definitional features of devolution *itself*, and the meaningful divergence it facilitates, which are incompatible with parliamentary sovereignty, even if these critics might disagree on the changes which are needed to resuscitate or rehabilitate that sovereignty (for instance, whether devolved competences need to be returned, or whether their effect on Westminster legislation needs to be limited).

This mirrors the observation of some writers that the mere possession of certain competences by the EU was considered antithetical to Westminster's sovereignty,[11] or that it was the *primacy* of EU law (or domestic law derived from it) that was problematic. In that context, parliamentary sovereignty's proper accommodation could be argued to necessitate a diminution of the scope, status and/or potency of EU-derived law.[12] Similarly, on this account parliamentary sovereignty is seen as incompatible with, and perhaps therefore warrants the overriding or curtailing of, devolved law-making power.[13]

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[11] 'The notion of sovereignty that drives Euroscepticism in Britain is a peculiarly absolutist one… state power must be concentrated in a single point or it is not sovereign at all'. Martin Sandbu, 'What Is Sovereignty?' *Financial Times* (7 January 2021) <https://www.ft.com/content/8c0aaf62-7a34-4afc-82e5-2b14d1ae342d> accessed 4 December 2023.

[12] For example one of the main benefits of the proposed Brexit Freedoms Bill was its '[a]sserting the sovereignty of Parliament by removing the supremacy of retained EU law over UK law in our legal system'. Prime Minister's Office, 10 Downing Street, 'The Queen's Speech 2022' 51. Prime Minister's Office, 10 Downing Street and The Rt Hon Boris Johnson MP, 'Prime Minister Pledges Brexit Freedoms Bill to Cut EU Red Tape' (*Press Release*, 31 January 2022) <https://www.gov.uk/government/news/prime-minister-pledges-brexit-freedoms-bill-to-cut-eu-red-tape> accessed 15 September 2022.

[13] Sandbu (n 11). McCorkindale finds that 'as officials had feared in 1978 – the prospect that devolution might undermine the sovereignty of the Westminster Parliament itself was given credence by Lord Steyn… in *Jackson*…'. Christopher McCorkindale, 'Devolution in Scotland and the Supreme Court: A Question of Interpretation' (2020) 50 Materiali per una storia della cultura giuridica 67 (pre-publication, 2).

Such an approach is 'protective' because it meets the two tests formulated earlier in this thesis: (i) its rigid, brittle conception of the sovereignty principle, or of the nature of Westminster's legislative power; and (ii) the pre-eminence it attaches to that principle, such that constitutional architecture incompatible with that conception should be rejected. It is brittle in its conception because it sees Westminster's legislative power as affected by the scope and/or even delegative architecture of the devolution of competences, reflecting a misguided treatment of the sovereignty principle, and (archaically) using 'the unitary state to describe and underscore parliamentary sovereignty'.[14]

The protective approach views some conditions on Westminster's legislative power, which the reconciliatory approach considers are—or can be rendered—consistent with parliamentary sovereignty, as unsalvageable *qualifications* to that sovereignty and incompatible with the principle. It is an approach which, following from an apparently uncompromising attachment to Dicey's negative aspect, considers the amendment or repeal of Westminster's legislation by the devolved legislatures as in tension with parliamentary sovereignty, even where Westminster provides that power, and even where certain accommodations for its sovereignty are provided within that empowering framework (for example by guaranteeing that Westminster's power to legislate in devolved areas remains intact as a matter of law).

The protective approach can also be observed as considering the breadth and potency of devolved law-making power as incompatible with parliamentary sovereignty, taking issue

[14] 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?' (2022) 10 Territory, Politics, Governance 696, 702.

with—for example—the absence of any requirement that devolved legislation be consistent with Westminster legislation. Bogdanor, in particular, appears to adopt just such a protective approach. He expresses dissatisfaction with the delegative model, suggesting that it is insufficient to secure the accommodation of parliamentary sovereignty, and that it cannot ensure that the devolution of certain competences does not deprive that principle of its meaning. For example, Bogdanor, suggesting that federalism is incompatible with sovereignty, writes that although 'there is of course a clear conceptual distinction between federalism and devolution: the one divides sovereignty, the other merely delegates it… this may be more a difference of form than of substance.'[15]

Bogdanor's criticisms have three obvious components, which are inter-woven, and which are worth considering here. The first is that devolution provides oxygen to alternative (UK) constitutional worldviews in which parliamentary sovereignty is not a dominant feature, or perhaps even a feature at all; the second is that Westminster's failure, or choice not to, legislate within devolved areas amounts to an *abdication* of that responsibility to the devolved institutions (something which is also in part responsible for the first concern); and the third is the unique danger posed by the qualities of the devolved legislatures: in particular that they *are* legislatures, and the breadth of their competences.

The first of his criticisms draws on the perceived purposes of the different devolution settlements, which he considers make their permanence difficult to dispute (at least as a

[15] Vernon Bogdanor, 'Our New Constitution' (2004) 120 Law Quarterly Review 242, 251. 'In normal times, the distinction between devolution and federalism seemed a distinction without a difference. If, however, Westminster found it difficult to exercise its supremacy over Northern Ireland, how much more difficult its task is likely to be vis-à-vis Scotland.': ibid 253.

matter of politics).[16] He suggests that, whatever the purchase of the delegative model of devolution in England, devolution is not viewed in those terms elsewhere in the UK,[17] a pluralism which is only more obvious in light of Brexit.[18]

As to the second, (and significantly contributing to his first criticism) Bogdanor uses examples which suggest that the growth of devolved powers has meant, in practice, a reduction in the exercise of Westminster's power in devolved areas, with political actors ruling out discussing or considering matters within devolved competences.[19] He argues that:

> 'Devolution' may be defined as a delegation of power from Westminster to another body. In practice, however, the consequences of the Scotland Act and the

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[16] Bogdanor's emphasis is placed on interpretations of the purposes of the different devolution settlements which are contestable: 'While it is normally a fairly easy matter for Parliament to assert its will over local authorities, and even, as in 1985, to abolish a whole tier of local government--the GLC and the metropolitan authorities--that will hardly be the case with the devolved bodies. The prorogation and ultimate abolition of the Northern Ireland Parliament in 1972 does not constitute a precedent either, since, as we have seen, that Parliament was not set up to placate a centrifugal nationalism, but, on the contrary, to make it easier for ministers to cede authority over a part of the United Kingdom for which many had no particular love'.: Bogdanor, 'Our New Constitution' (n 15) 256.

[17] 'Seen from Westminster, devolution is conceived as a delegation of power, a delegation which allows the sovereignty of Parliament to be retained intact. But, in all three of the non-English parts of the United Kingdom, the view is quite different'.: Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 253.

[18] 'What Brexit has revealed is that the United Kingdom, a multinational state comprising four territories, has not one constitution but four different constitutions, or perhaps four different interpretations of the constitution depending on whether it is viewed from Westminster, from Holyrood, from Cardiff Bay or from Stormont'.: ibid 249.

[19] Bogdanor, 'Our New Constitution' (n 15) 255.

> Government of Wales Act go much further. The Scotland Act, in particular, in practice *divides* the power to legislate for Scotland between Westminster and Edinburgh, thus creating a quasi-federal relationship between Westminster and the Scottish Parliament.[20]

Although recognising that 'Westminster retains full power to legislate for a devolved body',[21] Bogdanor nonetheless defines devolution not as the *sharing* of competences with the devolved institutions, but as, in practice, 'the *transfer* of powers from Parliament and government to directly elected sub-national bodies'.[22]

On Bogdanor's account, Westminster's competences within devolved areas *need* to be exercised for parliamentary sovereignty to be meaningfully accommodated: 'Political authority', he explains, 'moreover, depends upon its regular and continuous exercise; it means something more than a mere incursion during a pathological crisis'.[23] In this way, Bogdanor's is a call for Westminster to legislate within devolved areas and not, as a matter of practice, to exclude itself from devolved matters. On this point Bogdanor notes that

> [i]t may be objected against the argument that Westminster has lost its sovereignty, that ministers do not normally answer questions on matters which are the

[20] ibid 258 (emphasis added).

[21] Vernon Bogdanor, 'Devolving and Not Forgetting' in Richard Johnson and Yuan Yi Zhu (eds), *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart Publishing 2023) 291. Although this is erroneously said to be reflected in section 29 of the Scotland Act 1998.

[22] ibid 291 (emphasis added).

[23] Bogdanor, 'Our New Constitution' (n 15) 256.

> responsibility of local authorities, and yet it is not argued that Parliament is no longer sovereign over local authorities.[24]

However, in his third criticism, Bogdanor considers that the devolved legislatures raise 'awkward questions of sovereignty'—and, significantly, ones that do not arise in relation to local authorities—because of their character. In part, this is because they are *legislatures*, in contrast to other forms of devolution in which those questions do not arise.[25] Importantly, Bogdanor makes the following claim:

> In England, the sovereignty of the Westminster Parliament still corresponds to a genuine supremacy over 'all persons, matters and things', to cite, once again, the words of the Government of Ireland Act, 1920. In Scotland, by contrast, it seems to mean little more than a vague right of supervision over the Scottish Parliament, together perhaps with a power in some pathological situation, such as afflicted Northern Ireland in 1972, to abolish that Parliament. Parliament's sovereignty over England still corresponds to a real power to make laws affecting every aspect of England's domestic affairs. In Scotland, by contrast, it no longer corresponds to such a real power, but to a power--fairly nebulous in practice, one may suspect--to supervise another legislative body which enjoys the real power to make laws over wide areas of public policy. Except perhaps in times of crisis, the formal assertion

[24] ibid 255–6.

[25] 'Devolution in England was emphasised by Boris Johnson as part of his levelling up agenda; and since devolution to the combined authorities and mayors is non-legislative, it does not raise the awkward questions of sovereignty that are raised by devolution to the non-English parts of the UK': Bogdanor, 'Devolving and Not Forgetting' (n 21) 295.

> of Westminster's supremacy will become empty since it will no longer be accompanied by the exercise of real political authority.[26]

This view, however, raises broader questions about parliamentary sovereignty more generally. For example, it is surely perfectly orthodox to suggest that Westminster's sovereignty is not undermined, and its power to legislate on a certain matter is not impeded, simply because it has not legislated on a certain matter before or has not legislated on that matter for some time. Similarly, as a matter of course Westminster can, and does, legislate within devolved areas and even is sometimes invited to do so by the devolved legislatures.[27] However, Bogdanor's view of the dynamic interaction between Westminster and devolved legislation is quite different, as is apparent when he considers the role of the judiciary in policing the boundaries of competences:

> For, were the Judicial Committee to rule, in a particular dispute, that the Scottish Parliament was acting intra vires, it would be difficult, in practice, for Westminster to override it either by using its sovereignty to legislate for Scottish domestic affairs, or by altering the distribution of powers. For, in such a situation, Parliament would appear to be flouting the judgment of a court on an issue on which Scottish national sentiment might well be engaged. If that is so, then Westminster will in practice come to lose yet another of the characteristics of a sovereign Parliament, the power to make laws from which there is no appeal; and the powers of

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[26] Bogdanor, 'Our New Constitution' (n 15) 256.

[27] 'It has been useful at times for the UK Parliament to legislate for the devolved jurisdictions on devolved matters with consent; indeed, sometimes the devolved administrations have relied on Parliament to do so.': House of Lords Select Committee on the Constitution, *Respect and Co-Operation: Building a Stronger Union for the 21st Century* (n 4) para 121.

> Westminster and the Scottish Parliament will have come to depend upon the decisions of a court, a condition characteristic of a federal system of government.[28]

A judicial decision that a certain Act of the Scottish Parliament is within the Scottish Parliament's competence is not a decision that it is, on that basis, outwith the competence of the Westminster Parliament.[29] The courts have been clear that the *choice*—of either a devolved legislature or Westminster—to legislate within devolved areas is purely a matter of policy regulated only by political (and constitutional) concerns over which the courts have no jurisdiction.[30] Westminster's choice, to take Bogdanor's example, to legislate in a certain area already covered by the Scottish Parliament's *intra vires* legislation is perfectly legally permissible. Furthermore, this depiction of the relationship between Westminster and devolved legislation is incomplete, failing to consider the possibility of Westminster enacting legislation within devolved areas which allows certain devolved policy ambitions to be *more readily* met.[31] In other words, the relationship between devolved and

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[28] Bogdanor, 'Our New Constitution' (n 15) 258.

[29] E.g., *In the Petition of Sooy v Secretary of State for the Home Department* [2023] CSOH 93 [65] (Lord Richardson).

[30] 'It is not for the judges to say whether legislation on any particular issue is better made by the Scottish Parliament at Holyrood or by the UK Parliament at Westminster. How that issue is to be determined has already been addressed by the legislators': *Martin v Most* [2010] UKSC 10 [5] (Lord Hope); *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61, [2013] 1 AC 792 [13] (Lord Hope).

[31] For example, '[i]n [certain] situations the Scottish Parliament will not have all the powers that are needed to make a fully effective reform. So its legislation can take the matter only so far. If it is to be fully effective, the legislation passed by the Scottish Parliament will require to be "topped up" by legislation of the United Kingdom Parliament dealing with any aspects which are beyond its competence': *Martin v Most* (n 30) [79] (Lord Rodger).

Westminster legislation can be constructive, with each supplementing the other, rather than merely adversarial or corrosive.

However, to some extent Bogdanor's criticisms seem to hinge on the mere fact of devolved legislative power, rather than the more testing question of devolved interference with Westminster legislation. In particular, he considers that the devolved legislatures are distinguished from local authorities (and therefore give rise to the sovereignty question) partly on the grounds of the breadth of their competences: 'The Scottish Parliament and the National Assembly of Wales, however, are not local authorities but bodies with powers to legislate over *a wide range of domestic activity*'.[32] When considering an historical example, he similarly argues that '[i]n practice, therefore, *the powers* of the Northern Ireland Parliament came to be very like those of the Parliament of a province in a federal state', 'federal' here denoting a situation *incompatible* with parliamentary sovereignty.[33]

In this way, at least in part, the (scope of the) powers of the devolved institutions, as well as what he sees as the practical exclusion of Westminster from devolved affairs, make it impossible in Bogdanor's view to reconcile devolution and parliamentary sovereignty, and he is not the only author to express this concern.[34] Noting his claim that federalism is incompatible with parliamentary sovereignty, he says that 'Westminster, therefore, is no longer a Parliament for both the domestic and the non-domestic affairs of the whole of the

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[32] Bogdanor, 'Our New Constitution' (n 15) 256.

[33] ibid 253 (emphasis added).

[34] 'Arguably, devolution since 1999 can only be read as a renunciation of the idea of the UK as a unitary state with Westminster as the single locus of sovereignty, and as an embrace of the alternative conception': Akash Paun, 'Sovereignty, Devolution and the English Constitution' in Michael Kenny, Iain McLean and Akash Paun (eds), *Governing England: English Identity and Institutions in a Changing United Kingdom* (OUP 2018) 46.

United Kingdom. It has been transformed into a Parliament for England, a federal Parliament for Scotland and Northern Ireland, and [at that time] a Parliament for primary legislation for Wales.'[35] Indeed, here his suggestion appears to be that the entry of the devolved legislatures into certain areas of domestic policy represents a scheme which, on his view, is incompatible with parliamentary sovereignty. 'It is difficult,' he says 'therefore, to resist the conclusion that Westminster is in practice no longer sovereign over the domestic affairs of Scotland and Wales.'[36] This sentiment has been noted elsewhere, in particular by Martin:

> The sub-British national identities within the Union should amount to no more than mere cultural pageantry. *They are certainly not a basis for challenging Westminster's unfettered authority.* The devolved institutions are to be tolerated because of the present political climate, but their powers are to be checked and contested, and, should the opportunity arise, clipped.[37]

This chapter is concerned, in essence, with precisely that 'clipping' process. Bogdanor's criticisms go to both the scope of devolved competences, and to the architecture of the settlement that gives those competences their potency. It is implicit in Bogdanor's argument that the constriction of devolved competences, in both scope and structure (such as protecting Westminster's legislation from devolved interference)—along with a higher

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[35] Bogdanor, 'Our New Constitution' (n 15) 257 (reflecting position in Wales before it was altered by the Wales Act 2017).

[36] ibid 256.

[37] Ciaran Martin, 'Can the UK Survive Muscular Unionism?' [2021] *Political Insight* <https://journals.sagepub.com/doi/pdf/10.1177/20419058211066522?casa_token=DPcwB86qbS0AAAAA:EGQwHPO_biZDXYBIAW7oFd6odwZ4ot9zwQwx3IRlcLs2a8U6Nx79BrXQSTdRJj990a1ohmcJKxQ> accessed 10 January 2023 (emphasis added).

level of engagement from Westminster in devolved areas—is necessary to accommodate parliamentary sovereignty in light of the inadequacy of the reconciliatory approach to, in his language, 'vindicate its supremacy'.[38] The remainder of this chapter considers and appraises whether constricting devolved competences in this way *is* an appropriate means of securing that accommodation. It makes two core points which flow from its central metrics. First, as the examples of the EUWA and UKIMA demonstrate, competence constriction—especially of the more architectural type—often not only recentralises constitutional power (as might be expected) but can in fact be flatly irreconcilable with the fundamental character of devolution. Second, it argues that constricting devolved competences is an inappropriate means of securing accommodation because it rests upon a doctrinally unsound and unorthodox conception of the sovereignty principle which, properly understood, does not necessitate or depend upon Westminster's exclusive possession of legislative power over certain areas.

Thus, it is argued that the two examples of competence constriction considered here demonstrate why it as a broader notion can be incompatible with the fundamental character of devolution, failing to reflect how it operates in practice and subordinating the devolved legislatures in a way which is incompatible with the assumptions underpinning the dynamism of the settlement. It is also argued that, because the exclusive possession of certain competences does not form part of a compelling or sound understanding of the sovereignty principle, constricting devolved competences is an inappropriate means of securing that principle's accommodation. The upshot of this conclusion is that competence constriction must be understood, analysed and confronted as a matter of policy, rather than as being necessary for the accommodation of the sovereignty principle.

[38] Bogdanor, 'Our New Constitution' (n 15) 255.

3. Two Examples of Competence Constriction's Incompatibility with the Fundamental Character of the UK's Territorial Constitution

This section considers the relationship between the competence constriction—the narrowing, obstructing or inhibiting of devolved legislative power, broadly understood—and the territorial constitution. It uses two examples—the EUWA and the UKIMA—to demonstrate that this practice, particularly where it involves a more structural or cross-cutting reallocation of constitutional power, can fail to accurately reflect core elements of the territorial constitution, amounting to a reconstruction of the devolution settlement. Competence constriction is, perhaps obviously, broadly a 'centralising' practice. However, this section argues that it can actually have far more significant implications for the territorial constitution, being flatly *incompatible* with the devolution framework at a more foundational, existential level. This is because, as these two examples demonstrate, competence constriction can undermine the normative proximity of the devolved institutions, the status of their legislation and their practical workability, including the dynamism of the settlement and the full exercise of their legislative power.

There are two ways in which competence constriction might be incompatible with the fundamental character of devolution. First, it could deprive the devolved institutions of law-making powers that are considered fundamental to its operation, or which reflect some kind of irreducible core. That argument would require its proponents to set out which competences are irremovable without depriving devolution of its meaning because some kinds of incidental or insubstantial constriction—though perhaps undesirable as far as the devolved institutions might be concerned—might nonetheless be compatible with the fundamental qualities of the settlement set out here. This kind of approach, then, would engage with difficult and nebulous questions about the necessary minimum content of devolved competences. Furthermore, particularly given that a devolved institution might

itself seek or pursue a change in competences which deprives devolution of its core elements, it cannot be the case that the devolved institutions themselves unilaterally determine what is or is not consistent with the settlement.

The second way in which competence constriction might be incompatible with devolution's fundamental character is where it represents a reconfiguration of the way that competences are exercised, and the way they interact with, and are affected by, central institutions and legislation. That reconfiguration might not alter the *areas* over which the devolved legislatures can lawfully enact legislation, and therefore does not require an analysis of which competences are 'core' or definitional ones. But it might alter the status of the devolved institutions, the status of their legislation, the dynamism upon which the settlement depends, or the security and freedom which devolved law-making power in those areas is guaranteed. This kind of competence constriction, more focussed on the mechanics of devolved law-making power than merely the matters over which it operates, can have severe implications for devolved legislative freedom, interacting with the core characteristics of devolution as they are set out in this thesis. The two examples considered in this section—the EUWA and the UKIMA—fall into this second category. They represent a reconfiguration of the *way* in which devolution works and do so in ways which are difficult to reconcile with the fundamental characteristics of, and core assumptions underpinning, devolution itself.

Incompatibility with the core characteristics of the devolution settlement is a key weakness of competence constriction as a method of accommodating parliamentary sovereignty. As was apparent in the discussion of unqualified legislative power, however, this failure is a feature of the protective approach more generally. The protective approach's monocular, asymmetric account of the constitution—a focus on Westminster's legislative freedom *at the expense of* devolved legislative freedom—expresses itself in a number of ways in

competence constriction. The exercise of Westminster legislation—and therefore *of* parliamentary sovereignty—*to* constrict devolved legislative freedom without reference to, or consideration for, devolved interests is emblematic of the protective approach's deafness to other constitutional interests. This is especially obvious when it is considered that this process cannot *broaden* the competences available to Westminster. Similarly, it is a brittle account of parliamentary sovereignty in which, as Bogdanor appeared to suggest, that principle imposes an *obligation* to act in defiance of devolved interests, rather than (as the reconciliatory account accepted) merely the *power* to do so, which might be exercised consistently with devolution, facilitated by an account of parliamentary sovereignty that recognised its flexibility.

The first example explored, the EUWA, demonstrates this more rigid approach in practice, which—as already noted—has only become more apparent in light of the UK's departure from the EU. Further, it demonstrates the depth of competence constriction's potential to impact upon the scope and potency of devolved legislative power.

(a) The First Example of Competence Constriction's Incompatibility with Devolution: The European Union (Withdrawal) Act 2018

The UK's departure from the EU represented a significant moment to confront the principled core of the UK's constitution, and the extent and quality of the decentralisation it might be prepared to tolerate.[39] Determining whether powers, previously conditioned by an obligation to legislate compatibly with EU law, but otherwise within devolved

[39] See Paun (n 34).

competence,[40] would be repatriated to the UK level or devolved institutions upon the removal of that obligation would be telling about the centralising trajectory of the UK.[41]

Although this process appears to have initially been conducted on the basis of subsidiarity,[42] Masterman explains how '[t]he legislative management of the processes of repatriation of competence from the EU institutions displayed further centrist tendencies.'[43] Indeed, the legislation itself represented a change in trajectory, being arguably

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[40] 'While macro-economic stabilization is reserved to the centre, there is no provision (except a vague sentence in the Northern Ireland Act) for an internal market. This was provided, instead, by the European regulation and, particularly, the EU Internal Market regime. Since the devolved bodies have wide regulatory competences, notably in environment, food standards and agriculture, it was the EU framework that avoided internal regulatory borders.': Michael Keating, 'Taking Back Control? Brexit and the Territorial Constitution of the United Kingdom' (2022) 29 Journal of European public Policy 491, 494.

[41] See Mark Sandford and Cathy Gormley-Heenan, '"Taking Back Control", the UK's Constitutional Narrative and Schrodinger's Devolution' (2020) 73 Parliamentary Affairs 108.

[42] '…We will work closely with the devolved administrations to deliver an approach that works for the whole and each part of the UK.

This will be an opportunity to determine the level best placed to take decisions on these issues, ensuring power sits closer to the people of the UK than ever before. It is the expectation of the Government that the outcome of this process will be a significant increase in the decision making power of each devolved administration.': Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union* (Cm 9446, 2017) para 4.4-4.5 (emphasis added).

[43] Roger Masterman, 'Brexit and the United Kingdom's Devolutionary Constitution' (2022) 13 Global Policy 58, 65.

'the first time that the scope of devolved powers has been reduced rather than increased.'[44] Masterman explains, further, that 'little evidence can be found of post-referendum attempts to produce a Brexit which enjoys a broad territorial acceptance.'[45]

Tierney notes that simply leaving the EU and removing the relevant obligation would have had a significant impact on the workability of the domestic legal system.[46] Nonetheless, the UK Government's preferred approach fits broadly within the competence constriction framework:

> Despite calls – made forcefully by the Scottish Government – that the repatriation of powers from the EU should be achieved consistently with those areas of competence already held by the devolved institutions, the European Union (Withdrawal) Bill as introduced in 2017 would have rendered the management of all retained EU law the responsibility of the Westminster Parliament in order to ensure regulatory alignment within the UK's internal market.[47]

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[44] Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14 Contemporary Social Science 276, 284. See generally Jonathan Bradbury, 'Welsh Devolution and the Union: Reform Debates after Brexit' (2021) 92 The Political Quarterly 125.

[45] Masterman (n 43) 64. 'The Prime Minister's response was… not to ameliorate concerns relating to Brexit's impact on the devolved bodies, or to engage with them, but to supress their critical voices': ibid 64.

[46] Tierney explains that '[a]s a matter of pragmatics, Brexit does not fundamentally alter devolved competence. As a consequence, without agreement, common frameworks would be simply unworkable since the possibility exists of different and conflicting laws being passed across the UK, leading to the potentially interminable passage of contradictory, tit for tat laws': Stephen Tierney, 'The Territorial Constitution and the Brexit Process' (2019) 72 Current Legal Problems 59, 74.

[47] Masterman (n 43) 65.

The first illustrative example of competence constriction, therefore, can be found in the EU withdrawal legislation, in which some of the core assumptions at the heart of devolution were challenged. Importantly, the EUWA contained provision which allowed devolved legislation to modify retained EU law *except*—and within certain limits[48]—'so far as the modification is of a description specified in regulations made by a Minister of the Crown.'[49] This was a softening of a blanket restriction, proposed in the European Union (Withdrawal) Bill, that 'an Act of a devolved legislature could not modify retained EU law unless the modification would have been within the legislative competence of the devolved legislature before exit day', with UK ministers able to remove these limitations on a case-by-case basis by regulation.[50]

The approach in the first iteration of the Withdrawal Bill, therefore, was a firmly centralising one. As Mullen suggests, 'the proposal to cut down devolved powers may also represent the re-emergence of the unitary state narrative as the underlying assumption of

[48] E.g., 'But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Parliament': Scotland Act 1998 s 30A(2) (inserted by s 12 EUWA).

[49] ibid s 30A(1) (inserted by s 12 EUWA).

[50] Mark Elliott and Stephen Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' [2019] Public Law 37, 53. 'When the Bill was published, clause 11, which became s 12, left to the discretion of the UK Government, through Orders in Council, the power to determine when and how to release areas of legislative competence to the devolved administrations. It was in effect a unilateral, albeit apparently temporary, restriction of the self-rule component of devolved authority': Tierney (n 46) 73.

UK central government both at ministerial and official level.'[51] The later approach represented, instead, a willingness to consider devolved concerns,[52] and the Bill was 'completely rewritten'[53] to reflect some of them.[54] In its subsequent, somewhat softer form, the Act allowed ministers to 'freeze' certain areas of retained EU law in order to protect them from devolved interference. However, although this shift demonstrates a willingness to negotiate with the devolved institutions, it nonetheless represents the aversion to divergence emblematic of the protective approach.[55] For example:

> [These provisions] demonstrated both a concern that devolved competence might be used in a way that diverged from the UK Government's preferred policy; and a desire for the UK Government to have power to override devolved decision making

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[51] Mullen (n 44) 286. This approach, Mullen suggests, will have deep ramifications: 'if UK political elites continue to default to the unitary state perspective and to hoard power at the centre, that will probably increase the likelihood of disintegration in the longer term.': ibid 291.

[52] 'The devolution provisions illustrate again how the Government was willing to transform the published bill radically in light of criticism and in order to secure (at least partial) devolved consent.': Elliott and Tierney (n 50) 55.

[53] Tierney (n 46) 73.

[54] 'Unsurprisingly, claims by the Scottish and Welsh Governments of a Westminster "power grab" swiftly followed. The Bill was subsequently amended to stipulate that the devolved administrations are precluded from amending retained EU law in fields of devolved competence only to the extent specified in regulations by UK ministers. Any regulations limiting devolved competence in this regard must be preceded by consultation with the relevant devolved institution(s). On this basis, the legislative consent of the Senedd was secured, but due to the continued threat of unilateral restriction of the devolved bodies by UK Government ministers (as opposed to the UK Parliament), the Scottish Parliament emphatically withheld its support (by 93 votes to 30) in May 2018. The European Union (Withdrawal) Act 2018 nonetheless received royal assent in June 2018.': Masterman (n 43) 65.

[55] See Explanatory Notes to the European Union (Withdrawal) Bill para 39.

> when it disagrees. The Bill therefore rejected an approach based on negotiation and agreement between different decision-making bodies in favour of centralisation of power in Whitehall and Westminster.[56]

This approach, therefore, as well as being to some extent averse to divergence *at all* is also in tension with the view (although not universally accepted) that the devolved institutions' consent is needed when their competences are altered by UK ministers.[57] Furthermore, it was at odds with the actual devolution system, cutting across the settlement by providing a *ministerial* power to dynamically alter competences in addition to that provided in the statutes themselves. Where the devolution scheme had provided for powers which were devolved and which not, this legislation introduced a new more fluid system which, although in play in Northern Ireland,[58] supplemented the statutory scheme and introduced its novelty into the other devolution schemes.

It is difficult to contend from the position of constitutional *principle* that competences should be constricted in this *way*. Although the devolved institutions were always confined to legislating compatibly with *EU* law, so too was Westminster (at least in practice, unless it took the step, theoretically open to it, of expressly derogating, and certainly as a matter of EU law, and certainly as a matter of EU law). Retained EU law is, however, *domestic* law;[59] this restriction therefore seems to exacerbate the hierarchy between the different

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[56] Scottish Government, 'After Brexit: The UK Internal Market Act & Devolution' (2021) para 40.

[57] See e.g., Civil Service Learning, 'A Devolution Toolkit' (2015) 21.

[58] E.g., Northern Ireland Act 1998, s 4(2).

[59] House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill* (HL 2017-19, 69) paras 88–9. See also Paul Bowers, 'The European Union (Withdrawal) Bill: Devolution' (House of Commons Library 2017) Briefing Paper CBP 8154.

institutions[60] by freeing one institution from limitations that could continue to apply to the other, and to subject the question of which limitations do continue to apply to UK ministerial decision. Of course, the Scottish Parliament *is* subject to limitations not also applicable to Westminster, but many areas covered by retained EU law are *already* within devolved competence. As the Scottish Government has explained: '[t]he actual effect of the Bill, in both its original and final forms, is to constrain existing devolved competence - not as a result of international obligations, but as a result of domestic UK law, including the unilateral exercise of powers by UK Ministers.'[61] Indeed, there are no *international* legal justifications for constricting devolved competence in this way, as there might have been for EU or separation agreement law, and this legislation allows ministers to alter devolved competences on an ad hoc basis. This constraint, therefore, maps across a range of policy areas, restricting competences not on the basis of subject matter, but on the basis of the heritage of the law in question, a formulation which is incongruent with the settlement more broadly.

Further, the exacerbation of the hierarchy between Westminster and the devolved institutions, and the failure to accurately reflect some of the core elements of devolution, or respect the constitutional significance or consent of its institutions, is clear in other provisions of the EUWA. For instance, a provision ostensibly facilitating devolved involvement in the 'freezing' scheme actually allowed UK Ministers to proceed *absent*

[60] See Mark Drakeford, 'Written Statement - UK Government's Analysis of Where They Consider EU Law to Intersect with Devolved Competence' <https://www.gov.wales/written-statement-uk-governments-analysis-where-they-consider-eu-law-intersect-devolved-competence> accessed 8 February 2024.

[61] Scottish Government, 'After Brexit: The UK Internal Market Act & Devolution' (n 56) para 41.

devolved consent:[62] The definition of a 'consent decision' there included a decision to agree a consent motion, to *fail* to agree a consent motion, and a decision to *refuse* a consent motion.[63] Here the notion of devolved consent is arguably emptied of content, despite its role in protecting the devolution settlement and conditioning the exercise of powers that interfere with, or cut across it. This change arguably represents the unilateral remaking of the meaning of a tool, which is fundamental to the scheme, in a way that transforms it and undermines its purpose. This alteration in particular is affecting—rather than *reflecting*—of the devolution scheme, undermining one of its core mechanisms.

In reality, the ministerial freezing power was never used and has now expired. However, the EUWA represents an important turning point in the treatment of competences in three ways: First, the EUWA reflected a growing interest in recentralising constitutional power—of 'know-your-place unionism'[64]—forming part of what Martin described as

> a wide-ranging agenda [which] has seen powers repatriated from Brussels centralised at Westminster, and, more importantly, the exploitation of the vacuum

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[62] European Union Withdrawal Act 2018 s 12(3) provided: 'A Minister of the Crown must not lay for approval before each House of the Parliament of the United Kingdom a draft of a statutory instrument containing regulations under this section unless—

(a) the Scottish Parliament has made a consent decision in relation to the laying of the draft, or

(b) the 40 day period has ended without the Parliament having made such a decision.'

[63] ibid 30A(4); See also The Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, *The Impact of Brexit on Devolution* (5th Report, Session 6, SP Paper 223, 22 September 2022) para 169.

[64] Martin (n 37) 38.

> left by the withdrawal from the EU legal framework to constrain and contest the powers of the devolved governments.[65]

Second, it demonstrates a growing trend of disagreement about the implications of centralising legislation, based perhaps on a narrow characterisation of what devolution actually provides or means in practice (a point that is made more obvious still in the UKIMA). For example, the rhetoric surrounding the EUWA claimed it was an *expansion* of devolved law-making power[66] but, as the Scottish Government has contended, '[i]n fact, these powers were vested in the Scottish Parliament by the Scotland Act 1998; the effect of EU exit was to remove the obligation to comply with EU law in their exercise (an obligation that the Westminster Parliament also had to follow).'[67]

Third, the EUWA began a trend of diffusing constitutional authority and blurring the boundaries between what is devolved and what is not, unlikely to the benefit of the devolved institutions. This, importantly, undermines the axiomatic allocation of devolved powers, as well as their substance.[68] That allocation emphasises legal certainty and

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[65] ibid.

[66] '[T]he effect of the Bill was not fully captured. The Bill and the process of EU exit tended to be framed as returning powers the Scottish Parliament': Scottish Government, 'After Brexit: The UK Internal Market Act & Devolution' (n 56) para 41. '[T]he effect of the Bill was not fully captured. The Bill and the process of EU exit tended to be framed as returning powers the Scottish Parliament': ibid.

[67] Scottish Government, 'After Brexit: The UK Internal Market Act & Devolution' (n 56) para 41.

[68] See especially Aileen McHarg, 'The Contested Boundaries of Devolved Legislative Competence: Securing Better Devolution Settlements' (Bennett Institute for Public Policy and Institute for Government 2023) <https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2023/05/Contested-boundaries-devolved-legislative-consent.pdf> accessed 23 May 2023. Elliott and Tierney, for example, make the point that 'section 12 is likely to transform and make more obscure what has hitherto been a

accountability, and within the boundaries of their competences devolved legislative freedom has historically been significant. These changes are problematic on their own terms, as are the UK central institutions' attempts to perhaps *evade* rather than *confront* the constitutional implications of its constriction of devolved power.[69]

For these reasons, it is arguable that the kind of competence constriction represented by the EUWA is at odds with some of the foundational components of the devolution settlement. This is not simply because it is centralising in a loose or broad sense, but, rather, because of the *way* in which power is centralised. For instance, the diffusion of the boundaries of constitutional power and the failure to recognise constriction where it exists, are both in tension with a framework that has generally been recognised as being 'coherent, stable and workable'.[70] Limiting the devolved legislative freedom *within* the otherwise axiomatic boundaries of competences, and subjecting those competences to ministerial oversight unmoderated by respect for devolved consent are similarly abrasive of orthodox conceptions of devolution and the breadth of legislative freedom within competence.

Furthermore, it is an asymmetrical process. As restrictions on Westminster's engagement in devolved areas fall away, or Whitehall is permitted to enter certain devolved areas more freely, or those devolved areas are reduced in scope, this model implies that particular matters are less fit for unsupervised devolved legislation, being more properly possessed or

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fairly straightforward 'reserved powers' model for Scotland (and increasingly for Wales per the Wales Act 2017)': Elliott and Tierney (n 50) 55.

[69] Putting the point in very strong terms, Michael Russell MSP noted, '[t]his is not a big bang abolition of the Scottish Parliament. Westminster has instead put in train the slow demise of devolution in the hope that no-one will notice'.: Scottish Government, 'After Brexit: The UK Internal Market Act & Devolution' (n 56) 1 (Michael Russell MSP).

[70] *Inter alia*, *Imperial Tobacco* (n 30) [14] (Lord Hope).

managed by the UK's central institutions. In so doing, it gives a sovereign 'colour' to particular policy matters, rather than prioritising pragmatism or subsidiarity.

In part, the failure to recognise the implications of this model for devolution is a result of a narrow construction of the devolution settlement, and a reduced attentiveness to devolved interests. Such an approach, which views these kinds of changes to devolved competence in normatively arid, economic or policy terms, has indeed developed. A letter concerning the UK Internal Market White Paper from Baroness Taylor of Bolton, Chair of the House of Lords Constitution Committee to Lord Callanan, Minister for Climate Change and Corporate Responsibility, makes this point aptly:

> A central issue the Government faces with this white paper is that it attempts to deal with the economic matters without engaging with the political and constitutional issues... there are long-standing concerns about the practical operation of the devolution arrangements, in particular inter-governmental relations and the workings of the Joint Ministerial Committee. […]
>
> Our concern is that by seeking to deal with the economic challenges the Union may face at the end of the Brexit transition period without first, or concurrently, addressing political and constitutional challenges not only puts the economic proposals at risk but makes it more difficult to resolve the political disagreements. At a time when the Union is perceived by some to be fragile, as the post-Brexit devolution arrangements are determined, actions that risk inflaming disagreements are unwise. [71]

[71] Baroness Taylor of Bolton, 'Letter from the Chair to Lord Callanan, UK Internal Market White Paper' (29 July 2020)

Failing to recognise these constitutional implications poses its own problems (for instance, in the ways the legislation is presented and is subjected to accountability mechanisms),[72] but it also represents an unsympathetic and asymmetric approach to institutional relations; some perceived mere matters of policy may be regarded as constitutionally significant in the devolved territories, and the failure to recognise that is notable in its own right. The treatment of the UK Internal Market Bill itself is vulnerable to these same criticisms. Indeed, 'given the significance of this piece of legislation's constitutional implications for devolution, the lack of engagement seems particularly egregious.'[73] This failure to some extent *exacerbated* its constitutional implications, leading the Chair of the Legislation, Justice and Constitution Committee in the Welsh Parliament to describe it as 'a

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<https://committees.parliament.uk/publications/2225/documents/20331/default/> accessed 12 January 2023: 'We are not convinced about the need to legislate for the UK internal market and we are unsure precisely what problems the white paper is seeking to solve.'

[72] The UK Internal Market White Paper was only afforded four weeks of consultation, two weeks less than the Constitution Committee's minimum: '[S]ix weeks should be considered a minimum feasible consultation period, save in circumstances which would be generally recognised as exceptional': House of Lords Select Committee on the Constitution, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017-19, HL Paper 27) para 58. The Bill was published four weeks after, and only communicated to the devolved administrations 'one or two days before its publication': House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (HL 2019-21, 151) para 9. Consultation and engagement at the early stage of the legislative process is one the ways in which the central institutions can demonstrate that they take devolved concerns seriously, or at least acknowledge the constitutional implications of their proposals: ibid para 9, Q23 (Professor Nicola McEwan); House of Lords Select Committee on the Constitution, *The Legislative Process: Preparing Legislation for Parliament* ch 3.

[73] House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) para 10, Q23 (Professor Joanne Hunt).

constitutional ambush'.[74] The next section is focussed on the UKIMA and, particularly, its market access principles.

(b) The Second Example of Competence Constriction's Incompatibility with Devolution: The Market Access Principles and the Subordination of Devolved Competence[75]

The full effects of this constrictive approach are perhaps most obvious when the UKIMA is considered, legislation whose incompatibility with devolution is even more apparent than the EUWA's. This piece of legislation has caused consternation in devolved quarters from its very proposal. The Welsh Government's concerns, for example, chime well with the argument advanced here. It took issue not necessarily with the *principle* of an internal market—about which they had sought to offer constructive solutions to disagreements[76]—but with the particular way in which it would be implemented and that method's incompatibility with the fundamental precepts of devolution. The Welsh Government was 'not opposed to the principle of the internal market or a UK-wide subsidy regime',[77] but nonetheless said that the measures in the Bill were not 'in any way

[74] ibid para 10, Q 28 (Mick Antoniw MS).

[75] Portions of this section, with certain modifications, have been published in the following article: Nicholas Kilford, 'The Market Access Principles and the Subordination of Devolved Competence' (2024) 75 Northern Ireland Legal Quarterly 77.

[76] House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) para para 47; Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill* (2020) <https://senedd.wales/laid%20documents/lcm-ld13513/lcm-ld13513-e.pdf> accessed 12 January 2023.

[77] House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) para 47.

proportionate to the objectives which the UK Government claims for it', going 'far beyond the structure that may be needed to ensure economic and regulatory cooperation between the nations of the UK.'[78] The Scottish Government similarly said that the Bill 'undermines both the devolution settlement and agreed processes that are already established to agree common frameworks and ways of working across the UK following EU exit.'[79] The Northern Ireland Assembly expressed 'deep concerns about the UK Government's approach to negotiations and the terms of the United Kingdom Internal Market Bill',[80] mandating opposition by the First Minister and Deputy First Minister.[81]

As such, the House of Lords Select Committee on the Constitution said in October 2020 that '[t]he UK Government must work intensively with the devolved administrations to amend and clarify the proposals in the Bill in order to give the best chance of securing the legislative consent of the devolved legislatures.'[82] However, in reality the UKIMA was not only enacted absent devolved legislative consent, but also represents this asymmetrical approach to constitutionalism, paying scant regard to devolution or its interests. More

[78] Welsh Government (n 76).

[79] Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill* (2020) <https://www.parliament.scot/S5_Finance/General%20Documents/SPLCM-S05-47.pdf> accessed 12 January 2023. See also Scottish Parliament, 'Official Report, 7 October' (2020) <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12878&i=116422> accessed 12 January 2023.

[80] Northern Ireland Assembly, 'Official Report, 22 September' (2020) <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2020/09/22&docID=307905#2940318> accessed 13 January 2023.

[81] House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) para 49.

[82] ibid 50.

importantly for present purposes, however, is the way in which—incompatibly with the assumptions at the core of devolution—it normatively subordinates the devolved institutions and their legislation, providing a kind of supremacy scheme assuaged by the devolution scheme more generally, and undermining observations—made particularly by judges—about the role and function of devolution.

The UKIMA demonstrates aptly the consequences of the more protective approach towards Westminster's legislation, and the way in which competence constriction not only draws power away from the devolved legislatures, but normatively subordinates them at a far more fundamental level, in a way incompatible with the architecture of devolution itself and the status of the institutions within it.

(i) Setting Out the UKIMA's Interaction with Devolved Competence

The UK Internal Market White Paper, introduced in July 2020, claimed that the UK Government 'values the principle of devolution and believes that the UK's exit from the EU offers the chance to support the devolution settlements.'[83] It sought to provide reassurance that the UK Government's proposed approach was one 'that respects the devolution settlement',[84] a sentiment expressed elsewhere, too: Michael Gove, then Chancellor of the Duchy of Lancaster, spoke in similar terms following publication of the UK Internal Market Bill, saying that the devolved institutions would 'enjoy a power surge

[83] Department for Business, Energy & Industrial Strategy, 'UK Internal Market' (2020) White Paper CP 278 21.

[84] ibid 10.

when the transition period ends in December.'[85] Accordingly, the White Paper included a list of '[e]xample areas' of 'new powers transferring to the devolved administrations.'[86]

However, this characterisation of the internal market proposals was not universally accepted. In contrast, the devolved institutions made their views known 'in the strongest of terms'[87] with the Scottish Government's Constitution Secretary calling that list 'one of the most shocking pieces of dishonesty [he had] seen from a Government.'[88] The Welsh

[85] Scotland Office, 'UK Internal Market Bill Introduced Today' (9 September 2020) <https://www.gov.uk/government/news/uk-internal-market-bill-introduced-today> accessed 29 April 2023; Library Specialists, 'The United Kingdom Internal Market Bill, 2019-21' (House of Commons Library 2020) CBP 9003 20.

[86] Library Specialists (n 85) 20; Department for Business, Energy & Industrial Strategy (n 83) 17. See also Philip Sim, 'Fresh Row over Devolved Powers after Brexit' *BBC News Online* (16 July 2020) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-53423452> accessed 29 April 2023; Cabinet Office, 'Revised Frameworks Analysis: Breakdown of Areas of EU Law That Intersect with Devolved Competence in Scotland, Wales and Northern Ireland' (UK Government 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf> accessed 29 April 2023.

[87] Thomas Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42 Oxford Journal of Legal Studies 1143, 1156. See e.g., Constitution and Cabinet Directorate, 'UK Internal Market: Initial Assessment of UK Government Proposals' (Scottish Government 2020) <https://www.gov.scot/publications/uk-internal-market/> accessed 29 April 2023; External Affairs and Additional Legislation Committee, 'UK Internal Market Bill: Legislative Consent' (Welsh Parliament 2020) <https://senedd.wales/laid%20documents/cr-ld13860/cr-ld13860-e.pdf> accessed 29 April 2023.

[88] Library Specialists (n 85) 20; Sim (n 86). He continued: 'It's a mishmash of things the Scottish Parliament already has, things they've already decided we won't have because of the frameworks, and things that could be automatically overridden by a decision by the UK government to take a power away.

Government, in their legal challenge to the Act, maintained that its provisions 'ostensibly – albeit implicitly – limit the scope of the devolved powers of the Senedd.'[89] Similarly, Plaid Cymru described the White Paper as 'nakedly taking back competencies already held in Wales,' and further claimed that 'the Westminster Government is chipping away at two decades of devolution.'[90] Such a feeling was not confined to the devolved parts of the UK, though. William Wragg, Chair of the House of Commons' Public Administration and Constitutional Affairs Committee, said that 'the Bill involves areas of devolved competence and potentially reserves new powers.' In his view, 'the effects of the Bill as outlined in the White Paper will engage with and alter the UK's devolved governance arrangements. This is a significant constitutional effect.'[91]

There aren't new powers for the Scottish Parliament, that is a lie. Nobody should be fooled by this - what is actually happening here is taking away very significant powers that will have an effect on our daily lives.'

[89] Counsel General for Wales, *Grounds for Judicial Review: R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* (2021) para 1 <https://www.gov.wales/sites/default/files/inline-documents/2021-01/210119%20Counsel%20General%20for%20Wales%20v%20Secretary%20of%20State%20for%20Business%20-%20grounds%20for%20judicial%20review.pdf> accessed 29 April 2023; *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin); *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118.

[90] Plaid Cymru, 'Plaid Responds to Consultation on Westminster "Power Grab" Proposals' (10 August 2020) <https://www.partyof.wales/plaid_responds_power_grab_proposals> accessed 29 April 2023; Library Specialists (n 85) 21.

[91] William Wragg MP to Michael Gove MP and Alok Sharma MP, 'The White Paper on the UK Internal Market' (10 August 2020); Library Specialists (n 85) 21.

What explains such a marked difference of opinion? The answer, arguably, is telling about the way that the UKIMA—and the thinking underpinning it—interacts with the fundamental character of devolution. This is because the fulcrum of disagreement, the interpretation of the market access principles' impact on devolved law-making power, revolves around varying accounts of what devolved competences mean, and what devolution in practice is understood as *being*. Illustratively, Alok Sharma, Secretary of State for Business, Energy and Industrial Strategy, wrote in his foreword to the White Paper that the proposed market access principles 'will not undermine devolution, they will simply prevent any part of the UK from blocking products or services from another part while protecting devolved powers to innovate.'[92] By contrast, William Wragg was of the view that these same principles 'will effectively create new reservations in areas of devolved competence.'[93] This disagreement pivots, ultimately, on a disagreement about what the foundations underpinning the devolution settlement are, and how they can be recognised.

The market access principles at the core of the UKIMA invite the language of evasion: they only impact on devolved competence 'effectively' (according to Wragg), or 'impliedly' (according to the Counsel General for Wales). This may well be by design: the operation of the market access principles conceals any change in competence from a purely legal analysis, allowing the UK Government to contend that '[all] powers that have been devolved will remain devolved.'[94] The key is that the market access principles, rather than

[92] Department for Business, Energy & Industrial Strategy (n 83) 8.

[93] Wragg MP to Gove MP and Sharma MP (n 91).

[94] Jenni Davidson, 'UK Government Proposals for Post-Brexit Powers "One of the Most Significant Threats to Devolution Yet"' [2020] *Holyrood* <https://www.holyrood.com/news/view,uk-government-proposals-for-postbrexit-devolved-powers-one-of-the-most-significant-threats-to-devolution-yet-scotlands-constitution-secretary-warns> accessed 29 April 2023; David Torrance, 'EU Powers after

repealing devolved legislation, or providing any other 'hard' limitation on its validity, merely qualify its 'effect' in certain circumstances: a process captured by the term 'disapplication'.[95]

Because devolved legislation affected in this way remains 'valid' in all, and enforceable in some, circumstances it may appear that the UK Government's analysis, on which competences *technically* remain unchanged, is persuasive. However, reliance on disapplication as the means for mechanising the market access principles provides a kind of camouflage, or what has previously been described as a 'smoke screen',[96] concealing *de facto* changes to devolution from a *de jure* analysis, facilitated by a lack of any clear definition of 'competence' itself.

It is this smoke screen which allows the UK Government to maintain that its approach 'respects the devolution settlement'.[97] However, this section argues that it does the opposite. The very mechanism used by the market access principles to give the appearance of protecting devolution—disapplication—has, in reality, the effect of constitutionally subordinating the devolved legislatures. This subordinative effect is more significant than

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Brexit: "Power Grab" or "Power Surge"?' (*House of Commons Library: Insight*, 29 July 2020) <https://commonslibrary.parliament.uk/eu-powers-after-brexit-power-grab-or-power-surge/> accessed 29 April 2023.

[95] This term serves as a useful shorthand for this process, given its nuances are explored in detail in the following section.

[96] Anurag Deb and Nicholas Kilford, 'The UK Internal Market Act: Devolution Minimalism and the Competence Smoke Screen' (*UK Constitutional Law Association*, 4 July 2022) <https://ukconstitutionallaw.org/2022/07/04/anurag-deb-and-nicholas-kilford-the-uk-internal-market-act-devolution-minimalism-and-competence-smoke-screen/> accessed 4 July 2022.

[97] Department for Business, Energy & Industrial Strategy (n 83) 10.

a more conventional approach of reserving a particular policy area because, rather than merely cutting the outer limits of devolved legislative capability, it reduces the devolved legislatures to 'second-class' institutions *within* their competences, undermining the dynamism upon which much of the devolution system is predicated. Rather than protecting or empowering the devolved legislatures, the disapplication process is a core mechanism through which they are undermined. Importantly, this system is, it is argued, incompatible with some of the core elements of devolution.

The subordination of devolved legislation by disapplication therefore has a distinctly normative colour to it, but it is also a very practical tool. It provides the means by which the UK's central institutions can exercise a more assertive influence over, and involvement in, affairs *which they accept* remain devolved. Further, the UKIMA is an example of centralisation by stealth, allowing the UK Government to maintain that its approach is in keeping with at least the letter of devolution, while it is undermined in practice: a notably narrow interpretation of what it means to *respect* the settlement, and of what that settlement itself amounts to.

This section proceeds in three steps. First, it considers how the market access principles interact with legislation: 'the disapplication framework'. Second, it considers whether—and how—competences might be preserved under such a model, considering two approaches. One approach considers that a 'competence' does not necessarily mean the power to make *effective* legislation, and a second takes the opposite view. Third, this section will situate the subordination of devolved law-making power under the disapplication framework alongside the UKIMA's wider centralising project as, arguably, one of its core components.

(ii) The Disapplication Framework

How does the UKIMA interact with devolved law-making power? Perhaps its most obvious effect on devolution is found in s 54, in which the UKIMA adds itself to the list of enactments protected from modification by the devolved legislatures. Two further parts of the Act also cut across devolved law-making power: Part 6 makes provision for the UK Government to fund projects throughout the UK, 'regardless of devolved powers'[98] (although the UK Government could already spend in devolved areas)[99] and Part 7 'amends the devolution statutes to reserve subsidy controls, equivalent to state aid provision under EU law.'[100] This 'resolves a dispute regarding competence over subsidy control by expressly reserving it to the central UK authorities.'[101]

Most important for present purposes, however, are the 'market access principles': mutual recognition and non-discrimination. These principles, rather than cutting down devolved

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[98] Michael Dougan and others, 'Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020' (2022) 138 Law Quarterly Review 650, 651. See also House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) paras 37–44.

[99] Library Specialists (n 85) 22: 'The Explanatory Notes state that Part 6 of the Bill grants the power to a UK Minister of the Crown to provide funding for economic development, infrastructure, culture, sporting activities, and international educational and training activities and exchanges. The Explanatory Notes acknowledge that these purposes "fall within wholly or partly devolved areas". But the new powers are intended to "sit alongside the existing powers by which the UK Government can fund in relation to devolved matters across the devolved nations, in particular the Industrial Development Act 1982"': See also ibid section 6.6; Explanatory Notes to the United Kingdom Internal Market Act 2020 para 80.

[100] House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) para 45.

[101] Dougan and others (n 98) 651; House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) para 46.

competences, cut *across* them. The Explanatory Notes set these principles out in the following helpful terms:

> Mutual recognition means that any good that meets relevant regulatory requirements relating to sale in the part of the UK it is produced in or imported into, can be sold in any other part of the UK without having to adhere to additional relevant regulatory requirements in that other part. For example, a bag of flour made in one part of the UK that met the relevant requirements in that part (for example on the composition of the flour) can be sold in any other part of the UK without having to meet any other relevant requirements that apply there.[102]
>
> The non-discrimination principle means direct or indirect discrimination based on differential treatment of local and incoming goods is prohibited.[103]
>
> Direct discrimination is where an incoming good is disadvantaged compared to a local good because it originates from another part of the UK. For example, a requirement that incoming produce must be chilled but local produce does not.[104]
>
> Indirect discrimination is where incoming goods are not directly discriminated against, but where regulation disadvantages incoming goods and has an adverse market effect.[105]

[102] Explanatory Notes to the United Kingdom Internal Market Act 2020 para 11.

[103] ibid para 18.

[104] ibid para 19.

[105] ibid para 21.

The relevant provisions are these: Section 2(3) provides for the operation of the mutual recognition principle for goods. It says that '[w]here the principle applies in relation to a sale of goods in a part of the United Kingdom… *any relevant requirements there do not apply in relation to the sale.*'[106] Section 5(3) makes provision for the non-discrimination principle for goods.[107] It says that '[a] relevant requirement… *is of no effect in the destination part if, and to the extent that,* it directly or indirectly discriminates against the incoming goods…'[108]

The role of these provisions is, therefore, to *disapply* 'relevant requirements' where the market access principles are engaged.[109] Devolved legislation can clearly provide, contain or consist almost entirely of provisions which are 'relevant requirements' for the purposes of the UKIMA. Such provisions would, so far as they engage the market access principles, be disapplied and produce no legal effect in the relevant circumstance. The fact that the UKIMA interacts with *devolved* legislation is no accident: the UKIMA expressly confines the application of the market access principles to legislation,[110] and expressly includes *devolved* legislation.[111] The market access principles apply to future Westminster legislation,

[106] Emphasis added.

[107] Section 19(1) makes provision for the non-discrimination principle for services. It says that '[a]n authorisation requirement in relation to the provision of services in one part of the United Kingdom does not apply to a person who is authorised to provide those services in another part of the United Kingdom.'

[108] Emphasis added.

[109] It is not clear whether there is any significance in the distinction between legislation that does 'not apply' and that which 'is of no effect.'

[110] See e.g., UKIMA ss 3(8), 6(10) and 16(14).

[111] See ibid ss 3 and 58; Dougan and others (n 98) 662.

too,[112] but are of course vulnerable to amendment or repeal by that Parliament in a way not available to the devolved legislatures.[113]

Although there are only very limited exceptions to the market access principles and no wider, more general system of derogations,[114] their operation is tempered in other ways. They are *primarily* prospective,[115] and there are contexts in which relevant legislation will remain operable, namely so far as purely *internal* regulation is concerned. For example, in a general discussion of the mutual recognition principle, Dougan, Hunt, McEwan and McHarg explain that:

> mutual recognition will place significant limits on the ability of any legislative or governing body to set and enforce its own distinctive policy choices across its territory: rules might apply to local producers and suppliers, but cannot be enforced in the case of importation. For example, whilst one territory might ban the production of GMOs [genetically modified organisms] within its borders, it cannot stop the importation of GMOs which have been lawfully produced in another participating territory within the internal market.[116]

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[112] See *inter alia* UKIMA s 58.

[113] An issue discussed further below.

[114] Mutual recognition can, conditionally, be denied only in response to some 'highly specific problems', with the consequence that it 'offers only very limited opportunities for a host territory to insist upon applying its own standards to imports from elsewhere in the UK…': Dougan and others (n 98) 662. See also UKIMA s 10(1) and Sch 1, esp paras 1, 2 and 6-10.

[115] UKIMA s 4, esp s 4(2)(b), and s 9. The market access principles apply primarily to new regulatory requirements, as well as existing requirements that are amended in a substantive way, although '[w]hat amounts to a "substantive" amendment is not expressly defined': Dougan and others (n 98) 662.

[116] Dougan and others (n 98) 655.

The key issue is this: devolved legislation that contains relevant requirements would have those provisions, so far as relevant, 'disapplied' by the market access principles in the UKIMA. The consequence is, therefore, that 'the policy objective motivating the devolved regulations would be undermined',[117] with certain rules being 'rendered inapplicable' in relevant cases.[118] The question at the core of the disagreement discussed above seems to be whether this process, which the UKIMA itself describes as 'affect[ing] the operation of… legislation',[119] amounts to a limitation of 'competence', something which, in turn, relies on implied definitions of that concept. What view of competence is implied by the UKIMA, and by constitutional actors, is illuminating as to whether it is a statutory scheme that fits consistently with, or is (as is argued here) incompatible with, some of the core characteristics of devolution. Different positions on this are considered next.

(iii) Competence and the Problem of Disapplication

There are, broadly, two different views on whether disapplication goes to—or offends—a relevant competence. These different views hang on different notions of 'competence' as a concept: whether it is a 'thin' concept that does not provide protection against disapplication, or a 'thick' concept which does, each of which has implications for the market access principles' reconciliation with the devolution framework more broadly.

[117] ibid 663.

[118] ibid 663–4.

[119] For example, UKIMA sch 1 para 2(1).

(A) The First View: A Thin Conception

One answer to the question of whether disapplication goes to competence is 'no, disapplication leaves competences intact'. This view, apparently adopted by the UK Government, might be characterised by a 'thin', 'narrow' or 'flexible' conception of competence. Either because, on this view, a competence describes a power to enact valid legislation, rather than legislation which has full legal effect—a broader notion—or because competence is flexible and accommodating enough to survive the deprivation of practical effect in many, though perhaps not all, circumstances.

This view is immanent in the EU's own doctrine of primacy and its remedy of disapplication,[120] from which the UKIMA appears to draw.[121] In that context, Schütze notes this cognate question: '[i]n what way would Community law prevail over conflicting national law: would it "break" or "disapply" it?'[122] He explains that '[t]ransporting the doctrine of supremacy from German federalism would have put national courts under a duty to declare conflicting national laws void.'[123] This approach might be characterised as 'the non-existence' theory, or the 'competence reading of the doctrine of supremacy' which Schütze argues 'goes too far.'[124] He notes that a different approach has prevailed in practice: 'The Court[of Justice]'s preferred supremacy doctrine would not render existing national

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[120] See in particular Robert Schütze, 'Supremacy without Pre-Emption? The Very Slowly Emergent Doctrine of Community Pre-Emption' (2006) 43 Common Market Law Review 1023; Michael Dougan, 'Primacy and the Remedy of Disapplication' (2019) 56 Common Market Law Review 1459.

[121] Horsley notes that even the language of the UKIMA (such as 'relevant requirements'), and its definitions, appear to have been transplanted: Horsley (n 87) 1150.

[122] Schütze (n 120) 1026.

[123] ibid 1029.

[124] ibid 1030.

measures void, but only "inapplicable" to the extent to which they conflicted with Community law.'[125] Under that view, 'the incompatibility of subsequently adopted rules of national law with Community law did not have the effect of rendering these rules non-existent. National courts were only under an obligation to disapply a conflicting provision of national legislation.'[126] The effect is that '[t]he adoption of Community legislation, however, does not negate the underlying legislative competence of the Member States… It suspends national legislation in conflict with Community law.'[127]

In that context, this idea of 'suspension' has certain advantages which transpose well into the UKIMA regime. First, the disapplied legislation continues to operate in contexts in which it is not disapplied: 'A national rule, which is set aside for being inconsistent with Community law, is inoperative only to the extent of this inconsistency; the rule may continue to be applied to cases where it is not inconsistent, or to cases which are not covered by the Community norm…'[128] Accordingly, disapplied measures 'are not rendered null or void; they are merely to be treated as inapplicable in practice, and only to the extent of their verified incompatibility', and remain entirely valid and indeed fully applicable in all other situations/for all other purposes.'[129]

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[125] ibid 1029; *Simmenthal II* (1978 Case 106/77) [17].

[126] Schütze (n 120) 1030; *Simmenthal II* (n 125) [20]-[21].

[127] Schütze (n 120) 1031.

[128] Bruno de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP 1999) 190.

[129] It is also unclear who will be able to seek judicial enforcement of the market access principles or how far the courts will attempt, be able, or feel obliged to temper their application by reference to other doctrines or principles: Dougan and others (n 98) 668.

For the UKIMA, this is especially important given that relevant requirements—for example, devolved legislation providing for (simplistically) some higher regulatory standards—will remain applicable to producers based within the territory itself, in which context the market access principles do not bite.[130]

A second advantage, captured by the 'suspension' analogy, is that all disapplied legislation merely sits in a state of stasis, to become effective again where the disapplying legislation is repealed or accordingly amended.[131] In the context of the UKIMA this would mean that any amendment or repeal of the market access principles, or the addition of further justified derogations or exceptions might be able to reactivate any disapplied devolved legislation. A further, perhaps more subtle advantage is that the remedy of disapplication evades the need to provide, explain, or justify gifting a power to the courts to *invalidate* relevant legislation.[132]

On these bases, the UK Government's submission that 'competences' are not affected by the market access principles[133] seems persuasive. After all, legislative provisions will be fully effective in *some* contexts, and are at worst dealt with in a way that is limited in potency and time. It appears, on this account, not right to contend that the devolved legislatures' law-making power is meaningfully affected by the market access principles.

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[130] ibid 671.

[131] Schütze (n 120) 1032; de Witte (n 128).

[132] Schütze (n 120) 1031.

[133] 'Senedd Cymru has competence to legislate in all areas which are not reserved… The boundaries of Senedd Cymru's devolved competence set by the reservations in Schedule 7A to GOWA are […] unamended': Counsel General for Wales (n 89) para 50.

However, this view relies on an interpretation of 'competence' which merely describes a power to make laws on paper which could have no effect in practice. As such, it implies a narrow reading of the autonomy provided by the devolution settlement, according to which the possession of a legislative competence describes little more than a power which in practice may be impossible to exercise:[134] 'in practice, [the UKIMA] constrains the ability of the devolved institutions to make effective regulatory choices for their territories in ways that do not apply to the choices made by the UK government and parliament for the English market.'[135]

At the very least, the practical difficulty of regulating their import markets[136] means that 'it is difficult to see what other reading might be given to the Act that would leave devolved regulatory autonomy intact.'[137] To claim that disapplication, in leaving the *validity* of relevant legislation intact, leaves devolved competences intact too is to render competence a relatively illusory concept.

The House of Lords Select Committee on the Constitution, adopting a more practical lens, touched on this issue in their report on the Internal Market Bill:

> Limits to the competence of the devolved legislatures are set out in the devolution statutes. The Bill does not amend those Acts to include this restriction in competence. The Government should explain why the Bill does not amend the

[134] See Dougan and others (n 98) 672.

[135] ibid 671.

[136] 'The assumption is no longer that devolved regulation applies to all of the relevant activity within the relevant devolved territory. Instead, it applies to producers or suppliers based in the devolved territory.': ibid.

[137] ibid 672.

> devolution statutes explicitly to limit the competence of the devolved legislatures in respect of the non-discrimination principle.[138]

The reason why the UK Government has neither accepted that the market access principles amount to a competence restriction, nor sought to amend the devolution statutes accordingly, is perhaps clear given the preceding discussion: the market access principles do not, on the UK Government's preferred, thin conception of competence, affect devolved *competences* because they leave the legal validity of impugned legislation intact.

However, this account leads to some potentially incongruous results: The UK Government's thin conception of competence appears to potentially imply that a statute depriving *any* future devolved legislation of all (or at least much) of its practical effect would be compatible with the competences of the devolved legislatures and would not offend the devolution statutes which set them out. This would clearly be an absurd result, yet it is not clear what limits there are to protect against it, where they might be found, or on what principles they might be based.[139]

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[138] House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) para 86.

[139] One relevant principle might be that of 'devolved autonomy'; see e.g., Mark Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015); Christopher McCorkindale, 'UKIMA as Red Flag Symptom of Constitutional Ill-Health: Devolved Autonomy and Legislative Consent' (2024) 75 Northern Ireland Legal Quarterly 45. However, it is not clear what level of protection that principle can provide, given that the UK Government either considers that that principle is not engaged, or can be justifiably overridden, by the UKIMA.

Recourse to the devolution statutes themselves does not resolve matters, either. 'Competence' is used primarily as a heading, and certain other provisions—for example s 29 of the Scotland Act 1998—merely take the concept as read or explain it in negative terms. The fundamental core of the Scottish Parliament's law-making power, s 28(1) of that Act, provides that '[s]ubject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.' It is not clear whether 'make laws' necessarily implies that those laws are 'effective,' but it is not absurd to think that it might, something which would be difficult to square with the UK Government's position.

It should at this point be noted that the market access principles also bite on Westminster as much as devolved legislation, but here important distinctions between these institutions themselves yield quite different results:

> In the first place, the fact that UKIMA was made a protected statute that the devolved institutions are unable to modify means that they are unable to set aside or override the market access principles where these are considered to have a harmful effect on devolved regulation. By contrast, the operation of Westminster parliamentary sovereignty means that this is an option which remains open to the UK parliament when legislating for England.[140]

A similar point was again noted by the House of Lords Select Committee on the Constitution in their report on the Bill:

> These provisions apply unequally across the UK. While clause 6 [as it was] defines a "relevant requirement" as a statutory provision, the sovereignty of the UK

[140] Dougan and others (n 98) 671.

> Parliament means that it could be over-ridden implicitly or explicitly by later statute. The Government should explain whether clause 6 seeks to constrain Parliament's law-making power. If clause 6 is not intended to constrain Parliament, the Government should explain why it is not framed more accurately as a limitation only on the devolved legislatures. The Government should explain why clause 6 treats legislation intended for England differently from that passed by the devolved legislatures.[141]

This extract recognises one of the higher order impacts of the disapplication framework: it conceals the fact that the effects of the UKIMA's market access principles are quite different for Westminster and the devolved institutions. First, it notes that the Westminster Parliament could expressly repeal the market access principles; indeed, it could also simply enact legislation 'notwithstanding' them.[142] Second, it also notes that it arguably remains open for Westminster to *impliedly* repeal the market access principles, potentially by enactment of legislation with which they are merely incompatible, and even upon which they appear designed to bite. The courts categorising the UKIMA as a 'constitutional statute' might guard against such a course, but that categorisation is not inevitable, and may not be instructive.[143] Alternative routes, which might circumvent the question of implied repeal,

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[141] House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) paras 87–88.

[142] Horsley (n 87) 1162 and 1167.

[143] See Mark Elliott and Nicholas Kilford, 'Nothing to See Here? Allister in the Supreme Court' (2024) 28 Edinburgh Law Review 95; Nicholas Kilford, 'The Northern Ireland Protocol in The Supreme Court' (2023) 82 Cambridge Law Journal 200.

do not (yet) appear capable of facilitating the market access principles' intended disapplication of *future* legislation.[144]

That the market access principles would not go to the *validity* of future legislation does not appear to resolve matters, given, as is considered next, recent authority suggests that disapplication *would* go to *Westminster's* power to make laws (Westminster ostensibly benefitting from a richer account of competence than is purportedly accorded to the devolved legislatures). This view, if it has purchase, might limit the capacity of the market access principles to qualify the operation of future Westminster legislation which could impliedly repeal them.

Questions therefore remain as to whether—and how—the market access principles bite on Westminster legislation, and the extent to which that process is consistent with orthodox constitutional principle. Consequently, it is at its lowest uncertain whether the market access principles will have their desired effect on Westminster legislation and, even were they to do so, regard to the wider constitutional picture illuminates the differences in the positions of the devolved and Westminster legislatures. The latter is far freer to disregard the market access principles than the former. The UKIMA appears to emphasise a constitutional hierarchy between Westminster and the devolved legislatures which is

[144] E.g., *In the matter of an application by James Hugh Allister and others for Judicial Review* [2023] UKSC 5. Here the Court said that the constitutional statutes doctrine could be rendered 'academic' where the statutory language is sufficiently express to 'modify' an earlier statute, distinguished from implied repeal by way of its incompleteness and temporariness: [66]-[68] (Lord Stephens). However, it is not clear that this same logic can be applied *prospectively* such that future legislation (containing relevant requirements) would be 'modified' by earlier legislation (the UKIMA). Indeed, under that logic, future legislation might simply modify the market access principles into 'subjugation'.

somewhat ameliorated by the treatment of the latter in practice, and the status of laws they are competent to enact. Thanks to the camouflage provided by disapplication, however, these differences are hidden from view, with the UKIMA purportedly—and perhaps even more problematically, given its detachment from reality—treating these legislatures the same.

Ultimately, the use of disapplication under the UKIMA, especially given the differences in its interaction with the UK's different legislatures, implies that the devolution scheme provides no constitutional protection for the effectiveness of law enacted within competence. The thin conception of competence reflects a thin conception of devolution itself. To suggest that devolution is not meaningfully undermined by depriving devolved legislation of much of its practical effect is to view devolution in extremely narrow terms: as a scheme which merely provides competences that, in practice, may be little more than illusory, and which benefit from only very limited potency and security.

(B) The Second View: A Richer Account

The House of Lords Constitution Committee appears to have taken a different view of disapplication's effect on competence, and the constitutional implications which follow from that view:

> If devolved legislation is to be set aside automatically by the Bill, this in effect curtails devolved competence. Such a change should be made only after consultation with the devolved institutions […] such engagement has been limited and unsatisfactory.[145]

[145] House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) paras 83–85.

This explains the Committee's concern over the failure to amend the devolution statutes themselves, which might otherwise be thought to reflect all the statutory limitations on devolved legislative power. The Committee's concern is rooted in a different understanding of competence, one that appeals not to a power which exists merely on paper, but also in practice. Clearly, on this view, which—as has been seen—is shared elsewhere, the UKIMA looks very much like a competence limitation.

This is a 'richer' account of competence as the power to make 'effective' law and, because it qualifies the effectiveness of legislation, on this account disapplication does affect competence. An advantage of such an approach is that its focus on practice is better able to do justice to the *real* (as opposed to hypothetical) extent of legislative power. Indeed, such a view might be motivated by a desire to render competence useful as an analytical tool, prioritising legal certainty.

There is authority for this approach more widely, particularly in the devolution context. For example, if a Bill is outwith devolved competence by virtue of the limitations provided in the relevant devolution statute, it is not simply 'disapplied'. Instead, such provisions cannot reach, or are excised from, the statute book itself.[146] Some parts of the devolution framework appear incapable of tolerating beyond-competence legislation remaining on

[146] See Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 3). Indeed, legislation beyond the competence limits in s 29 of the Scotland Act (for instance) is by definition 'a nullity': McHarg and McCorkindale (n 2) 196; *Continuity Bill* (n 2) [56]; Mark Elliott, 'The Supreme Court's Judgment in the Scottish Continuity Bill Case' (*Public Law for Everyone*, 14 December 2018) <https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/> accessed 9 June 2020.

the statute-book, even if in such a case they would not be given effect by the courts.[147] Others, however, do appear on their face capable of tolerating that alternative outcome: That '[a]n Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament'[148] seems to foresee provisions contained within legislation being legally ineffective (rather than being excised from that legislation). Further, the courts have interpretive obligations to, so far as possible, read devolved legislation 'down' so that it *is* within competence.[149] In this way, the plain terms of devolved legislation may not reflect its actual, more limited legal effect, which is provided by interpretive work on the part of the courts.

Despite this, and in pursuit of rendering devolution 'workable', the courts have been keen to ensure that devolved legislation does accurately mirror the extent of the legislatures' competences. They have, accordingly, adopted quite a narrow approach to this interpretive obligation. In *Treaty Incorporation*, the UNCRC Bill made use of broad terms, 'admittedly beyond competence', and relied on the courts, using their interpretive obligation, to give effect only to the extent that it was within competence. Such an approach, in other words, relied overtly on the courts using the competence limits to interpretively 'cookie-cut' the Bill, rather than the provisions *themselves* reflecting the limits on competence found in the devolution statutes. The Supreme Court held that such an approach was impermissible in particular on the grounds that it was incompatible with the demands—pursuant to the rule of law and ECHR—of legal certainty and clarity, and that it was antithetical to the

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[147] *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106 [12]-[18].

[148] Scotland Act 1998 s 29(1).

[149] For example, ibid s 101.

coherence and workability of devolution embodied elsewhere in the legislation and case law.[150]

The approach in this context, reinforced by the devolution statutes' 'pre-enactment safeguards',[151] prioritises legal certainty: rather than merely giving within-competence *effect* to relevant provisions, they must on their face *be* within competence. In this sense, the legal effect of devolved legislation and its validity are entwined. 'Competence' is thus an analytical device to accurately explain the real legal picture rather than some hypothetical one. The existence of valid but ineffective legislation would, therefore, be in tension with the courts' wider approach in this context. This aspect demonstrates the wider tension between the view of devolution implicit in UKIMA (and its presentation) and the assumptions underpinning, and mature approaches to, devolution itself.

There are clearly some good reasons for desiring this degree of certainty in the devolution context. It ensures, simply, that the legal effects of laws enacted by the devolved legislatures are apparent on their face, with provisions already sculpted by competence boundaries, rather than needing to have these applied subsequently. The courts have not been attracted to the idea that effectiveness can be easily—or usefully—severed from validity[152] and, consonant with this view, have also provided authority that the deprivation of the practical effect of legislation *does* engage the relevant competence. It will be recalled that, in its unanimous judgment in *Continuity Bill,* the Supreme Court said this:

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[150] *Treaty Incorporation* (n 147) [75]-[79].

[151] See Kilford, 'Limitation, Empowerment and the Value of Legal Certainty in the Treaty Incorporation References Case' (n 3); *Treaty Incorporation* (n 147) [73]-[74]. The Court here put considerable, and somewhat surprising, weight on these safeguards.

[152] *Continuity Bill* (n 2) [49]-[53].

> 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.* The imposition of such a condition on the UK Parliament's law-making power would be inconsistent with the continued recognition, by section 28(7) of the Scotland Act, of its unqualified legislative power.[153]

This is an important passage to revisit. It is concerned not with legal validity, but with effectiveness, the same point on which disapplication pivots. Indeed, the relevant provision 'would not affect the formal validity of any subordinate legislation made in the exercise of such powers, but is directed merely at the legal effect of such legislation.'[154] This distinction was not able to save the provision, however, because the Court's unambiguous view was that Parliament's power to make laws is undermined by a condition on the effectiveness of its legislation in a certain context.

This 'rich' approach to Westminster's legislation contrasts with the approach taken by the UKIMA. Rather than being incoherent, however, it is arguable that *Continuity Bill* provides a rich account of competence which the UKIMA, along with the UK Government's accompanying discourse, implies *simply does not extend to the devolved legislatures*. But what might justify an approach that vests *only* Westminster with a rich account of competence?

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[153] ibid [52] (emphasis added).

[154] ibid [49].

One answer might be that the richness of the account of competence in *Continuity Bill* is simply attributable to parliamentary sovereignty. This principle, of course not shared by the devolved legislatures, might seem to require stauncher protection by the Court than devolved competence can be afforded. However, as was considered in the previous chapter, the Court itself accepted that the relevant provision did *not* affect Westminster's sovereignty.[155] This is a persuasive contention: that '*Parliament cannot meaningfully be said to "make laws" if the laws which it makes are of no effect*' is simply a legal analysis independent of parliamentary sovereignty. Any relationship with sovereignty must be borne by the secondary question: whether the Scottish Parliament is competent to *qualify* Westminster's power to make laws in this way. In the Court's judgment, it is not because to do so would modify a protected enactment (s 28(7)).

Even in this second stage of the analysis, however, parliamentary sovereignty is not the relevant concept. Instead, it is the distinct (and, as has been argued, quite different) notion of unqualified legislative power, more fully explored in the previous chapter and in the Supreme Court's subsequent *Treaty Incorporation* judgment, which is engaged.[156] That

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[155] 'Nor are we persuaded that section 17 impinges upon the sovereignty of Parliament. Section 17 does not purport to alter the fundamental constitutional principle that the Crown in Parliament is the ultimate source of legal authority; nor would it have that effect. Parliament would remain sovereign even if section 17 became law. It could amend, disapply or repeal section 17 whenever it chose, acting in accordance with its ordinary procedures'.: ibid [63]; McHarg and McCorkindale (n 2) 194.

[156] *Treaty Incorporation* (n 147). Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: Legislative Supremacy, Parliament's "Unqualified" Power, and "Modifying" the Scotland Act' (*UK Constitutional Law Association*, 15 October 2021) <https://ukconstitutionallaw.org/2021/10/15/mark-elliott-and-nicholas-kilford-devolution-in-the-supreme-court-legislative-supremacy-parliaments-

concept might be—at best—tangentially connected to parliamentary sovereignty, but it will be recalled that its distinctness is evidenced (among other things) by its incapacity to tolerate qualifications which the Court, on its own analysis in both *Continuity Bill* and *Treaty Incorporation*, suggests *can* be borne by parliamentary sovereignty.[157] Sovereignty is painted in more flexible, accommodating terms than unqualified legislative power, which is more rigid and fragile. As such, it is right that an interference with s 28(7) does not necessarily meet the threshold to interfere with parliamentary sovereignty.

This point does not need to be laboured but suffice it to say that the Supreme Court's recent jurisprudence is not evidence that parliamentary sovereignty necessitates a 'rich' account of competence. Instead, it suggests that parliamentary sovereignty *can accept precisely* the kinds of limitations under discussion. The account of parliamentary sovereignty adopted by the Court in these cases is one that, if anything, is more closely aligned with the 'thin' account of competence, being flexible enough to tolerate conditions on legislative effectiveness.

The answer might then be that whatever the relevant principle—whether parliamentary sovereignty or unqualified legislative power—protection is provided to Westminster's legislation through a mechanism that the devolved institutions cannot draw upon, and so the distinction between their conceptions of competence is justified. Yet, this still does not provide a complete answer. That 'Parliament cannot meaningfully be said to "make laws" if the laws which it makes are of no effect' does not appear to be the product of s 28(7), and neither is it clear that it is confined to the context of *unlimited* legislative power. Instead,

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unqualified-power-and-modifying-the-scotland-act/> accessed 15 October 2021; Mark Elliott and Nicholas Kilford, 'The Supreme Court's Defence of Unqualified Lawmaking Power: Parliamentary Sovereignty, Devolution and the Scotland Act 1998' (2022) 81 Cambridge Law Journal 4.

[157] *Continuity Bill* (n 2) [63]; McHarg and McCorkindale (n 2) 194.

this statement suggests that a qualification of the legal effect of legislation goes to the power to make laws, *whatever its scope,* whether infinite or infinitesimal. It does not appear that the presence of a limit on the scope of legislative competences would deprive that reasoning of its resonance. Other legislatures in the UK are empowered to 'make laws'[158] and, even though they have limited competences, they might, therefore, be justified in seeking to rely on this reasoning, and its normative foundations, as much as a legislature with legally unlimited competence. That the attribution of the richer account to the devolved legislatures is endorsed by the Constitution Committee (among others) demonstrates that this view *does* have purchase in contexts where the relevant legislature does have limited law-making power. Furthermore, the normative equivalence of within-competence devolved legislation and Westminster legislation is not only well-established but is also a core pillar upon which the dynamism of the settlement rests. To suggest that the devolved institutions are distinct to Westminster at this more fundamental level—as the UKIMA as the UK Government's rhetoric surrounding it, appear to suggest—is also dissonant with the essential nature of that settlement.

Continuity Bill and *Treaty Incorporation*, far from explaining why different rules might—or should—apply to Westminster, simply highlight that the rich account of competence has purchase, and that attempts to limit that account to Westminster require solid, yet absent, reasoning. Furthermore, the issues in those cases compound the tension between this regime and the devolution framework. Embracing the approach advanced in the UKIMA and reflected in these cases is, again, only to exacerbate—rather than ameliorate—the growing normative distance between the devolved institutions (and their legislation) and Westminster (and its legislation) in a way that is difficult to reconcile with the character of devolution.

[158] E.g., Scotland Act 1998 s 28(1).

(iv) A Moment of Departure: Competence, Disapplication and Devolution

The use of disapplication by the UKIMA's market access principles is a double-edged sword. Because it leaves the legal validity—if not the effect—of devolved legislation intact, it facilitates what Plaid Cymru have described as 'Westminster double-speak'.[159] Competences undermined in practice, appear untouched on paper. Disapplication therefore provides the strongest case, endorsed by the UK Government through its preferred account of competence, that the UKIMA is not in fact an entirely centralising project. However, it is argued that rather than disguising or deflating the centralising tendencies of the UKIMA, the adoption of this mechanism enhances them, and is fundamental to its incompatibility with the devolution scheme itself.

First, at a deeper level, disapplication under the UKIMA, because it partially restructures the way that devolved and Westminster legislation interacts, alters the normative position *of* the devolved institutions and of their legislation, departing from the way that position is characterised by the devolution scheme itself and its orthodox treatment. Under the UKIMA's market access principles, devolved legislation is only effective so far as compatible with a scheme that is explicitly (supposedly) *not* a competence limitation. Rejecting, as the UK Government does, that disapplication *does amount to* a competence limitation implies that the devolution scheme offers protection only to the validity and not the effectiveness of devolved legislation. Further, where the devolved legislatures must accordingly rely only on a 'thin' conception of competence which is little more than illusory, Westminster

[159] Plaid Cymru (n 90).

benefits from the richer account adopted by the Supreme Court.[160] As such, especially when Westminster's capacity to circumvent or alter the market access principles is recalled, the devolved legislatures are subordinated at a foundational, normative level.

This is important because the UK's devolution framework is—or at least, has been—predicated on a normative equivalence between Westminster and *intra vires* devolved legislation.[161] This is why, as will be recalled, so far as within their competence, the devolved legislatures can amend—or even repeal—Acts of the Westminster Parliament.[162] Westminster can, of course, return the favour (a process described as 'legislative ping-pong');[163] although its capacity to do so is qualified to some extent by the

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[160] This has been described elsewhere as 'bifurcation': Nicholas Kilford, 'The UK Internal Market Act and the Power to Make Effective Laws' (*The Institute of Welsh Affairs*, 27 September 2022) <https://www.iwa.wales/agenda/2022/09/the-uk-internal-market-act-2020-and-the-power-to-make-effective-laws/> accessed 27 September 2022.

[161] See *AXA* (n 1) [45]-[46] and [146]; Aileen McHarg, 'What Is Delegated Legislation?' [2006] Public Law 539.

[162] Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 36. See also Mohamed Moussa, 'The "Absent Word" Canon and Asymmetrical Sovereignty' (*UK Constitutional Law Association*, 20 December 2022) <https://ukconstitutionallaw.org/2022/12/20/mohamed-moussa-the-absent-word-canon-and-asymmetrical-sovereignty/> accessed 20 December 2022.

[163] 'In short, Parliament can always assert its will against a devolved legislature such as the Assembly even in relation to a devolved matter; but, in order to avoid the prospect of legislative "ping-pong" over a contested provision, with successive amendments made by the Assembly and undone by Westminster, an intrusion into the current devolved settlement would likely be required': *Safe Electricity A&T Ltd & Anor, Re Application for Judicial Review* [2021] NIQB 93 [45] (Scoffield J).

constitutional need (if not always the political desire) for devolved consent.[164] It will be recalled that the Northern Ireland Act 1998 provides expressly that 'an Act of the [Northern Ireland] Assembly may modify any provision made by or under an Act of [the UK] Parliament in so far as it is part of the law of Northern Ireland'.[165]

Dynamism is a key component of the devolution scheme and at its core lies the premise that neither Westminster's parliamentary sovereignty, nor its possession of a number of exclusive competences, renders the devolved legislatures themselves constitutionally insignificant, nor emasculates the normative character of their within-competence legislation.[166] It is the boundaries of competence, historically at least, which are therefore axiomatic, determinative of the freedom those legislatures possess. Within those boundaries, autonomy is considerable, outside of them it is non-existent.[167]

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[164] See notably Graeme Cowie, 'Brexit: Devolution and Legislative Consent' (House of Commons Library 2018) Briefing Paper CBP 08274.

[165] Northern Ireland Act s 5(6).

[166] 'When acting within competence, the legislative autonomy granted to the Assembly under the Northern Ireland devolution settlement is considerable … within its sphere of competence, the Assembly is entitled to pass laws modifying any provision made by an Act of Parliament in so far as it is part of the law of Northern Ireland. By section 98(1), 'modifying' is defined, in relation to an enactment, to include amendment or repeal. Thus, provided the Assembly is not acting beyond its competence as defined by sections 6–8 of the NIA, it may repeal any provision made by an Act of the Parliament of the United Kingdom as a matter of the law of Northern Ireland': *Safe Electricity* (n 163) [43]-[44] (Scoffield J).

[167] 'There is no limitation on the Assembly's power to legislate for transferred matters, other than those relating to legislative competence more generally': ibid [48] (Scoffield J).

The UKIMA, by contrast, presents a different view of devolution wherein devolved legislation—even within competence—is second-class. Rather than being the normative equivalent of Westminster's, devolved legislation *within* competence can be deprived of its practical effect by ordinary Westminster legislation, and even by lower regulatory standards in other parts of the UK. The autonomy provided by the legislative competences in the devolution statutes is therefore hollowed of much of its content, and those competences themselves are deprived of much of their potency, and their accuracy as accounts *of* the scope of legislative freedom.

Disapplication's tension with devolution is not only abstract and normative, however. It also has a very real and practical dimension, affecting the capacity of the devolved legislatures to exercise powers in areas allocated to them under the settlement and eroding the insulation between the different spheres of legislative authority in the UK. In this way, it compounds the UKIMA's more general centralising effects. The disapplication framework has two centralising implications which chime with, and emphasise, the broader centralising project under the UKIMA, and its tension with the fundamental character of devolution. First, disapplication limits devolved freedom to diverge. Second, it is an essential mechanism through which Westminster's (and Whitehall's) engagement in devolved areas is emboldened. As such, it both *reduces* the outer limits of what the devolved institutions are capable of achieving, and *empowers* the central institutions even in areas where devolved institutions *retain* power.[168]

[168] This second component might appear analogous to 'cooperative federalism' or 'shared rule', in which (at least) two regulatory bodies and spheres 'overlap' in the same areas. However, it is difficult to argue, given the general disregard for devolution throughout the enactment and content of the UKIMA, that it is meaningfully 'cooperative'.

The remainder of this section proceeds in two parts: first it sets out the general centralising components of the UKIMA itself. These have been explored elsewhere but are worth rehearsing here because they illuminate how disapplication fits within this broader scheme. Second, the way that disapplication both normatively and practically undermines devolution is considered, to illustrate the scale of its irreconcilability with the foundational elements of devolution.

(A) The UKIMA as a Sea-Change for Devolution

Because several parts of the legislation itself, and the process of enacting it 'do betray the centralizing motivations that underpin UKIMA',[169] it is worth devoting a little time to the broader centralising picture painted by the UKIMA to better understand how the subordination of devolved legislation fits within that context, and to better understand its tension with the orthodox character of devolution.

To take process first, the UKIMA's enactment was notably dismissive of devolved concerns and interests,[170] an approach mirrored by its explicit departure from the less unitary approach to market regulation under the common frameworks that preceded—and continue to interact with—it:[171]

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[169] Dougan and others (n 98) 651.

[170] House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill* (n 72) paras 7–14.

[171] The 'market access principles are displaced only if the UK Government makes secondary legislation to give statutory effect to a common framework': Seán Patrick Griffin, 'The Deposit Return Scheme and the UK Internal Market' (*The Constitution Society*, 7 July 2023) <https://consoc.org.uk/the-deposit-return-scheme/> accessed 8 October 2023. UKIMA s 10; Thomas Horsley and Jo Hunt, 'In Praise of Cooperation and Consensus under the Territorial Constitution: The Second Report of the House of

> …in place of a co-operative, co-owned process that embedded respect for devolution, as was the case with common frameworks, UKIMA was driven by the UK Government alone in the face of deep-seated opposition from all three devolved administrations. It was also introduced very late in the Brexit process. A White Paper was published in July 2020, allowing only four weeks for consultation[.][172]

Despite this opposition, the UKIMA proceeded without devolved consent, and the principles contained in the UKIMA, bereft of devolved input, contrast with the more consensual arrangements common to other internal markets.[173] Indeed, the substance of

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Lords Common Frameworks Scrutiny Committee' (*UK Constitutional Law Association*, 26 July 2022) <https://ukconstitutionallaw.org/2022/07/26/thomas-horsley-and-jo-hunt-in-praise-of-cooperation-and-consensus-under-the-territorial-constitution-the-second-report-of-the-house-of-lords-common-frameworks-scrutiny-committee/> accessed 2 January 2023. See also Legislation, Justice and Constitution Committee, 'Statement by the Committee: United Kingdom Internal Market Bill' (Welsh Parliament 2020) <https://business.senedd.wales/documents/s105221/Statement%20by%20the%20Legislation%20Justice%20and%20Constitution%20Committee%20on%20the%20UK%20Internal%20Market%20Bill%2023.pdf> accessed 29 April 2023.

[172] Dougan and others (n 98) 661. These four weeks were during the Senedd's recess: David Rees MS to Alok Sharma MP and Simon Hart MP, 'UK Internal Market White Paper' (30 July 2020) <https://business.senedd.wales/documents/s103831/Correspondence%20from%20Chair%20of%20the%20External%20Affairs%20and%20Additional%20Legislation%20Committee%20to%20the%20Right%20.pdf> accessed 29 April 2023.

[173] 'The co-option, by force of constitutional principle, of the devolved administrations into the UK internal market contrasts with the procedures governing the establishment of the EU internal market.

the UKIMA appears to neglect, or undervalue, the contribution that the devolved institutions might be able to offer:

> Impressed throughout the UKIMA is the primacy of the UK government as UK-wide regulator… [T]he UK government retains a significant degree of control over the scope of the mutual recognition and non-discrimination tests. This is evident, for example, through its powers to amend the definition of 'relevant requirements' for goods, as well as to modify the frameworks governing the justification of measures that infringe either principle. Prior to exercising those powers, the Secretary of State is required to seek the consent of the devolved administrations, but may proceed regardless after one month provided she provides a reasoned statement.[174]

Horsley explains, for example, that the UKIMA's emphasis is on competition rather than cooperation[175] and it is as part of this emphasis that the UKIMA limits the capacity for devolved legislative divergence.[176] However, it also provides for, and legitimates, central engagement within devolved areas. In this sense, it 'disrupts the basic approach to managing the co-existence of different sites of legislative power within the UK', standing in contrast to the '"devolve and forget" model, according to which the UK Parliament transferred legislative powers to the devolved administrations to exercise as they see fit and subject only

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In the latter case, the Member States freely consented to the adoption of the EU Treaties (and their subsequent amendment) as institutional partners': Horsley (n 87) 1156.

[174] ibid 1157.

[175] ibid 1153.

[176] Thomas Horsley, 'Reshaping Devolution: The United Kingdom Internal Market Act 2020' (*UK In a Changing Europe*, 10 October 2022) <https://ukandeu.ac.uk/reshaping-devolution-the-united-kingdom-internal-market-act-2020/> accessed 22 November 2022.

to compliance with specific, predetermined limits.'[177] This is important: the UKIMA erodes the boundaries that have been so important in insulating devolved competences from central interference, or at least in holding such interferences accountable.

Arguably, then, the UKIMA 'introduces something genuinely novel into the UK's pre-existing territorial constitution' by establishing a scheme which transcends the boundaries of devolution,[178] and which mirrors the 'muscular' or 'hyper-unionism' seen elsewhere.[179] Indeed, 'the Johnson administration's centralising and unilateral approach to the introduction of UKIMA [was] founded on an understanding of the United Kingdom more as a "unitary" than a multi-layered, territorially complex state.'[180] Accordingly, the curtailment of both devolved input to the legislative process and devolved legislative freedom under the scheme is accompanied by a growth of powers providing for central interference within devolved matters. Convergence was expressly the intention of the

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[177] ibid. See also Alex Wickham, 'POLITICO London Playbook: Oxford down - New Rules - Market Day' [2020] *POLITICO* <https://www.politico.eu/newsletter/london-playbook/politico-london-playbook-oxford-down-new-rules-market-day/> accessed 1 February 2023; Library Specialists (n 85) 22; Stephen Weatherill, 'Will the United Kingdom Survive the United Kingdom Internal Market Act?' (*UK In a Changing Europe*, 7 May 2021) <https://ukandeu.ac.uk/will-the-united-kingdom-survive-the-united-kingdom-internal-market-act/>.

[178] Horsley (n 87) 1152.

[179] Martin (n 37); Michael Kenny and Jack Sheldon, 'Unionism, Conservative Thinking and Brexit' (*Centre on Constitutional Change*, 27 July 2020) <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/unionism-conservative-thinking-and-brexit> accessed 11 November 2020; Michael Kenny and Jack Sheldon, 'When Planets Collide: The British Conservative Party and the Discordant Goals of Delivering Brexit and Preserving the Domestic Union, 2016-2019' (2020) 69 Political Studies 965; Henry Hill, 'Putting Muscle behind the Union' [2021] *The Critic* <https://thecritic.co.uk/issues/november-2021/putting-muscle-behind-the-union/> accessed 10 January 2023.

[180] Dougan and others (n 98) 661.

legislation from at least an international perspective,[181] despite federal experiences suggesting that divergence is compatible with international agreements.[182]

The UK Government's response is that, under the UKIMA 'the devolved administrations… retain the right to legislate in devolved policy areas that they currently enjoy.'[183] Even though that right does not benefit so strongly from *constitutional* guarantees of exclusivity, the UK Government's position, as has been seen, is that it is disapplication which *preserves* devolved competence and therefore renders the scheme compatible with the character of devolution. However, the opposite is true: the disapplication framework, in subordinating the devolved legislatures and contributing to the erosion of the boundaries of devolved competences, is a core and significant element of its incompatibility with the fundamental nature of devolution, compacting the more interventionist sea-change reflected by the UKIMA more generally.

(B) Illustrating the Tension between Disapplication and Devolution

The broader centralising effects of the UKIMA may be well-known. They are not likely a surprise: the White Paper described the UK merely as 'a unitary state with powerful devolved legislatures, as well as increasing devolution across England.'[184] And yet, despite the lack of emphasis placed on the constitutional significance of devolution, the White

[181] Department for Business, Energy & Industrial Strategy (n 83) paras 123–3.

[182] Library Specialists (n 85) 15–16; CBI, 'A Roaring Trade: Capitalising on the Opportunities of a UK-US Free Trade Agreement' (2020) 34–5; Welsh Parliament Research Service, 'Internal Market White Paper Research Briefing' (2020) 16.

[183] Department for Business, Energy & Industrial Strategy (n 83) 22.

[184] ibid 12.

Paper also said '[l]egislative innovation would remain a central feature – and strength – of our Union.'[185]

The cover for this claim is provided by disapplication and the implication that it, at least on one account, leaves competences intact and, therefore, is consistent with the devolution framework. However, in adopting that model, the UKIMA is—perhaps inadvertently, perhaps not—normatively subordinating the devolved institutions in an arguably far more fundamental way than a simple alteration of competences, reconfiguring that framework itself. This subordination fits within, and forms part of, the wider centralising implications of the UKIMA. Importantly for present purposes, it is also difficult to reconcile with the character of devolution in three ways. First, it undermines devolution's dynamism. This is because it establishes what might tentatively be described as a kind of 'supremacy clause' through which *within-competence* devolved legislation is unequal to, and disapplied by, purportedly non-competence limitations in ordinary but normatively superior Westminster legislation. Second, it undermines legal certainty by creating a complex scheme through which valid legislation is in some cases—and depending on a complex analysis—of no practical effect, undermining the axiomatic nature of devolved competences. This is particularly jarring given the courts' attempts—historic and recent—to ensure that devolved legislation does not need to be interpretively 'trimmed' by competence limitations but should be able to be read on its face as providing an accurate picture of the law. Third, the use of disapplication means that constitutional change is disguised, and that the discourse itself is obfuscated as the different institutions are encouraged to talk past one-another.

[185] ibid 22; Library Specialists (n 85) 13.

(B1) Undermining Dynamism and The Scope of Competences

Perhaps its most significant impact is the UKIMA's influence on the dynamism of devolution—reflecting, or symbiotic with, the normative equivalence of *intra vires* devolved and Westminster legislation—and the degree of autonomy enjoyed by the devolved legislatures *within* their competences.

First, the UKIMA appears to operate as a *within-competence* restriction on the devolved legislatures. A protected enactment, like the UKIMA, cannot be 'modified' by the devolved legislatures. However, rather than merely being incapable of modifying the UKIMA, the devolved legislatures *must legislate compatibly with* the market access principles. Because this qualification does not take the form of a 'hard' competence limit it appears to act as a kind of supremacy clause: Westminster has provided, in ordinary legislation, a framework within which the devolved institutions must operate for their law to be effective *even within their competence limits*.[186] Put another way, devolved legislation may only make effective provision so far as compatible with the market access principles. The subordinating effect of this framework is amplified by the ease with which Westminster might be able to amend the UKIMA to tighten these restrictions further or alter their effect, and by the power of the Secretary of State to alter the exemptions to the market access principles.[187]

Consequently, the UKIMA places Westminster and devolved legislation on different normative planes. It is true that the Westminster Parliament always has the legal power to amend the competences of the devolved institutions and to protect its enactments from modification but, in taking the form of 'hard' limitations, these changes are both exposed

[186] See, e.g., Australian Constitutions Act 1850 s 14.

[187] Explanatory Notes to the United Kingdom Internal Market Act 2020 para 26.

to proper levels of accountability and form the boundaries of competence themselves. The UKIMA presents a quite different picture wherein, even *within* those boundaries, devolved legislation is 'second-class'. Rather than the legislative 'ping-pong' implied by devolution, the UKIMA framework is far more rigid and hierarchical.

Second, another tension with the settlement is that the UKIMA imposes additional complex requirements with which the devolved institutions are themselves relatively powerless to engage. For example, sometimes the application of the market access principles will require a complex, perhaps unfamiliar, economic analysis. However, unlike competence limits, where there are a number of avenues open to the devolved legislatures to engage with, test and ultimately challenge their application, no similar mechanism exists for a devolved legislature to challenge the disapplication of its legislation by the UKIMA.[188] As such, an essential mechanism through which the devolved institutions can attempt to defend their legislation on competence grounds is absent in the context of the UKIMA. The consequence of this approach is that devolved freedom to diverge is deeply qualified, with limited opportunities for that qualification to be challenged (even if such a challenge *would* ultimately be successful). The protections usually afforded elsewhere in the settlement for the exercise of devolved legislative power, therefore, are absent in the UKIMA scheme, and the degree of autonomy within competences is reduced.

[188] Dougan and others (n 98) 671. The closest mechanism contained in the Act is that the Office for the Internal Market 'may also issue non-binding advice on the compatibility with the UKIMA of proposed regulations': Horsley (n 87) 1149; UKIMA ss 34-5. Dougan and others (n 98) 667: 'UKIMA does not go as far (say) as mimicking the EU's long-established model of mandatory prior notification of draft standards'.

The UKIMA, on this basis, appears to present a new, albeit relatively nascent, approach to the configuration and management of devolution. Rather than an assumption that devolved power can be exercised freely within competence, this new approach is to permit autonomy only where central institutions are satisfied that that is appropriate in a particular case.

Evidence for this can be found in statutory instruments which qualify the operation of the market access principles. One of the earliest sources of the Welsh Government's concerns about the UKIMA was in the context of single-use plastics. Put simply, the Welsh Government was seeking to regulate their use in legislation, the operation of which would be cut down by the market access principles in the UKIMA. To the extent that this legislation regulated imports into Wales, it would have no effect at all, seriously undermining its policy ambitions.

In July 2022, using the powers under s 10(2) UKIMA, the Secretary of State made regulations exempting single-use plastics from the market access principles.[189] These regulations came into force in August 2022 and follow an agreement reached under the common frameworks mechanism, through which the devolved institutions sought an exemption.[190] Not only does this instrument appear to imply that devolved concerns about the UKIMA were well-founded, it also points to a new relationship between the institutions

[189] The United Kingdom Internal Market Act 2020 (Exclusions from Market Access Principles: Single-Use Plastics) Regulations 2022, SI 2022/857.

[190] Department for Levelling Up, Housing and Communities and Cabinet Office, 'Process for Considering UKIM Act Exclusions in Common Framework Areas' <https://www.gov.uk/government/publications/process-for-considering-ukim-act-exclusions-in-common-framework-areas/process-for-considering-uk-internal-market-act-exclusions-in-common-framework-areas> accessed 29 April 2023.

wherein the devolved institutions seek permission to make effective law in a certain area, and Whitehall and Westminster—if inclined—acquiesce. Similarly, the Scottish Government has proposed a deposit return scheme pursuant to which it has sought an exemption from the UKIMA's market access principles. However, the UK Government has not agreed a *full* exemption (only agreeing an exemption to the extent that it would align the scheme with its own proposed UK-wide one). The Scottish Government announced, after failing to secure the UK Government's reconsideration, that the scheme would be delayed.[191] Recently, the Scottish Parliament has passed the Wildlife Management and Muirburn (Scotland) Bill, but no exemption to the market access principles pursuant to banning the sale of glue traps has been secured.[192] Thus, under this model, the UK Government occupies a dominant position: it has the discretion to determine whether certain devolved policies otherwise within competence will be fully effective. This is a noticeable shift away from a position wherein the devolved institutions did not require consent for legislation within their competences to be effective.

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[191] The Scottish Parliament has also subsequently voted in favour of repealing the UKIMA: Scottish Government, 'Protecting the Powers of the Scottish Parliament' (*Scottish Government News*, 3 October 2023) <https://www.gov.scot/news/protecting-the-powers-of-the-scottish-parliament/> accessed 13 October 2023.

[192] Shona Robinson, 'Letter to the Secretary of State for Environment, Food and Rural Affairs from Deputy First Minister and Cabinet Secretary for Finance Shona Robison about Concerns over the Refusal of an Internal Market Act Exclusion' (31 March 2024) <https://www.gov.scot/publications/glue-traps-sales-ban-letter-uk-government/> accessed 2 April 2024; Craig Paton, 'Robison Hits out at Lack of Exemption for Glue Traps' *Independent* (31 March 2024) <https://www.independent.co.uk/news/uk/scottish-government-uk-government-scotland-government-steve-barclay-b2521317.html#> accessed 2 April 2024.

In fact, this system represents a regression to one analogous to that abandoned in Wales in 2011. Under that system, set out in Part 3 of the Government of Wales Act 2006, the Welsh National Assembly only received competence following Legislative Competence Orders which needed to be negotiated with the UK Parliament. Not only was this system complex and often unworkable, but it also made it clear that, in practical and symbolic terms, the Welsh institutions were junior partners.

(B2) Undermining Legal Certainty

The courts have, as explored above, sought to ensure that legal certainty is a core component of the devolution scheme, especially given that the UK's internal market has already provided some of the competence limitations under that scheme.[193] However, the UKIMA enables the devolved legislatures to enact provisions which may, in relevant circumstances, have no—or much more limited—legal effect. As noted, the UKIMA requires a complex analysis, part of which is overlaying the market access principles on top of legislation, and part of which may be a complex economic analysis (for example, in order to deduce if there is indirect discrimination).[194] Both of these qualities are antithetical to the Supreme Court's recent unanimous position that a legislature's enactments should accurately mirror the scope of its powers, rather than those limitations being implied into their operation by the courts *ex post*.[195] Furthermore, the UKIMA—to draw a parallel with Lord Rodger's reasoning in *Martin v Most*—at least in practical terms 'would offend against the principle that the limits on the competence of the Scottish Parliament are fixed by the 1998 Act and

[193] 'As Lord Hope noted in *Imperial Tobacco*, a common theme of the reservations is that they "are designed to ensure that there is a single market within the United Kingdom for the free movement of goods and services"': Dougan and others (n 98) 657; *Imperial Tobacco* (n 30) at [29] (Lord Hope).

[194] Dougan and others (n 98) 669.

[195] *Treaty Incorporation* (n 147) [17], [59] and [62].

cannot be altered except by new legislation by Parliament or by Order in Council under section 30(2).'[196]

(B3) Concealing Constitutional Change and Obscuring the Discourse

Inter-institutional discussions are important, as are agreed concepts. However, one of the reasons that the UK Government and the devolved institutions have been, effectively, talking past one another is because they appear to disagree about what competence actually means, and what it takes to change it. In this way disapplication—in contrast to invalidity—becomes a useful device to conceal or disguise significant constitutional changes:

> On paper, devolution might continue to look the same. Indeed, it might even look more extensive, given the repatriation of powers previously exercised at EU level to the devolved authorities under the EU (Withdrawal) Act 2018. But in practice, the operation of UKIMA has real potential to limit the capacity of the devolved institutions to pursue different economic or social choices from those made in London.[197]

Accordingly, disapplication allows the UK Government to contend—using a legalistic analysis—that devolved powers have grown, whereas a more practical analysis yields the opposite results.

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[196] *Martin v Most* (n 30) [138] (Lord Rodger).

[197] Dougan and others (n 98) 674.

It is not necessarily clear that the UKIMA impliedly repeals relevant provisions of the devolution statutes.[198] However, by characterising its effects in terms of disapplication, it simply does not need to. Yet this approach adds to the 'smoke-screen', making significant adjustments to the territorial constitution via ordinary legislation without proper oversight, accountability and transparency; even more concerning when the limited engagement with the devolved institutions throughout its enactment is considered. Indeed, this approach arguably undermines the functionality and accuracy of the devolution statutes themselves.

Put another way, the UKIMA 'de-constitutionalises' the question of competences, suggesting that the practical effect of devolved legislation is not a major constitutional concern, certainly not in comparison to the *de jure* competences set out in the devolution statutes themselves. This is something that no doubt the devolved institutions would reject, and may be the product of a narrow legalistic analysis, or it may be an attempt to insulate significant constitutional changes from proper scrutiny and accountability. In either case, it is difficult to argue—even if *de jure* competences are unchanged—that the UKIMA is consistent with the terms and spirit of the devolution settlement, let alone any wider principle of devolved autonomy, a broader idea surely concerned with the effectiveness of devolved legislation, rather than being satisfied merely by the capacity of the devolved legislatures to enact valid but ineffective legislation. Further, these are features of the constitution which might be undermined by attempts to conceal real changes to the

[198] See, *Counsel General for Wales' Application for Judicial Review (High Court)* (n 89); *Counsel General for Wales' Application for Judicial Review (Court of Appeal)* (n 89). Nicholas Kilford, 'The UK Internal Market Act's Interaction with Senedd Competences: The Welsh Government's Challenge' (*UK Constitutional Law Association*, 23 February 2021) <https://ukconstitutionallaw.org/2021/02/23/nicholas-kilford-the-uk-internal-market-acts-interaction-with-senedd-competences-the-welsh-governments-challenge/>.

devolution settlement by devices like disapplication, through which a centralising project is disguised, dressed in the camouflage of further decentralisation.

(v) Concluding the UKIMA as Competence Constriction

The UKIMA's market access principles do not explicitly alter the competences of the devolved legislatures. Consonant with the UK Government's position, this is because disapplication—the process by which they affect the 'operation' but not the validity of devolved legislation—arguably does not go to 'competence' per se. However, this account is predicated on a narrow view of that concept, which does not appear to apply with the same force to Westminster. The result of this process is the creation of a new within-competence limit on devolved law-making power which undermines several core components of the devolution settlement, including its dynamism and emphasis on legal certainty. Rather than merely adding to the list of 'hard' limits on devolved power, the disapplication system employed by the UKIMA undermines the status of devolved legislation, rendering it subordinate to ordinary Westminster legislation, all while effectively concealing the reality of this change. However, rather than disguising the UKIMA's centralising implications, the disapplication process *is* itself their core component, reconfiguring the interaction between Westminster and devolved legislation, and limiting the potency of devolved legislative freedom.

It may seem like this case is being overstated: the UKIMA is one piece of legislation operating within quite a limited context. However, not only is the UKIMA illustrative of a broader centralising trajectory, it is also a striking case of *déjà vu*. The UKIMA is a prime piece of post-Brexit regulation and, as Horsley and others have noted, bears an intriguing resemblance to the system it replaces, being modelled on—or at least borrowing from—the EU's own internal market architecture. This is perhaps ironic in itself. However, the UKIMA

also reopens questions, all too familiar in the EU context, about 'competence creep' and the overriding of local policy ambitions by distant political institutions. As in that context, it is not clear that limiting the UKIMA to the practical effect of legislation rather than its validity will provide much by way of consolation or ameliorate its tension with the constitutional frameworks with which it interacts.

Indeed, the narrower view of competence is defined by the claim that the disapplication of devolved legislation is constitutionally tolerable and compatible with the devolution settlement. As such, narrow and rich views of devolved competence—especially so far as they contrast with accounts of Westminster's—are microcosms for narrow and rich accounts of devolution itself, and its place within the UK's contemporary constitution. Which path is taken on competence might be instructive as to exactly what position devolution itself is thought to occupy.

The UKIMA embodies a particular, and inaccurate, vision for the UK's territorial constitution. In place of devolved autonomy comes a scheme where devolved legislation, in order to be effective, must be compatible with Westminster's own provision within that area. In place of legislative parity, and the normative proximity of the different legislatures within the UK, comes the dominance of Westminster as the omniscient legislative institution. The UKIMA is, therefore, an about turn for devolution, a reimagining of its practical requirements, and a rejection of its orthodox interpretation. The UKIMA provides a deeply centralising scheme which subordinates the devolved legislatures at both practical and normative levels, while failing to acknowledge these implications, or couple them with either the commensurate degree of accountability or the necessary consent to achieve or embody any meaningful level of institutional respect. Furthermore, it is accompanied by the narrowing of the very definition of devolution adopted by the UK Government, which

contends that the deprivation of the effect of devolved legislation does not go to devolved competence and is constitutionally insignificant.

The fact that the UKIMA cuts against the 'general constitutional presumption in favour of devolving (as opposed to reserving) power'[199] is one thing, but the picture it paints of the status of the devolved institutions *vis a vis* Westminster, and the hierarchy between devolved legislation and Westminster legislation—both of which are inconsistent with the core character of the devolution settlement—is quite another. Indeed, 'the reassertion of the central authority of Westminster and Whitehall in the devolutionary context is a further manifestation of a retreat to unitary government',[200] is significant, and is contributed to by the competence analysis offered above.

The UKIMA demonstrates how competence constriction—even that does not explicitly amend the scope of competence—can lead to the mischaracterisation of devolution. Far from being a merely centralising scheme with which certain devolved institutions or political actors might take issue, the UKIMA—and, especially, its disapplication framework—are transformative for devolution. The axiomatic nature of devolved

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[199] Wincott, Murray and Davies (n 14) 705. The UK Parliament 'has rarely sought to re-reserve devolved powers, has not sought to use either legislative powers or finance to (routinely) assert its supremacy, and has responded positively to demands for greater devolution—to the point, in the mid-2010s, of creating declaratory legislative provisions that the Scottish Parliament and National Assembly for Wales are now "permanent" Since the Brexit vote, UK Government rhetoric has increasingly acknowledged the necessity of seeking to negotiate the legalities of Brexit with input from the devolved bodies. Judicial interpretations have been favourable to extending devolved powers, and to the idea that the devolved legislatures' status is close to parity with the UK Parliament.': Sandford and Gormley-Heenan (n 41) 113–4.

[200] Masterman (n 43) 66.

competences, the breadth of legislative freedom within them, the absence of a supremacy rule and the immunity of Westminster's legislative power from the scope of devolved power to diverge within competences are all questioned by the UKIMA.

Furthermore, that Act appears to conceive of Westminster's legislative freedom existing in a zero-sum relationship with devolved legislative freedom: devolved legislative freedom must, it implies, be curtailed if Westminster's is to be properly exercisable. Westminster has always had the power to introduce certain frameworks to apply throughout the UK, and to protect them from devolved interference. However, rather than being something which should fit within the logic implied by devolution in this way, or preserve the maximum-possible scope of devolved competences, the UKIMA seeks to protect Westminster's legislative freedom at the expense of devolved legislative freedom, interpreting the former broadly (and in brittle terms), and the latter narrowly and in a way that significantly reduces its substance.

Again, this has a functional and a normative dynamic. At a functional level, the legislative freedom of Westminster remains unchanged; Westminster has not gained—and cannot gain—new legislative competences because of the UKIMA, but the devolved legislatures have their competences dramatically undercut. Instead, Westminster's engagement in devolved areas is liberated from the oversight, accountability and political convention which had moderated it under the reconciliatory model. Dougan and others considered the interaction between the practical and normative components in this way, noting that the UKIMA undermines the very character of devolution:

> The BEIS Impact Assessment acknowledges that the market access principles will reduce the ability to pursue targeted… social and environmental policy objectives,

> with the result that the intended societal benefits that could have resulted from such policies 'would be foregone'…
>
> The effect of the market access principles would therefore significantly undermine the purpose of devolution, which was to enable the devolved nations and regions to legislate according to their own local needs and political preferences.[201]

Similarly to unqualified legislative power, competence constriction sits uncomfortably with the devolution settlement and does not accurately reflect it. In this way, the UKIMA demonstrates how competence constriction can fail on the first metric deployed in this thesis: it is an inappropriate means of securing the accommodation of parliamentary sovereignty within the UK's territorial constitution because it is an inaccurate account of the reality *of* the UK's territorial constitution, unpicking rather than understanding it. To the extent that it has the effect of accommodating Westminster's legislative power, it does not do so *within* the UK's territorial constitution, but at the expense of some of its core characteristics. The next, and final, substantive section of this chapter considers the second metric: competence constriction's relationship with parliamentary sovereignty, demonstrating how the narrowing of devolved competences (and the growth of areas that, therefore, are the exclusive possession of Westminster) is neither necessitated by the sovereignty principle, nor coherently sustainable by reference to it.

[201] Michael Dougan and others, 'UK Internal Market Bill: Devolution and the Union' (Centre on Constitutional Change, UK in a Changing Europe and Wales Governance Centre 2020) 7–8.

4. Questioning the Link Between Competence Constriction and the Accommodation of Parliamentary Sovereignty

Both of the pieces of legislation considered above are examples of competence constriction. They each, though with varying potency, limit the scope and exercise of devolved legislative freedom in areas that were (or are) otherwise within their competences. Bogdanor, and others, were seen earlier in this chapter to suggest that such an exercise would have accommodative implications for parliamentary sovereignty, helping ameliorate the threat posed to that principle by devolution. It follows from the logic that the possession of devolved law-making power is in tension with parliamentary sovereignty that constricting devolved competences (either by reducing their scope, or through more structural alterations which diminish their potency or freedom of exercise) would help preserve and secure that principle. In other words, it was Bogdanor's implicit suggestion that limiting devolved law-making power, and therefore giving Westminster a more exclusive possession of areas of competence, would 'vindicate its supremacy'.[202]

However, this final substantive section argues that competence constriction cannot accommodate parliamentary sovereignty. This means that, whatever purpose these constrictive examples might serve, the accommodation of parliamentary sovereignty cannot be one of them and is not something that renders them necessary. This section makes the case that there is no intrinsic connection between the (increasingly) exclusive possession of competences and parliamentary sovereignty. Instead, it is argued that any recourse to parliamentary sovereignty as warranting, necessitating or justifying the exclusion, or reduction, or devolved power within certain areas would be unfounded and incoherent with the orthodox treatment of both that principle and the allocation of

[202] Bogdanor, 'Our New Constitution' (n 15) 255.

competences in the UK. It proceeds by first considering the orthodox approach to competence allocation, and then considering the intellectual difficulties of seeing sovereignty in terms defined by exclusive competences.

(a) The Orthodox Approach to Competence Allocation

In the UK, as chapter 3 sought to illustrate, accommodating parliamentary sovereignty has been more to do with the delegative *way* in which competences are allocated, as well as the preservation of Westminster's legal power within devolved areas, than *which* competences are allocated. Indeed, because of its capacity to do justice to this fact, the reconciliatory approach—which is consistent with it—is the way to satisfactorily accommodate parliamentary sovereignty. On that account, the provision of those accommodations, built into the structure of the settlement, means that concern that particular competences should necessarily be exclusively held by Westminster (at least largely) falls away. This approach, wherein it is the delegative manner of allocation and Westminster's *inclusion* in areas devolved, rather than the *exclusion* of other institutions from particular areas that matters for parliamentary sovereignty, is at the root of the orthodox approach to allocation in the UK. Reserving particular competences to the UK level has often, therefore, been little more than a question of policy, and often an idiosyncratic one at that, depending on the various needs of the devolved territories.[203]

[203] 'The extent of powers reserved to Westminster, however, varies in Scotland, Wales and Northern Ireland, which is partly a reflection of each territory's distinct history and governance. While some reserved matters are common to all three devolved legislatures, such as the Crown, defence and foreign affairs, others are not. In Northern Ireland, for example, the ability to set income tax is reserved to the UK Parliament, but, to varying degrees, devolved in Scotland and Wales.': Torrance (n 6) 4.

Parliamentary sovereignty, in other words, has not in practice been a key motivator for competence (non-)allocation, de- or recentralisation, provided the accommodations considered in chapter 3 are in place. Although the incremental and *ad hoc* development of devolution makes it difficult to trace a unifying rationale for the reservation of competences,[204] *policy* has arguably remained front and centre. New Labour's White Paper in 1997, for example, relied on a policy (rather than constitutional) analysis when it considered that 'there are many matters which can be more effectively and beneficially handled on a United Kingdom basis.'[205] It is even difficult to suggest that reservations are united by a concern for the preservation of the integrity of the United Kingdom, even though that argument has often been offered. For example, Alex Salmond, then leader of the SNP queried during the passage of the Scotland Bill whether

> the central integrity of the United Kingdom [would] have been damaged if the Scottish Parliament had been given competence to license cinemas and theatres,

[204] For the role of incrementalism, and the absence of an overriding theme to devolution, see Arthur Aughey, 'Fifth Nation: The United Kingdom between Definite and Indefinite Articles' (2010) 5 British Politics 265, 274; Bagehot [Adrian Wooldridge], 'A Heath Robinson Constitution' *The Economist* (18 April 1998) 34; Lord Irvine, 'Government's Programme of Constitutional Reform', *Annual Constitution Unit Lecture* (1998) 8; Kenneth MacKenzie, 'How the Reforms Came About' in Andrew McDonald (ed), *Reinventing Britain: Constitutional Change under New Labour* (University of California Press 2007) 116; Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 104.

[205] Scottish Office, *Scotland's Parliament* (Cm 3658, 1997) para 3.2.

> and had been trusted with earth-shattering matters such as the Hypnotism Act 1952 and its regulation?[206]

The response to his query, from Sam Galbraith, the Scottish Office Minister, was an appeal to policy: 'I think that we all agree that that would best be left on a United Kingdom basis. There is a UK market, and that is the best way to handle the matter.'[207] In a similar vein the Northern Ireland Act's excepted matters—those on which its Assembly is not competent to legislate—were thought to reflect 'matters of UK importance as well as subjects which have proved contentious in the past.'[208]

Lord Hope, in a dictum that has been echoed extra-judicially by Lady Hale,[209] explained what he thought to be the unifying theme of competence reservation in *Imperial Tobacco*:

> Sometimes the subject matter is described in broad terms; sometimes it is identified simply by the name and date of a statute. There is no common characteristic, but

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[206] HC Deb 12 January 1998, vol 304, col 61. However, '[a]t the Bill's Committee Stage, theatres and hypnotism were removed from Schedule 5': Torrance (n 6) n 34. The SNP were not the only ones to query the logic of reservation, Oliver Heald, a Conservative MP, also wondered: 'If equal opportunities law is separated from equal opportunities policy, policy on misuse of drugs is separated from policy on crime in general, or issues such as abortion and euthanasia—which obviously have much in common—are separated, there will be areas of dispute': HC Deb 12 May 1998, vol 312, col 200; Torrance (n 6) 10–11.

[207] HC Deb 12 January 1998, vol 304, cols 116-17.

[208] House of Commons Library, 'The Northern Ireland Bill - Implementing the Belfast Agreement' (House of Commons Library 1998) Briefing Paper RP98-76 31; Torrance (n 6) 12.

[209] Lady Hale, 'Devolution and The Supreme Court – 20 Years On' (Scottish Public Law Group 2018, Edinburgh, 14 June 2018).

> there is a common theme. It is that matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the United Kingdom Parliament at Westminster. They include matters which are affected by its treaty obligations and matters that are designed to ensure that there is a single market within the United Kingdom for the free movement of goods and services.[210]

The exclusive possession of certain matters by the Westminster Parliament is, on Lord Hope's analysis, a matter of convenience, expediency or social, political or economic interests; it is not a constitutional obligation necessary for the protection or accommodation of parliamentary sovereignty.[211]

There is, of course, one key exception in this regard: the reservation of certain 'aspects of the constitution' (in, illustratively, paragraph 1 of Schedule 5 to the Scotland Act 1998) including—in paragraph 1(c)—'the Parliament of the United Kingdom'. The Supreme Court held in *Continuity Bill* that this reservation 'encompasses, amongst other matters, the sovereignty of Parliament'.[212] However, there are two reasons why this reservation does not necessarily undermine the argument that parliamentary sovereignty does not provide a helpful indicator of which policy areas should be the exclusive possession of Westminster or render the constriction of devolved competences necessary.

First, this is because the reservation *of* parliamentary sovereignty—as the Court has interpreted that paragraph—surely to some extent renders *additional* reservations of

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[210] *Imperial Tobacco* (n 30) [29] (Lord Hope).

[211] Indeed, as has already been suggested, the UK Government's own focus on policy over constitutional principle has obscured certain constitutional implications. See Baroness Taylor of Bolton (n 71).

[212] *Continuity Bill* (n 2) [61].

particular policy areas on the basis that they also need to be reserved to secure that principle superfluous. If that reservation is given meaningful effect, such additional reservations will contribute little, if anything, to the accommodation of that principle. Furthermore, this reservation does not point to an analysis of the sovereignty principle that is sensitive to the allocation of particular subject matters but presents that principle in more abstract terms consistent with this analysis.

Second, this reservation does not render the *entire* constitution beyond the competence of the devolved institutions. This is, therefore, a fairly narrow reading of parliamentary sovereignty, in contrast to the view that only Westminster can effect significant constitutional change;[213] although, in practice that view is heavily qualified, and is arguably consistent with the narrower account of the principle in this reservation. In exposing *some* aspects of the constitution to devolved interference, even this reservation appears to accept that parliamentary sovereignty cannot provide a wider basis for the allocation of devolved competences. The Supreme Court has, for example, accepted that devolved legislation *can* 'relate to' this reservation, and be outwith competence for that reason, but has only found accordingly in some of the most extreme circumstances, namely concerning secession. The Supreme Court in the *Lord Advocate's Reference* held that 'a Bill which makes provision for a referendum on independence – on ending the sovereignty of the Parliament of the United Kingdom over Scotland – has more than a loose or consequential connection with the

[213] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583; 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* (Hart Publishing 2021).

sovereignty of that Parliament.'[214] This, arguably, represents a high threshold for engaging this reservation. It may be recalled that the Supreme Court had in its *Continuity Bill* judgment set a similarly high bar for engaging this reservation, which it treated generally in very flexible terms which did not have wider implications for the propriety of the Scottish Parliament's possession of competences more generally. Thus, even this reservation points to a more flexible interpretation of the sovereignty principle and what is necessary to accommodate it.

(b) The Difficulty with Associating Sovereignty with Exclusive Competences

The potential connection between parliamentary sovereignty and Westminster's exclusive possession of particular competences runs quickly into some important analytical difficulty. First, as noted already, McHarg explains that 'the idea that Parliament has a monopoly over legislation forms no part of the orthodox understanding of parliamentary sovereignty.'[215] As mentioned above, even in cases where Westminster *has* been held exclusively responsible for the law in a certain area (most notably, significant constitutional change) that exclusivity has been qualified in recognition of 'the limits of any supposed parliamentary monopoly

[214] *REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31 [82].

[215] McHarg, 'Giving Substance to Sovereignty' (n 213) 206; Mark Elliott, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (2017) 76 Cambridge Law Journal 257, 267.

over constitutional change in a constitutional order only partially regulated by law;'[216] and might even be subject to a kind of proportionality test.[217]

Not only therefore is there an extremely limited doctrinal case for Westminster's exclusive control over certain matters, but the courts have also demonstrated very limited willingness to accept that legislative divergence is *per se* incompatible with parliamentary sovereignty. For example, in *Continuity Bill* submissions were made that there *were* constitutional reasons to oppose divergence, especially in light of the unique circumstances of Brexit:

> The argument is that the Scottish Bill cuts across the attempts of the UK Parliament and government to deal in a way that applies coherently and consistently across the whole of the UK with a matter within their reserved competence, namely the legal consequences of withdrawal from the EU. It is also said that the existence of parallel legislation on the same subject-matter in Scotland and in the UK as a whole, undermines legal certainty.[218]

The Court's response was that divergence or convergence is simply a matter of policy, in which compatibility with parliamentary sovereignty is not engaged. In the Court's view, there was nothing in the sovereignty principle *per se* that could necessitate the exclusion of

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[216] McHarg, 'Giving Substance to Sovereignty' (n 213) 207. See, Alison L Young, 'Miller and the Future of Constitutional Adjudication' in Mark Elliott, Jack Williams and Alison L Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) 291; Gavin Phillipson, 'EU Law as an Agent of National Constitutional Change: Miller v Secretary of State for Exiting the European Union' (2017) 36 Yearbook of European Law 46, 77–8.

[217] McHarg, 'Giving Substance to Sovereignty' (n 213) 206–7; *R (Miller) v The Prime Minister* [2019] UKSC 41, [2019] 9 WLUK 256.

[218] *Continuity Bill* (n 2) [25].

the devolved legislatures from subject areas, or require the diminution of the potency of their legislative power within those areas:

> Parts of the argument of the UK Law Officers appear to suggest a wider objection that separate Scottish legislation about the consequences of withdrawal is legally untidy, politically inconvenient or redundant in the light of the corresponding UK legislation. But we are not concerned with supposed objections of this kind, which go to the wisdom of the legislation and not to its competence.[219]

Thus, on the Court's view there was no need for the devolved institutions to legislate consistently with any wider schemes Westminster had put in place, in notable contrast to the picture painted by the UKIMA. The argument from principles beyond parliamentary sovereignty was roundly rejected in these terms:

> The UK Law Officers' case on these points is not assisted by reference to the constitutional framework underlying the devolution settlement or the principles of legal certainty and legality. The constitutional framework underlying the devolution settlement is neither more nor less than what is contained in the Scotland Act construed on principles which are now well settled. And there is nothing legally uncertain or otherwise contrary to the rule of law about the enactment of legislation governing the domestic legal consequences of withdrawal at both the UK and the Scottish level, provided that they do not conflict.[220]

[219] ibid [33].

[220] ibid [35].

The Court is, in this case, clear that the level of divergence facilitated by the devolution settlement is compatible with constitutional principles and that arguments for centralisation are issues of policy. Thus, on the orthodox view parliamentary sovereignty does not appear to be necessarily engaged by the exercise of legislative power by *other* institutions.

A second challenge also awaits advocates of competence constriction or centralisation as a necessary concomitant of parliamentary sovereignty: which competences do they consider to be essential for its preservation?[221] If, in defiance of the orthodox approach to competence distribution, certain matters *were* considered to possess a sovereign 'character', how might these be identified or defined? Identifying 'sovereign' competences—the sort which might be most ripe for Westminster's exclusive possession—has proved difficult and problematic in other jurisdictions and a brief consideration of the wider notion of sovereignty demonstrates the fragility of a purported connection between sovereignty (of any kind) and competences, and the difficulty in identifying which competences are necessarily the exclusive possession of a single sovereign institution. These weaknesses arguably apply with equal force to parliamentary sovereignty.

It may be right that '[o]nce upon a time, every discussion regarding the way to organize the allocation of competences would have begun with a debate about sovereignty.'[222] But, more

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[221] In a more general context, see Dora Kostakopoulou, 'Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?' (2002) 22 Oxford Journal of Legal Studies 135; Eva Herschinger, Markus Jachtenfuchs and Christiane Kraft-Kasack, 'Scratching the Heart of the Artichoke? How International Institutions and the European Union Constrain the State Monopoly of Force' (2011) 3 European Political Science Review 445.

[222] Olivier Beaud, 'The Allocation of Competences in a Federation - A General Introduction' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014) 28.

recently—and in many different constitutional orders—using sovereignty as a justification for the distribution or hoarding of particular competences has proved difficult to sustain. The idea that there might be a connection between competences and sovereignty is predicated on the notion that some areas of policy are intrinsic *to* the possession of sovereignty, their possession serving to illustrate which institution is, in fact, sovereign. For example, some powers, such as 'the right to coin money' might be described as 'marks of sovereignty'.[223] These areas of policy, on this view, need to be ring-fenced in order to protect sovereignty; to do otherwise—to decentralise legislative power over them—would undermine it.[224]

However, there are two key weaknesses with this approach. First, it is a slippery analysis. Courts have often struggled to pin down which competences correspond with sovereignty and which do not, let alone the difficulties of attempting an exhaustive list. Indeed, even once a 'mark of sovereignty' is identified it remains difficult to identify a corresponding *competence*. For example, does the (potentially sovereign) right to coin money entail competence over taxation?[225] Such an approach also affects, rather than merely reflects, our understanding of sovereignty itself: As Jakab suggests, a close relationship between sovereignty and particular competences reduces it to being 'understood as a catalogue of

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[223] ibid 34.

[224] For example: 'The right definition or test for international legal sovereignty in order to find out whether a territorial entity is sovereign has always been contested. One attempt is to list the sovereign rights (competences)… The question of how to find out which rights are sovereign rights, and which are not, was never answered. Therefore, the list might be non-comprehensive.': András Jakab, 'Neutralising the Sovereignty Question: Compromise Strategies in Constitutional Argumentations before European Integration and Since' (2006) 2 European Constitutional Law Review 375, 385.

[225] See Beaud (n 222) 34.

state competences – which however become arbitrary and unjustifiable'.[226] Indeed, the idea that there is a 'core' of competence which cannot be outsourced without impairing sovereignty[227] suggests that the concept itself is merely 'a bundle of discrete state functions'.[228] Second, as chapter 3 sought to illustrate, the focus on competences *per se* or *in vacuo* is a distraction. Far more important is the *nature* of the conferral of those competences. A power, to use the same example, of coining might be deprived of its sovereign qualities if it is given—and revokable—by a higher authority, exercised only on terms set by that higher authority. Sovereignty is, in this way, better accommodated by the delegative *way* decentralisation is achieved, rather than *whether or not* certain matters happen to, or not to, be decentralised.

Comparative examples illustrate further difficulties with an approach to competences that considers them to have a sovereign character. For example, and particularly relevant in the context of devolution and subnational decentralisation, the US Supreme Court in the 1980s entered a short-lived spell in which it provided, inter alia, the following limitation on its otherwise expansive interpretation of the centralising 'Commerce Clause': 'federal acts could not regulate areas pertaining to attributes of state sovereignty or could not directly impinge upon states' power to freely organize activities corresponding to traditional

[226] Jakab (n 224) 381; Hans Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts* (Mohr 1920) 7.

[227] Alec Stone, 'Ratifying Maastricht: France Debates European Union' (1993) 11 French Politics and Society 70, 82. For an analysis of how outsourcing some competences often considered the 'hard core' of sovereignty can actually advance a state's control over those areas, see generally Kostakopoulou (n 221).

[228] Stone (n 227) 74.

governmental functions.'[229] This reasoning relied on there being a clear notion of the 'attributes of state sovereignty' and 'traditional governmental functions,' which the Court later accepted were simply impossible to identify. In its later jurisprudence this approach was jettisoned: 'the Supreme Court not only based its [subsequent] judgment on the lack of objective criteria to determine what would qualify as a "traditional state function", but also emphasized the futility of a priori definitions of state sovereignty.'[230]

A second example of the weaknesses of this approach can be found in response to the 'creeping' competences of the European Union, where it has been equally difficult to sustain using sovereignty as a hard limit on the conferral of legislative powers on the Union. The concern is this: 'International organisations may be entrusted with sovereignty functions, and thus become "sovereign" or supreme in certain areas; they may even display such "true marks of sovereignty" as the power to legislate or coin money.'[231] However, problems with this approach follow: firstly, it is, as in the US example, difficult to identify what subject-matters are 'marks of sovereignty.' Indeed, 'a high-profile scholar and practitioner of EU law even stated that there was "simply no nucleus of sovereignty that the Member State can invoke as such against the Community".'[232] Second, as signalled above, the *terms* of allocation were here seen as more important for sovereignty than the particular

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[229] François-Xavier Millet, 'The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014) 257; *Hodel v Virginia Surface Mining & Reclamation Association Incorporated* 452 US 264 [1981].

[230] Millet (n 229) 257–8; *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528 [1985].

[231] Guglielmo Verdirame, 'A Normative Theory of Sovereignty Transfers' (2013) 49 Stanford Journal of International Law 371, 412.

[232] Millet (n 229) 259; Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 American Journal of Comparative Law 205, 220.

powers allocated: The idea that competence allocation can in fact undermine sovereignty is difficult to sustain when the institutions to which that power is allocated are derivative (or delegative) in nature. Verdirame explains that '[t]he derivative nature of the legal order of [in this case] international organisation[s] makes their exercise of sovereignty functions conditional upon an initial grant of powers by states, and subject to the possibility of revocation.'[233] This, in turn—analogous to the argument advanced in chapter 3—neutralises the threat they pose to sovereignty.[234]

These comparative examples demonstrate the difficulties in attaching a particular list or set of competences to any notion of sovereignty, rather than concerning more appropriately about the delegative manner of their conferral. However, although it might be suggested that these examples concern *state* sovereignty rather than *parliamentary* sovereignty, the issues highlighted—that identifying relevant competences is fraught with difficulty, reduces sovereignty to a list of competences and distracts from the more appropriate focus on the manner of allocation—are all applicable in the context of parliamentary sovereignty. In this way, although concerned with different ideas, this analysis is applicable in either context. These issues arise as readily in the context of parliamentary sovereignty as in the context of state sovereignty. Further, to the extent that a more rigid account of parliamentary sovereignty elides that principle with a similarly rigid conception of state sovereignty, this analysis is engaged with further force.

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[233] Verdirame (n 231) 412. He continues: 'If the transfer were not in some ways revocable, the loss of specific sovereignty would be permanent and a situation of subjections, albeit limited to the specific area to which those functions apply, would arise.'

[234] 'In one sense… international organisations are not really sovereign at all, since all they may possess are the mere emanations of sovereignty but not *true* sovereignty.': ibid (original emphasis).

Even, for example, in international affairs the UK Government and devolved institutions have significant roles to play which would make Westminster's exclusive competence in that area practically difficult to maintain.[235] Thus, in the UK the difficulties in clearly defining 'sovereign' competences and cleanly excluding the devolved legislatures from them are equally apparent as in comparative examples. The point is that a focus on the allocation of particular competences, and excluding certain institutions from certain policy areas, would be an unorthodox approach to parliamentary sovereignty, and that relying on the sovereign 'qualities' of particular matters is fraught with incoherence. The courts have accepted—rightly—that the accommodation of parliamentary sovereignty is more about the delegative form of allocation (and Westminster's continuing legal power within any areas allocated) than which powers *are* allocated. Sandra Day O'Connor makes this point aptly in these terms:

> In all cases, the assemblies are subordinate to the Westminster Parliament, which retains supremacy throughout the entire United Kingdom. Many scholars have pointed out that devolution thus rests on two seemingly conflicting principles: parliamentary sovereignty and domestic self-government. But parliamentary sovereignty is not, in theory, incompatible with the exercise of some local control. The theoretical reconciliation of these principles lies in the idea that the authority

[235] Even in the realm of foreign policy, it is the Government which has 'relative autonomy in the drafting, agreement and ratification' of international agreements and the devolved institutions that are intimately entangled in their implementation: Tierney (n 46) 76. '[I]t is a very different matter when it comes to implementation should these agreements, as in areas such as fisheries or agriculture, involve devolved matters.' In such cases 'there will be extensive discretion on the part of devolved legislatures on how best to implement' them: ibid.

> exercised at levels below the central government ultimately derives from and depends on the will of Parliament.[236]

This was precisely the model reflected by the reconciliatory approach.[237] That approach renders further constriction of devolved competence superfluous and brings into sharp relief that such an approach would do little to accommodate parliamentary sovereignty.

5. Conclusion: Competence Constriction as an Inappropriate Means of Securing Accommodation

Competence constriction is an inappropriate means to provide parliamentary sovereignty with satisfactory accommodation. This is for two reasons: First, as the two examples explored here demonstrate, it—particularly in the context of more structural alteration to the exercise of devolved legislative freedom—fails to reflect the contemporary territorial constitution, instead appearing to pivot away from the fundamental components at the core of the devolution framework like its dynamism, the scope of legislative freedom it grants within competence, its recognition of the normative proximity of the devolved institutions to Westminster, the normative status of within-competence devolved legislation, and the orthodox absence of a rule that Westminster's legislation possess 'primacy' or supremacy, as well as the fact that the presence of devolved law-making power

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[236] Sandra Day O'Connor, 'Altered States: Federalism and Devolution at the "Real" Turn of the Millennium' (2001) 60 Cambridge Law Journal 493, 497.

[237] Paun similarly explains that '[i]n 1973, the Royal Commission on the Constitution, established to consider options for devolution, set out its conclusions on the premise that "it is necessary for the undivided sovereignty of Parliament to be maintained"… Devolution was thus defined as the (implicitly reversible) "delegation of central government powers without the relinquishment of sovereignty"': Paun (n 34) 49 (references abridged).

in a particular area does not impact upon Westminster's power in that same area. Instead, it turns the territorial constitution towards a model wherein the devolved institutions are normatively subordinated to Westminster, undermines their effectiveness in practice and erodes the axiomatic clarity of the boundaries of devolved law-making power. It therefore sits uncomfortably with, and cannot accurately reflect, the core elements of the UK's territorial constitution. Second, it can possess only an illusory relationship with the sovereignty principle itself: excluding the devolved institutions from particular matters cannot intellectually defensibly be necessitated by the sovereignty principle. Although some commentators, like most notably Bogdanor, suggested that the scope, structure or potency of legislative competences possessed by the devolved institutions was at least in tension with parliamentary sovereignty, this represents an unduly inflexible account of the sovereignty principle. *Constricting* devolved competence—which might be the anticipated cure for any incompatibility—lacks the coherent connection to the principle necessary to meaningfully secure its accommodation.

Unqualified legislative power and competence constriction, through their brittle and monolithic account of parliamentary sovereignty, are instantiations of the protective approach. Each demonstrates how that approach, in practice, is difficult to reconcile with the UK's territorial constitution. Each makes it more difficult for the devolution framework to work according to the statutory conferral of legislative power, and undermines the legislative freedom it provides, but they also exaggerate the normative distance between the devolved institutions and Westminster further than naturally implied—and often in fact *ameliorated*—by the settlement and its judicial treatment. These examples are 'protective' of Westminster's legislative freedom because of their rigid, brittle construction of that phenomenon (intolerant of the dynamism and legislative divergence implied within the devolution settlement), and because of their failure to accept that parliamentary sovereignty possesses a degree of flexibility allowing it—and its exercise—to be

accommodated consistently with, rather than at the expense of, devolved legislative freedom. It is not necessarily argued that competence constriction *is* overtly used as a way of accommodating parliamentary sovereignty, but it is argued that these are reasons to question whether it *can be*.

This approach would be to answer the thesis' research question in the negative: were competence constriction pursued as an accommodation for parliamentary sovereignty, it would imply that that accommodation is only possible *at the expense of*, rather than within, the UK's territorial constitution. Unqualified legislative power, for example, is incompatible with the text of the devolution settlement and with the way in which both parliamentary sovereignty and devolution have been understood by the courts. Its treatment of the former, for example, is incompatible with the way in which EU membership and the HRA have been reconciled with parliamentary sovereignty. Competence constriction, similarly, is incapable of reflecting constitutional reality, being blind to some of the core features of devolution and the role played in the constitution by parliamentary sovereignty. Furthermore, it applies a sovereign 'quality' to certain matters of policy which can, has historically, and should be rejected.

These two examples are illustrative both of a wider *legal* approach, and of a wider approach within *political* circles. The protective approach, however, rather than representing an orthodox or coherent approach to the two features of the constitution engaged in this thesis, represents a departure from accepted positions and an unsound interpretation of both the devolution settlement itself, and its implications for sovereignty. Indeed, neither of these instantiations of the protective approach is *actually* capable of accommodating parliamentary sovereignty. When examined closely, neither can be seen to sustain a compelling or coherent connection with the sovereignty principle itself. However, they do appear to distort its meaning and role in the domestic constitution, from which lessons

follow. In concluding the thesis, the next chapter examines these issues in order to argue that reliance on the protective approach cannot satisfactorily accommodate parliamentary sovereignty within the UK's territorial constitution.

Chapter 6

Conclusion

1. The Accommodation of Parliamentary Sovereignty

Parliamentary sovereignty remains a, if not *the*, most important principle in the UK's constitution, and its dominance is eminently and consistently affirmed by constitutional actors. The core task at the centre of this thesis has been to consider what this importance, and what interpretations of that principle, mean for *other* parts of the constitution with which parliamentary sovereignty interacts, particularly the territorial constitution. It has been argued that, because of that principle's importance, it is necessary to ask whether certain norms—in particular, forms of decentralisation—that coexist alongside that principle are consistent with it, and to consider the different ways in which that consistency can—if at all—be achieved. This exploration is significant for three reasons.

First, the introduction of norms or forms of constitutionalism that are incompatible or inconsistent with parliamentary sovereignty might 'question the feasibility of classifying the United Kingdom constitution as one that does, or should, adhere to Dicey's conception of parliamentary sovereignty'.[1] In other words, they might corrode or undermine the role presently played by parliamentary sovereignty within the constitutional order. This, given this principle's orthodox significance, would be notable in its own right. Conversely, as this thesis has argued, that tension might actually resolve itself differently, conditioning *other* parts of the constitution in order that this incompatibility is cured or avoided. The pre-eminence, strength and continuing potency of that principle in practice means that

[1] Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Bloomsbury 2008) 5.

parliamentary sovereignty can be understood as exhibiting what has been described as a 'gatekeeping function': parliamentary sovereignty, and the necessity of sustaining it, determines and shapes what kinds of constitution, and kinds of constitution*alism*, are achievable in the UK. The importance of parliamentary sovereignty, on this view, means that *it* provides the parameters within which other phenomena must operate, and it is therefore important to understand what those parameters are and whether certain phenomena can or do fit within them.

Second, this means that relevant phenomena, like the territorial constitution, can (or need to) *themselves* be built, rendered or understood in ways that are consistent with, rather than impugning, parliamentary sovereignty. This is what has been described as 'accommodation'. Accommodation is the device this thesis has used to describe the ways in which the territorial constitution (as well as other analogous phenomena) can be rendered consistent with parliamentary sovereignty, or provide sufficient intellectual reassurance that, despite the presence of the relevant phenomenon, the UK's is still a constitution which adheres to parliamentary sovereignty. The language of accommodation is intended to capture the idea that other constitutional phenomena can account for, preserve, protect, adhere to, reflect, or provide conceptual space for parliamentary sovereignty, as well as capturing the variation between such strategies. Indeed, different options for rendering phenomena compatible with parliamentary sovereignty will differ in their strength or transformative severity. On some accounts, a particular theoretical framework—that is, a way of making sense of or giving effect to a given phenomenon—might be sufficient to ensure it is consistent with parliamentary sovereignty. On other accounts, or for different phenomena, a more wholesale transformation might be considered necessary, altering or severely limiting the way in which that phenomenon works in practice. The idea of accommodation also assists in its specificity, identifying not only which phenomena are compatible with parliamentary

sovereignty, which are not, and why, but also locating where that incompatibility lies and how it might be rectified.

Third, this exploration is significant because it is revealing as to the nature, meaning, and implications of parliamentary sovereignty. What is necessary to accommodate that principle will turn on a prior (or, more accurately, conterminous) analysis of what that principle is thought to mean, and what qualities it possesses. In particular, this will be a function of the kinds of issues it is sensitive to, and whether it is conceptually a brittle or flexible principle. These qualities are only, or at least best, revealed upon parliamentary sovereignty's interaction with other phenomena, in the way considered in this thesis.

This concluding chapter, having set out some of the reasons for the particular framing adopted by this thesis, will seek to do two further things. First, it will recapitulate the argument that has been advanced in the thesis, and the method by which that argument has been developed. Second, it will offer some final, concluding observations and reflections which arise from that argument, including its capacity to illuminate the contours of parliamentary sovereignty, and what this thesis' approach can tell us about analysing the UK's constitutional order more generally. It will, in this final part, consider some open questions, including where this analysis takes us next, and what it means for centralisation within the UK's constitution.

2. Summary

This thesis' research question was this: can parliamentary sovereignty be satisfactorily accommodated within the UK's territorial constitution and, if so, how? At the outset of the thesis, in its first chapter, the context for this question and the intellectual framework for answering it were set out. This first chapter centred the thesis on two phenomena, parliamentary sovereignty and devolution, and outlined the notion of accommodation in

similar terms to those set out above; that is, whether parliamentary sovereignty can be said, in an intellectually coherent way, to be meaningfully preserved or maintained by devolution, and whether the latter could therefore be said to be 'consistent' or 'compatible' with the former. In the thesis' introduction, the meaning of 'satisfactorily accommodated' was also explored. It was explained that, if parliamentary sovereignty was to be said to be 'satisfactorily accommodated' in the UK's territorial constitution, this would mean ensuring that *both* of the two phenomena with which this analysis is concerned were accurately and properly characterised, rather than distorted or caricatured. This issue of accuracy would provide the metrics against which to consider whether accommodation was real and genuinely meaningful. A form of accommodation which had only an illusory connection to a doctrinally coherent interpretation of parliamentary sovereignty could not be said to 'accommodate' it. This might be the case if a particular form of accommodation purported to preserve something that could not soundly be said to *be* parliamentary sovereignty or failed to reflect that principle as it is understood in practice. Similarly, if accommodation meant mischaracterising, corrupting or undermining the way that devolution is understood, this would not be to satisfactorily accommodate parliamentary within the UK's territorial constitution but, rather, at the expense of it. The introduction nonetheless maintained, as it has been argued throughout, that these criteria *can* be met, that therefore parliamentary sovereignty can be satisfactorily accommodated, and that this is achieved by a particular approach (the 'reconciliatory approach').

The second chapter's focus was to identify two meaningfully distinct and internally coherent ways of approaching the interaction between parliamentary sovereignty and multi-layered or decentralised constitutionalism. This chapter illustrated one of the strengths of the notion of accommodation as a tool for examining constitutional law: its capacity to draw together issues about the relationship between sovereignty and multi-layered constitutionalism in many contexts, sub-national and supra-national, unitary and

federal. It was noted that parliamentary sovereignty's endurance as an idea at the centre of the UK's constitutional law has proven difficult to reject, and its potency has often been at the forefront of analysis. Because of its endurance, whether, and to what extent, the decentralisation of constitutional power can take place on terms that are consistent with parliamentary sovereignty has been a similarly enduring dilemma, and one which informs the level, and kind, of decentralisation this constitutional system can sustain. It was observed that this can be understood as a function of the flexibility, breadth and brittleness of parliamentary sovereignty, and it was noted that many of these observations mirror issues that have arisen in the context of different ways of framing the interaction between sovereignty (as a broader notion) and decentralisation.

Two approaches to accommodation were explored in this second chapter. One considered parliamentary sovereignty a rigid phenomenon, and understood accommodation largely as an exercise in the defence or protection of that principle. Another approach considered parliamentary sovereignty as a more flexible phenomenon, capable of tolerating some limited conditions. On this latter account, accommodation was understood as an exercise in giving effect to sovereignty in a way that did—or could—preserve certain important aspects of decentralisation, and not in adhering to an overly dogmatic account of the former that impeded a pragmatic account of the latter. These two ways of looking at the conceptual relationship between parliamentary sovereignty and decentralisation had implications for the way that accommodation could be approached in practice; what, in other words, needed to be done to ensure that decentralisation preserved, adhered to or was consistent with parliamentary sovereignty. One approach to accommodation, starting from a more flexible conception of parliamentary sovereignty was described as 'reconciliatory'; the other, which painted sovereignty in brittle and inflexible terms, was described as 'protective'.

The thesis has argued that the reconciliatory approach provides the way to satisfactorily accommodate parliamentary sovereignty. That approach, and the case for it, was the focus of chapter 3. This chapter argued for the reconciliatory approach on the grounds that it provides an accurate characterisation of parliamentary sovereignty, consistent with the treatment of that principle in the contexts of devolution and of the UK's constitutional reconciliation with the primacy of EU law. This account, even though it is flexible, is a coherent explanation of the way that parliamentary sovereignty has been seen to interact with other norms and principles that also inhabit or compose the UK's wider constitution. Furthermore, the reconciliatory approach was also observed to recognise—and, indeed, facilitate—some of the core, definitional features that make devolution what it is. In particular, it was seen to be capable of recognising and accounting for the normative proximity of the devolved legislatures to their counterpart at Westminster, for the full scope of devolved competences to be realised, and it provided a framework within which the dynamic interaction between devolved and Westminster legislation could also be recognised. For these reasons, the reconciliatory approach provided a meaningful account of both relevant phenomena, and accommodated parliamentary sovereignty in a way that was able to do justice to the contemporary constitutional role, functions and implications of devolution.

The remainder of the thesis considered the protective approach, focussing on two particular instantiations of it. The first, the subject of chapter 4, was the notion of unqualified legislative power. It was argued that unqualified legislative power, a function of the Supreme Court's interpretation of s 28(7) of the Scotland Act 1998, is not only a phenomenon *distinct from* parliamentary sovereignty (despite its sporadic equivocation with that principle), but also one which is an inappropriate means of accommodating that principle because it does not share the qualities that the Court has itself explained are essential to its account of, or which might be said to be definitive of, parliamentary

sovereignty. Furthermore, that sporadic equivocation is problematic for the way parliamentary sovereignty is interpreted, appearing to endow it with a rigidity, and a resistance to some of the core features of devolution, that it should not be—and has not been orthodoxly—understood to possess. For example, unqualified legislative power was seen to be incompatible with legislative voids being filled by the devolved institutions, and the subjection of Westminster to political 'opprobrium'.[2] Unqualified legislative power is also a phenomenon that was demonstrated to mischaracterise devolution. This chapter showed that it either fails to recognise, or actively distorts, some core aspects of devolution, such as the dynamism of the settlement and the scope of devolved legislative freedom. Unqualified legislative power therefore possesses very limited accommodative potential, inaccurately characterising parliamentary sovereignty *and* the territorial constitution.

Finally, in chapter 5, the second instantiation of the protective approach was considered: competence constriction, an idea capturing both reductions to the *scope* of devolved law-making power, and changes to the structure of the settlement which affect the *potency* and *exercise* of devolved legislative freedom. This chapter argued, in a similar vein to chapter 4, that competence constriction is not an appropriate means of securing the accommodation of parliamentary sovereignty. This was in part because it lacked a coherent or defensible connection to an intellectually sound account of parliamentary sovereignty. That principle is more accurately understood as being concerned with, and accommodated by, the devices explored in chapter 3, rendering further constriction, particularly that concerned with *which* competences are allocated to which institutions, superfluous. Furthermore, particularly where examples of competence constriction entail restructuring devolved law-making power, they can, or tend to, do so in a way which (as the EUWA and the UKIMA

[2] *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106 [52].

demonstrated) can be difficult to reconcile with the core features of devolution outlined above. For example, the UKIMA—and its surrounding discourse—effectively grants Westminster legislation a kind of primacy, disapplying devolved legislation with which it is incompatible (in certain circumstances). This runs counter to, and underestimates, dynamism's role at the core of the devolution settlement. Competence constriction, therefore, can lead to the mischaracterisation of devolution and cannot provide satisfactory accommodation.

3. Some Concluding Reflections and Where Next

It is worth at this juncture briefly exploring two issues that emerge at the conclusion of this thesis' argument. The first concerns one of the thesis' central contributions: its capacity to illuminate the contours of parliamentary sovereignty—a process which is dynamic—and the second concerns the method by which this thesis has gone about appraising the two models it has considered, which gives rise to a particular empirical issue as times change and particular approaches take root or become established.

(a) *Illuminating the Contours of Parliamentary Sovereignty*

One of the contributions of this thesis is in facilitating a better understanding of the principle of parliamentary sovereignty. It has been noted at several junctures that the contours of parliamentary sovereignty are best revealed when that principle comes into contact with other constitutional phenomena, and this contact is precisely what the accommodation analysis at the heart of this thesis concerns. Indeed, it is an analysis which considers whether parliamentary sovereignty can coexist alongside other constitutional phenomena or abrases them, what demands it makes of those phenomena, and whether those phenomena even apply pressure to the principle at all, and whether that pressure

requires (or can be rectified by) some kind of accommodative compensation. These are all matters that are symbiotic with a better, richer, understanding of parliamentary sovereignty and the role it plays in the constitution. It is an analysis that relies upon, and therefore assists in uncovering, the boundaries of the principle, what issues affect its core, and which do not. It also helps disaggregate the principle from other phenomena that—like unqualified legislative power—may *look* like an instantiation of the sovereignty principle, but which cannot accurately be understood in that way.

Considering what is necessary to accommodate parliamentary sovereignty is not, however, a static undertaking. A certain phenomenon might be ostensibly recognised or given effect in a way that is thought to render it consistent with parliamentary sovereignty at one point, only for it later to be revealed that that accommodation must be considered insufficient and does not render it so compatible or adequately guarantee the principle's position, status or preservation. This is because what the sovereignty principle requires might only become clear *when* this interaction happens and is later reflected upon or (re-)evaluated. Parliamentary sovereignty's requirements (for example, during another phenomenon's introduction) might have been unclear, ambiguous, or the thinking around it might have since changed in light of other (cumulative) developments. Indeed, this is precisely what can be observed in practice. Certain new pieces of legislation are passed, and new theoretical frameworks are endorsed in the courts as accommodation continues dynamically. This more nuanced way of viewing the gatekeeping function recognises that the precise size and shape of the gateway may not always be immediately clear. Put another way, the contours of the sovereignty principle that determine that gateway might only be revealed *by* the dynamic accommodative process itself.

Indeed, this was the course that appeared to have been taken during the UK's membership of the EU. During the earlier period of that membership there was forceful disagreement about what effect EU law *could* have domestically, and whether and how that effect could

be understood as being consistent with parliamentary sovereignty. The consequence of this was, it seemed, to give EU law's primacy only an effect that was consistent with parliamentary sovereignty. The majority of the Supreme Court in *Miller I*, as has been noted, maintained that EU law could only have a domestic effect that parliamentary sovereignty *in the first place* allowed it to have[3] (a view also evident in *HS2* previously).[4] This, the majority argued, left the sovereignty principle safe from impugnment.[5] Latterly, however, there was renewed debate about whether the effect that primacy *had* been given *was* sufficiently accommodating. The intellectual reassurance provided by the majority in *Miller I* was subsequently re-evaluated and considered by some (including by the Court itself) to be an insufficient protection,[6] and observed by others to be genuine but not sufficiently obvious or 'felt'.[7]

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[3] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 [67] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[4] 'It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.': *R (HS2 Action Alliance Limited) v The Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 [207] (Lord Neuberger and Lord Mance).

[5] *Miller I* (n 3) [60] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

[6] The Supreme Court itself later considered EU membership a 'qualification' of parliamentary sovereignty, language that implies the accommodations considered sufficient in *Miller I* had been reassessed: *Treaty Incorporation* (n 2) [40].

[7] HM Government, *The United Kingdom's Exit from and New Partnership with the European Union* (Cm 9417, February 2017) 13.

One explanation for that is simply that accommodation is indeed a dynamic process, and that our understanding of the contours of the constitution, and the interaction of the norms within it, changes over time. What was at one time considered satisfactory as an accommodation might, at a later point, be considered an impermissible transgression. Because the boundaries of the sovereignty principle might only be revealed with clarity upon its interaction with other phenomena, it is likely to be difficult to say with certainty at an early stage whether a particular accommodation has indeed been sufficient. It is often only clear whether a particular theoretical framework is the right one long after it has been offered by a court and subsequent courts, reflecting upon it, continue to endorse it. On other occasions, a particular approach might be abandoned or later considered flawed. This reflects the way that parliamentary sovereignty's meaning, scope and effect are illuminated when pressure is applied upon it.

Importantly, accommodation is the vehicle through which these matters are revealed in the first place. It is a platform from which to observe these changes in perspective, and to identify pluralism where it exists. And it is *both* a means of giving interpretive effect to norms and principles within the constitution that is consistent with parliamentary sovereignty, *and* a means of continually appraising whether a particular approach is satisfactory.

(b) On the Nature of the Analysis

This thesis has sought, through its analysis of the idea of accommodation, to do justice to the variation, and changes over time, in the way the relationship between parliamentary sovereignty and decentralised constitutionalism is understood. This is partly the reason that the two different approaches or models—reconciliatory and protective—have been considered, rather than the latter being dismissed out of hand. There is a *prima facie* case to

be made in defence of the protective approach but, it has been argued, it is not one that withstands meaningful or sustained scrutiny. Nonetheless, that approach does represent *a* particular way of conceptualising the relationship at the heart of this work. It has not been the argument of this thesis, however, to prefer or dismiss particular approaches by reference to the extent to which they consider devolution or parliamentary sovereignty as 'good' or 'bad' things. Rather than focussing on normative desirability, the two metrics deployed to appraise each model revolve around accuracy, considering each approach by reference to its capacity to characterise the sovereignty principle and devolution as they actually are, derived from an analysis of practice. The thesis has sought to identify key aspects of both phenomena and consider the extent to which each model can explain, reflect or properly do justice to those aspects.

Implicit in that approach is, of course, an analytical or empirical methodology: a claim that it is important, or sufficient, to examine theories by their ability to accurately make sense of constitutional facts. Whether those facts, and the theories that reflect them best, are desirable (whether, for example, parliamentary sovereignty or devolution *should* be endorsed or rejected) is a latter analysis with which this thesis has not sought to openly engage. However, the mode of analysis adopted here exposes this work to a particular critique, which is perhaps a useful indicator for where this analysis might lead next.

The issue that this approach is exposed to is how to deal with matters, and perspectives, changing. The thesis has argued that the reconciliatory approach is a better reflection of parliamentary sovereignty—vesting it with a degree of flexibility and particular core characteristics which that principle has been observed to possess more widely. The reconciliatory approach has also been advanced because it offers a more accurate account of devolution, capable of doing justice to the imposition of political pressure that follows from that settlement's qualities as a policy laboratory, its implications for Westminster legislation, and the scope of legislative freedom it facilitates. But what happens if the

qualities of the constitution change such that the protective approach *becomes* their more accurate reflection? The key strength of the reconciliatory approach—its analytical accuracy—will wane the more that parliamentary sovereignty is understood in inflexible terms. It might in time be inaccurate to describe parliamentary sovereignty as flexible, devolution as constitutionally significant, or its interaction with Westminster legislation as dynamic and, if that were to become the case, the key premises underpinning the argument in favour of the reconciliatory approach would no longer hold.

This is, however, an important conclusion. It reflects the fact that the UK's constitutional order is, to an extent, a product of how the phenomena and principles which comprise it are understood. If that understanding changes, the meaning and purchase of, and interaction between, those phenomena are likely to substantively change too. If parliamentary sovereignty is understood as an inflexible principle, more akin for example to unqualified legislative power, the distinction between those two ideas at the core of chapter 4 will be deprived of its force and might collapse. This is, if anything though, an argument for careful reflection upon the way we think about the UK's constitution, and the relationships internal and external to it. Neither it, nor any of the principles at its core, are immune to change; accommodation facilitates the observation and exposure of that change as and when it happens but does not purport to inhibit those changes themselves.

What does this mean for parliamentary sovereignty's relationship with centralisation? In recent years, that principle has been observed to resist decentralised forms of constitutionalism with which it has been considered incompatible.[8] That view is, of course, at the core of the protective model of accommodation. This thesis has sought to argue, by contrast, that it is not parliamentary sovereignty *itself* that necessitates the recentralisation

[8] E.g., Akash Paun, 'Sovereignty, Devolution and the English Constitution' in Michael Kenny, Iain McLean and Akash Paun (eds), *Governing England: English Identity and Institutions in a Changing United Kingdom* (OUP 2018) 46.

of constitutional power, but a particular approach to—and conception of—that principle. That approach is, it has been argued, flawed and indefensible on its own terms, being a poor reflection of an even traditional conception of the sovereignty principle. It is, again, no part of the orthodox conception of parliamentary sovereignty that that principle is sensitive to political conditions on Westminster's legislative power or the mere *attempt* at imposing conditions on legislative freedom which can subsequently be overcome or set aside by Westminster.[9] Yet, as has been conceded, this might remain the case only for as long as it is considered to be the case. The reality is, therefore, that parliamentary sovereignty may not necessitate centralisation so long as those characteristics which allow it to tolerate decentralisation (notably, its flexibility) continue to accurately describe it. The more dominant the inflexible account becomes, the stronger the empirical case for the protective approach becomes.

This thesis has sought to construct an intellectual argument for the reconciliation of parliamentary sovereignty and devolution. It has attempted to identify the way in which the former might *necessarily or inevitably* undermine the latter, to expose the thinking behind this perceived incompatibility, to engage with it, and to demonstrate that this reasoning is flawed. It has sought to argue that parliamentary sovereignty cannot soundly be thought to necessitate the recentralisation of constitutional power—nothing in that principle requires it. However, whether it is put to such purposes rests ultimately on political will. If the relevant actors can recognise that parliamentary sovereignty is not necessarily imperilled by the decentralisation of constitutional power, they might well be less inclined to wield it in that way. Nevertheless there remains an obligation on

[9] See 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* (Hart Publishing 2021) 209.

constitutional lawyers to continue to make the case that parliamentary sovereignty can be satisfactorily accommodated within the UK's territorial constitution in a way that leaves the latter meaningfully intact.

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