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PARLIAMENTARY SOVEREIGNTY AND POPULAR SOVEREIGNTY IN THE UK CONSTITUTION

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ABSTRACT. *Rivka Weill claims that in the nineteenth century the foundation of the UK constitution changed from parliamentary sovereignty to popular sovereignty, originally as a matter of constitutional convention but today as a matter of law. I argue, to the contrary, that parliamentary sovereignty as a legal principle and popular sovereignty as a political principle are perfectly compatible. Constitutional conventions are essentially political not legal requirements. Therefore, a constitutional convention requiring popular approval of constitutional change, if it ever existed, would not have violated parliamentary sovereignty. But if it did exist, it was displaced by the Parliament Act 1911 and has not been revived since. Moreover, there is no evidence that courts today have legal authority to enforce any requirement, conventional or legal, requiring such approval.*

KEYWORDS: *UK constitution, parliamentary sovereignty, popular sovereignty, constitutional convention, referendums, A.V. Dicey, Parliament Acts 1911 and 1949.*

I. INTRODUCTION

In various publications Professor Rivka Weill has examined the role of "the people", since 1832, in endorsing fundamental changes to the constitution of the United Kingdom. She proclaims a "revolutionary" thesis: that Britain underwent a "subtle, unacknowledged transition" "from parliamentary sovereignty to popular sovereignty in the nineteenth century [that] created a large gap between the British practice of popular sovereignty and its narrative of parliamentary sovereignty, which persists to this day".[1]

Popular sovereignty came to be upheld by new constitutional conventions, enforceable by unelected branches of government: in the nineteenth century, by the House of Lords and the monarch, and more recently, by the

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[1] R. Weill, "Constitutionalism Reborn" (2021) 60 Colum. J. Transnat'l L. 132, 204, 202.

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courts.[2] "[I]f … political branches do not step in to fulfil their duty to enforce constitutional conventions … the courts should serve as the last line of defense and possess both the authority and the responsibility to enforce them to protect popular sovereignty."[3] Due to these "sophisticated enforcement mechanisms", she rejects the orthodox understanding that because conventions are part of the political rather than the legal constitution, they are consistent with the legal sovereignty of Parliament.[4] The modern role of the courts shows that "[t]he political constitution converged with the legal constitution".[5]

I will criticise Weill's thesis, and defend the orthodox understanding, on several grounds. First, in the UK parliamentary sovereignty and popular sovereignty are not competitors; the former is a legal principle and the latter a political one, and they are perfectly compatible. Therefore, secondly, even if it is true that in the nineteenth century there was a constitutional convention requiring popular approval of fundamental constitutional changes, this would have been consistent with parliamentary sovereignty. The supposed requirement would have been inconsistent with parliamentary sovereignty only if it were legally binding rather than a convention. Thirdly, there is little evidence that this convention, if it did exist (which seems questionable), survived after 1911 or has been revived since. Fourthly, there is little or no evidence that courts today have – or even claim to have – the authority Weill attributes to them, to enforce either constitutional conventions, or a new rule of recognition, upholding popular sovereignty.

My third ground challenges Weill's claim that the UK today – like the US – exemplifies a "dualist" rather than "monist" model of lawmaking, which requires that constitutional changes must be approved by the people but ordinary lawmaking need not.[6] That claim would be vindicated if there were currently a constitutional convention requiring popular approval of constitutional change, which I deny. But even if there were such a convention, my first and second grounds show that this would still be consistent with parliamentary sovereignty.

I will refer to "the people" and "popular sovereignty" without attempting to analyse those concepts or justify their use. That is a task for those such as Weill who advance theories which depend on them. It is not a task I need to undertake, since my purpose is merely to clarify the compatibility of such theories with the legal doctrine of parliamentary sovereignty.

[2] Ibid., at 203.
[3] Ibid., at 204; see also 142.
[4] Ibid., at 203, 140.
[5] Ibid., at 200.
[6] Ibid., at 200–01; for this terminology, see R. Weill, "Dicey Was Not Diceyan" [2003] C.L.J. 474, 475, note 5, citing the work of Bruce Ackerman.

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II. Weill's History of Popular Sovereignty in Britain

Weill is convinced that "[t]he U.K. has been operating under a popular sovereignty model that is remarkably similar to the U.S. model for the past *two-hundred years*. Each iteration of the U.K. model has exhibited a commitment to enacting constitutional change only with the people's endorsement".[7] She identifies four main iterations: 1832–1911; 1911–49; 1949 to the mid-1970s; and since the mid-1970s.

She argues that from 1832 until 1911 it became generally accepted that fundamental constitutional changes must be approved by the people before being enacted.[8] The will of the people was ascertained at elections called specifically for that purpose, often due to prior obstruction of such changes in the House of Lords. If a majority of the electors approved of the change, but the Lords continued to obstruct it, the monarch would threaten to appoint enough new peers to ensure its passage.[9] The unelected House of Lords therefore possessed a power to review constitutional changes that resembled the US Supreme Court's power of judicial review: both powers could be used to stymie attempts at constitutional change that had not received the constitutionally required endorsement of the people.[10] A system of parliamentary sovereignty was thereby transformed into one of popular sovereignty.[11]

Weill's analysis of the period between 1911 and 1949 has shifted over time. She originally wrote that the Parliament Act 1911 "made Parliament, and more particularly the Commons, sovereign in practice and not just in law".[12] But she has since qualified that assertion; the Act "embodied a transformation from a strong-form model of popular sovereignty to a weakened commitment to popular sovereignty and a parallel strengthening of commitment to parliamentary sovereignty".[13] "Although the House of Lords (HL) lost its ability to exercise an absolute veto, it nonetheless maintained a [two-year] suspensory veto that enabled it to protect the constitutional status quo and refer issues to the People's decision."[14]

This weakened model of popular sovereignty survived until 1949, when the second Parliament Act (assuming its legal validity[15]), together with the Salisbury Convention, inaugurated full parliamentary sovereignty that lasted until the modern use of referendums commenced in the

[7] Weill, "Reborn", 137, emphasis in original; see also 201.
[8] Ibid., at 143–44.
[9] Ibid., at section I, 148, 208–09.
[10] Ibid., at 145–46.
[11] Ibid., at 144, 147.
[12] Weill, "Dicey Was Not Diceyan", 490.
[13] R. Weill, "Centennial to the Parliament Act 1911: The Manner and Form Fallacy" [2012] P.L. 105, 105.
[14] Weill, "Reborn", 141, 169–71; see also Weill, "Manner and Form Fallacy", 118, 117.
[15] See text to notes 104–107 below.

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mid-1970s.[16] By affirming the validity of the 1949 Act (questionably, in her opinion), the court in *Jackson* in effect held that it had established full parliamentary sovereignty.[17]

But this proved to be merely a "short lapse to parliamentary sovereignty".[18] "Since the 1970s, the U.K. returned to a full-fledged popular sovereignty model accompanied by formal written constitutional norms and the exercise of various forms of judicial review over primary legislation."[19] The will of the people regarding proposed constitutional changes has been ascertained through referendums.[20] This provided a "substitute model to express the People's will", replacing the House of Lords' suspensory veto that had been so weakened by the Parliament Act 1949.[21] "The commitment to popular sovereignty, thus, remained strong. Only the means of expressing that will changed."[22] Furthermore, judicial decisions in *Jackson* and *Miller II* demonstrated that ultimately, the courts may enforce constitutional conventions when other enforcement mechanisms fail to do so.[23]

She concludes that "Britain indeed operates by a popular sovereignty model … [whereby] constitutional change requires the People's consent, expressed through elections, super-majorities or referenda",[24] which "contradict[s] the very definition of a parliamentary sovereignty model".[25] The orthodox view that the UK constitution has exemplified parliamentary sovereignty from well before 1832 until today is mistaken. Scholars "misunderstood the British model by treating it as a model of parliamentary sovereignty when it is, in fact, a model of popular sovereignty".[26]

III. Was and Is there a Constitutional Convention requiring Popular Endorsement of Constitutional Change?

A. 1830–1911

In earlier publications, Weill did not use the term "constitutional convention" in the British sense, but appeared to have it in mind. To establish the supposed requirement of popular approval of fundamental constitutional

[16] Weill, "Manner and Form Fallacy", 119–21. See also R. Weill, "We the British People" [2004] P.L. 380, 383, 403.
[17] Weill, "Manner and Form Fallacy", 107, 112.
[18] Weill, "Reborn", 141, 174.
[19] Ibid., at 175.
[20] She adds the qualification that the recent use of referendums has re-established popular sovereignty only in a weaker form: Weill, "Manner and Form Fallacy", 121, 123.
[21] Weill, "Reborn", 185.
[22] Ibid., at 185.
[23] Ibid., at 142.
[24] R. Weill, "We the British People Rule: From 1832 to the Present" (2021) U.K.C.L.A. Blog, "Conclusion", available at https://ukconstitutionallaw.org/2021/01/21/rivka-weill-we-the-british-people-rule-from-1832-to-the-present/ (last accessed 20 January 2022).
[25] Loc. cit.; see also Weill, "Reborn", 149.
[26] Weill, "Reborn", 204.

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change, she relied on political practice, political rhetoric, and scholarly writings, especially that of A.V. Dicey.[27] In her most recent article, she explicitly argues that the requirement was embodied in constitutional conventions.[28]

Her first article described Dicey's changing views,[29] which do seem to support her thesis. He described constitutional conventions as "understandings, customs, or conventions"[30] which are not laws but constitute "constitutional or political ethics",[31] or "the constitutional morality of the day".[32] They regulated how the three members of the sovereign body – the King in Parliament – should exercise their discretionary powers (prerogatives in the case of the Crown, privileges in the case of the two Houses).[33] The ultimate object of constitutional conventions was to ensure that these entities acted consistently with the will of the political sovereign, namely, the electors.[34] One major convention, concerning disagreements between the two Houses, provided that the Lords should "at some point, not definitely fixed" give way, and if they did not, authorised the Crown to create or threaten to create enough new peers to override their opposition.[35] "[T]he point at which the Lords must yield or the Crown intervene is properly determined by anything which conclusively shows that the House of Commons represents on the matter in dispute the deliberate decision of the nation."[36] "The nature of the proof differs under different circumstances"[37] and "the will of the nation is often not clearly expressed".[38] Elsewhere, he implied that in practice, though not in law, this had led to "a distinction between laws which affect the Constitution and laws which deal with matters of everyday life".[39]

Weill reports that in a journal article published in 1910, Dicey proposed that Parliament subject itself to a statutory requirement to hold a referendum before enacting any fundamental constitutional change, a requirement that would to some extent be judicially enforceable.[40] That proposal is intriguing. Although the device of self-entrenching such a requirement was first used in New South Wales in 1930, Dicey anticipated it. He advocated the enactment of a Referendum Act that would list important constitutional

27 Weill, "Manner and Form Fallacy", 113.
28 Weill, "Reborn", 137–38, then *passim*.
29 Weill, "Dicey Was Not Diceyan".
30 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London 1915), 465. This edition, the one that Weill cites, was the last written by Dicey himself.
31 Ibid., at 413.
32 Ibid., at 418.
33 Ibid., at 424.
34 Loc. cit.
35 Ibid., at 417–18, 423, 427.
36 Ibid., at 427, 454.
37 Ibid., at 454.
38 Ibid., at 456.
39 A.V. Dicey, "The Referendum" (1894) 23 National Review 65, 66, quoted in Weill, "Dicey Was Not Diceyan", 476, note 8.
40 Weill, "Dicey Was Not Diceyan", 486–87, citing A.V. Dicey, "The Referendum and Its Critics" (1910) 212 Quarterly Review 538, 554–55.

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statutes in a Schedule, and forbid their amendment or repeal except with the approval of a majority of voters obtained in a referendum. He recommended that the Referendum Act itself be included in the Schedule, which would constitute self-entrenchment.[41] The Act would also require courts throughout the British Empire to declare invalid any Bill or "so-called Act" that purported to amend or repeal a protected statute without the approval of a majority of voters.[42] He confidently asserted that this "would clearly, as regards any enactment whatever included in its Schedule . . . make an alteration impossible without an appeal to the people".[43]

But Dicey immediately went on to consider the objection that his Referendum Act "would, after all, as long as the sovereignty of the Imperial Parliament is acknowledged, be futile, for Parliament could clearly evade . . . [it] by adding to any Bill which affected any scheduled Act . . . words exempting the Bill from the operation of the Referendum Act".[44] He said that this objection was "verbally sound", but "in reality . . . without force" because "[t]he electors may be trusted to resent an attempt to deprive them of legal power ensured to them by the Referendum Act" and "[n]o party leader will risk this resentment. The Referendum Act will be less subject to change, except by way of extension, than any enactment in the statute book".[45] He qualified this by adding that the "latent sovereignty of Parliament" would, nevertheless, enable the Referendum Act to be overridden in a national emergency threatening the safety of the nation.[46] So Dicey's reference to the "impossibility" of the Referendum Act being evaded is a reference to political, not legal, impossibility – and even in that sense, not complete or therefore genuine impossibility.

Weill suggests that in this 1910 article Dicey may have been trying to deflect objections to his proposal by denying that it contradicted parliamentary sovereignty.[47] But as early as 1894 he had acknowledged in a private letter that Parliament could bind itself only politically, and not legally:

> It is true that an Act of Parliament might repeal or override the Referendum Act itself, but this though a plausible, is not a valid objection. The Referendum Act would practically be secured by the odium which any Ministry or party would incur by depriving the people of their right to be

[41] Dicey, "The Referendum and Its Critics", 554.
[42] Loc. cit.
[43] Loc. cit.
[44] Ibid., at 555. The following discussion was written before I discovered Mark Walters' similar rejoinder to Weill's claim that Dicey's referendum proposal was inconsistent with parliamentary sovereignty: see M.D. Walters, *A.V. Dicey and the Common Law Constitutional Tradition, a Legal Turn of Mind* (Cambridge 2020), 379–85.
[45] Loc. cit.
[46] Loc. cit.
[47] Weill, "Dicey Was Not Diceyan", 488, note 53.

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> appealed to. I am quite certain that once established the Referendum would never be got rid of by anything short of a revolution.[48]

As well as relying on political rather than legal obstacles, Dicey in these passages seems to deny the principle of implied repeal: Parliament could expressly repeal or override the Referendum Act, but would otherwise be legally bound by it. That interpretation would make sense of his proposal that the courts should be directed to declare invalid any breach of its requirements. This is admittedly contrary to Dicey's previous commitment to implied repeal, but there is no good reason to think that implied repeal is essential to parliamentary sovereignty: Parliament is fully sovereign if it can change the law however and whenever it chooses, even if it must sometimes do so by using express words (which is not difficult).[49] It is also far from certain that if his Referendum Act had been enacted, the courts would have exercised the power to invalidate a later, inconsistent statute.

Even more importantly, as Weill observes, Dicey's proposal for a Referendum Act was never adopted, and indeed was repudiated when the Parliament Act was enacted in 1911.[50] At most, then, Weill's account shows that there may have been a constitutional convention in the late nineteenth century requiring that, before a fundamental constitutional change was made, the approval of the people be obtained in an election devoted specifically to the issue. She acknowledges this when she says that "between 1832 and 1911 the British constitution operated under popular rather than parliamentary sovereignty. This British version of the popular sovereignty model was part of the political rather than legal constitution. The political actors and primarily Parliament, not the courts, enforced this model".[51]

In 1913 Dicey declared that if Parliament passed a bill for Home Rule in Ireland, without the approval of the people being obtained in an election focusing on that issue, the resulting statute would be unconstitutional.[52] Weill deems this "the ultimate contradiction of Dicey's conception of parliamentary sovereignty".[53] It amounted to "recognising the People as the legal sovereign of Britain even without the adoption of the referendum

[48] Dicey to Leo Maxse, 2 February 1894 (Maxse Papers, West Sussex County Record Office, Chichester), quoted in M. Qvortrup, "A.V. Dicey: The Referendum as the People's Veto" (1999) 20 History of Political Thought 531, 545. At the time, Maxse was the editor of the journal *National Review*, in which Dicey was about to publish his article "The Referendum", on which Weill relies (see note 39 above).

[49] Dicey, *Law of the Constitution*, 141; J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford 1999), 15; J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge 2010), 181–82. See also Walters, *A.V. Dicey*, 385.

[50] Weill, "Dicey Was Not Diceyan", 492.

[51] Weill, "We the British People", 380. See also Weill, "Reborn", 180: Britain in the early twentieth century was still "one step away from becoming a *formal* popular sovereignty system".

[52] A.V. Dicey, *A Fool's Paradise* (London 1913), quoted in R. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapell Hill 1980), 246.

[53] Weill, "Dicey Was Not Diceyan", 491.

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and notwithstanding the passage of the Parliament Act" – the "basic norm of popular sovereignty was entrenched even against the People's will".[54]

Weill relies here on Richard Cosgrove, who wrote: "By his own definition the laws Parliament passed were constitutional; Dicey himself had done most to banish the idea of unconstitutionality from English law."[55] But Dicey had done no such thing: he emphasised that in Britain, the word "unconstitutional" is often used to denote a breach of constitutional convention, or "constitutional ethics", rather than of law[56]: "The expression, as applied to an English Act of Parliament, means simply that the Act in question, as, for instance, the Irish Church Act, 1869, is, in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the Act is either a breach of law or is void."[57]

For this reason, Dicey used the words "constitutional" and "unconstitutional" to describe compliance with or violations of constitutional conventions, even though he emphasised that British courts could not declare a statute to be void on the ground that it was unconstitutional.[58] That usage was entirely orthodox, long before Dicey's era.[59] Therefore, his condemnation of the proposed statute for Home Rule as unconstitutional was not inconsistent with his conception of parliamentary sovereignty.

But it seems debatable whether a constitutional convention, requiring popular assent to constitutional change, existed at the time, notwithstanding Dicey's apparent belief that it was.[60] The accepted tests for the existence of a convention require, among other things, general agreement among relevant political actors that a certain course of action is obligatory.[61] But Weill reports that "[t]he House [of Lord]'s exercise of its veto power [to force an election] subjected it to constant and vehement attacks … [and was] portrayed as partisan and biased in favour of the Conservatives. It was also claimed that as an unelected chamber, it should not obstruct the will of the nation as expressed by the elected Commons".[62] "Within the

[54] Ibid., at 493, 492, respectively.

[55] Cosgrove, *Rule of Law*, 246. Cosgrove also wrote: "That a Home Rule Act might lack moral validity was also a remarkable doctrine from a lawyer who, when it suited his purposes, had adhered rigidly to the Austinian separation of law and morality" (loc. cit.). But this was not at all remarkable: it is precisely this separation that permits a legal positivist to criticise the moral validity of a law while acknowledging that it is legally valid. Austin himself insisted that all governments are bound by moral law and lack legitimacy in so far as they fail to comply with it: see Goldsworthy, *Sovereignty of Parliament*, 19.

[56] Dicey, *Law of the Constitution*, 516, Appendix, Note VII. Weill seems to overlook this in Weill, "Dicey Was Not Diceyan", 491–92. See also Walters, *A.V. Dicey*, 393–96.

[57] Dicey, *Law of the Constitution*, 516, Appendix, Note VII.

[58] Ibid., at 417, 430, 432, 436, 442, 445.

[59] See Goldsworthy, *Sovereignty of Parliament*, 190–91.

[60] See above text to notes 34–39. Mark Walters also questions whether such a convention existed: *A.V Dicey*, 392.

[61] See the chapters by Galligan and Brenton and by N. Aroney, in B. Galligan and S. Brenton (eds.), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge 2015).

[62] Weill, "Dicey Was Not Diceyan", 486. Dicey expressed a similar criticism: ibid., at 489. See also Weill, "We the British People", 399.

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Liberal party, some denied the legitimacy of the specific mandate theory altogether."[63] Liberal Prime Minister Asquith attacked the theory as a "new-fangled Caesarism which converts the House of Lords into a kind of plebiscitary organ".[64] It also seems doubtful that those who passionately advocated extensions of the franchise would have accepted that such an extension had first to receive the approval of a majority of those who currently enjoyed the privilege of being enfranchised; these advocates, presumably, regarded the unreformed electorate as not truly representing the people.

Moreover, if the employment of a veto by the House of Lords had proven a satisfactory remedy, Dicey would surely not have advocated its replacement by a popular veto in a referendum. In 1894, he implied that the House of Lords had lost its power.[65] Weill does provide evidence of some bipartisanship: Liberals as well as Conservatives sometimes "opposed their respective party's constitutional initiatives" and "demanded the People's decision on the fundamental constitutional issues of the day".[66] But this implies that other members of those parties, or at least of the Liberal Party, ignored or resisted these demands, which would be inconsistent with the general acceptance required for a constitutional convention to exist. I do not assert that Weill is wrong; to do so would require more detailed historical investigation than I can undertake. I merely suggest that she herself (commendably) provides some grounds to question her claim.

B. 1911 to Mid-1970s

To support her contention that even after the enactment of the Parliament Act 1911 "Britain was still operating under a popular sovereignty model, though weaker than before",[67] Weill relies on the fate of the two Bills whose passage the Act was intended to facilitate: one for Irish Home Rule and the other for disestablishment of the Welsh Church.[68] The House of Lords was still able to obstruct both Bills, but only delayed their enactment by two years.

As evidence of the continued operation of a popular sovereignty model, this seems slim. Both Bills were enacted in 1914, despite the obstruction of the House of Lords, although their coming into force was delayed until the end of the War. The Welsh Church Act 1914 came into effect in 1920,

[63] Weill, "Reborn", 177.
[64] Ibid., at 161.
[65] See Dicey, "The Referendum", quoted in Weill, "Dicey Was Not Diceyan", 476, note 8.
[66] Weill, "We the British People", 386, esp. note 20. See also Weill, "Reborn", 148 (in "both the Whig and Tory parties, dissidents pushed the popular commitment further by demanding the people's decision in referenda on divisive constitutional issues").
[67] Weill, "Reborn", 171.
[68] Ibid., at section III.B, 169–71.

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while Home Rule (the subject of a further Act passed in 1920) became redundant when the Irish Free State was established in 1922. Obstruction by the House of Lords did not lead to public opinion being consulted in an election or referendum devoted to either issue, although as Weill notes, it did enable armed opposition to Home Rule to be instigated in Ulster, which was hardly an expression of the will of the people as a whole.[69]

Weill presents no evidence of a constitutional convention in existence between 1911 and 1949 requiring that the approval of the people be sought for major constitutional changes. Sir W. Ivor Jennings confidently asserted that the convention concerning disagreements between the two Houses, discussed by Dicey (who said that resolution depended on which House better represented the will of the nation), disappeared when supplanted by the Parliament Act 1911.[70] Weill acknowledges that between 1949 and the mid-1970s, full parliamentary sovereignty was generally accepted.[71]

C. After the Mid-1970s

Whether or not new constitutional conventions regarding referendums have developed since the mid-1970s has been discussed by Stuart White.[72] He concludes that while there may now be a convention that the outcome of a referendum must be complied with, it is doubtful that there is any convention regarding the holding of referendums. He draws on two recent parliamentary enquiries into the use of referendums, by the House of Lords Select Committee on the Constitution in 2010, and by the House of Commons Public Administration and Constitutional Affairs Select Committee in 2017. He notes that "it is striking that neither the Lords report nor the 2017 Commons Report actually confirm" the existence of a convention in relation to the holding of referendums.[73]

This is corroborated by Michael Gordon's careful account of recent practice regarding referendums, which draws on the House of Lords report as well as the 2018 Report of the Independent Commission on Referendums (established by the Constitution Unit at University College London, comprising senior civil servants, politicians, journalists, academics and other experienced people).[74] Prominent features of that practice include the

[69] But see the discussion of competing conceptions of "the people" in C.W. Reid, "Democracy, Sovereignty and Unionist Political Thought During the Revolutionary Period in Ireland, c. 1912-1922" (2017) 27 Transactions of the Royal Historical Society 211, esp. 222, 231.
[70] Sir W. Ivor Jennings, *The Law and the Constitution*, 5th ed. (London 1959), 90; see also G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford 1984), 13, 24.
[71] See notes 16–18 above.
[72] S.G. White, "The Referendum in the UK's Constitution: From Parliamentary to Popular Sovereignty?" (2020) Parliamentary Affairs, 12–16, available at doi:10.1093/pa/gsaa062 (last accessed 20 January 2022).
[73] Ibid., at 14.
[74] M. Gordon, "Referendums in the UK Constitution: Authority, Sovereignty and Democracy after Brexit" (2020) 16 EuConst 213, 215–23.

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lack of both a "specific constitutional framework" and clear prescriptive criteria determining when referendums should be held,[75] and inconsistency in decisions to hold them, especially in terms of subject matter,[76] due to "ad hoc, circumstantial decision-making"[77] driven by "political pragmatism, not constitutional principle".[78] It seems clear that political actors have not yet developed "a principled constitutional practice", and whether they ought to do so is contested.[79] Both the House of Lords Committee and the Independent Commission doubted the possibility or desirability of establishing a comprehensive list of issues that should require a referendum,[80] and expressed scepticism about a more formal incorporation of referendums into the constitution.[81]

It seems that at most, it can be argued that Parliament is morally obligated to hold a referendum before making a fundamental change to the constitution, but as yet there is no generally accepted and consistent practice of doing so. To be fair, Weill at one point seems to acknowledge this: "the extent of British commitment to hold referenda is still developing. While some commentators have suggested that its use is partisan and intended to serve governmental needs alone, others are suggesting that it become a prerequisite for conducting any further major constitutional change. *If* the latter view prevails, the referenda may become a tool of a popular sovereignty model".[82]

IV. Would such a Constitutional Convention Contradict Parliamentary Sovereignty?

Weill assumes that popular sovereignty and parliamentary sovereignty are rivals: that there is a feature of government called "sovereignty", which can be possessed by the people, or by Parliament, but not by both (although it can apparently be divided between them).[83] But that assumption is wrong.

It is true, on the one hand, that parliamentary sovereignty and popular sovereignty cannot co-exist if a constitution gives direct legal effect to the latter principle, by mandating that certain laws may be enacted only

[75] Ibid., at 218.
[76] Ibid., at 217–18.
[77] Ibid., at 218.
[78] Ibid., at 221; this was the view of the Independent Commission.
[79] Ibid., at 220.
[80] Ibid., at 219, 222.
[81] Ibid., at 220–21.
[82] Weill, "Manner and Form Fallacy", 123, emphasis added.
[83] Weill refers to parliamentary sovereignty and popular sovereignty as "conflicting constitutional theories": Weill, "Manner and Form Fallacy", 105. She assumes that sovereignty can to some extent be shared, by being divided, when she says that the Parliament Act 1911 "embodied a transformation from a strong-form model of popular sovereignty to a weakened commitment to popular sovereignty and a parallel strengthening of commitment to parliamentary sovereignty": ibid., at 105. But in that situation, popular and parliamentary sovereignty are still competitors.

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by or with the consent of the people, or by empowering the people through initiative and referendum procedures to bypass or override the legislature. On the other hand, parliamentary sovereignty and popular sovereignty can be quite different things, operating in different domains, and are in principle perfectly compatible.[84] That is the case in the UK, as I will now explain.

Parliamentary sovereignty concerns legal authority to legislate: it consists of legally unlimited authority to enact whatever legislation Parliament chooses, or in other words, authority that is not subject to any judicially enforceable limits.[85] Popular sovereignty concerns the ultimate source of governmental legitimacy – of moral authority to govern, including to legislate – which it identifies as "the people".[86] With respect to legislation, parliamentary sovereignty concerns its legal validity, while popular sovereignty concerns its moral authority. They operate in different domains because they have different sources. Parliamentary sovereignty is part of a fundamental norm of the domestic legal system – the rule of recognition – whereas popular sovereignty is a fundamental norm of political morality.[87]

They also differ in another respect. Parliamentary sovereignty, on the one hand, is only minimally limited by its source. The authority that the law confers on Parliament is not limited by law, except that it may not be used to impose limits on itself (that would require a change in the rule of recognition). Popular sovereignty, on the other hand, is necessarily limited by its source: no person or body, not even the people, can possess authority that is not limited by morality. Morality does not confer authority to violate its own most fundamental norms. It follows that while parliamentary sovereignty consists in being almost entirely unlimited by the norms within its (legal) domain, as well as not being subject to constraint or correction by any other person or body within that domain, popular sovereignty is necessarily limited by the norms within its (moral) domain, and therefore can only consist in not being subject to control or correction by any other body within that domain.

The moral authority of the people, to make a new constitution or to authorise or approve of government decisions, is necessarily subject to moral limits. On the one hand, the moral legitimacy of acts of government including the making of laws necessarily depends, not solely on the will of

[84] For agreement, see Gordon, "Referendums in the UK Constitution", 236–37, and White, "Referendum in the UK's Constitution", 7–8.

[85] This is a slight simplification; for some complications, see Goldsworthy, *Sovereignty of Parliament*, 9–16.

[86] Weill, "We the British People", 380.

[87] One referee objected that "the rule of recognition is not a law". But H.L.A. Hart, who devised the concept, states that "in a mature legal system, we have a system of rules which includes a rule of recognition", mentions "my doctrine that developed municipal legal systems contain a rule of recognition", and refers to "important legal rules including the rule of recognition, which is in effect a form of judicial customary rule": *The Concept of Law*, 2nd ed. (Oxford 1994), 110, 246, 256; see also 111–12.

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the people, but also on compliance with fundamental moral principles. The will of the people is an important but not exclusive or decisive consideration. On the other hand, in a system of full parliamentary sovereignty the legal validity of legislation depends solely on its having been enacted by Parliament.

These two kinds of sovereignty, being so different in terms of sources, domains and extent within their respective domains, are in principle perfectly compatible. It is possible for Parliament to possess unlimited legal authority to legislate, and to derive its moral authority to do so from the people. Conversely, it is possible for the people to be the source of moral authority to govern, including to legislate, without themselves possessing any legal authority to legislate.

Dicey was very clear that in the UK, this was not only possible but a reality:

> Parliament is, from a merely legal point of view, the absolute sovereign of the British Empire, since every Act of Parliament is binding on every Court throughout the British dominions, and no rule, whether of morality or of law, which contravenes an Act of Parliament, binds any Court throughout the realm. But if Parliament be in the eye of the law a supreme legislature, the essence of representative government is, that the legislature should represent or give effect to the will of the political sovereign, *i.e.* of the electoral body, or of the nation. The electorate … is a body which does not, and from its nature hardly can, itself legislate, and which, owing chiefly to historical causes, has left in existence a theoretically supreme legislature. The result of this state of things would naturally be that the conduct of the legislature, which *(ex hypothesi)* cannot be governed by laws, should be regulated by understandings of which the object is to secure the conformity of Parliament to the will of the nation. And this is what has actually occurred.[88]

No doubt, Dicey would have agreed that these understandings amounted to constitutional principles, but only insofar as they were constitutional conventions; he never suggested that they were justiciable. But he did go so far as to assert that "the fundamental dogma of modern constitutionalism … [is that] the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation".[89] In that sense, Weill could rightly say that his model was *ultimately* one of popular rather than parliamentary sovereignty. But it was not one in which the two kinds of sovereignty were incompatible. Parliament was for Dicey, and remains today, the legal sovereign.

It is clear that when, in a typical referendum, the people are asked their opinion, they do not exercise legislative sovereignty, or any kind of legislative power.[90] They do not initiate the passage of legislation, nor do they participate directly in its enactment. At most, they are taken to approve of

[88] Dicey, *Law of the Constitution*, 425.
[89] Ibid., at 449.
[90] Contra Weill, "Dicey Was Not Diceyan", 475, 483.

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Parliament enacting legislation, thereby giving it their moral imprimatur. The legislation must still be enacted by Parliament. The people act as political sovereign and Parliament as legal sovereign.

If Parliament, before exercising its authority on particular occasions, chooses to seek the approval of the people, this does not diminish its legally unlimited power to legislate. Even if Members of Parliament believe themselves (indeed, even if they really are) bound by a moral obligation, or a constitutional convention, to do so, its legislative sovereignty remains intact. Neither moral obligations nor constitutional conventions amount to legal limitations. As I have recently shown, Parliament's sovereignty would be diminished if it were to succeed in enacting a legally binding, and self-entrenched, referendum requirement. That would make it legally impossible for Parliament to enact particular legislation without first obtaining popular approval in a referendum, which would be inconsistent with its continuing to possess legally unlimited legislative authority.[91] But the UK Parliament has not yet done this, or even attempted it.

Historically, parliamentary sovereignty has been given many different justifications, at different times, aimed at demonstrating Parliament's moral authority to legislate. Ten such justifications are listed in my book *The Sovereignty of Parliament: History and Philosophy*.[92] One of them has appeared in various forms ever since the thirteenth century: the claim that Parliament represents the entire community, which is deemed to consent to its Acts.[93] This justification is compatible with, if not tantamount to, the proposition that the people are sovereign. It has provided the principal justification for parliamentary sovereignty since at least the nineteenth century. When Parliament seeks the approval of the people in a referendum for particular legislation, it seeks a more direct and specific expression of the community's consent.

I note in passing a difficult issue for proponents of popular sovereignty: who exactly are the people, in a state such as the UK, whose opinion should prevail on questions such as devolution or secession? Is it the people of the state as a whole, the people of the nation or region whose self-government is in question, or both? Weill maintains that to legitimise secession, the consent of both the "seceding People" and (separately) of the "remaining People" is required, with negotiation between them required if they disagree (she does not discuss what should happen if agreement cannot be reached).[94] When it came to Home Rule for Ireland, opponents such as Dicey insisted that the people of the UK as a whole rather than just

[91] J. Goldsworthy, "The 'Manner and Form' Theory of Parliamentary Sovereignty" [2021] P.L. 586.
[92] Goldsworthy, *Sovereignty of Parliament*, 234.
[93] Ibid., at 30–31; for subsequent appearances of this idea, see Index, 318, under "Parliament, as representing and binding community".
[94] Weill, "Reborn", 188–89; see also R. Weill, "Secession and the Prevalence of both Militant Democracy and Eternity Clauses Worldwide" (2018) 40 Cardozo L. Rev. 905, 980–81.

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those of Ireland had to approve, expecting that this would be unachievable.[95] Ulster Unionists insisted that the approval of the people of their region was essential.[96] It is necessary for Parliament to choose between competing demands of this kind, as well as to determine other matters such as precisely what question should be put to voters. That makes the practical exercise of popular sovereignty dependent on the sovereignty of Parliament.

When Parliament defers to the will of the people it does not diminish its legislative sovereignty, which should always be exercised in accordance with its Members' considered judgments about what it morally ought to do. They might judge that that a certain law is so important and controversial that they morally ought to ascertain the will of the people. Contrary to Weill's suggestion, it is therefore not "unnatural" or "incomprehensible" for the UK to be committed to parliamentary sovereignty but also to test proposed constitutional changes in referendums.[97] She says that Brexit should make no sense to anyone committed to parliamentary sovereignty: "How could a nation committed to parliamentary rule find itself bound by a consultative referendum's result", especially "after the majority in Parliament had repeatedly opposed Brexit!"[98] But this ignores the ambiguity of the word "bound": Parliament might well find itself morally bound by the result of a referendum, even though it is not legally bound by it.

Weill may be right to say that the British constitution is "based on popular sovereignty".[99] But that is in the domain of moral legitimacy. In the domain of law, it is based on parliamentary sovereignty. The strongest claim she can plausibly make is that the constitution is based on both kinds of sovereignty.

V. Law, the Rule of Recognition and the Role of the Judiciary

Weill sometimes suggests that the practice she purports to describe, of requiring the people's assent to fundamental constitutional changes, and the justifications given for it by politicians and constitutional scholars such as Dicey, "are paramount for understanding Britain's ultimate rule of recognition … as one of popular sovereignty".[100] "Where sovereignty (the highest authority in the legal system) lies – with the People or with parliament – is defined externally, by the political facts and is the product of assertion of power. It later receives the courts' recognition that it forms the basis of legal validity in the system."[101]

[95] J. Kirby, "A.V. Dicey and English Constitutionalism" (2019) 45 History of European Ideas 33, 43; H. Tulloch, "A.V. Dicey and the Irish Question: 1870–1922" (1980) The Irish Jurist 137, 156.
[96] See note 69 above.
[97] Weill, "Reborn", 183, 135.
[98] Weill, "We the British People Rule".
[99] Ibid., at 381.
[100] Weill, "Manner and Form Fallacy", 113; see also Weill, "Reborn", 141.
[101] Weill, "Manner and Form Fallacy", 113, note 43.

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Here, we again observe Weill's assumption that parliamentary sovereignty and popular sovereignty are competitors for the position of "highest authority in the legal system". But it is possible for Parliament to be the highest legal authority in the system, while the people are simultaneously the highest moral or political authority. A rule of recognition concerns legal authority: it governs the recognition of norms by legal officials, particularly judges, as valid laws within a legal system.[102] Weill adduces no evidence that British courts, in any of the periods she discusses, would have held invalid an Act of Parliament that had not been endorsed prior to its enactment by a majority of the people, in an election or referendum devoted specifically to the proposal to enact it. It is almost inconceivable that any court would have done so. As Weill acknowledges, before 1911 the practice she describes was "enforced" not by the courts, but by the House of Lords,[103] which of course was an element of Parliament itself. The sovereignty of Parliament can hardly be said to be diminished due to one of its own Houses declining to pass proposed legislation.

Weill maintains that "because the 1911 [Parliament] Act was enacted by Parliament along with the people … [it] amounts to a constitutional document. The decision to amend the Act is thus left to the People".[104] Moreover, she takes the same view of every "constitutional statute" enacted only after receiving the approval of the people in a special election or referendum:

> we treat all constitutional law enacted by the People as enjoying the same constitutional status and entitled to similar judicial protection. Once the constitutional enactment reached the level of a "We the People" enactment (in terms of the breadth, depth, and decisiveness criteria), the strength of the courts' commitment to upholding it should not vary according to the strength of its underlying claim to a popular imprimatur.[105]

She says it is arguable that in *Jackson*, the Appellate Committee of the House of Lords should have declared the Parliament Act 1949 to be invalid, because it amended the 1911 Act without the explicit approval of the people.[106] By not declaring the 1949 Act to be invalid, she claims, the court contributed to a change in the rule of recognition.[107] The 1949 Act already amounted to a shift towards parliamentary sovereignty, but this was fortified by the decision in *Jackson* which marked "the ultimate triumph of parliamentary and, more specifically, the Lower House's sovereignty".[108]

[102] Hart, *Concept of Law*, ch. 5.
[103] Weill, "We the British People", 381, note 5; Weill, "Manner and Form Fallacy", 124–25.
[104] Ibid., at 119.
[105] Ibid., at 115, note 59. The criteria referred to are those required by Bruce Ackerman's "dualist" theory of lawmaking: see note 6 above.
[106] Weill, "Manner and Form Fallacy", 106–07, 119, 124.
[107] Ibid.
[108] Ibid., at 124–25.

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But the fact that the 1911 Act and other statutes can reasonably be labelled "constitutional documents" does not entail that they are legally protected from amendment or repeal by Parliament using its ordinary law-making procedures. This remains true even if we define a "constitutional statute" narrowly, as "any statute dealing with fundamental constitutional matters, which was enacted only after and because it received the approval of the people in an election or referendum devoted specifically to the proposal to enact it". To assert that such a statute may, as a matter of law, be repealed only through the same or an equivalent process, is to make a radically novel claim. It also involves a non sequitur. If the original requirement – that the prior approval of the people had to be obtained before such a statute's enactment – was one of constitutional convention rather than law, then surely any proposed requirement that such a statute can be amended or repealed only by the same process must equally be a matter of constitutional convention rather than law (unless, perhaps, a self-entrenched manner and form requirement is included in the statute). By suggesting that such statutes are entitled to judicial protection against repeal, Weill obliterates the distinction between constitutional convention and law, and ignores the pre-1911 dependence of the supposed convention on enforcement by the House of Lords – a House of Parliament itself – rather than by the courts.

Weill might reply that I have fallen into the same error as others: "Constitutional scholars of the twentieth century have mistakenly focused on a legal analysis of sovereignty rather than a historical and factual analysis of the workings of the British constitution. Substance and practice in constitutional law are no less important than legalistic appearances."[109]

This is unfair to those scholars, who paid enormous attention to the historical and factual basis for constitutional conventions, and thereby went far beyond "legal analysis".[110] But parliamentary sovereignty is about legality: it asserts that Parliament's legislative authority is not subject to legal, judicially enforceable limits. That is a matter of legal substance and practice, not mere "legalistic appearance".[111]

Weill attempts to bolster her thesis by relying on recent developments in the role of the judiciary, which have enhanced their ability to protect constitutional norms. But it seems doubtful that these developments play a significant role in enhancing popular sovereignty, in her sense of requiring public approval of constitutional change. They have more to do with enhancing judicial protection of certain constitutional norms against legislative incursion.

[109] Weill, "We the British People", 405.

[110] All major textbooks on British constitutional law devote considerable space to discussing constitutional conventions.

[111] For a rebuttal of the objection that parliamentary sovereignty is now just a formal legal theory that ignores practical reality, see Goldsworthy, *Parliamentary Sovereignty*, 302–04.

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One of these developments is the relatively recent judicial recognition of "constitutional statutes", and reputed requirement that they may only be repealed expressly. Weill insists that this "is inconsistent with the norms of parliamentary sovereignty that allow for implicit repeal of legislation".[112] But in fact, implied repeal of such statutes remains possible, provided that the implication is "necessary".[113] As John McGarry and Samantha Spence correctly summarise the current position, "it is fair to say that … the implied repeal rule has been amended [note: not excluded] with regard to constitutional statutes – so that such statutes may only be amended by express words in, or as a necessary implication of, a later Act of Parliament".[114] But even if implied repeal of these statutes were now completely impermissible, implied repeal is not a necessary feature of parliamentary sovereignty, as previously noted.[115] Dicey did state that Parliament could amend or repeal any law, even a constitutional one, in the same manner and as easily as any other law, and he described this as a "trait" (apparently meaning an "essential feature") of parliamentary sovereignty.[116] But that ability was neither part of nor entailed by his definition of parliamentary sovereignty,[117] and the better view is that he was wrong to suggest that it is essential to it.[118]

Another recent development Weill cites is the enactment and operation of the Human Rights Act 1998 (UK), which obligates courts to interpret statutes, as far as possible, to be consistent with the rights it protects. "The more the courts interpret this obligation as requiring purposive interpretations of statutes to prevent noncomformity with the Convention, the more they deviate from traditional norms of parliamentary sovereignty."[119] "In substance, British courts exercise judicial review under that HRA. The Act constitutes a superior law against which other legislation is measured. That prior acts – in this case the HRA – prevail and implicitly overrule later legislation contradicts the fundamental hallmark of parliamentary sovereignty."[120]

I have previously discussed and rejected claims of this kind.[121] Parliament enacted the HRA and retains the legal power to repeal it at any time. Weill emphasises that it may be immune to implied repeal,[122] but we have already

112 Weill, "Reborn", 166.
113 F. Ahmed and A. Parry, "The Quasi-Entrenchment of Constitutional Statutes" [2014] C.L.J. 514, 517–18.
114 J. McGarry and S. Spence, "Constitutional Statutes – Roots and Recognition" (2020) Stat. L. Rev. 378, 388.
115 See note 49 above.
116 Dicey, *Law of the Constitution*, 83–87.
117 Ibid., at 37–38.
118 See note 49 above.
119 Weill, "Reborn", 190.
120 Ibid., at 191.
121 Goldsworthy, *Parliamentary Sovereignty*, 299–304.
122 Weill, "Reborn", 191.

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dealt with that point.[123] Occasionally, courts in applying section 3(1) of the Act interpret statutes so creatively that they in effect rewrite them, whether or not they ought to.[124] Commentators disagree about the extent to which this has happened. Richard Ekins says that in "many cases" courts have adopted "unreasonable readings that depart from the will of Parliament".[125] But a very recent survey of 593 cases, over a 13-year period, reached this conclusion:

> Overall, we found relatively few cases in which s.3 was decisive to a case's outcome. However, when it was, its use, although important, was not radical with the courts being vigilant to not undermine Parliament's intention … rather we found that s.3 was often used to address unforeseen drafting issues or factual situations that clearly fell within the overall intention of the legislative scheme. This is not the same as interpreting statutes in a manner inconsistent with Parliament's intention and can in fact ensure that Parliament's overarching intention is realised.[126]

Weill also places considerable emphasis on statements by three Law Lords in *Jackson* expressing doubts about the doctrine of parliamentary sovereignty, and suggesting that the courts possess a common law power to invalidate statutes.[127] She speculates that these statements were motivated by a perception that the judiciary had to step up and replace the House of Lords in upholding the constitution.[128] But relying on these notorious statements is problematic, because they were (1) obiter dicta, (2) made by a minority (three out of nine) and (3) based on known falsehoods.[129] In addition, they have been contradicted by the subsequent, unequivocal endorsement of parliamentary sovereignty in the two *Miller* cases.[130]

[123] Notes 49, 115, 118 above.

[124] The example usually cited is *Ghaidan v Godin-Mendoza* [2014] UKHL 30, [2004] 2 A.C. 557.

[125] R. Ekins, "Legislative Freedom in the United Kingdom" (2017) 133 L.Q.R. 582, 596.

[126] F. Powell and S. Needleman, "How Radical an Instrument Is Section 3 of the *Human Rights Act* 1998?" (2021) U.K.C.L.A. Blog, available at https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/ (last accessed 20 January 2022).

[127] *R. (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262, at [102] (Lord Steyn), [104], [107], [126] (Lord Hope), [159] (Baroness Hale).

[128] Weill, "Reborn", 198–99.

[129] Lord Steyn's assertion at [102] that the judges created the principle of parliamentary sovereignty is demonstrably false, as is Lord Hope's related assertion at [126] that the principle was "created by the common law", if he means judge-made law. See Goldsworthy, *Sovereignty of Parliament*, ch. 10; Goldsworthy, *Parliamentary Sovereignty*, ch. 2. Lord Hope's suggestion at [104]–[106] that the Acts of Union 1707, the European Communities Act 1972 and the Human Rights Act 1998 all qualified or limited parliamentary sovereignty are highly questionable: Goldsworthy, *Sovereignty of Parliament*, 165–73; Goldsworthy, *Parliamentary Sovereignty*, 287–304. The strongest case concerned the European Communities Act, but Brexit has put that to rest: see in particular *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] A.C. 61, at [60] (Lord Neuberger, Lady Hale, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge). See also M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford 2015), 204–06.

[130] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [43]; and see also at [61] and [67] (Lord Neuberger, Lady Hale, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge); also affirmed by Lord Reed (at [183] and [334]) and Lord Carnwath (at [274]). *R. (Miller) v The Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, [2020] A.C. 373, at [41] (Ladies Hale, Black and Arden; Lords Red, Kerr, Wilson, Carnwath, Hodge, Lloyd-Jones, Kitchin and Sales).

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Weill also relies on the decision in *Miller II*, in which the Supreme Court arguably enforced a constitutional convention, by declaring unlawful a prorogation of Parliament that had temporarily prevented it from exercising its legislative and supervisory functions in relation to Brexit.[131] Once again, she claims, the Court stepped up to replace the House of Lords as guardian of the constitutional status quo.[132] Judicial review thereby replaced the Lords' legislative veto, and "the political constitution merged with the legal constitution".[133]

But there are two difficulties with this claim. First, the decision in *Miller II* was explicitly based partly on giving effect to the principle of parliamentary sovereignty, which makes it difficult to construe as undermining that principle.[134] The Supreme Court reviewed the legality of an exercise by the executive government of a prerogative power, not the validity of a statute. Secondly, although the decision was arguably based partly on giving effect to the constitutional convention of responsible government, elevated to a justiciable "constitutional principle", that provides little support for a claim that the Court may enforce constitutional conventions – if any are extant – upholding popular sovereignty as Weill conceives of it.[135] In particular, it offers no support for the proposition that the Supreme Court has authority to prevent the enactment of, or to invalidate, a statute that brings about a major constitutional change without a referendum first being held. That would contradict the Court's explicit affirmation of parliamentary sovereignty.

VI. Conclusion

I have found Weill's historical evidence interesting, and her arguments provocative, but I am unable to accept her claim that the UK constitution, for the last 200 years, has exemplified popular rather than parliamentary sovereignty.

I have offered various grounds for defending the orthodox understanding that the constitution has exemplified parliamentary sovereignty, even if it has also exemplified popular sovereignty in some sense of that term. First, in the UK parliamentary sovereignty and popular sovereignty are not competitors; the former is a legal principle and the latter a political

[131] Weill, "Reborn", 199–200.
[132] Ibid., at 199–200, 203.
[133] Ibid.
[134] See note 130 above.
[135] Whether or not the court in *Miller II* enforced a constitutional convention has been debated. See e.g. M. Elliott, "Constitutional Adjudication and Constitutional Politics in the United Kingdom: The *Miller II* Case in Legal and Political Context" (2020) 16 EuConst 625, 632–33; A. Perry, "Enforcing Principles, Enforcing Conventions" (2019) U.K.C.L.A. Blog, available at https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/ (last accessed 20 January 2022); L. Sirota, "The Case of Prorogations and the Political Constitution" (2021) 3 J.C.C.L. 103, esp. 124–35.

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one, and they are perfectly compatible. Therefore, secondly, even if in the nineteenth century there were a constitutional convention requiring popular endorsement of fundamental constitutional changes (which seems questionable), this would have been consistent with parliamentary sovereignty. The supposed requirement would have been inconsistent with parliamentary sovereignty only if it were legally binding. Thirdly, this convention, if it did exist, did not survive after 1911, nor has it been revived more recently. Fourthly, there is little or no evidence that the judiciary today has – or even claims to have – the authority Weill attributes to it, to enforce either constitutional conventions or a new rule of recognition upholding popular sovereignty in her sense of requiring public approval of constitutional change.

I therefore reject Weill's thesis that "[t]he U.K. and U.S. have shared a common constitutional model of popular sovereignty for over two hundred years. This model demarcates constitutional from regular law, entrenching the former and entrusting unelected branches with the role of guardians of the constitutional status quo".[136]

[136] Weill, "Reborn", 216; see also 200–01.

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