Constitutionalism Reborn: Popular Sovereignty and Constitutional Conventions in the U.S. and U.K.

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As conservatives have come to dominate the U.S. Supreme Court, originalist interpretation methods will determine constitutional disputes. While the Court rejects the use of comparative constitutional law to interpret the Constitution, even its conservative members accept the legitimacy of resorting to British sources, if the language of the Constitution was derived from the U.K. This practice of reliance on British precedents seems natural yet perplexing. It is natural because the U.S. seceded from the U.K. It is perplexing because the U.S. constitutional revolution stands for rejection of the British model of parliamentary sovereignty.

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This Article intends to redefine the relationship between the U.S. and U.K. constitutional models. While the literature perceives the two as polar-opposites, I suggest that there is, in fact, a common Anglo-American constitutional model, which has been informing the United States' character since its founding. It is not that we misunderstood the American model of popular sovereignty and constitutional supremacy. Rather, we did not realize that parallel developments were taking place in the U.K. The political actors on both sides of the pond were aware of this reality, but the jurisprudence missed it. Shifting the paradigm and accepting the existence of this common model will enable us to grapple with the most burning current dilemmas of our time on both sides of the Atlantic. It lends new legitimacy to examining British sources to better understand American constitutional law, even if the textual provision per se is not attributable to the U.K.

We may now study how the common model intended the dynamics between the different constitutional actors to play out. While the U.S. felt powerless to deal with a President who has treated constitutional norms with little to no respect, the Article reveals how the model designated enforcement mechanisms for constitutional norms and conventions, including court packing and judicial review. British debates on reforming an obstructionist second chamber resonate with current American discourse on reforming the U.S. Supreme Court and the Senate. Both American institutions were modeled after the House of Lords. The Article develops the two types of court packing justified in the U.S. under the common model to remedy breach of constitutional norms. It further discusses the inevitability of filibuster reform. Similarly, while Brexit is incomprehensible in a parliamentary sovereignty system, Parliament's reluctant adherence to the 2016 "consultative" referendum's results is a natural outgrowth of the common Anglo-American rule of the people.

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INTRODUCTION

Trumpism and Brexit have become the poster children of an era of crisis and democratic backsliding on a global scale. Many people treat both phenomena as products of the rise of nationalism, isolationism and xenophobia. Such movements express commitment to "make the nation great again" by redrawing the boundaries of who is included within "We the People." Some even see these phenomena as the tipping point towards rapid global decline of commitment to democracy, which has only been made worse by the COVID-19 pandemic.[1] Both phenomena caught their respective societies and the entire global community by surprise. Trumpism exposed the vulnerability of the U.S. constitutional system as never before. The theory of supreme constitutions is, supposedly, about having grand norms that do not leave the system helpless when political actors defy constitutional norms. The U.K.'s[2] willingness to go ahead with Brexit and threaten its very unity, all because of a referendum that was branded as merely "consultative" and faced persistent opposition in Parliament, is equally incomprehensible.[3] After all, in a constitutional system purportedly ruled by parliamentary sovereignty, Parliament's will should have prevailed. In both countries, theory did not align with reality. This Article shifts the paradigm to explain this twinned development in a way that offers new possibilities for both countries to address current challenges and draw from each other's experience.

We are accustomed to identifying the U.K. as the archetype of the parliamentary sovereignty model and the antithesis to the U.S. popular sovereignty model.[4] The parliamentary sovereignty model does not distinguish between constitutional and regular law. Under it, the

1. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 206 (2018).

2. This Article refers to the United Kingdom interchangeably as "the U.K." and as "Britain."

3. *See infra* Sectiont IV.D.

4. For a discussion of the conventional dichotomy between the British and U.S. constitutional systems, see JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 11–13 (2010); JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 159–220 (1999); HERBERT L.A. HART, THE CONCEPT OF LAW 74 (2d ed. 1994); BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS 3–33 (1991); GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 139–166 (2002); H.W.R. Wade, *The Basis of Legal Sovereignty*, 13 CAMBRIDGE L.J. 172, 172–74 (1955).

legislature may make and unmake law as it desires, and no court may declare its statutes void.[5] The popular sovereignty model makes the people's will, as expressed in the constitution, supreme over the legislative will, as expressed through statutes.[6] It provides processes for the people to express their will on constitutional matters that are distinct from legislative processes.[7] These constitutional processes produce better approximations of the popular will on particular issues than regular legislative enactments.[8] Judicial review over primary legislation guarantees the supremacy of popular sovereignty but threatens parliamentary sovereignty.[9] Scholars believe that a transition between these models requires a revolution, not easily attained nor desired.[10] Thus, the U.K. has never adopted a formal supreme constitution like a popular sovereignty system. Australia and New Zealand followed the British approach regarding their Bills of Rights.[11] Most of the Western world followed the American approach.[12]

Jurists underscore at times that parliamentary sovereignty is a *legal* doctrine that intends to serve popular sovereignty in the *political* sense. That is to say, Parliament is sovereign to enact freely, but its political legitimacy is based on popular representation expressed through periodical elections. Portrayed in this light, there is no contradiction between parliamentary and popular sovereignty.[13] This,

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5. ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39 (8th ed., Liberty Classics 1982) (1915). The eighth edition is the last written by Dicey himself.

6. *See* HART, *supra* note 4, at 74.

7. *See* ACKERMAN, *supra* note 4, at 6.

8. Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT' L. 349, 372 (2012) ("While these mechanisms are not free of challenges, they are at least better approximations of the popular will than that which can be achieved by the legislative body acting alone.").

9. Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 458 (2012).

10. *See, e.g.*, HANNAH ARENDT, ON REVOLUTION 20, 35 (1963).

11. JOSEPH JACONELLI, ENACTING A BILL OF RIGHTS: THE LEGAL PROBLEMS 45 (1980); Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7, 13–16 (2006).

12. Hiebert, *supra* note 11, at 7–9.

13. A manifestation of such an attitude may be found in Israel's equivalent of *Marbury v. Madison*:

> In my understanding, the Knesset is 'sovereign' i.e. independent and supreme, in the sense that no other authority, legislative or otherwise, prevails over it in its power and its authorities. The reason lies in the source of its power: It was elected by the people, which as stated, is the sovereign.

however, is not the way popular sovereignty is defined in this Article. Rather, popular sovereignty is used to depict the anti-thesis of the parliamentary sovereignty model, as defined above.

The strict divide between the U.K. parliamentary sovereignty model and U.S. popular sovereignty model has been partially undermined by the work of some scholars, who have identified an intermediate model of the Commonwealth. These scholars posit that, in the second half of the twentieth century, some Commonwealth countries adopted a semi-constitution with a weak form of judicial review.[14]

However, I claim that the conventional story of a great dichotomy between the U.S. and U.K. constitutional systems is no more than a myth. We still tell this tale in our classrooms and casebooks. The U.K. parliamentary website proudly pledges to the norm of parliamentary sovereignty.[15] Yet, we got the story wrong. The 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.[16] In fact, the two models resemble and influence each other to the extent that we can identify a *common* model of popular sovereignty shared by both countries. The challenges facing the common model in both countries over the past two centuries also bear resemblance: enfranchisement, protectionism, territorial divisions, welfare and allocation of legislative power. The political actors, thus, felt justified in learning from each other's experience, as should we.

This Article reveals how constitutional norms (American terminology) and conventions (British terminology) promote popular sovereignty on both sides of the Atlantic. In order to recognize the existence of a constitutional convention, three conditions should be met: (1) political actors must act consistently in a certain manner; (2) they should use rhetoric that recognizes the existence of a convention

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CivA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill., 49(4) PD 221 (1995) (Isr.) (President Meir Shamgar's Opinion ¶ 23). For a theoretical and comparative treatment of the decision, see generally Weill, *supra* note 8.

14. *See* STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 1 (2013); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 18 (2007); Hiebert, *supra* note 11, at 9.

15. "Parliamentary Sovereignty Is the Most Important Part of the UK Constitution." *Parliamentary Sovereignty*, UK PARLIAMENT, https://www.parliament.uk/site-information/glossary/parliamentary-sovereignty/ [https://perma.cc/XH7S-R9TD].

16. *See infra* Parts I–IV.

that guides their behavior; and (3) there should be a constitutional rationale that justifies this convention.[17]

Like the U.S., the U.K. developed a model that distinguished between constitutional and regular law and entrusted unelected branches with the task of guarding the constitutional status quo. This British popular sovereignty model relied on constitutional conventions as the bridge between the practice of popular sovereignty and the rhetoric of parliamentary sovereignty. These constitutional conventions had potent, double-layered enforcement mechanisms to guarantee that political actors could not deviate from them. This Article thus argues that we should understand Brexit and recent seemingly revolutionary U.K. judicial decisions that enforce constitutional conventions as a story of continuity, rather than a great break from the past.[18]

Why did we get the story wrong all along? Britain became identified with the archetype of parliamentary sovereignty based primarily on the scholarship of Albert Venn Dicey, perhaps the most renowned British constitutional scholar of the last two centuries. Because there was no codified constitution, Dicey's *Introduction to the Study of the Law of the Constitution* became synonymous with the British Constitution itself.[19] Dicey identified parliamentary sovereignty as the U.K.'s basic constitutional norm based on Sir William Blackstone's *Commentaries*.[20] Yet, aware of the gap between theory and practice, Dicey argued that constitutional conventions were intended to enable the people to rule. Scholars have missed the role of constitutional conventions to align theory and practice in an ever-evolving constitution. Similarly, they failed to identify the mechanisms through which conventions were to be enforced.

Blindness to the way in which constitutional conventions operate prevented each country from drawing lessons from the other in recent times and hindered the development of comparative constitutional law worldwide. The American Justices are divided over the legitimacy of using comparative constitutional law, treating the American enterprise as exceptional.[21] In the U.S., various states have

17. *See* Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, 888 (Can.) ("We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?") (citing SIR W. IVOR JENNINGS, THE LAW AND THE CONSTITUTION 136 (5th ed. 1959)).

18. *See infra* Part IV.

19. DICEY, *supra* note 5.

20. WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND, BOOK THE FIRST 160–61 (1st ed. 1765).

21. Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 519 (2005).

proposed laws prohibiting their courts from using foreign and international law.[22] Nonetheless, the U.S. Supreme Court was willing to draw on British experience in landmark decisions when interpreting constitutional provisions that were modeled on the British Bill of Rights of 1689. This reliance shaped important debates on the death penalty, the right to bear arms, and substantive due process.[23]

Recognizing that there is a common Anglo-American constitutional model will enable us, *even* under an originalist interpretive approach (which I do not endorse but enjoys the support of conservative Justices on the U.S. Supreme Court), to study how the model intended the different constitutional actors to interact. We will no longer be confined to explicitly borrowed constitutional provisions to justify studying from the "other" system. In fact, Justice Scalia articulated the originalist rationale to rely on British sources, particularly regarding constitutional conventions, whose protection was entrusted to the prerogatives of the Crown[24]:

> [Different constitutional phrases] had a meaning to the American colonists, all of whom were intimately familiar with my friend Blackstone. And what they understood when they ratified this Constitution was that they were affirming the rights of Englishmen. So to know what the Constitution meant at the time, you have to know what English law was at the time . . . . Well, what were the prerogatives of a sovereign, as understood by the framers of the Constitution? The same as was understood by their English forebears.[25]

The American dimension of this story did not lose relevance with Joe Biden's election as President. The phenomenon of Trumpism, which involves acute disregard of constitutional norms, is very much alive. Its impact on American governmental institutions is

22. Aaron Fellmeth, *International Law and Foreign Laws in the U.S. State Legislatures*, 15 AM. SOC. INT'L L. INSIGHTS 13 (May 26, 2011), https://www.asil.org/insights/volume/15/issue/13/international-law-and-foreign-laws-us-state-legislatures [https://perma.cc/PZ5F-J9XK].

23. *See* Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (leading to a period of de facto moratorium of capital punishment in the U.S. and in which Justice Douglas connects the Eighth Amendment to the British Bill of Rights of 1689); District of Columbia v. Heller, 554 U.S. 570, 594, 613 (2008) (recognizing an individual constitutional right to keep and bear arms unconnected to militia service and in which the majority discusses briefly the Second Amendment's connection to the British Bill of Rights of 1689).

24. *See infra* Part V, and especially the discussion on Dicey's articulation that the prerogatives of the Crown are meant to enforce constitutional conventions.

25. Dorsen, *supra* note 21, at 540.

profound.[26] The U.S. Supreme Court is dominated by a strong conservative majority, which was achieved through partisan abuse of appointment power in breach of longstanding constitutional conventions.[27] The Court might now more readily frustrate the people's will. The U.S. Senate has become an obstructionist body, stuck in endless political deadlock.[28] To contend with these phenomena and more, it is important to understand the true historical-constitutional narrative that has long evaded us.

Since the U.S. treated constitutional norms as unenforceable based on the British tradition,[29] this Article offers new ways to counter Trumpism even under an originalist approach.[30] While former President Trump regularly breached constitutional norms, constitutional design not only permits but *requires* their enforcement. Under the common model, the U.K. enforced conventions through methods equivalent to court packing and judicial review. This Article thus challenges the prevalent jurisprudential approach in both countries, which sharply distinguishes between the political and legal constitutions, treating constitutional conventions and norms as within the province of politics and according judicial protection only to the legal constitution.[31] It further asserts that British debates on reforming an obstructionist second chamber, in particular, resonate with current American discussions on reforming the judiciary and the Senate. This is especially so since both institutions were modeled after the British House of Lords.[32]

This Article applies an enhanced understanding of U.S. constitutional law, gained by relying on the common Anglo-American

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26. *See, e.g.*, Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018); David Montgomery, *The Abnormal Presidency*, THE WASH. POST MAG. (Nov. 10, 2020), https://www.washingtonpost.com/graphics/2020/lifestyle/magazine/trump-presidential-norm-breaking-list [https://perma.cc/4CGY-G7TS]; John Cassidy, *Trump May Be Gone, But Trumpism Isn't*, THE NEW YORKER (Jan. 22, 2021), https://www.newyorker.com/news/our-columnists/trump-may-be-gone-but-trumpism-isnt [https://perma.cc/68H5-5GWB].

27. *See infra* Part V.

28. *Id.*

29. *Id.*

30. On recent scholarly attempts to delineate a role for the courts in enforcing constitutional conventions, see Farrah Ahmed et al., *Enforcing Constitutional Conventions*, 17 INT'L J. CONST. L. 1146, 1147 (2019) (calling the courts to enforce conventions that involve transfer of political power); Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CAL. L. REV. 1913, 1916–17 (2020).

31. *See infra* Part V.

32. *See infra* Parts I & V; *see also* Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 N.W. U. L. REV. 527, 535 (2012).

model, to study Senate and judicial reform. Specifically, it argues that two types of court packing are justified under the common model to remedy breach of constitutional norms. For similar reasons, it further projects that filibuster reform is all but inevitable.

Part I presents the Anglo-American popular sovereignty theory as developed by the political contemporaries of the nineteenth century. It explains the sophisticated use of elections to generate a *specific* mandate for constitutional change. It presents the legislative veto power of the House of Lords as parallel to the U.S. Supreme Court's power of judicial review and further portrays the royal power to create Peers as the equivalent of American court packing.

Part II explains how popular sovereignty best described the British constitutional system's *de facto modus operandi*, even when the scholarship identifying Britain with parliamentary sovereignty was at its height. All branches of government spoke the language of popular sovereignty and acted in conformity with it in a way that enables us to identify a new British rule of recognition based on popular, rather than parliamentary, sovereignty.[33] This is in contradistinction to the prevalent approach of contemporary and last century British constitutional historians and legal theorists, who treated the theory of British popular sovereignty as mere partisan rhetoric. The coexistence of rhetoric and practice of popular sovereignty enables us to identify the existence of a *common* Anglo-American constitutional model.

Part III argues that, in the first half of the twentieth century, Britain evolved into a softer model of popular sovereignty. Although the House of Lords (HL) lost its ability to exercise an absolute veto, it nonetheless maintained a suspensory veto that enabled it to protect the constitutional status quo and refer issues to the people's decision. It further argues that scholars have missed this model's existence because of Britain's short lapse to parliamentary sovereignty in the beginning of the second half of the twentieth century. With the Lords' loss of any effective legislative power to refer constitutional issues to the people after the enactment of the Parliament Act 1949, the British were left with no mechanism to express popular sovereignty until the rise of referenda in the 1970s. The next Part shows why the rise of referenda in Britain in the 1970s should be treated as a direct substitute for the loss of the Lords' legislative veto.

Part IV further discusses the different proposals to reform the HL in the beginning of the twentieth century. These ideas preceded

33. The practice of the various branches of government may define the nature of the constitutional system. We may learn to identify the ultimate rule of recognition, or the *Grundnorm*, by observing what courts, officials, and the people treat as the ultimate rule of recognition. HANS KELSEN, PURE THEORY OF LAW 193–95 (Hans Knight trans., 1967). HART, *supra* note 4, at 105–07.

current American discourse on overcoming an obstructionist second chamber by over a hundred years. This Part also explains recent U.K. constitutional developments—including Brexit, the *Jackson*[34] and *Miller I* and *II* decisions[35]—as the product of continuity, rather than major deviations from existing British law. It suggests that, ultimately, by constitutional design, the courts may enforce constitutional conventions when other enforcement mechanisms lose their power to protect the constitutional framework.

Part V explores some of the implications of the shared Anglo-American model of constitutional law on current dilemmas of Senate and judicial reform in the U.S.

I. THE COMMON ANGLO-AMERICAN POPULAR SOVEREIGNTY THEORY

Americans, and the world at large, treat the U.S. Constitution as the result of the American revolution, which, in turn, led to a revolution in political thought.[36] The U.S. Constitution departed from the British model of elite rule, upholding the people's rule instead. It, therefore, required the people to ratify the Constitution through constitutional conventions.[37] The Constitution requires that amendments pass through an arduous process which guarantees that the people have spoken.[38] It is not enough that the federal elected legislators propose amendments; an overwhelming majority of state-level legislative bodies must approve the amendments, ensuring the constitutional change reflects the people's will.[39] The courts exercise judicial review to enforce the rule of the people over the legislature and prevent erosion of the Constitution through legislative enactments.[40] In contrast, Americans and British believe that the U.K. maintained its parliamentary

34. R (Jackson) v. HM AG [2005] UKHL 56, [2005] 1 AC (HL) 262 (appeal taken from Eng.) [hereinafter *Jackson* decision].

35. R (Miller) v. SOS for Exiting the Eur. Union [2017] UKSC 5, [2018] AC 61 [hereinafter *Miller I* decision]; R (Miller) v. The Prime Minister [2019] UKSC 41, [2020] AC 373 [hereinafter *Miller II* decision].

36. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 116–229 (1967); WOOD, *supra* note 4, at 3–4; GOLDSWORTHY, *supra* note 4, at 213–215.

37. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 238 (Sanford Levinson ed., 1995).

38. *Id.* at 240.

39. U.S. CONST. art. V.

40. *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803).

sovereignty structure.[41] It has neither experienced a great revolution since the Glorious Revolution of the 17th century nor its fruits in the form of a popular-based constitution.[42] Jeffrey Goldsworthy in his classic work on *The Sovereignty of Parliament* accordingly writes, "[t]he theory of legislative sovereignty was so influential that the [Americans] cast it off only with great difficulty, inventing in the process a whole new system of government."[43]

Britain gradually adopted democracy during the nineteenth century by enfranchising the middle and lower classes.[44] However, the prevailing narrative does not acknowledge that Britain used elections not just to create a more inclusively representative legislature but also to evaluate popular judgments on major constitutional issues. This Article argues that there was a deep nexus between the process and content of democratization: Britain evolved from a parliamentary to a popular sovereignty model as it deepened its democratic commitment to suffrage.[45]

The Great Reform Act of 1832 enfranchised the middle class and eliminated the Lords' indirect control of the Commons' composition.[46] The weakened Lords turned to legislative veto power as their new primary weapon. During this era of aspiration for greater democratization, the Lords faced criticism for the veto's "aristocratic" nature and, in turn, had to develop a theory that legitimized their increased use of the veto and justified it in democratic terms.[47]

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41. *See, e.g.*, GEOFFREY MARSHALL, PARLIAMENTARY SOVEREIGNTY AND THE COMMONWEALTH 1 (1957).

42. *See* GOLDSWORTHY, *supra* note 4, and accompanying sources.

43. GOLDSWORTHY, *supra* note 4, at 233.

44. *See infra* Part II; *see also, generally* J.B. CONACHER, THE EMERGENCE OF BRITISH PARLIAMENTARY DEMOCRACY IN THE NINETEENTH CENTURY: THE PASSING OF THE REFORM ACTS OF 1832, 1867, AND 1884–1885 (1971).

45. British theories of popular sovereignty may be traced to the seventeenth century. *See generally* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1st ed. 1988).

46. MICHAEL BROCK, THE GREAT REFORM ACT 25 (1973); W.N. MOLESWORTH, THE HISTORY OF THE REFORM BILL OF 1832, at 5 (1865).

47. While I associate the origins of the referendal theory with the Great Reform Act and the subsequent deadlocks that ensued between the two Houses of Parliament, scholars disagree regarding its origins. *See* CECIL S. EMDEN, THE PEOPLE AND THE CONSTITUTION 201 (2d ed. 1956) (attributing the theory's origin to the Great Reform Act); CHARLES SEYMOUR, ELECTORAL REFORM IN ENGLAND AND WALES 314–15 (1915) (attributing the theory's origin to the first two reform acts); SIR IVOR W. JENNINGS, THE LAW AND THE CONSTITUTION 176 (5th ed. 1959) (attributing the theory's origins to 1852); CORINNE COMSTOCK WESTON, THE HOUSE OF LORDS AND IDEOLOGICAL POLITICS 13 (1995) (attributing the theory's origins to the Corn Laws Crisis).

The Lords asserted that the franchise's extension strengthened the political parties and subjected Members of Parliament (MPs) to party rule.[48] Democratizing the Lower House paradoxically weakened its claim to represent the people, as opposed to the party. The government came to rule the House of Commons (HC).[49] The Lords rebranded their veto power as referendal, exercised to refer constitutional matters to the people's decision, as expressed through election results or through platform politics.[50]

During this period, the Commons proposed constitutional changes on different occasions, and the Lords vetoed them, citing the need to gain the people's consent, even though they truly opposed their contents.[51] The Lords' vetoes on constitutional issues often led to the Commons' dissolution.[52] At the very least, the Commons' members usually engaged in platform politics. If the reformers won the "war of numbers" in platform politics or maintained the majority in the Commons following elections that served as a semi-referendum, then the Lords would remove their veto, acknowledging that the people had spoken. The proposed constitutional change would, then, be codified via a parliamentary act.[53] All political branches of government acknowledged that the people determined the fate of constitutional change.

Thus, Britain began to function under popular sovereignty.[54] Parliament was redefined and a distinction between the making of regular and constitutional law arose. Regular legislation demanded the consent of the legislature, composed of the two Houses and the Crown. Constitutional law required the people's approval through elections or platform politics. Though Parliament's internal deliberation process changed completely, Parliament's external composition remained the same, effectively disguising the revolutionary nature of this transformation to popular sovereignty. The transformation from parliamentary sovereignty to a popular sovereignty model involved no violation of pre-existing parliamentary procedures. The people *supplemented* rather than replaced Parliament. The referendal theory redefined not

48. *See* Rivka Weill, *Dicey Was Not Diceyan*, 62 CAMBRIDGE L.J. 474, 485 (2003) (describing the inverse relationship between MPs' independence and party rule).

49. *Id.*

50. *See infra* Part II. *See also* Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMPAR. L. 429, 439 (2006).

51. Corinne C. Weston, *Salisbury and the Lords, 1868–1895*, 25 HIST. J. 103, 114 (1982); ANDREW ROBERTS, SALISBURY: VICTORIAN TITAN 494 (1999). *See also infra* Part II.

52. *See infra* Sections II.A–B.

53. *See infra* Part II.

54. *Id.; see generally* Rivka Weill, *We the British People*, PUB. L. 380 (2004).

only the function of both Houses but also the role of elections. Rather than just choose representatives, as the influential philosopher Edmund Burke argued,[55] elections became a form of referenda on constitutional measures. While the Burkean approach imposed a constitutional duty upon MPs to follow their judgment, the referendal approach demanded that MPs apply the people's verdict whenever it was pronounced in an unequivocal way on constitutional matters.

The Conservative Party leader, the Third Marquis of Salisbury, argued that the HL could perform a similar function to the U.S. Supreme Court as guardian of the constitutional status quo:

> There is no power in the Constitution which can secure that the will of the nation shall be ascertained and obeyed . . . except the House of Lords. Even the House of Lords . . . cannot make provision for ascertaining, still less can it insist on, a specified proportion in the majority of votes to be obtained. But it can require that a special Election shall be held to return the House of Commons . . . and it can insist that no such fundamental change shall be introduced into our ancient polity unless England and Scotland are assenting parties to it . . . .[56]

The Lords insisted on the need to garner consent of a majority in each of the major territorial divisions of the U.K. as a prerequisite for constitutional change. They implicitly defined popular sovereignty as requiring taking account of the combined elements of people plus territory.[57] This was especially required when it came to devolving governmental power to the sub-parts of the U.K.[58]

The British House of Lords was the forerunner to the U.S. Supreme Court.[59] The HL fulfilled a dual function in British history: It was an upper legislative body like the American Senate. But, in addition, the House of Lords and eventually a sub-part of it, the Law Lords,

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55. Edmund Burke, *Speech to the Electors of Bristol, on His Being Declared by the Sheriffs Duly Elected One of the Representatives in Parliament for That City (Nov. 3, 1774)*, *in* 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 81 (John C. Nimmo ed., 1887).

56. Robert Gascoyne-Cecil, 3rd Marquess of Salisbury, *Constitutional Revision*, 20 NAT'L REV. 289, 298–99 (1892).

57. I elaborate on popular sovereignty as a territorial concept in Rivka Weill, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide*, 40 CARDOZO L. REV. 905, 907 (2018).

58. *See infra* Section IV.B.1.

59. For a discussion of the similarities between the House of Lords and the U.S. Supreme Court, see George Jarvis Thompson, *Development of the Anglo-American Judicial System*, 17 CORNELL L.Q. 9 (1931).

served as the highest court of Britain, like the Supreme Court.[60] To maintain its legitimacy, the House of Lords had to exercise its role as constitutional guardian upfront as a legislative branch, rather than as a judicial branch. Otherwise, the HL would have exposed itself to criticism that, what it allows in its role as a legislature, it later undoes in its capacity as a court. This U.K. model preceded the theorist Hans Kelsen's idea that the veto of a second legislative chamber may function as the equivalent of judicial review over primary legislation.[61] The Lords' legislative veto on constitutional matters, thus, resembled judicial review power in the U.S. Both were intended to guarantee that no constitutional change would pass without popular consent.

The guardian role of the constitutional status quo was not left to the whims of democracy but entrusted in Britain, just like in the U.S., to a defined unelected branch. In both countries, entrusting the exercise of the constitutional veto function to an unelected branch was crucial because it avoided crises in which competing institutions argue they have a direct, express, mandate to represent the people. When the Lords or the U.S. Supreme Court were exercising their veto, they only asserted that they were not convinced that the representative bodies had a mandate from the people for constitutional change.[62] They forced a "second look" at the constitutional change. They did not and could not make the stronger argument that they had an independent mandate from the people and thus better represented the people than the representative branches.[63]

The Framers of the U.S. Constitution were familiar with the workings of this British popular sovereignty model.[64] They debated at great length whether the judiciary should also serve as a Council of Revision and veto laws as part of the legislative function, like the House of Lords.[65] They ultimately rejected this idea to uphold separation of powers. They did not want to grant the judges a "double

60. After the fourteenth century, no one "seriously questioned" Parliament's role as the final court of appeal. The judicial function settled in the Lords as early as the fifteenth century since the Commons chose not to exercise it. Even after 1844, when only the Law Lords exercised the judicial function, they continued to serve as legislators as well. *See* ROBERT STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800–1976, at 32–79 (1978).

61. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 268 (Anders Wedberg trans., 1945); Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183, 197 (1942).

62. *See* G.H.L. LE MAY, THE VICTORIAN CONSTITUTION 136 (1979).

63. *See* Weill, *supra* note 50, at 448–49.

64. James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 235–36 (1989).

65. *Id.* at 239, 243.

negative" capacity to null laws through a legislative veto in addition to judicial review.[66] They further held that judges should not be biased in their judicial function because of their previous involvement as legislators.[67] The Framers explicitly discussed the similarities between the Lords' legislative veto function and judicial review.[68] They understood why the Lords exercised their judicial review function as a legislature rather than as a Court.

Although nineteenth century constitutional scholars continued to identify parliamentary sovereignty as the British basic norm, they simultaneously acknowledged the referendal theory's existence. Influential first-rate constitutional scholars from across the political spectrum recognized the emerging model of popular sovereignty, including Sir William Reynell Anson, Walter Bagehot, Albert Venn Dicey, and Sir Henry Maine.[69] This should not surprise us, since it is during periods of constitutional transformation that both political actors and scholars simultaneously employ two conflicting narratives: the old, familiar narrative and the new, evolving one. Only in retrospect, judging both rhetoric and practice, can it be determined that Britain has been functioning under popular sovereignty since 1832.

The British Whig comparative jurist Sir Henry Maine wrote: "[A] new theory has made its appearance . . . It seems to be conceded that the electoral body must supply the House of Commons with a Mandate to alter the Constitution."[70] Even the Whig Dicey, who is associated with parliamentary sovereignty more than any other scholar, suggested that, on executive issues, the will of just a small majority of the Commons was decisive.[71] On constitutional issues, however, the British practice required that the permanent will of the people be clearly expressed.[72] He wrote: "[N]o one till 1910 and 1911 seriously disputed the doctrine that the House of Lords in modern times had the right to demand an appeal to the people whenever on any great subject of legislation the will of the electorate was uncertain or unknown."[73] He acknowledged that the HL must yield to the HC when

66. *Id*. at 255 (quoting Luther Martin in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 76 (Max Farrand ed., 1911)).

67. *Id.* at 256.

68. *Id*. at 243, 252.

69. *See infra* notes 70–77, 217, and accompanying text.

70. HENRY S. MAINE, POPULAR GOVERNMENT 118 (1897).

71. Albert Venn Dicey, *The Referendum*, 23 NAT'L REV. 65, 65–67 (1894).

72. *Id.* at 65.

73. Albert Venn Dicey, *The Parliament Act, 1911, and the Destruction of All Constitutional Safeguards*, *in* THE RIGHTS OF CITIZENSHIP: A SURVEY OF SAFEGUARDS FOR THE PEOPLE 81, 85–86 (William Reynell Anson et al. eds., 1912).

the latter represents the people's will because the people are the "true political sovereign" in Britain.[74] He even legitimized the Crown's threat to create Peers to coerce the Lords to abide by the popular will.[75] Dicey recognized that the people dictated the acts of Parliament in constitutional matters rather than leaving them to parliamentary discretion.[76] Scholars even identified the criteria for distinguishing between false and true positives for constitutional change. They required the consent of cumulative representative bodies to manifest popular endorsement of constitutional change.[77] They required a large, deep, and decisive support for change.

In contrast, contemporary as well as twentieth century British scholars dismissed this referendal theory as mere rhetoric, a tool utilized by the Lords on partisan grounds to promote the Conservative agenda alone.[78] Contrary to this approach, I show in the next Part that the referendal theory captured the way the British constitutional system operated. All branches of government accepted and acted in conformity with popular sovereignty.

I argue that the Conservatives were the first to promote the theory because they controlled the Upper House, but the major intra-party disputes of 1832-1911 granted it general legitimation. The mainstream Whig Party accepted the referendal theory with the refinement that the Crown would use its power to create Peers, if the Lords frustrated the popular will as expressed at elections. If the Crown was convinced that the people had spoken and the Lords did not remove their veto, it would be legitimate to "pack" the HL to enable constitutional change. The potent threat of packing the Lords served to offset the partisan numerical advantage of the Tories in the Upper House. The potential of packing the Lords was intended to guarantee that the Lords would exercise the legislative veto in a non-partisan way. The threat of packing the Lords underscored that the people would not only prevent undesired constitutional change (negative role) but also dictate it when warranted (positive role). Further, 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,

74. DICEY, *supra* note 5, at 286–87.

75. *Id. Cf.* W.E. HEARN, THE GOVERNMENT OF ENGLAND 177, 179 (1867).

76. DICEY, *supra* note 5, at 286–87

77. *See, e.g.*, WALTER BAGEHOT, ESSAYS ON PARLIAMENTARY REFORM 202–03 (1896).

78. *See, e.g.*, WESTON, *supra* note 47; SIR IVOR W. JENNINGS, CABINET GOVERNMENT 504 (3d ed. 1959); SIR IVOR W. JENNINGS, THE LAW AND THE CONSTITUTION 176 (5th ed. 1959).

especially Home Rule for Ireland (devolution) and Tariff Reform (protectionism). [79]

II. A COMMON PRACTICE OF POPULAR SOVEREIGNTY

This Part shows how the British people, rather than Parliament alone, decided the fate of the major constitutional issues of the nineteenth and early twentieth centuries through a model very similar to the U.S. These include the three Reform Acts, which enfranchised the middle and lower classes, the Irish Church Act, which disestablished the Irish Church, and the Parliament Act of 1911, which diminished the Lords' veto power. This demonstrated practice and rhetoric contradicts the prevailing global narrative that the U.K.'s basic norm is that of parliamentary sovereignty. What is astonishing about this constitutional history is that, even in the heydays of the U.K.'s identification with the norm of parliamentary sovereignty, all political branches of government acknowledged that no major constitutional change could pass without the people's specific endorsement. Thus, Home Rule for Ireland repeatedly failed because it lacked popular endorsement. An unelected branch served as the guardian of the constitutional status quo exercising a function equivalent to judicial review in the U.S. Moreover, this Part demonstrates how the Anglo-American constitutional model of popular sovereignty envisioned the enforcement of constitutional conventions. When the Lords abused constitutional norms in their use of the veto power, they became an obstructionist second chamber rather than a constitutional guardian. They thus faced the threat of packing or reform to coerce them to adhere by constitutional norms. I will demonstrate the relevance to current U.S. dilemmas regarding judiciary and Senate reform later in the Article.

A. The First Reform Act 1832

The Great Reform Act began the democratization of the British constitutional system by extending the franchise to the middle classes in a restricted manner.[80] British practice of popular sovereignty preceded the theory that legitimized it. In 1830, Tory PM Arthur

79. *See infra* Parts II & IV. *Cf.* R.M. PUNNETT, BRITISH GOVERNMENT AND POLITICS 493–94 (6th ed. 1994) (attributing the theory primarily to the Labour and Liberal Parties); A. H. BIRCH, REPRESENTATIVE AND RESPONSIBLE GOVERNMENT 116–9 (1964) (attributing the theory mainly to the Labour Party).

80. MICHAEL BROCK, THE GREAT REFORM ACT 25 (1973); W.N. MOLESWORTH, THE HISTORY OF THE REFORM BILL OF 1832, at 5 (1865).

Wellesley, the 1st Duke of Wellington, opposed reform and thus resigned.[81] His successor, the Whig Earl Grey, accepted the premiership on the condition that the Crown would assist him in extending suffrage.[82] When the Commons did not support his bill,[83] King William IV dissolved Parliament at the government's advice to hold an election within a year of the previous one. The goal was to consult the people on suffrage by transforming the election into a referendum on the matter.[84]

Dicey wrote that "[n]ever did an election approach more nearly to a Referendum."[85] Even the Duke of Wellington, who led the Tory opposition to reform, conceded that the question referred to the people was "not whether Parliament was to be reformed, because, upon the principle of reform, there was a majority in the late House of Commons, but upon a particular plan of reform."[86]

Despite the Whigs' decisive victory at the polls, the Tory HL rejected the measure.[87] The Tories feared that the "commoners" would dominate the other classes of society: royalty (represented by the King) and aristocracy (represented by the Lords). Yet, PM Earl Grey treated their veto as illegitimate, arguing that the "lasting and intense feeling of the public, after so much discussion, and so long an interval for consideration, and the increased majority in the House of Commons, would have been decisive."[88] The Whig government resigned over its failure to pass reform.[89] However, the people's mobilization and agitation, culminating in the famous nine "Days of May," in which political unions rioted and contemplated a run on the banks,[90] convinced a reluctant King to threaten the Lords with the creation of Peers if they refused to endorse reform.[91] The Lords were confronted with "the

81. EMDEN, *supra* note 47, at 198; 1 HENRY JEPHSON, THE PLATFORM: ITS RISE AND PROGRESS 65–66 (1968).

82. J.R.M. BUTLER, THE PASSING OF THE GREAT REFORM BILL 140–41 (1964).

83. ERIC J. EVANS, THE GREAT REFORM ACT OF 1832, at 49 (2d ed. 1994).

84. BUTLER, *supra* note 82, at 218.

85. Albert Venn Dicey, *Ought The Referendum to be Introduced into England?*, 57 CONTEMP. REV. 489, 494 (1890).

86. EMDEN, *supra* note 47 at 199.

87. EMILY ALLYN, LORDS VERSUS COMMONS: A CENTURY OF CONFLICT AND COMPROMISE, 1830–1930, at 18 (1931).

88. BUTLER, *supra* note 82, at 335 n.1 (quoting 2 EARL CHARLES GREY, CORRESPONDENCE WITH KING WILLIAM IV AND SIR HERBERT TAYLOR 44 (1867).

89. ALLYN, *supra* note 87, at 19.

90. *Id.* at 275, 396; CONACHER, *supra* note 44, at 8–9; NANCY D. LOPATIN, POLITICAL UNIONS, POPULAR POLITICS, AND THE GREAT REFORM ACT OF 1832, at 13 (1998).

91. ALLYN, *supra* note 87, at 19.

alternative of the Reform Bill with an addition to the peerage, or the Reform Bill without it."[92] The Whigs returned to power with the King's support.[93]

The Lords condemned the threat to create Peers as unconstitutional.[94] PM Earl Grey, however, believed the government was justified because it had exhausted all other available constitutional methods.

> [I]f a majority of this House is to have the power, whenever they please, of opposing the declared and decided wishes both of the Crown and the people, without any means of modifying that power, then this country is placed entirely under the influence of an uncontrollable oligarchy.[95]

Subsequently, the HL switched its position and ratified the Great Reform Act.[96] The political analyst Walter Bagehot wrote that the King had coerced the Lords "at the will of the people."[97] This was the first constitutional measure whose enactment depended on the people's consent.

B. The Second Reform Act 1867

The Second Reform Act enfranchised primarily the householders in the boroughs, as well as lodgers who paid a yearly rent of at least £10.[98] The Act increased the voting lists of England and Wales by eighty-eight percent and is identified with the rise of the modern British party system.[99]

Already in the 1840s, the Chartist movement drafted a charter demanding political rights for the working class.[100] In the 1850s, MPs

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92. *Id.*

93. *Id*. at 19–23; W.I. JENNINGS, *supra* note 192..

94. ALLYN, *supra* note 87, at 19–20.

95. *Id.* at 21 (quoting HL Deb (17 May 1832) (12) cols. 1005–06).

96. WALTER BAGEHOT, THE ENGLISH CONSTITUTION 127–28 (2d ed. 1963).

97. *Id.* at 128.

98. F.B. Smith, *"Democracy" in the Second Reform Debates*, 11 HIST. STUD., AUST. & N.Z. 306, 313 (1963). For discussions of the Second Reform Act's impact on enfranchisement, *see generally* F.B. SMITH, THE MAKING OF THE SECOND REFORM BILL (1966); ROYDEN HARRISON, BEFORE THE SOCIALISTS (1965); JOSEPH H. PARK, THE ENGLISH REFORM BILL OF 1867 (1920); MAURICE COWLING, 1867: DISRAELI, GLADSTONE AND REVOLUTION (1967).

99. SEYMOUR, *supra* note 47, at 533.

100. *Id*. at 234–38.

attempted to pass reforms repeatedly.[101] In the 1860s, the National Reform League and the National Reform Union formed to mobilize support for parliamentary reform.[102] Finally, in 1866, the Liberal government proposed a reform bill based on proposals from the 1850s.[103] When both Conservatives and dissident Liberals opposed the bill in the Commons, the government resigned.[104] The resulting popular agitation lasted over six months and included people of all classes throughout the U.K.[105] At times, over 100,000 people participated in each demonstration, despite weather conditions, loss of business opportunities, crowding, and distance.[106] Contemporaries compared the agitation to that preceding the passage of the Great Reform Act.[107] By January 1867, the newspapers overwhelmingly concurred that the people had demonstrated their active and intensive support of reform.[108] Queen Victoria urged the Cabinet to proceed with reform, writing that "the security of her throne was involved in the settlement of this question."[109]

These events led the newly appointed Conservative government to enact comprehensive reform. The irony of this move, after the Conservatives had opposed the Liberals' limited reform plan during the very preceding year, did not go unnoticed. Some of the government's supporters admitted, "We cannot pretend that it is a matter of option with us whether we will undertake this question or not."[110] Not only did the people cause reform to pass, they also shaped its content through constant dialogue with the sitting Parliament.[111] Once again, the practice and rhetoric accompanying a constitutional moment of

101. *Id.* at 241–43.

102. *Id*. at 43–79; SEAN LANG, PARLIAMENTARY REFORM, 1785–1928, at 41–61(1999); Carl F. Brand, *The Conversion of the British Trade-Unions to Political Action*, 30 AM. HIST. REV. 251, 259–60 (1925).

103. *See* SEYMOUR, *supra* note 47, at 248–79.

104. SMITH, *supra* note 98, at 69–112.

105. *Id.* at 140–44.

106. *Id.* at 140.

107. PARK, *supra* note 98, at 106–109; SMITH, *supra* note 98, at 140; 2 HENRY JEPHSON, THE PLATFORM: ITS RISE AND PROGRESS 347–48 (1892).

108. *See, e.g.*, TIMES (London), Dec. 4, 1866, at 8; DAILY NEWS (London), Dec. 4, 1866; *Reform and Reformers*, 87 WESTMINSTER REV., 171, 185 (Jan. and Apr. 1867); *Public Affairs*, 7 FORT. REV., 104, 104 (1867); *The Political Profits of the Recess*, THE SPECTATOR, Feb. 2, 1867, at 118; *Reform*, MACMILLAN'S, Apr. 1867, at 529.

109. SMITH, *supra* note 98, at 151.

110. HARRISON, *supra* note 98, at 99 (quoting HC Deb (20 May 1867) (187) col. 800).

111. COWLING, *supra* note 98, at 3.

enfranchisement revealed the people's power to dictate constitutional change in Britain that would be codified in a statute.

C. The Irish Church Act 1869

The Irish Church Act, which disestablished the Anglican Church in Ireland, was the first in which not only the practice but also the rhetoric of popular sovereignty was present. Under the Union Act with Ireland, the Anglican Church enjoyed a privileged position, despite representing only a minority of Christian believers. Because disestablishment required amending the Union Act, contemporaries treated it as a constitutional act.

The Lower House passed the bill, but the Lords vetoed it. The Lords argued that the people had never approved the measure.[112] They demanded that an election solely focused on the Irish Church Bill should determine the matter.[113] Thus, the Act would need to garner the support of a large national majority, as well as a majority in each of the main parts of Britain.[114] Only then would the Lords treat the election's results as an endorsement by "We the British People" and enable the Act to pass.

Both contemporaneous[115] and later scholars[116] recognized that the 1868 election functioned as a referendum on the Irish Church's disestablishment. Dicey, for example, attested that "[the Liberal PM] Gladstone's plan for the Disestablishment of the Church in Ireland" had "been laid before the electors and been the main object of debate at a General Election . . . . [I]t was surely right to treat such ratification as the deliberate approval by the nation."[117]

After the election, Queen Victoria explained why the Lords should surrender. She, too, opposed disestablishment on the merits but

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112. G.H.L. LE MAY, *supra* note 62, at 134.

113. A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 17, 42, 43, 82 (12th ed. 1997).

114. Weston, *supra* note 51, at 127–28 (quoting THE TIMES (London), Apr. 8, 1895, at 9).

115. 2 LADY GWENDOLEN CECIL, LIFE OF ROBERT MARQUIS OF SALISBURY 24 (1922); LEONARD COURTNEY, THE WORKING CONSTITUTION OF THE UNITED KINGDOM AND ITS OUTGROWTHS 115 (1905); 1 WILLIAM R. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 285–86 (4th ed. 1909).

116. *See, e.g.*, EMDEN, *supra* note 47, at 214; BIRCH, *supra* note 79 at 116; *cf.* LE MAY, *supra* note 62, at 134.

117. A. V. Dicey, *The Parliament Act, 1911, and the Destruction of All Constitutional Safeguards*, *in* RIGHTS OF CITIZENSHIP: A SURVEY OF SAFEGUARDS FOR THE PEOPLE 81, 85–86 (William R. Anson ed., 1912).

acknowledged that the people endorsed it.[118] The Queen identified the following conditions as both necessary and sufficient to requiring the Lords' surrender: *First*, the size of the majority supporting the bill in the Commons should be "overwhelming."[119] *Second*, the majority should be stable and not temporary. *Third*, a prior election should have focused on the issue and expressed popular support for it. *Fourth*, there should be no indication of a substantial change in popular support for the measure since the election.[120]

Following the elections, the Lords ratified the bill despite their continuing opposition to its content.[121] Lord Hugh Cairns, High Chancellor of Britain, explained this turnabout:

> There are questions which arise now and again . . . as to which the country is so much on the alert . . . that it steps in as it were, takes the matter out of the hands of the House of Lords and the House of Commons . . . and in those cases either House of Parliament or both together cannot expect to be more powerful than the country, or to do otherwise than the country desires.[122]

The Lords acknowledged that it was the people's will that determined their use of the veto. Parliament could promote religious freedom in Ireland only after its endorsement by the people.

D. The Third Reform Act 1884

For a decade before the Third Reform Act passed, the agitation in favor of reform occurred both within and outside of Parliament.[123] In 1877, the Liberals, convinced of popular support for the measure, decided to incorporate the policy into their platform for the coming election.[124] After winning the 1880 election, the Liberals proposed reform towards the end of the parliamentary term.[125] The proposal was influenced by the American Civil War and the Fifteenth Amendment to the United States Constitution, which protects American citizens'

118. HARRY JONES, LIBERALISM AND THE HOUSE OF LORDS 54 (1912).

119. *Id.*

120. *Id*. *See also* 1 THE LETTERS OF QUEEN VICTORIA: SECOND SERIES 603 (George Earle Buckle ed., 1926).

121. ANSON, *supra* note 115, at 285.

122. *Id.* (quoting HL Deb (18 June 1869) (197) col. 293).

123. WILLIAM A. HAYES, THE BACKGROUND AND PASSAGE OF THE THIRD REFORM ACT 15–51 (1982); JEPHSON, *supra* note 107, at 401–02.

124. *See* sources *supra* note 123 and accompanying text.

125. JEPHSON, *supra* note 107, at 402.

right to vote from denial on the basis of their "race, color, or previous condition of servitude."[126] The proposal thus suggested equalizing the counties' and boroughs' franchise. It focused on enfranchisement of the working class with the aim of dealing with redistribution of seats later.[127] However, the Lords used the referendal theory to reject the measure. Lord Salisbury explained:

> We do not shrink from bowing to the opinion of the people . . . But now that the people have in no real sense been consulted, when they had at the last general election no notion of what was coming upon them, I feel that we are bound, as guardians of their interests, to call upon the Government to appeal to the people, and by the result of that appeal we will abide.[128]

A day after the Lords' veto, the Cabinet decided to prorogue Parliament and hold a special session in the autumn. The government decided to drop other pending bills to enable Parliament and the people to concentrate on reform. The government further decided to advance the reform bill in the new session *de die in diem*.

The Lords' resistance prompted the people to mobilize.[129] Many organized demonstrations in favor of reform, while others counter-demonstrated in support of the Upper House.[130] PM Gladstone distinguished between the constitutional politics occurring at that time and regular politics, saying:

> The calls of your private and individual lives are far too urgent to enable you from day to day to be considering as a nation what is done by one or the other House of Parliament . . . . It is only in these great crises that it is possible to address a call to the heart and mind of the country sufficient to bring about anything of the manifestations that are now so abundantly before our eyes.[131]

Lord Salisbury opposed the use of platform politics instead of an election to decide the issue, calling it "legislation by picnic."[132] Yet, he could not win on the basis of this principled argument. In this battle of platform politics, the overwhelming majority of demonstrations and

126. U.S. CONST. amend. XV.

127. SEYMOUR, *supra* note 47, at 466.

128. JEPHSON, *supra* note 107, at 403–04.

129. *Id.* at 404–06.

130. *Id.* at 406–07.

131. *Id*. at 416.

132. *Id.* at 532.

participants supported reform.[133] Even Lady Gwendolen Cecil, Lord Salisbury's daughter and biographer, admitted, "The numerical preponderance was on the ministerial side."[134]

In light of "the possible gravity of the situation,"[135] both the Queen and the Lords accepted the need to pass the Third Reform Bill.[136] While in 1867 Parliament resolved the crisis, in 1884 the leaders of the two political parties struck the final compromise and imposed their decision on Parliament.[137] This was, to a large extent, the result of the Reform Acts, which strengthened political parties and caucuses at the expense of MPs. PM Gladstone updated the Queen that there would "very probably be on both sides a resolute disposition to expedite them [i.e. the bills], were it only because any serious prolongation of them would be likely to provoke public uneasiness."[138] Henry Jephson, the author of an extensive work on *The Platform*, concluded, "The effect of the agitation is known to all. Within less than two months the Franchise Bill became law, and in the following session of Parliament the almost greater measure was passed for the redistribution of seats."[139] The people extended the franchise through an act of popular sovereignty.

E. Home Rule

So far, this article has established the existence of a recurrent pattern under which Parliament had to comply when the people required the adoption of constitutional change. The reverse was also true: Parliament could not endorse constitutional change without proof of the people's consent. The British treatment of Home Rule for Ireland fell victim to this requirement.

The 1885 election was the first in which the majority of Irish men could vote, since the Third Reform Act increased the Irish electorate five-fold. Now, Irish Nationalists could potentially negate any

133. 2 ROBERT WILSON, THE LIFE AND TIMES OF QUEEN VICTORIA 678 (1888).

134. 2 CECIL *supra* note 115, at 113.

135. 3 JOHN MORLEY, THE LIFE OF WILLIAM EWART GLADSTONE 130 (Macmillan Co. 1903) (1884).

136. 3 THE LETTERS OF QUEEN VICTORIA, *supra* note 120, at 561.

137. JOHN D. FAIR, BRITISH INTERPARTY CONFERENCES 48–51 (1980).

138. FAIR, *supra* note 137, at 49.

139. JEPHSON, *supra* note 107, at 421. *See also* O.F. CHRISTIE, THE TRANSITION TO DEMOCRACY 1867–1914, at 136 (1934); PETER MARSH, THE DISCIPLINE OF POPULAR GOVERNMENT 43 (1978).

Liberal majority in the Commons.[140] This forced the Liberals to introduce the first draft of a Home Rule bill.[141] Home Rule was intended to address Irish demands for self-determination by granting Ireland a domestic legislature with limited power (devolution).[142] Enacting such a bill would have required amending the Act of Union with Ireland.[143] With its passage, Parliament would have delegated its legislative power to determine Ireland's affairs to an Irish legislative body. Parliament's composition would have changed as well, excluding Irish representatives.[144] As it involved a practically irrevocable transfer of power, Dicey believed that the measure infringed upon parliamentary sovereignty.[145] It was a constitutional matter of the first order.

Although the Liberals won the 1885 election and proposed Home Rule immediately thereafter, the Commons' majority rejected the first Home Rule bill.[146] The deliberation over the bill concentrated on Parliament's lack of mandate to pass it because the people did not endorse the measure at a general election that focused on the issue.[147] The Liberal government resigned over the measure and introduced the details of the bill to the people's decision.[148] However, the election returned the Conservatives to power, leading them to argue that this result proved that the people did not endorse Home Rule.[149] The 1886 election ended a period of non-Conservative rule which had lasted, with only one interruption, since 1846.[150] Home Rule was such a divisive issue that the Liberal party split over it and a Liberal-Unionist party formed.[151]

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140. James McConnel, *The Franchise Factor in the Defeat of the Irish Parliamentary Party, 1885-1918*, 47 HIST. J. 355, 357–58 (2004); ALLYN, *supra* note 87, at 133–43.

141. Thomas Mohr, *Irish Home Rule and Constitutional Reform in the British Empire, 1885-1914*, XXIV-2 FR. J. BRIT. STUD. 2019, 1 (2019).

142. *See id.* at 1–5.

143. William R. Anson, *The Government of Ireland Bill and the Sovereignty of Parliament*, 2 L.Q. REV. 427, 427 (1886).

144. *Id.* at 436.

145. RICHARD A. COSGROVE, THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST chs. 6, 7, 10 (1980).

146. EMDEN, *supra* note 47, at 222.

147. *Id.* at 218–22; ALLYN, *supra* note 87, at 140; Ebrington, *Liberal Election Addresses*, 19 THE NINETEENTH CENTURY 606, 617–18 (Apr. 1886).

148. EMDEN, *supra* note 47, at 222.

149. JONES, *supra* note 119, at 81; *The New House of Commons*, 164 EDINBURGH REV. 575, 577–78 (1886); Dicey, *supra* note 85, at 494, 506.

150. JONES, *supra* note 119, at 80–81.

151. NEAL BLEWETT, THE PEERS, THE PARTIES AND THE PEOPLE: THE GENERAL ELECTIONS OF 1910, at ch. 1 (1972).

Fascinatingly, in 1891, Liberal Leader Herbert Henry Asquith wrote an open letter in *The Times*, questioning the referendal theory.[152] His letter foreshadowed his attitude nearly twenty years later, when he served as PM during the 1909–1911 constitutional crisis that led to the removal of the Lords' absolute veto power.[153] Asquith raised multiple interesting questions: Should *every* important measure be referred to the people, or only constitutional issues? How should constitutional measures be defined in the absence of a formal written British Constitution? Should the referendal function be employed only when the two Houses are in dispute or also when they agree? Does the issue subjected to the people's will have to be the main, or even sole, issue of an election? What level of detail is required when submitting an issue to the people? Would an election even suffice, or would a referendum be necessary to attain the people's consent on a specific issue?[154]

When the Liberals regained power in 1892, they immediately proposed Home Rule again.[155] The second Home Rule bill passed the Commons, but the Lords vetoed it even though the HC was fresh from an election where the bill had "figured prominently in the electioneering of both major parties."[156] The Lords defended their veto on several grounds. *First*, they argued the bill passed the Commons with a small majority. Further, the Liberals' electoral victory was based on "765 electors out of an electorate of 4,800,000."[157] "[S]omething more than a bare majority" was necessary to approve constitutional change.[158] *Second*, the Lords did not interpret the election as a referendum on Home Rule: "No human being can tell on what question the majority which put the present Government in power was returned."[159] *Third*, despite recurring demands from both ends of the political spectrum, the bill's details had not been referred to the people.[160] *Fourth*, the majority in the Commons was not "English," but relied on Irish support. The Lords demanded a majority of the "predominant partner,"[161] especially when altering an international treaty of Union between

152. TIMES (London), Nov. 25, 1891, at 3f.

153. *See* 1 J.A. SPENDER & CYRIL ASQUITH, LIFE OF HERBERT HENRY ASQUITH, LORD OXFORD AND ASQUITH 285–93 (1932).

154. *See* TIMES (London), *supra* note 152.

155. ROY JENKINS, MR. BALFOUR'S POODLE 16 (1954).

156. *Id.* at 17.

157. Salisbury, *supra* note 56, at 298.

158. *Id.* at 296.

159. LE MAY, *supra* note 62, at 141.

160. TIMES (London), Nov. 25, 1891, at 10e.

161. ALLYN, *supra* note 87, at 151.

Ireland and Britain. Otherwise, it was an illegitimate unilateral change of the treaty.[162]

When the 1895 election brought a victorious Unionist Party to power with a substantial majority, the Liberals' attempt at Home Rule again became a failed constitutional moment.[163] Dicey wrote that this election proved that the "the deliberate will of the country was expressed, not by the representative and elected House of Commons, but by the hereditary and unelected House of Peers."[164] The Conservatives would govern throughout the next decade. The HL's rejection of the second Home Rule bill was justified from the British people's vantage point, if not the Irish people, since the Liberals did not secure sustained majorities for their policy.

F. The Budget Act 1910

The Parliament Act of 1911 transformed the Upper House's absolute veto into a suspensory veto on almost all issues and ended the era of the referendal model. An early formulation of the Act can be found in the writings of James Mill, John Stuart Mill's father, following the passage of the Great Reform Act.[165] Liberal MP John Bright, one of the greatest orators of his generation, proposed a suspensory veto during the enactment of the Third Reform Act in 1884.[166] In 1907, Liberal PM Henry Campbell-Bannerman proposed a mechanism for overruling the Lords' veto within the life of the same Parliament.[167] Finally, in 1910, the electorate endorsed the Parliament bill twice in two separate elections, almost a year apart.[168] In both elections, the bill reached the top of the electoral agenda.[169] This transformation, thus, passed according to the most arduous criteria of a popular sovereignty theory.

The Liberals won an overwhelming victory at the 1906 election, and their coalition controlled nearly three-quarters of the Commons.[170] Yet, the Lords chose to continuously obstruct the

162. ALBERT VENN DICEY, A LEAP IN THE DARK OR OUR NEW CONSTITUTION 126 (1893).

163. JONES, *supra* note 119, at 95–96.

164. Albert Venn Dicey, *The Referendum and its Critics*, 212 Q. REV. 538, 541 (1910).

165. JONES, *supra* note 119, at 20–21.

166. TIMES (London), Oct. 19, 1883, at 4f.

167. Alfred L.P. Dennis, *The Parliament Act of 1911*, 6 AM. POL. SCI. REV. 194, 196 (1912).

168. *Id.* at 198.

169. *See infra* Section II.G.

170. JENKINS, *supra* note 155, at 18–19.

government's work. Arthur Balfour, the Conservative Party's leader, explained:

> You must have within the limits of the constitution some authority which shall be able not to resist the will of the people, but to see that . . . the consistent and persistent will of the people [is obeyed], not the will of the people as exhibited at a particular moment and in a particular place . . . .[171]

The Liberals criticized the Lords for utilizing the veto in a partisan fashion and in violation of constitutional norms. They accepted that the Lords could legitimately exert the veto to require a specific mandate for constitutional change. But the Lords misused their constitutional power when obstructing regular enactments.[172]

The tension reached a climax when the Lords rejected the 1909 budget bill proposed by the Liberal Chancellor of Exchequer, David Lloyd George.[173] His was an atypical money bill that promoted social welfare policies and included new land taxes.[174] The Lords justified their veto in democratic terms, saying, "[T]his House is not justified in giving its assent to the Bill until it has been submitted to the judgment of the country."[175] They even assured King Edward VII that they would support the budget's passage if the people returned the Liberals to power following an election.[176]

By rejecting the budget in the name of the people, the Lords injected the referendal theory into the budget crisis. The Liberal Secretary of State for India, Lord John Morley, opposed the veto and made a frontal attack on the mandate theory, concluding that "[i]f there is one thing that cannot be wisely submitted to a plebiscite, it is a Budget."[177]

Liberal PM Asquith attacked the HL's action as "the most arrogant usurpation"[178] of the Commons' powers in two centuries, calling it "a breach of the Constitution"[179] that would bring about a constitutional revolution. He described the Tory domination of the HL as

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171. JONES, *supra* note 119, at 113–14.

172. *See, e.g.*, *id.* at 168 (Liberal PM Asquith said "[t]he absolute veto which [the House of Lords] at present possesses must go.").

173. JENKINS, *supra* note 155, at 61–62.

174. *Id.* at 39–57.

175. *Id.* at 61.

176. JONES, *supra* note 119, at 162.

177. *Id.* at 159.

178. BLEWETT, *supra* note 151, at 101 (quoting HC Deb (2 Dec. 1909) (13) cols. 547–53).

179. *Id.*

"a system of false balances and loaded dice,"[180] and the referendal theory as a "new-fangled Caesarism which converts the House of Lords into a kind of plebiscitary organ."[181] The theory portrayed the Lords as though they had "a kind of instinct of divination"[182] to discern when the representatives betray the people. Asquith argued that the Lords rejected the budget "not because they love the people, but because they hate the Budget."[183] The Conservative Party leader retorted, "You are going to try and persuade the people of this country that they are suffering from some great wrong and indignity by having their opinion asked about the Budget."[184]

By vetoing the budget, the Lords effectively forced an election, as no government can survive without the power of the purse.[185] In rejecting the budget, the Lords encroached upon the privileges of the Crown, the HC, and the PM in violation of constitutional norms. They usurped the Crown's dissolution prerogative by forcing Parliament to dissolve. They not only disregarded the British convention that the Commons is supreme in fiscal matters, but brazenly challenged the HC's control of the executive, thus undermining the very theory of cabinet government. By determining election time, the Lords further prevented the PMs from doing so. The Lords usurped these privileges with no apparent risk to their Chamber because they were not an elected body like the Commons. This absence of accountability created the potential for serious abuse. All these breaches of the British Constitution did not escape the Liberals.[186] Since the time of the Magna Carta, the power of the purse had been used to prevent the Monarchy from dominating Parliament.[187] Now, the Liberals believed they could use it to end the Lords' domination.

In 1910, the Liberals held two successive elections to settle the question of the Lords' power once and for all. Prior to the first 1910 election in January, PM Asquith asked the King to exercise his prerogative to create Peers to enable the passage of a bill.[188] However, the King refused to do so for a bill that would curtail the Lords' veto power. He insisted on the need to hold another election in which the public would be informed of the particular measures proposed for

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. JONES, *supra* note 119, at 166.

185. EMDEN, *supra* note 47, at 229.

186. JONES, *supra* note 119, at 167–68.

187. *See generally* MORGAN, *supra* note 45.

188. SPENDER & ASQUITH, supra note 158, at 261.

altering the Lords' powers.[189] Indeed, during the first 1910 election, the Cabinet did not present to the electorate any concrete plan regarding the Lords because the Cabinet was itself divided over this issue.[190] Instead, the election focused on the budget and touched upon the Lords' power only indirectly.[191]

This first election of 1910 returned the Liberals to power, enabling them to pass the budget bill,[192] but it did not end the crisis over the Lords' powers. The Lords' veto power was an impediment to the government's ability to execute its long sought-for policies regarding Irish Home Rule and the Welsh Church's disestablishment. Moreover, the Irish took pains to entwine the fates of the budget and Home Rule. They coined the slogan "No Veto, No Budget."[193] John Redmond, who had been leading the Irish Parliamentary Party since 1900, demanded that the Lords' veto be restricted in a Parliament Act as quid pro quo for supporting the budget.[194] Because the government needed the Irish to maintain a majority in the Commons, the Irish MPs could extract Home Rule as their prize for supporting the budget.[195] Within two weeks of the Parliament bill's first reading in the Commons, the budget passed the HC with the support of most Irish MPs.[196]

Arthur Balfour attacked PM Asquith, claiming that he had "bought the Irish vote for his Budget."[197] Dicey agreed with this criticism and wrote, "The general election of 1910 will remain forever a satire upon the attempt to identify a general election with a Referendum."[198] Dicey believed the Lords represented the national will on the budget: "No bribe which leads Irish Nationalists to accept for the moment financial proposals which all Ireland abhors, will deprive of their true meaning facts which no man can dispute."[199] Dicey claimed that only legislative "logrolling" had enabled the budget's passage. The Unionists, who opposed Home Rule, also treated a majority based on

189. *Id.*

190. *See infra* Section IV.A.

191. JENKINS, *supra* note 155, at 40.

192. *See* W.I. JENNINGS, THE LAW AND THE CONSTITUTION 133 n.1 (3d ed. 1943); HOUSE OF COMMONS LIBRARY, TWENTIETH CENTURY PRIME MINISTERS AND THEIR GOVERNMENTS, REPORT, 2013, HC (UK), https://researchbriefings.files.parliament.uk/documents/SN05650/SN05650.pdf [https://perma.cc/ZZC3-TRN9].

193. JONES, *supra* note 119, at 195.

194. *Id.*

195. *Id.*; *see also* SPENDER & ASQUITH, *supra* note 153, at 270–302.

196. SPENDER & ASQUITH, *supra* note 153, at 277–78.

197. JENKINS, *supra* note 155, at 88.

198. Dicey, *supra* note 164, at 548.

199. *Id.*

Irish support as undemocratic because it was a non-*British* majority. Yet, the Lords accepted the election results as decisive despite their objections to the budget's merits. They kept their promise to the King to pass the budget if the Liberals won the 1910 election.[200] They again bowed to the people's decision to endorse a specific statutory measure.

G. The Parliament Act 1911

The Liberal government could not successfully pass the budget and curtail the Lords' veto in the life of one parliament. As expected, the Lords would not willingly pass a law that would restrict their power. The King, the only one who could force the Lords to pass such a law by creating Peers, insisted on the need to hold an additional election focused on the issue of the Lords' veto.[201] Interestingly, the King viewed the first election's results as "inconclusive"[202] as far as the Lords' powers were concerned. Using Queen Victoria's criteria from 1868, the King found that the government's majority had decreased following the first election of 1910 and was dependent on Irish support. In addition, the constitutional issue was not the sole issue at the election, and thus the electoral outcome did not clearly reflect a mandate for diminishing the Lords' powers.[203] It is striking that the King explicitly required that arduous popular sovereignty criteria be satisfied before he would allow the passage of fundamental constitutional change. The Liberals, however, secured the King's guarantee to create Peers if they won an "adequate majority" at the second election of 1910.[204]

After the first election, the Liberals proposed the Parliament bill, which passed through the Commons. The Lords resisted the Parliament bill. Instead, they counter-proposed the reform of their House's composition and the adoption of the referendum to replace their absolute veto.[205] The parties fought the December 1910 election over these rival proposals.

While the first election of 1910 dealt only indirectly with the Lords' powers, the second concentrated solely on the Lords.[206] Neal Blewett, in his canonical book on the 1910 elections, wrote:

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200. JONES, *supra* note 119, at 162.

201. SPENDER & ASQUITH, *supra* note 153, at 298.

202. JENKINS, *supra* note 155, at 83.

203. SPENDER & ASQUITH, *supra* note 153, at 269–70, 333–34.

204. JONES, *supra* note 119, at 310.

205. *See infra* Part IV.A.

206. BIRCH, *supra* note 79, at 116; PUNNETT, *supra* note 79, at 493.

> In January three questions – the House of Lords, the Budget and Tariff Reform – were each mentioned in 85 per cent or more of the addresses; in December only one issue – the House of Lords – appeared in 85 per cent or more of the addresses. In January, while Liberal and Labour addresses emphasized the House of Lords, Tory addresses gave first place to Tariff Reform; in December all parties agreed on the primacy of the constitutional controversy.[207]

The Liberals, who advanced the Parliament bill, won three consecutive general elections between 1906 and 1910.

In Asquith's interview with the King following the second 1910 election, he described the majority as "cohesive and formidable & . . . 'returned' after what in effect had been a 'Referendum.'"[208] Lord Richard Burdon Haldane, Secretary of State for War, said:

> [T]here has been as true a Referendum as [the Lords] could wish to see. The propositions of that Bill, not only in general terms but in specific terms, were submitted to the country at the General Election; line for line they were made the predominant feature at the last election.[209]

After the second election, the King consented to create Peers to coerce the Lords to pass the measure.[210] Asquith justified the use of force, claiming that a majority of the Commons supported the bill, including MPs representing a British majority as demanded by the Lords.[211] He claimed that the people had approved the bill in all its detail at election.[212] He further relied on the dynamics of the Great Reform Act's passage to justify his action: "[W]e are following in spirit and almost to the letter the precedent set by the great Whig statesman of 1832."[213]

Only when confronted with the threat of creating Peers did the Lords "switch in time" and allow the transformation. The Unionists had been divided on the appropriate reaction to the threat to create Peers. The majority of Lords, known as the "Hedgers," understood that the battle over the Parliament bill had already been lost and thus

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207. BLEWETT, *supra* note 151, at 326.

208. *Id.* at 201.

209. HL Deb (22 May 1911) (8) col. 678.

210. SPENDER & ASQUITH, *supra* note 153, at 321.

211. *Id.* at 322–23.

212. *Id.* at 315–20.

213. *Id.* at 320.

preferred *to abstain* to prevent the creation of Peers. They hoped that they could change the Parliament Act once in power.[214] The Conservative Lord George Nathaniel Curzon explained:

> If the peers are created, we do not postpone Home Rule; we expedite and render it certain. We do not prevent Disestablishment; we facilitate it. We do not render the Parliament Bill odious or ridiculous. On the contrary, we deprive the country of the luxury of seeing it in operation.[215]

With the Parliament Act, the Lords could still delay a bill and force deliberation upon the country. However, if many Peers were created, the HL would assent immediately to any government initiatives, and the last check against hasty measures would be removed. In Balfour's words, "It would, in my opinion, be a misfortune if the present crisis left the House of Lords weaker than the Parliament Bill by itself will make it . . . ."[216] Sir William Anson, a Liberal Unionist, even justified their surrender based on popular will:

> We may say that the last general election was a snap-vote, taken before the people had time to understand the issue; but I doubt if there are many Unionists who think that a general election this month or next would appreciably alter the composition of the House of Commons. And if we believe that the electors would now return a majority in favour of the Bill, the Lords will only follow the course adopted by the Duke of Wellington, by Lord Cairns, and by Lord Salisbury if they accept, however reluctantly, the verdict of the nation as it is now represented.[217]

A smaller group, known as the "Judah Group," agreed to vote *in favor* of the bill to prevent the creation of Peers. They accepted that the people had spoken.

The minority, known as the "Diehards," supported *vetoing* the bill at the cost of peer-packing. This would alert the nation to the revolutionary nature of the Parliament Act, which, in effect, marked the HL's death as a powerful institution.[218] They believed "a veiled

214. JONES, *supra* note 119, at 283.

215. JONES, *supra* note 119, at 299.

216. AUSTEN CHAMBERLAIN, POLITICS FROM INSIDE 319 (1936).

217. JONES, *supra* note 119, at 304.

218. *Id.* at 283–86.

revolution . . . [was] far more dangerous than a naked revolution"[219] and that the people did not appreciate the true nature and extent of the constitutional revolution taking place.[220] In the end, the Parliament Act passed with the support of some Unionists to avoid the creation of Peers.[221]

The process resembled the Great Reform Act's passage. In fact, Asquith believed his actions were more legitimate than those of Earl Grey since the popular mandate was clearer:

> We are dealing with a Bill, the principle of which has been thrice approved in three successive Houses of Commons, and we are dealing with a Bill in regard to which we have not asked for the exercise of the Royal Prerogative [i.e. packing the Lords] until it had gone through all its stages in the House of Lords. In Lord Grey's case there had been one election and one election only when he demanded the exercise of the Royal Prerogative before the Bill had even been in Committee in the Upper House. The truth is that this is a far stronger case in every one of its details.[222]

With popular endorsement, the Parliament Act 1911 ended the referendal model. The Lords could no longer coerce the Commons to submit a constitutional initiative to the people at election.

H. Constitutional Statutes

Currently, U.K. courts recognize that some statutes in Britain rise to the level of "constitutional statutes." The courts require Parliament to use *explicit* language if it is to repeal any of them.[223] This judicial demand is inconsistent with the norms of parliamentary sovereignty that allow for implicit repeal of legislation.[224] Explicit repeal requirements force Parliament to resort to special legislative processes. They insist that repeal comes after clear legislative deliberation with

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219. WILLIAM WALDEGRAVE PALMER SELBORNE, THE CRISIS OF BRITISH UNIONISM 56 (George Boyce ed., 1987).

220. CHAMBERLAIN, *supra* note 216, at 319.

221. *Id.*

222. JONES, *supra* note 119, at 311.

223. *See, e.g.*, Thoburn v. Sunderland City Council [2002] EWHC (QB) 195 [63], [2003] QB 151 [63] (Eng.); BH (AP) (Appellant) v. The Lord Advocate (Respondents) [2012] UKSC 24 [30], [2013] 1 AC 413 [30]; R. (Appellants) v. SOS for Transp. (Respondent) [2014] UKSC 3 [207], [2014] 1 WLR 324 [207].

224. *See, e.g.*, Karen Petroski, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 497–98 (2004).

Parliament taking full public responsibility for its actions.[225] They are intended to affect the legislative incentives by extracting a public price for its actions, thus deterring it from deviating from the constitutional statute.

In the absence of explicit repeal language, courts might engage in robust interpretation techniques that are not easily detectable or accounted for to align conflicting statutes with constitutional statutes. It is arguable that, at times, the power to interpret statutes creatively allows courts to intervene in legislative sovereignty more readily than declaring a statute void or non-operable.[226] With regard to some constitutional statutes, British courts even enjoyed the power to declare conflicting statutes invalid or incompatible, as further discussed below.[227]

The list of constitutional statutes recognized by the courts includes those enacted with popular endorsement of the people, as articulated above. The judges have recognized the statutes' special constitutional status because of their content, but this Article offers them the tools to recognize that the statutes' special constitutional status is attributable to their process of enactment.

III. REFORM OF AN OBSTRUCTIONIST SECOND CHAMBER

The Lords' obstructionist legislative behavior in breach of constitutional norms led to reforms that reduced their veto power from absolute to suspensory. Yet, even under the suspensory veto model, Britain maintained its commitment to popular sovereignty in a way that will enable us to later draw lessons to the United States.

A. Democratic Transition of Power

The Parliament Act 1911 consolidated the HC's superiority within a bicameral structure. It eliminated the HL's absolute veto power and left it with suspensory veto power over regular legislation and no veto power over money (budgetary) bills. Dicey agonized over this outcome, writing that a Commons' majority "can arrogate to itself that legislative omnipotence which of right belongs to the nation."[228]

225. *See* Thoburn v. Sunderland City Council [2002] 4 All ER 156, 185.

226. I develop this topic further in Rivka Weill, *Exploring Constitutional Statutes in Common Law Systems*, *in* QUASI-CONSTITUTIONALITY AND CONSTITUTIONAL STATUTES: FORMS, FUNCTIONS, APPLICATIONS 64 (Richard Albert & Joel I. Colón-Ríos eds., 2019).

227. *See infra* Sections IV.C–D.

228. Dicey, *supra* note 117, at 91.

To balance the Commons' increased legislative power, the Act shortened Parliament's term from seven to five years.[229]

The British Constitution still retained a full popular sovereignty track under the Parliament Act regarding one issue: no Parliament may extend its own life without the approval of the HL. This is symbolic; the ultimate preservation of democracy requires frequent and regular elections, and since the HC had become stronger, a counterbalance was needed to guarantee that the Commons could not entrench itself in office. It is also symbolic on a deeper level. Dicey highlighted the Septennial Act 1716, which extended Parliament's life from three to seven years and was applicable to the sitting Parliament, as the ultimate proof of parliamentary sovereignty.[230] Yet, the Parliament Act 1911 elevated the people's will, in conjunction with the Lords' veto, over the extension of Parliament's life.[231]

Despite this constitutional guarantee, the British Parliament did extend its own life. The very Parliament, elected in December 1910, that had enacted the Parliament Act 1911 extended its own existence five times, dissolving at last in 1918. Similarly, the Parliament elected in 1935 prolonged its own life until 1945.[232] Both extensions were exceptional and occurred because of the two World Wars. Yet, they cast a shadow over British democracy.

The Parliament Act's preamble stated that it would be followed by the HL's reform, which was set to make the HL a popular rather than a hereditary chamber.[233] Only in 1999 would the British exclude most hereditary Peers from the HL.[234] Parliament did not hasten to reform the Lords out of inertia, respect for tradition, or fear that a reformed Upper House would enjoy greater legitimacy and therefore more power.

During World War I, Liberal PM Lloyd George headed a bipartisan coalition. This coalition rejected the referendum, or a joint sitting (i.e., joint session) of the two Houses, as suitable mechanisms for resolving deadlocks in Parliament. By bipartisan consent, the

229. JONES, *supra* note 119, at 197.

230. DICEY, *supra* note 5, at 6–9.

231. Most of the Lords in the *Jackson* decision ruled out the possibility that Parliament may achieve in two stages (first amending the Parliament Act 1911 and then extending Parliament's life) what it cannot achieve in one stage—namely extension of Parliament's life without the Lords' consent. *See Jackson* decision, *supra* note 34.

232. A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 60–61 (13th ed. 2003).

233. *See* Dennis, *supra* note 167, at 198.

234. House of Lords Act 1999, c. 34, § 1.

Parliament Act, which was initially imposed on the Conservatives, attained general and final acceptance.[235]

B. The Suspensory Veto Model

With popular endorsement, Britain transformed into a weaker model of popular sovereignty. The Lords' veto power became suspensory because the Commons could overrule the Lords' veto on most legislation within two years and coerce the enactment of even contentious constitutional measures.[236]

Nevertheless, the HL's powers remained impressive. The Lords' persistent rejection of a bill would require a government to hold consistent majority support in the Commons to override its opposition. The majority's endorsement of the bill would be tested on three separate sessions within a period of no less than two years. In PM Asquith's words, "[T]he Parliament Act presupposes the 'unswerving support' of a majority in the House and of a 'stable public opinion' outside it."[237] Even Balfour admitted, "[T]here is virtue in the three sessions and two years' delay," which he described as "a bad form of referendum."[238] Dicey similarly accepted "that the House of Lords, tho' from one point of view almost destroyed, retains a suspensive veto, wh. [sic] may turn out of considerable power."[239]

In the *last* two years of a government's term, the Lords' power to delay legislation would transform into a *de facto* veto power. This spawned a distinction between fresh and old mandates from the people.[240] The HC's legislative power was at its peak when its mandate was fresh from elections and at its nadir toward the end of its life.[241] Thus, the Parliament Act effectively created an exceptionally long "lame duck" or "caretaker" period.

Parliament passed the Parliament Act of 1911 to enable the Irish Home Rule's enactment and the Welsh Church's disestablishment.[242] The Liberals' legislative position would have been stronger had the King created additional Peers. They would have controlled a

235. ALLYN, *supra* note 92, at 228–29.

236. ROYAL COMMISSION ON THE REFORM OF THE HOUSE OF LORDS, A HOUSE FOR THE FUTURE, 2000, Cm. 4534, ¶ 4.3 (UK) [hereinafter ROYAL COMMISSION].

237. CHAMBERLAIN, *supra* note 216, at 493.

238. JONES, *supra* note 119, at 258.

239. COSGROVE, *supra* note 145, at 240.

240. Rivka Weill, *Resurrecting Legislation*, 14 INT'L J. CONST. L. 518, 528–29 (2016).

241. *Id.*

242. See *supra* Sections II.D–E.

majority in the HL, enabling the immediate passage of these contentious measures. As it happened, the Parliament Act of 1911 left the Lords with sufficient powers to mobilize the nation against proposed constitutional transformations.

Despite its reduced veto power, the HL succeeded in blocking the implementation of both bills. Between the Lords' first rejection of the Government of Ireland Act and its final passage two years later, the opposition mobilized political activists against the measure. The Unionists in the Ulster province—situated in Northern Ireland, the wealthiest region of Ireland at that time—organized armed resistance to Home Rule.[243] Considering WWI and the tension between the North and South of Ireland, which verged on a civil war, the British government enacted the Suspensory Act 1914, which postponed Home Rule's implementation.[244] Asquith understood that any Irish Home Rule required special provisions for Ulster, but he could not promptly address the situation in Parliament because of the Lords' suspensory veto powers.[245]

The Unionists then suggested a referendum on Ulster as a solution to the political stalemate but failed.[246] Finally, in 1920, Britain implemented a new bill on Home Rule. However, by then, it was too late and the U.K. lost control over Southern Ireland, which eventually became the Irish Free State.[247] Today, Ulster is divided, with six of its counties forming part of the U.K. and three belonging to the Republic of Ireland.[248] Its status was a major hurdle to the Brexit agreement between the EU and the U.K.[249]

John Alfred Spender, Asquith's biographer, described the suspensory veto's operation in this case:

> [F]ar too little attention has been paid to the constitutional aspects of the Irish struggle between 1912–1914. If the period of the suspensory veto is to be used for organizing forcible resistance to the decisions of the

243. *See generally* A.T.Q. STEWART, THE ULSTER CRISIS: RESISTANCE TO HOME RULE 1912–1914 (Blackstaff Press 1997) (1967).

244. Suspensory Act 1914, 4 & 5 Geo. 5 c. 88, § 1 (UK).

245. ANDREW ADONIS, MAKING ARISTOCRACY WORK 159–60 (1993).

246. CHAMBERLAIN, *supra* note 216, at 626.

247. Government of Ireland Act 1920, 10 & 11 Geo. 5 c. 67 (UK); Constitution of the Irish Free State (Saorstát Eireann) Act 1922, 12 & 13 Geo. 5 c. 1, § 1 (Ir.).

248. JONATHAN TONGE, NORTHERN IRELAND: CONFLICT AND CHANGE 4 (2013).

249. Jennifer Rankin, *Irish Board Remains a Brexit Hurdle, Says EU Sources*, THE GUARDIAN (Mar. 16, 2018, 6:06 PM), https://www.theguardian.com/politics/2018/mar/16/irish-border-remains-a-brexit-hurdle-say-eu-sources [https://perma.cc/HH22-VS47].

> House of Commons, the last state of the case will be worse than the first, and the House of Lords may find itself the centre of extra-constitutional movements which, if not checked would be fatal to parliamentary government. The question is in a dangerous state of unsettlement, and if two Chambers are still thought necessary, experience points to the necessity of quick decisions in the issues which arise between them.[250]

The contentious Welsh Church Act 1914, designed to abolish tax payments to the Anglican Church of England, met with a similar fate. The Lords' resistance forced the government to delay the effective date of this Act until after the War.[251] The outcome of both Acts demonstrated that Britain was still operating under a popular sovereignty model, though weaker than before 1911.

C. The Salisbury Convention

In 1945, the British constitutional system edged closer to a parliamentary sovereignty model. In that year, the Labour Party won by a landslide, running on a platform of a radical nationalization.[252] Following the election, the Fifth Marquis of Salisbury, the leader of the Conservative Lords, realized the need for self-restraint. He acknowledged that the Labour Party won a clear mandate to pursue nationalization.[253]

In a new iteration of his ancestors' referendal doctrine, Lord Salisbury articulated "the Salisbury Convention" to prevent unwarranted clashes between the Houses when the government mastered a large majority in the Commons.[254] He argued that the Lords should amend, but not reject, bills foreshadowed in the governing party's manifesto. The Lords would treat these bills as endorsed by the people.[255] Thus, the Salisbury Convention covers all bills discussed in the

250. 1 JOHN A. SPENDER, THE PUBLIC LIFE 170 (1925).

251. Suspensory Act 1914, 4 & 5 Geo. 5 c. 88, § 1 (UK).

252. GEORGE GALLUP, THE GALLUP INTERNATIONAL PUBLIC OPINION POLLS: GREAT BRITAIN 1937–1964, at 122 (1976).

253. Rodney Brazier, *Defending the Hereditaries: The Salisbury Convention*, PUB. L. 371, 373 (1998).

254. *Id.* at 372–73.

255. *Id.* at 373.

Queen's Speech, delivered when Parliament reassembles after an election.[256]

The Convention would not apply to matters of great constitutional importance "on which there was known to be a deep division of opinion in the country or perhaps on which the people's opinion was not known." [257] In such cases, the Lords' constitutional duty remains ensuring that the country reflects upon the issues and reaches a sustained and deliberate judgment.

The Salisbury Convention restricts the Lords' veto power, even though party manifestos state only general policy objectives and rarely provide details for proposed legislation.[258] The Convention assumes that the people are acquainted with the content of manifestos, though this is an unrealistic expectation. From endorsing a theory requiring a *specific* mandate to a detailed policy measure designed to protect the constitutional status quo, the Lords rearticulated the mandate theory as granting a *general* mandate to enact all regular legislation after elections.[259]

A joint committee report titled "Conventions of the U.K. Parliament" affirmed the Salisbury Convention as binding on all political parties,. Parliament endorsed this report in 2007.[260] However, the Convention's future is unclear. Some argue that a reformed Upper House would have the democratic legitimacy to act upon its opinions more often than is currently recognized under the Convention.[261]

D. The Parliament Act 1949

In light of the dire needs resulting from WWII, the HC was not content with the Salisbury Convention. It wanted to impose its will on the Lords, even if certain issues were not foreshadowed in the government's manifesto. In particular, the HC wanted to nationalize the steel and iron industries, which the government managed during WWII.[262]

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256. Donald Shell, *To Revise and Deliberate: The British House of Lords*, *in* SENATES: BICAMERALISM IN THE CONTEMPORARY WORLD 202 (Samuel C. Patterson & Anthony Mughan eds., 1999).

257. COLIN TURPIN, BRITISH GOVERNMENT AND THE CONSTITUTION 491 (2d ed. 1990).

258. *Id.* at 490.

259. Brazier, *supra* note 253, at 374–75.

260. JOINT COMMITTEE ON CONVENTIONS, CONVENTIONS OF THE UK PARLIAMENT, 2005–6, HL 265-I, HC 1212-I, at 27–28.

261. ROYAL COMMISSION, *supra* note 236, ¶¶ 4.20–4.25 (treating the Convention as an outcome of the Parliament Act 1911). *Cf.* CONVENTIONS OF THE UK PARLIAMENT, *id*. (suggesting a need to revise the Convention under a reformed HL).

262. O. HOOD PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 142 (7th ed. 1987).

The Lords, however, staunchly opposed their nationalization.[263] They argued that the Labour government's manifesto in the preceding 1945 election discussed nationalization but did not specify these industries.[264]

Because the government anticipated that the Lords would exercise their *de facto* absolute veto during Parliament's last two years in office, the government decided to further curtail the Lords' power. The HC's long "lame duck" period levied by the Parliament Act 1911 thus led to the Parliament Act 1949.[265]

Between 1915 and 1945, there were mainly Conservative, national, or coalition governments. Thus, there was no political need to utilize the 1911 Act's fast track legislation of overcoming the Lords' veto. The expedited procedure was used to enact only three major contentious constitutional changes: the Government of Ireland Act 1914, the Welsh Church Act 1914, and the Parliament Act 1949.

The Parliament Act 1949 was not foreshadowed in the Labour government's manifesto during election.[266] The government proposed the Act despite its losses in English municipal elections, which expressed a decline in Labour support.[267] Labour won the 1950 elections by an extremely slim majority.[268] It thus held snap elections in 1951 to increase its majority but lost power, which proved that it did not muster a specific mandate to pass the Parliament Act 1949.[269]

The Parliament Act 1949 further restricted the Lords' powers by shortening the effect of the Lords' suspensory veto to one year or *de facto* six months.[270] The Act applied to statutes in the process of enactment during its passage.[271] This retroactive application was intended to overcome the Lords' opposition to the nationalization of the

263. *Id.*

264. *Id.* at 169.

265. *See generally* W. H. Morris Jones, *Parliament Bill, 1947: Agreed Statement on Conclusion of Conference of Party Leaders, February–April, 1948 (Cm. 7380)*, 11 MOD. L. REV. 332 (1948) [hereinafter PARLIAMENT BILL].

266. D.G. Hitchner, *The Labour Government and the House of Lords*, 1 WEST. POL. Q. 426, 426 (1948); PHILLIPS, *supra* note 262, at 169.

267. Hitchner, *supra* note 266, at 428.

268. H.G. Nicholas, *The British General Election of 1951*, 46 AM. POL. SCI. REV. 398, 404 (1952).

269. *See generally id*. *See also* Rivka Weill, *Centennial to the Parliament Act 1911: The Manner and Form Fallacy*, PUB. L. 105, 105 (2012) (arguing that Parliament should have consulted the people before amending the Parliament Act 1911).

270. Donald Shell, *The House of Lords: Time for a Change?*, 47 PARL. AFFS. 721, 725 (1994).

271. Hitchner, *supra* note 266, at 427.

steel and iron industries and negated fundamental principles of the rule of law.[272]

The Parliament Act 1949 moved Britain closer to parliamentary sovereignty than ever before. This process began with the enactment of the Parliament Act 1911, continued with the adoption of the Salisbury Convention, and culminated with the Parliament Act 1949. The process of enacting the Parliament Act 1949 reflected this shifting basic norm. Though the Act redefined legislative powers, it passed under the expedited procedure of the Parliament Act 1911 that enables the override of the Lords' veto.[273] The Conservative Party opposed the Parliament Act 1949 because the abridged veto power would annihilate their ability to awaken the people and mobilize them against constitutional change.[274]

The expedited process provided by the 1949 Act was used four times beginning in 1991 to enact the following statutes: the War Crimes Act 1991, the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000, and, the Hunting Act 2004, which banned hunting wild animals using dogs.[275] On other occasions, the mechanism's mere existence fostered compromises between the chambers, which explains its rare usage.[276]

This British transformation from a referendal to a suspensory model contributed to scholars' blindness to the *common* Anglo-American popular sovereignty model. Britain became identified with the notion that elections grant a parliamentary mandate to enact *all* laws. But, in fact, while Britain transitioned in an evolutionary way from popular to parliamentary sovereignty in the second half of the twentieth century, this transformation was short-lived. Two decades after the enactment of the Parliament Act 1949 that removed the Lords' legislative veto, the British found a new mechanism to enable the people to pronounce their decisions in constitutional matters. They resorted to the use of referenda, as discussed in the next Part.

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272. PHILLIPS, *supra note* 262, at 142; Hitchner, *supra* note 266, at 427–32.

273. PHILLIPS, *supra note* 262, at 141–42.

274. PARLIAMENT BILL, *supra* note 265, ¶ 9.

275. A. Samuels, *Is the Parliament Act 1949 Valid? Could it be Challenged?*, 24 STATUTE L. REV. 237, 238 (2003).

276. ROYAL COMMISSION, *supra* note 236, ¶ 4.4.

IV. BREXIT AS A STORY OF CONTINUITY

Brexit is the most defining event affecting Europe since the establishment of the EU.[277] Observers treated it as incomprehensible considering the U.K. Parliament's manifest reluctance to endorse it throughout most of the process.[278] Yet, this Article makes sense of Brexit as a story of continuity. 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. Understanding British constitutional history as part of an Anglo-American popular sovereignty tradition since the American founding enables us to both understand Brexit and face current challenges in the U.S. regarding both Senate and judicial reform. Various proposals to deal with an obstructionist HL have preceded the current debates in the U.S. on reforming both the Senate and the judiciary.

A. The Historical and Theoretical Roots of British Referenda

The political actors in the dawn of the 20th century understood that the suspensory veto is a weaker form of popular sovereignty and there might be a need to adopt the referendum. They clearly identified the constitutional issues that would eventually be subject to referenda beginning in the 1970s—primarily devolution and allocation of legislative power.

1. The Referendum as the Tool of Dissident Party Members

Already in the 1890s, while the Conservatives chose to exercise the HL's referendal function as the engine of popular sovereignty, dissident Unionist Liberals preferred the referendum. Party considerations dictated both choices: The Conservatives dominated the HL and controlled its veto power, while dissident Liberals needed to bypass Parliament altogether in their quest to defeat Home Rule and reunite their party.

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277. Charles Grant, *The Impact of Brexit on the EU*, CENTRE FOR EUROPEAN REFORM (June 24, 2016), https://www.cer.eu/insights/impact-brexit-eu [https://perma.cc/CP4S-KDAU].

278. *See, e.g.*, Timothy B. Lee, *Why Did Britain Vote to Leave the EU?*, VOX (June 25, 2016, 12:120 PM), https://www.vox.com/2016/6/25/12029962/why-did-britain-leave-the-eu [https://perma.cc/L7RR-AG6M]; Nic Robertson, *A Look at Brexit: Why are the Brits Thumbing Their Noses at Europe?*, CNN (June 24, 2016, 5:48 PM), https://www.cnn.com/2016/06/24/europe/brexit-aftermath-robertson/index.html [https://perma.cc/A7J9-48Y9].

Following the Liberals' victory in 1892, the Whig Dicey tried to convince the Conservative Party leader, Lord Salisbury, to support the referendum as a means to defeat Home Rule. He wrote that the referendum was necessary "to guard the rights of the nation against the usurpation of national authority by any party which happens to have a Parliamentary majority."[279] Dicey thought the HL could introduce a requirement to hold the referendum "into any measure such as a Home Rule Bill which involved a fundamental change in our institutions."[280] He would not have viewed even two consecutive Liberal victories at the polls as proof of public support for Home Rule; only a referendum could express the will of the people.

The Unionists' demand for the referendum was based on a two-tiered claim: (1) the HC did not represent the people because it lost its independence and was subject to the control of the executive and the party caucus; and (2) elections could not constitute referenda on specific legislation.[281] A referendum could isolate a topic better than an election. In Dicey's words, referenda expressed the verdict of "Philip sober," and elections of "Philip drunk."[282] Furthermore, the British electoral system was inequitable and in need of seat-redistribution.

In 1903–1907, dissident Conservatives endorsed a call for referenda as well.[283] They wanted to hold a referendum on Tariff Reform when their party adopted protectionism as its official policy to protect British industry from foreign competition.[284]

2. Reform Alternatives of an Obstructionist Second Chamber

In the years 1906–1909, the Liberal government confronted a HL so obstructionist that, "[f]or three years[,] the smallest Opposition within living memory had effectively decided what could, and what could not, be passed through Parliament."[285] It became clear that the Lords were abusing the referendal theory. They acted as an obstructionist second chamber rather than as guardians of the constitutional status quo.

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279. COSGROVE, *supra* note 145, at 106.

280. *Id*.

281. Dicey, *supra* note 164, at 559.

282. *Id.*; *see also* Dicey, *supra* note 85, at 494–96.

283. *See, e.g.*, JONES, *supra* note 119, at 211–12 (describing the House of Lords' reluctance to put Tariff Reform to a referendum); *id.* at 238 (Conservative Balfour announcing that he wanted to put the Tariff Reform to a referendum).

284. J. Meadowcroft & M.W. Taylor, *Liberalism and the Referendum in British Political Thought 1890–1914*, 1 TWENTIETH CENT. BRIT. HIST. 35, 35–36 (1990).

285. JENKINS, *supra* note 155, at 63.

The political parties toyed with four different options to address the crisis: (1) resolving deadlocks by joint sitting of the two Houses; (2) transforming the Lords' absolute veto to suspensory; (3) using the referendum to replace or supplement the Lords' veto; and (4) reforming the HL's composition.[286] Initially, the referendum had supporters and opponents in each of the two major parties, although the discussion within each party was different.

Within the Liberal party, some denied the legitimacy of the specific mandate theory altogether. Others supported the referendum as an efficient way to deal with an obstructionist HL while avoiding the evils of elections or creating new Peers.[287] These Liberals believed that the "people's veto" could replace the Lords', as the Lords would not dare exercise their veto against the pronounced will of the nation. Their proposal was that, in addition to the Lords, 200 Commons members would be allowed to initiate referenda. This would enable them to wield the referendum also against controversial Unionist legislation. This Liberal camp even considered adopting the referendum along with the HL reform to remedy the HL's Unionist bias.

Some Liberals supported the referendum as an end in itself. They believed it would protect against absolutism of either House or the executive. They admitted that the British Constitution had changed with the development of the political party system. They lamented that MPs were no longer independent but, rather, subject to party rule. These Liberals preferred that the people, rather than the political party, dictate Parliament's mandate.[288]

However, the Liberal leadership preferred enhancing its power within Parliament to adopting the referendum. Liberal PM Campbell-Bannerman, who was replaced upon his death by Asquith in 1908, promoted a suspensory veto plan, which served as the basis of the Parliament Act 1911.[289] In contrast, his Cabinet preferred the Ripon plan, which provided for joint sittings of the two Houses to resolve deadlocks. The joint sitting would consist of a full HC and 100 members of the HL.[290] The Liberal Marquess Robert Crewe-Milnes, who would become the HL's leader during Asquith's premiership, formulated the

286. *See* ALLYN, *supra* note 87, at 176 (describing a proposal for a suspensory veto coupled with a conference between the Houses of Parliament); Corinne Comstock Weston, *The Liberal Leadership and the Lords' Veto, 1907–10, in* PEERS, POLITICS, AND POWER: THE HOUSE OF LORDS 494 (Clyve Jones & David Lewis Jones eds., 1986).

287. L.T. Hobhouse, *The Question of the Lords*, 91 CONTEMP. REV. 1, 2 (1907); L.T. Hobhouse, *The Constitutional Issue*, 91 CONTEMP. REV. 312, 312–13 (1907); L.T. HOBHOUSE, LIBERALISM 125 (1964).

288. *See supra* Part IV.A.(1).

289. Dennis, *supra* note 167, at 196; EMDEN, *supra* note 47, at 226.

290. Weston, *supra* note 286, at 489–90.

Ripon plan with Asquith.[291] Crewe opposed the suspensory veto for fear that it would eventually lead to the referendum's adoption.[292] Both were aimed at enabling the country to deliberate on contentious measures. Crewe believed that the referendum was predicated on popular sovereignty, and, as such, it was alien to the British Constitution's parliamentary sovereignty framework.[293]

Crewe eventually agreed to the suspensory veto plan only after PM Campbell-Bannerman committed to shorten the life of Parliament. Crewe hoped that the shorter parliamentary term would inhibit the Unionists from adopting the referendum.[294] Crewe was correct in noting the connection between the suspensory veto and the referendum. The Parliament Act 1911, which incorporated the suspensory veto, played a fundamental role in leading Britain to eventually adopt the referendum.

In 1910, while Asquith pressed ahead with suspensory veto, he opposed adopting the referendum as part of the government's regular machinery.[295] However, he supported its use to enact the Parliament bill itself and accordingly mentioned the referendum to the King as a possible alternative to the creation of Peers.[296]

The Unionists understood that they needed to offer their own solution to the legislative stalemate, which the Lords' veto created. Their reaction to the 1910 Parliament bill was mixed. The Lords preferred reforming their own House over losing their veto: Even an elected HL would be better than a toothless chamber. Lord Lansdowne, the Lords' Unionist leader, admitted that the country no longer considered the HL impartial, and reform was a sure way to remedy its Tory bias.[297] Some Lords even hoped that reform would eliminate the King's prerogative to create Peers, thus removing the last check upon their chamber. If the Lords were elected, this reform would reduce the legitimacy of any intervention by a monarch. Some Unionists also backed the referenda as an alternative to the Parliament bill. Whereas the Parliament bill made the Commons the final arbiter between the two Houses, the Conservatives' proposal would have granted this role to the people.[298]

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291. *Id.* at 493.

292. *Id.* at 494.

293. *Id.* at 489.

294. WILLIAM SHARP MCKECHNIE, THE REFORM OF THE HOUSE OF LORDS 21 (1909).

295. SPENDER & ASQUITH, *supra* note 153, at 279.

296. *Id.*

297. JONES, *supra* note 119, at 202.

298. CHAMBERLAIN, *supra* note 216, at 264; BLEWETT, *supra* note 151, at 158.

3. Formal Adoption of a Two-Tier Constitutional System

On May 6, 1910, King Edward VII suddenly died of heart attack.[299] Both political parties preferred not to burden the new, inexperienced, King George V with a constitutional crisis and a second election within the same calendar year. They decided to make a last attempt to reach a compromise. The parties' leadership met twelve times over six months in a constitutional conference. They remained deadlocked on two issues: (1) the legislative process for enacting Home Rule; and (2) the composition and relative strength of each chamber in the proposed joint sitting for non-budgetary bills.[300]

At the conference, the Conservatives proposed that the legislators distinguish between constitutional, regular, and budgetary bills, with each enjoying a different legislative track.[301] Budgetary bills would be completely exempt from the Lords' veto power.[302] Regular bills would be subject to joint sitting of the two Houses if deadlock ensued, as suggested in the Ripon Plan.[303] Finally, constitutional bills that were twice rejected by the Lords would be subject to a referendum.[304] The Conservatives treated Home Rule as a constitutional matter requiring a referendum.

But the Liberals were reluctant to recognize a distinction between constitutional and regular bills and introduce the referendum into the British constitutional system.[305] They regarded both as greater constitutional revolutions than the Parliament bill because such legislative demarcations do not exist in legal systems that lack a written constitution. Defining and distinguishing constitutional from regular legislation and creating separate legislative tracks for each would pave the way for the adoption of a written constitution. Furthermore, this demarcation implied the need for an arbiter to resolve disputes over the classification of specific bills. This would introduce judicial review into the British system—a feature that the Liberals regarded as "wholly alien to the spirit of our constitution."[306]

The referendum proposal, according to the Liberals, would inject direct democracy into Britain. Shifting decision-making to the people, whose fleeting passions might determine the fate of the nation

299. BLEWETT, *supra* note 151, at 164.

300. CHAMBERLAIN, *supra* note 216, at 190; JONES, *supra* note 119, at 204–16.

301. JONES, *supra* note 119, at 210.

302. Weston, *supra* note 286, at 504–06.

303. *Id.* at 506–07.

304. CHAMBERLAIN, *supra* note 216, at 194, 249–50.

305. *Id.* at 211–12.

306. VERNON BOGDANOR, THE PEOPLE AND THE PARTY SYSTEM 23 (1981).

on significant matters, also contradicted the principle of parliamentary responsibility. The introduction of the referendum would also cause frequent elections since no government could stay in power after the people had rejected its major policy proposal. Accordingly, the referendum would not add anything to the British constitutional system that elections did not already accomplish. Moreover, because the Conservatives controlled the HL, only Liberal constitutional initiatives would cause a deadlock between the Houses and, therefore, be subject to a referendum.[307] Finally, the Liberals argued that the proposal would subvert the Lords' role, as described by the Unionists themselves, because the Lords would cease to be a check on hasty legislation.[308]

Despite these principled objections, toward the end of the Conference, the Liberals almost agreed to a group of enumerated constitutional issues that would require amendment by referendum or special elections. They eventually sank the deal because they opposed the inclusion of Home Rule in that group.[309] Remarkably, they suggested submitting constitutional measures that passed both Houses to the people's decision while dropping altogether any disputed constitutional reforms.[310] They believed this approach was more just than referring only disputed constitutional measures to referenda because their proposal would subject both Conservative and Liberal measures to the people's will.[311] This proposal would have enabled the people to *overrule* Parliament, thereby making the people the official sovereign. Thus, at the beginning of the twentieth century, Britain was only one step away from becoming a *formal* popular sovereignty system.

On the eve of the second 1910 elections, the HL passed the Lansdowne resolutions while indefinitely postponing discussion of the Parliament bill.[312] The Lansdowne resolutions embodied the Conservatives' position at the failed Constitutional Conference. They provided the following: (1) joint sitting of both Houses if deadlocks ensued on regular legislation; (2) reform of the HL; (3) referenda on issues of "great gravity . . . [that] had not been adequately submitted to the judgment of the people," even if both Houses agreed on the matter; and (4) sole control of the HC on budgetary bills.[313] By subjecting all "grave" matters to referenda, the Lansdowne resolutions applied

307. JONES, *supra* note 119, at 210–212.

308. *Id*. at 228.

309. Weston, *supra* note 286, at 512–14.

310. BOGDANOR , *supra* note 306, at 21–23.

311. *Id.*; Weston, *supra* note 286, at 504–18.

312. *See* JONES, *supra* note 119, at 217–232.

313. JENKINS, *supra* note 155, at 186; BLEWETT, *supra* note 151, at 172.

referenda uniformly to both parties and skirted the sticky problem of defining constitutional measures. Later, Lansdowne would change his mind and conclude that enabling the people to overrule Parliament would negate parliamentary sovereignty.[314] Even some Liberal peers supported the Lansdowne resolutions.[315] The government, however, refused to compromise, leading to the second 1910 elections, which focused on the Lords' powers.

4. The Tory Referendum and the Liberal Suspensory Veto

During their campaign in the second 1910 elections, the Conservatives proposed the referendum as an alternative to the Parliament bill.[316] The Conservatives were attracted to the referendum also as a way of breaking the Liberal alliance. They viewed the Liberal alliance as an unstable mix of sectional interests controlling a majority solely through political horse-trading.[317] They believed that, if each Liberal reform, including Home Rule and welfare, were subject to a separate referendum, each would be defeated.[318] Under the Conservative proposal, a referendum would be held when the two Houses disagreed, i.e., on Liberal measures.[319] Although the Conservative Party adopted the referendum as its official policy, it remained deeply divided over the choice, since the referendum would weaken the Lords' veto and mean direct democracy.[320]

The Liberals challenged the Unionists to commit to submitting Tariff Reform to a referendum.[321] They believed that they had placed the Unionists in a lose-lose situation. If the Unionists accepted the challenge, the public would likely defeat Tariff Reform, as even the Unionists were deeply divided over it; if they did not, the Unionists would be shown to be partisan.[322] Four days before the polls, Balfour accepted the challenge by pledging to submit Tariff Reform to a referendum.[323] His pledge removed Tariff Reform from the electoral

314. JENKINS, *supra* note 155, at 186; BLEWETT, *supra* note 151, at 172.

315. *Id.* at 306.

316. WESTON, *supra* note 51, at 229; BLEWETT, *supra* note 151, at 173–74. *Cf.* Meadowcroft & Taylor, *supra* note 284, at 36 (arguing that the referendum was adopted as official Conservative policy only after the December 1910 election).

317. BLEWETT, *supra* note 151, at 174–75.

318. *Id.* at 175.

319. JONES, *supra* note 119, at 210.

320. BLEWETT, *supra* note 151, at 174–75.

321. *Id.* at 178.

322. *Id.*

323. CHAMBERLAIN, *supra* note 216, at 303–07, 310.

agenda, at a point when it was too late to substantially affect the electoral results.[324]

Sir Austen Chamberlain—former Chancellor of Exchequer under the Conservative government (1903-1905) and a strong proponent of Tariff Reform—rigorously attacked Balfour's decision on principled and strategic grounds. He believed that budgetary matters, including Tariff Reform, were not a suitable subject for a referendum. He was especially concerned about bribing the majority by taxing minorities. He further believed that Balfour's commitment enabled the issue of the HL to become the main issue of the election, to the Unionists' disadvantage.[325]

Prominent Labour members expressed principled arguments against the referendum, which are still considered serious objections to its full adoption. James Ramsay MacDonald, a founding member of the Labour Party who later served as PM, and the left-wing journalist, Clifford Dyce Sharp, attacked the referendum as a flawed guide for a nation because it merely aggregated individuals' will and ignored the community's needs.[326] They also portrayed the referendum as a majoritarian tool that discriminated against minorities while praising the regular legislative process as the opposite—a mechanism for satisfying all through compromise.[327] The Irish also opposed the referendum because they feared that it might prevent Home Rule.[328] Consequently, the Unionists were the only ones who fought the December elections as proponents of the referendum.

While the HC passed the Parliament bill after the second 1910 elections, the HL considered various proposals for reform and/or the adoption of the referenda to replace the Parliament bill.[329] Supporters of Tariff Reform, who controlled the Unionist Party, opposed the referendum because they had no interest in subjecting their cause to a referendum. As both Unionists and Liberals opposed the referendum, these proposals failed.[330] Furthermore, because the Liberals insisted that the Parliament Act would apply even to a reformed HL, the Lords had no incentive to agree to reform.

At the committee stage on the Parliament bill, Lord Lansdowne suggested a list of issues that would be decided by a referendum instead of the suspensory veto if the Houses disagreed. The proposal

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324. BLEWETT, *supra* note 151, at 179.

325. CHAMBERLAIN, *supra* note 216, at 303–07, 310.

326. J. RAMSAY MACDONALD, SOCIALISM AND GOVERNMENT 91 (1909).

327. *Id.*; CLIFFORD SHARP, THE CASE AGAINST THE REFERENDUM 11 (1911).

328. SHARP, *supra* note 327.

329. Weston, *supra* note 286, at 505.

330. BOGDANOR, *supra* note 306, at 24–26.

demanded a referendum "on all bills affecting the existence of the Crown and the Protestant succession, establishing local parliaments within the United Kingdom, or raising new issues of great gravity in the opinion of the joint committee."[331] All these issues dealt with changes in the machinery of government, especially Parliament's power to legislate. The Lords attempted to specify the distinction, originally suggested at the Constitutional Conference, between constitutional and ordinary bills. They attempted to overcome the Liberals' objection that such a distinction would demand judicial review.[332] Irish Home Rule, but not Tariff Reform, would require a referendum under these categories. This proposal attempted to supplement, rather than replace, the Parliament bill.[333] However, PM Asquith would not accept amendments to his proposed Parliament Act of 1911.[334] Thus, these amendments failed to become law. In retrospect, the issues identified as worthy of a referendum in 1911 are those that the British Parliament has, indeed, submitted to referenda since the 1970s.[335]

B. The Referenda as the New Engine of Popular Sovereignty

1. The Exercise of Referenda

Since the 1970s, Britain held 11 referenda to affect major constitutional change.[336] This frequent resort to the referenda seemed unnatural to observers accustomed to identifying the U.K. with the norm of parliamentary sovereignty. Some have suggested that the referendum was primarily the partisan tool of the Labour Party.[337] Most notably, PM Tony Blair held four referenda within a year of Labour's victory in the 1997 general election. However, this explanation fails because Conservative governments held two referenda on the continued membership in the EU.[338]

331. *Id.* at 26–27.

332. *Id.* at 25.

333. *Id.* at 27–28.

334. *See supra* Section II.G.

335. *Referendums Held in the UK*, UK PARLIAMENT, https://www.parliament.uk/get-involved/vote-in-general-elections/referendums-held-in-the-uk/ [https://perma.cc/Q3HW-SJKN].

336. *Id.*

337. DAVID DENVER ET AL., SCOTLAND DECIDES: THE DEVOLUTION ISSUE AND THE SCOTTISH REFERENDUM 181 (2000).

338. *See infra* Section IV.D.

A widely accepted academic analysis connects the practice of holding referenda in the U.K. to political expediency.[339] In fact, an examination of British history lends some support to this explanation. Often governments pledged during elections to hold referenda to remove a divisive issue from the agenda and maintain party unity.[340] Referenda were typically designated as consultative—not binding upon representative bodies—so that parliamentary sovereignty could save face.[341] But the governments have consistently, even if grudgingly, acted in conformity with referenda's results.

Professor Vernon Bogdanor, a leading U.K. constitutional scholar, offered an alternative analysis. He suggested that the U.K. has held referenda on transfers of parliamentary sovereign powers to other bodies, whether upward to the EU or downward in the devolution context.[342] Thus, Bogdanor explains the conduct of British referenda under the Lockean principle that a Parliament exercising powers delegated to it by the people cannot redelegate its powers to others without the explicit authorization of the people.[343] This type of argument was raised by the claimants in the *Jackson* decision but failed.[344] Moreover, Bogdanor's explanation is unconvincing because there was no U.K.-wide vote in any of the devolution referenda. The referenda were held only in the regions to which power was to be devolved—primarily Northern Ireland, Scotland and Wales—even though the British *people* were the ones to supposedly relinquish their sovereignty to the devolved regions.

I argue that a better explanation for the use of referenda is to link its practice to the British commitment to popular sovereignty going back to the nineteenth century. At the turn of the twentieth century, the British treated the suspensory veto and the referendum as alternative tools to express the people's will.[345] The suspensory veto initially triumphed. The Parliament Act 1949 weakened the suspensory veto so

339. BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW 1–23 (2019); DENNIS KAVANAGH, BRITISH POLITICS: CONTINUITIES AND CHANGE 60 (3d ed. 1996); DENVER ET AL., *supra* note 337, at 183; Laura McAllister, *The Welsh Devolution Referendum: Definitely, Maybe?*, 51 PARLIAMENTARY AFFS. 149, 152 (1998).

340. *See supra* Section III.A.

341. SELECT COMMITTEE ON THE CONSTITUTION, REFERENDUMS IN THE UNITED KINGDOM, 2009–10, HL 99, at 21–22.

342. Vernon Bogdanor, *Western Europe*, *in* REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 33, 46 (David Butler & Austin Ranney eds. 1994).

343. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, THE SECOND TREATISE ¶ 141 (Peter Laslett ed. 1988).

344. *See Jackson* decision, *supra* note 34.

345. *See supra* Section IV.A.

that it could no longer serve its purpose.[346] In its place emerged the referendum as the substitute model to express the people's will.

The commitment to popular sovereignty, thus, remained strong. Only the means of expressing that will changed: from the referendal model (1832–1911), to the suspensory veto (1911–1949), to the referendum (1970s to present).[347] The political actors consciously treated these different mechanisms as historical substitutes to one another. These mechanisms enabled the British to distinguish between regular and constitutional law.

Parliament accepted the referendum as a permanent feature of the constitution in its Political Parties, Elections and Referendums Act 2000.[348] While the Act establishes a common procedure for all future referenda, each requires a separate authorizing bill.[349] The referenda have dealt mainly with the territorial allocation of political power, as predicted by British politicians at the turn of the twentieth century.[350] They were used to garner legitimacy for especially contentious and potentially irrevocable constitutional reforms.

Thus, in 1973, the Conservative Heath government conducted the Northern Ireland Border Poll to inquire whether the people of Ulster wanted to remain part of the U.K.[351] Despite the nationalists' boycott of the referendum, an overwhelming majority (98.9%) voted to keep Northern Ireland in the U.K.[352] In 1998, the government revisited the issue and used the referendum to legitimize the Good Friday Peace Agreement, which proposed the re-establishment of a separate legislature for Northern Ireland and the creation of cross-border All-Irish institutions.[353] The referenda cemented a consensus on an issue that had brought violence and divisions to the Northern Irish society for more than a century.

Devolutions in Scotland and Wales were achieved after two rounds of referenda. At first, in 1979, the Labour government enacted devolution Acts and asked for their ratification by the Scottish and Welsh people.[354] After failing to gain the requisite ratification for lack

346. *See supra* Part III.

347. *Id.*

348. Political Parties, Elections and Referendums Act 2000, c. 41 pt. VII (UK).

349. *Id.* pt. VII, ch. I, § 104.

350. *See supra* Section IV.A.

351. Bogdanor, *Western Europe*, *supra* note 342, at 36–37.

352. There was a 58.6% turnout. DENVER ET AL., *supr*a note 337, 186 n.1.

353. On an 81% turnout, 71.1% supported the agreement. *Id.* at 174. Ireland held a referendum on the peace proposal the very same day. There, on a 55.6% turnout, 94.4% approved the agreement. *Id.* at 187 n.4.

354. *Id.* at 15–26 (describing the failed 1979 devolution referenda).

of majority (Wales),[355] or lack of *sufficient* majority (Scotland),[356] Parliament abolished the devolution Acts, proving that the people determine constitutional change in Britain.

The U.K. eventually enacted devolution Acts after the public endorsed devolution in referenda held in 1997 in both Scotland and Wales. In 1997—in contrast with the failed 1979 referenda—the government was fresh from election and enjoyed wide popularity.[357] Three of the four major political parties supported devolution, which faced only Conservative opposition.[358] The government demanded mere voting majority support in Scotland, though support for devolution would have passed even the 40% hurdle of the 1979 referendum.[359] This Scottish devolution Act proved to be a mere milestone in Scottish demands for self-rule. In 2014, the U.K. worried about a Scottish secession, but the Scottish people voted through a referendum to remain in the U.K.[360] To accommodate Scottish nationalist sentiments, Parliament declared, in the Scotland Act 2016, that "the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum."[361] Following Brexit, there are renewed demands to hold a referendum on Scottish secession.[362]

In 1997, the government proposed a more limited devolution to Wales, including an independent Assembly with no taxation

355. The Welsh devolution was decisively defeated on a 58.8% turnout, with only 20.3% supporting devolution. *Id.* at 174.

356. In the referendum on Scottish devolution, with a 63.8% turnout, 51.6% voted in favor of devolution. This led to defeat, since the referendum's terms required a majority consisting of at least 40% of the electorate. *Id.* at 174.

357. DENVER ET AL., *supr*a note 337, 44–46 (describing the Labour government's majority and mandate to hold devolution referenda); *id.* at 15–26 (describing the failed 1979 devolution referenda).

358. James Mitchell et al., *The 1997 Devolution Referendum in Scotland,* 51 PARLIAMENTARY AFFS. 166, 166 (1998).

359. On a 60.4% turnout, 74.3% approved devolution and 63% approved the tax varying powers proposed for the new Scottish Parliament. *Id.* at 174. *See also* James Mitchell et al., *supra* note 358, at 179.

360. Severin Carrell et al., *Scotland Rejects Independence With No Winning 55% of Vote*, THE GUARDIAN (Sep. 19, 2014, 12:09 AM), https://www.theguardian.com/politics/2014/sep/19/scotland-independence-no-vote-victory-alex-salmond [https://perma.cc/A97V-QJZB].

361. Scotland Act 2016, c. 11, §1 (UK).

362. *Scottish Independence: Will There Be a Second Referendum?* BBC (Mar. 22, 2021), https://www.bbc.com/news/uk-scotland-scotland-politics-50813510 [https://perma.cc/2XHV-LAYL].

power.[363] The Labour government held it a week after the Scottish devolution referendum, in hopes of creating a domino effect, but both the thin majority and the low turnout suggested that the public was quite apathetic.[364] The referendum was not preceded by intensive deliberations, with the Welsh "No" campaign lacking sufficient financial backing.[365] Nonetheless, the government was satisfied enough with this weak support to press ahead with devolution. In 2011, the Welsh people voted in a referendum to enhance the legislative power of their National Assembly.[366]

England also held two internal referenda. In 1998, the government used a referendum to gain popular consent to make London's Mayor a directly elected official with executive powers and authority over Greater London.[367] In 2004, the people of Northern England voted against devolving power to an elected regional assembly.[368] This halted the English regional devolution process.

Only three U.K.-wide referenda were held. In 1975, through a national referendum, the U.K. gained the people's consent to continued British membership in the European Economic Community (which later became the EU).[369] In 2011, in a nation-wide referendum, the people rejected the proposal to change the election system from the First Past the Post majoritarian system to a system that promotes more proportional representation (the Alternative Vote system).[370] The latest was the Brexit referendum discussed below.[371]

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363. *See* OONAGH GAY, THE *GOVERNMENT OF WALES BILL*: DEVOLUTION AND THE NATIONAL ASSEMBLY 5, 9, HOUSE OF COMMONS LIBRARY, HOME AFFAIRS SECTION (1997), https://researchbriefings.files.parliament.uk/documents/RP97-129/RP97-129.pdf [https://perma.cc/P9AQ-6NLJ].

364. On a 50.1% turnout, 50.3% approved the devolution proposal. DENVER ET AL., *supra* note 337, at 174.

365. McAllister, *supra* note 339, at 160–61.

366. RICHARD WYN JONES & ROGER SCULLY, WALES SAYS YES: DEVOLUTION AND THE 2011 WELSH REFERENDUM 109–11 (2012).

367. With no opposition and a very low turnout, the reform was ratified. A. Chander, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 457, 476–79 (1991); DENVER ET AL., *supr*a note 337, at 174–76; ANDREWS, *supra* note 365.

368. C. Jeffery, *Devolution and Local Government*, 36 PUBLIUS: J. FED. 57, 64 (2006).

369. On a 64.5% turnout, 67.2% voted to remain in the EEC. DENVER ET AL., *supra* note 337, at 174.

370. Paul Whiteley et al., *Britain Says NO: Voting in the AV Ballot Referendum*, 65 PARL. AFF. 301, 302 (2012).

371. *See infra* Section IV.D.

2. We the Territorial People

The fact that the U.K. held at times national referenda, and at other times local referenda, raises the question "who" are the people whose popular sovereignty is expressed. The U.K. held local referenda regarding devolution or secession that involve, by definition, a quest to mark who are the sovereign people in a given territory. While scholars typically treat popular sovereignty as a population concept,[372] I argue that "We the people" is a territorial concept composed of the combination of citizens plus territory.[373]

When considering the devolution of power to its components, Parliament held referenda only in the devolved areas.[374] While devolution is characterized by the retention of the central government's discretion to re-exercise devolved power, it is a political gamble.[375] Acting too late may lead to domestic frustration and increase sentiments to secede, as occurred with the establishment of the Irish Free State in 1922 (instead of Home Rule).[376] Thus, devolution may be the means necessary to keep the union together and the people intact. Devolving power without authentic local demand, on the other hand, may grant the resources to locals to leverage devolution to demand greater independence.[377] Thus, it is prudent of Parliament to verify domestic support for devolution or its abolishment before embarking on such hazardous processes.

The secession of Scotland, on the other hand, would have been irrevocable and involve a redefinition of the sovereign polity in the U.K. I argue that secession amounts to an "annihilation" of an existing constitutional order and requires a new constitutional start by two new people—the remaining population of the mother state as well as the seceding population.[378] Each must engage in a self-defining act of constitution-making independently of the other in the sense that

372. *See, e.g.*, ACKERMAN, *supra* note 4.

373. For a detailed treatment of the topic, see generally Weill, *supra* note 57.

374. *See supra* Section IV.B.1.

375. Thus, for example, in the Scotland Act 2016, Parliament only committed to "not normally legislate with regard to devolved matters without the consent of the Scottish Parliament." Scotland Act, *supra* note 361, §2.

376. *See supra* Section III.B.

377. Weill, *supra* note 57, at 931.

378. *Cf.* CARL SCHMITT, CONST. THEORY 151 (Jeffrey Seitzer ed. & trans., 2008) (using the term "constitutional annihilation"). It is questionable whether one can separate Carl Schmitt's work from his support for Nazism. *See generally* Peter C. Caldwell, *Controversies over Carl Schmitt: A Review of Recent Literature*, 77 J. MOD. HIST. 357 (2005).

ultimately, a new beginning is a factual matter from a constitutional perspective.

Thus, the consent of the seceding population in a referendum is insufficient to legitimize secession, as was attempted in Scotland in 2014. It can only serve as a starting point in a long process of negotiation whose results are not guaranteed. The two new people must negotiate and reach agreement from a constitutional perspective to avoid competing claims to sovereignty over people and territory. This may also justify the U.K.'s decision not to resort to a *national* referendum on Scottish secession. In the secession context, the consent that counts is between the seceding people and the remaining people, not a consultation with a national people, whose very unity is on the line.[379]

C. The Human Rights Act 1998

Conventional wisdom holds that Britain would be averse to adopting a complete written constitution because it would contradict its system of parliamentary sovereignty.[380] Britain did, however, finally incorporate the European Convention of Human Rights (ECHR) into its law in the Human Rights Act (HRA), a move that undermined the preeminence of Parliament. The advantages of incorporation are numerous.[381] *First*, since 1951, international law requires Britain to abide by the Convention.[382] The Convention's incorporation into domestic law did not, therefore, drastically alter Britain's existing obligations.

Second, incorporation prevented the need to adopt a Bill of Rights from scratch.[383] This enabled Britain to escape the controversies and turmoil associated with a new beginning, while benefiting from the Convention's international recognition, which lends Britain legitimacy as a nation that prioritizes individual rights.

Third, the European Court of Human Rights has been actively administering and interpreting the Convention.[384] Thus, British judges

379. I develop these ideas in Weill, *supra* note 57, at 979–81.

380. *See supra* Introduction.

381. *Human Rights: The European Convention*, BBC NEWS (Sept. 29, 2000, 3:19 PM), http://news.bbc.co.uk/2/hi/uk_news/948143.stm [https://perma.cc/U8ZJ-GP4A]. The UK ratified the ECHR in 1951, and the Convention came into force in 1953. *Id.*

382. *Id.*

383. SECRETARY OF STATE FOR THE HOME DEPARTMENT, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cm. 3782, ¶¶ 1.14–1.19.

384. EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 3 (2014), https://www.echr.coe.int/Documents/50Questions_ENG.pdf [https://perma.cc/BV8F-MZH2].

can consult up-to-date sources in applying the HRA. The European Court also enhances the legitimacy of the British courts' decisions. The opposite is true as well. The judicial administration of cases in the U.K. is believed to affect the interpretation of the Strasbourg Court.[385]

The HRA's section 3 requires that all British courts, to the extent possible, interpret parliamentary legislation in conformity with the ECHR.[386] The more the courts interpret this obligation as requiring purposive interpretations of statutes to prevent nonconformity with the Convention, the more they deviate from traditional norms of parliamentary sovereignty.[387] Moreover, purposive interpretation may be a more powerful weapon than invalidating a statute. By avoiding blunt invalidation and the inevitable clashes that follow with the political branches, courts can "create" their desired outcome without depending on the legislature to take further action, as would be required after invalidating a statute. Richard Ekins, who argues that parliamentary sovereignty is still the fundamental principle of British constitutionalism, nonetheless attests: "Many cases involving s.3 have failed to interpret legislation correctly, instead adopting unreasonable readings which depart from the will of Parliament."[388]

The courts must strike down any subordinate legislation that conflicts with the Convention. Only the superior courts are authorized to declare that primary law is incompatible with Convention rights.[389] Although a judicial declaration of incompatibility does not affect the validity of the statute,[390] the government would find it hard to ignore such a ruling.[391] The HRA also requires the government, when presenting new bills to Parliament, to state whether they are compatible with the Convention.[392] It further instructs other political actors, including administrative agencies, to consider whether their actions conform to the Convention.[393]

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385. SECRETARY OF STATE FOR THE HOME DEPARTMENT, RIGHTS BROUGHT HOME, supra note 383, ¶ 1.18.

386. Human Rights Act 1998, HC Bill [42] cl. 3(1) (UK).

387. *See* J.W.F. ALLISON, THE ENGLISH HISTORICAL CONSTITUTION: CONTINUITY, CHANGE AND EUROPEAN EFFECTS 232 (2007).

388. Richard Ekins, *Legislative Freedom in the United Kingdom*, 133 L.Q. REV. 582, 596, 604 (2017).

389. Human Rights Act, *supra* note 386, §4.

390. *Id.* § 4(6).

391. HC Deb (16 Feb. 1998) (306) col. 773.

392. Human Rights Act, *supra* note 386, § 19.

393. *Id.* § 6.

Despite the HRA, the prevailing narrative continues to speak of parliamentary sovereignty. Scholars explain that there is a fundamental distinction between judicial review and a declaration of incompatibility. While the former can invalidate legislation, the latter leaves both the law intact and the final decision about a statute's validity in Parliament's hands.[394] Indeed, Parliament retains the power to enact laws contrary to the HRA.[395] This is a marked difference from a constitutional regime, in which the legislature is subordinate and cannot overcome constitutional safeguards by regular legislative mechanisms.

However, I disagree with this minimalist interpretation of the HRA. In substance, British courts exercise judicial review under the HRA. The Act constitutes a superior law against which other legislation is measured.[396] That prior acts—in this case the HRA—prevail and implicitly overrule later legislation contradicts the fundamental hallmark of parliamentary sovereignty.[397] This conclusion is supported by the fact that Britain would face great hardship, both domestically and internationally if it chose to ignore a judicial ruling of incompatibility. In fact, since the HRA came into force in 2000 until the end of July 2020, the superior courts have made 33 declarations of incompatibility that are final and may not be appealed.[398] Only two of those, both from recent years, have not yet been remedied.[399]

Parliament can pass legislation contrary to the HRA—and be assured that it will not be circumvented through interpretation—only if it explicitly expresses its intent. This is equivalent to a declaration of override in Canada, which is highly inadvisable politically. Although the HRA has not been ratified by referendum,[400] one should not underestimate its potential of transforming Britain into a more formal two-track system of lower and higher law. The HRA's higher law status domestically may be explained by British commitment to it in the

394. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *supra* note 383, ¶¶ 2.13–2.14.

395. ROYAL COMMISSION, *supra* note 236, ¶ 3.4.

396. *See also* K.D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79, 92 (1999); A.W. Bradley, *The Sovereignty of Parliament – Form or Substance?*, *in* THE CHANGING CONSTITUTION 23, 55 (Jeffrey Jowell & Dawn Oliver eds., 2000).

397. For the features of English parliamentary sovereignty, see DICEY, *supra* note 5, at 39.

398. *See* MINISTRY OF JUSTICE, RESPONDING TO HUMAN RIGHTS JUDGMENTS: REPORT TO THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE GOVERNMENT'S RESPONSE TO HUMAN RIGHTS JUDGMENTS 2019–2020 annex A (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944857/responding-to-human-rights-judgments-2020_pdf [https://perma.cc/M9FC-MATW].

399. *Id.* at 30.

400. *See* MICHAEL TUGENDHAT, LIBERTY INTACT: HUMAN RIGHTS IN ENGLISH LAW 207 (2016).

international arena and its exposure to the decisions of the Strasburg Court as an external enforcement mechanism. In fact, the British courts treat the HRA as a constitutional statute, for which repeal would require explicit, rather than implicit, language.[401]

D. Tensed Membership in the Community and Brexit

Scholars and politicians portray the Brexit referendum as an opportunistic gambit that backfired.[402] PM David Cameron committed to a Brexit referendum to win elections and maintain the Conservative party's unity. He opposed Brexit and resigned when the referendum revealed support for Brexit.[403] Since the Brexit referendum, the U.K. political and economic systems have been in turmoil. Just the anticipation of Brexit has cost the U.K. billions of dollars.[404] Brexit also exposed the territorial cleavages within the U.K. Northern Ireland's unique status greatly complicated a withdrawal agreement between the U.K. and the EU,[405] and the Scots began demanding a second secessionist referendum.[406] The Brits' willingness to bear these costs is astonishing since referenda in the U.K. are typically defined as merely "advisory" to preserve the appearance of a U.K. governed under parliamentary sovereignty.[407] Accordingly, the European Union Referendum Act 2015 was silent on the binding effects of the Brexit referendum. Yet, all U.K. governmental branches found themselves bound by the referendum's results.

Scholars suggest that any manifestation of the British people's involvement in endorsing constitutional change is a matter of sheer

401. *See supra* note 224 and accompanying text.

402. *See, e.g.*, Albert Weale, *The Democratic Duty to Oppose Brexit*, 88 POL. Q. 170 (2017). For a general evaluation of the impetus to hold British referenda, see DENVER ET AL., *supra* note 337, at 183; McAllister, *supra* note 339, at 152; DENNIS KAVANAGH, BRITISH POLITICS: CONTINUITIES AND CHANGE 60 (3d ed. 1996).

403. *See generally* Peter Lunt, *The Performance of Power and Citizenship: David Cameron Meets the People*, 22 INT'L J. CUL. STUD. 678 (2019).

404. Michael Heise & Ana Boata, *Economic Costs of Brexit*, 16 INT'L ECON. & ECON. POL. 27, 27 (2019).

405. MARY C. MURPHY, EUROPE AND NORTHERN IRELAND'S FUTURE: NEGOTIATION BREXIT'S UNIQUE CASE 7–11 (2018).

406. Ruth Wishart, *A Second Referendum on Scottish Independence Is Suddenly Very Likely*, THE GUARDIAN (Oct. 18, 2019, 6:15 AM), https://www.theguardian.com/commentisfree/2019/oct/18/second-referendum-scottish-independence-brexit-scots [https://perma.cc/Z8FK-MCAT].

407. Bogdanor, *Western Europe*, *supra* note 342, at 33–47; Suzanne Bailey, *Referendum Is a Foreign Word*, 138 NEW L.J. 181, 181–82 (1988).

political opportunism on the part of its leaders.[408] Scholars argue that if Brexit is a manifestation of popular sovereignty, then democracy might be better off to abandon the idea altogether, as the people did not seriously deliberate on Brexit.[409] Others suggest that only now have the British people become the sovereign body.[410] Some scholars justify Brexit as a mechanism of regaining control over British affairs and enhancing parliamentary sovereignty after its erosion under the supremacy of EU law.[411] Using the same logic to defend the sovereignty of Parliament, the U.K. Supreme Court, in the momentous *Miller I* decision, required an Act of Parliament as a precondition to a governmental notification of withdrawal from the EU following the referendum.[412] The Court justified the decision on parliamentary sovereignty grounds without acknowledging the people's role in the constitutional system.

Yet, the conundrum is how to reconcile the use of the Brexit referendum with the enhancement of parliamentary sovereignty.[413] This was accentuated by the fact that a majority of Parliament was against Brexit in 2017 yet voted in its favor solely to uphold the people's decision.[414] This Article offers a coherent account of British constitutional development from PM Earl Grey to PM Boris Johnson that puts Brexit in historical context, which may end the bewilderment surrounding Brexit.

In 1972, Britain signed the Treaty of Brussels to join the European Community. The U.K. then incorporated its treaty obligations into British law through the European Communities Act 1972 (ECA).[415] According to its Section 2(4), both existing and future laws "shall be construed and have effect," subject to applicable Community

408. *See, e.g.*, *supra* notes 402 & 403 and accompanying texts.

409. *Id.*

410. Vernon Bogdanor, *After the Referendum, the People, Not Parliament, Are Sovereign*, FIN. TIMES (Dec. 9, 2016), https://www.ft.com/content/9b00bca0-bd61-11e6-8b45-b8b81dd5d080 [https://perma.cc/RS4Z-LFY6].

411. Fergal Davis, *Brexit, the Statute of Westminster 1931, and Zombie Parliamentary Sovereignty*, 27 KING'S L.J. 344, 344 (2016).

412. Keith Ewing, *Brexit and Parliamentary Sovereignty*, 80 MOD. L. REV. 711, 712–13 (2017); *Miller I* decision, *supra* note 35, at 183, 248–49.

413. Ewing, *supra* note 412, at 725; Davis, *supra* note 411, at 353 (discussing shifts in parliamentary sovereignty occurring alongside and prior to Brexit); Michael Gordon, *The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond*, 27 KING'S L.J. 333, 340–43 (2016).

414. Juliette Ringeisen-Biardeaud, *"Let's Take Back Control": Brexit and the Debate on Sovereignty*, XXII-2 FR. J. BRIT. POL. 1, 6 (2017).

415. European Communities Act 1972, 1972 c. 68 (UK).

law.[416] Parliament passed the ECA under the assumption that, as a sovereign body, it would still be able to enact any legislation "fundamental or otherwise," including laws inconsistent with Community law.[417] In fact, Law Lord Kenneth Diplock advised Parliament during the Act's passage that British courts would give effect to a parliamentary act later in time to Community law, even if it were inconsistent with Community law.[418] But, in the famous *Factortame* decision of 1991,[419] British courts decided that they would not apply national legislation that conflicted with Community law. The court reasoned:

> [The supremacy of Community law over the national law of member states] was certainly well established in the jurisprudence of the European Court of Justice 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.[420]

Britain thus understood, after the fact, that its membership in the EU compromised the parliamentary sovereignty traditions whereby later statutes prevail over earlier ones and a legislature cannot bind its successors. Parliamentary sovereignty also requires that no judicial or other authority may enjoy the power "to nullify an Act of Parliament . . . ."[421] But, both the European Court of Justice and British courts had been exercising judicial review and did not apply British law that was repugnant to Community law. As long as the U.K. remained in the EU, not only were parliamentary statutes inferior, but also the source of that supreme law was foreign (i.e. European). This had been one of the Brexiteers' most motivating slogans—"taking

416. *Id.* § 2(4).

417. DICEY, *supra* note 5, at 39.

418. HL Deb (8 Aug. 1972) (334) col. 1029.

419. R. v. SOS for Transport, *ex parte* Factortame Ltd. [1990] 2 AC 85 (refusing interim relief because the court assumed parliamentary legislation was valid, even if contrary to Community law); R. v. SOS of Transport, *ex parte* Factortame Ltd (No. 2) [1991] 1 AC 603 (granting interim relief in the form of an injunction against the application of parliamentary legislation—the Merchant Shipping Act 1988—in the name of protecting Community rights. The court thus overruled its previous decision after the European Court of Justice ruled to the same effect); R. v. SOS of Transport, *ex parte* Factortame Ltd (No. 3) [1991] 2 LLOYD'S REP. 648 (deciding on the merits that the Merchant Shipping Act 1988 was contrary to Community law, instead of dealing with interim relief as in the two previous decisions).

420. Factortame (No. 2), 1 AC, at 694–95 (Lord Bridge).

421. DICEY, *supra* note 5, at 39.

back control" of Britain's destiny and making the locus of sovereignty British again.[422]

British membership in the EU had been half-hearted from the very start. Ironically, though Winston Churchill envisioned a "United States of Europe" after WWII,[423] Britain was not one of the Community's six founding members.[424] It never adopted the Euro as its currency nor signed the Schengen Agreement, which largely abolished internal border checks between parties and complicated dealing with illegal immigration.[425] Britain joined the Community primarily for economic reasons, incorrectly anticipating a similar economic growth to that experienced by other Community members in the 1970s.[426] But, the EU's leaders had different ambitions. The EU aspired to move to a more manageable qualified-majority regime and integration before its failure to adopt the Treaty Establishing a Constitution for Europe,[427] and Britain became increasingly defensive in recent years about its national sovereignty and restless to reclaim its full legislative powers.[428] In fact, Article 50 of the Treaty on European Union, which grants member states the right to secede and enabled Brexit, originated with

422. *Cf.* Matthew Goodwin & Caitlin Milazzo, *Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit*, 19 BRIT. J. POL. & INT'L REL. 450, 456 (2017).

423. WINSTON CHURCHILL'S SPEECH TO THE ACADEMIC YOUTH IN ZURICH, 19.9.1946, http://www.law.tohoku.ac.jp/~schaefer/documents/churchill.pdf [https://perma.cc/K4WC-A573]. *See generally* David Ramiro Troitiño, *Winston Churchill and the European Union*, 8 BALTIC J.L. & POL. 55 (2015).

424. N. PIERS LUDLOW, DEALING WITH BRITAIN: THE SIX AND THE FIRST UK APPLICATION TO THE EEC 19–22 (1997).

425. Antje Wiener, *Forging Flexibility - The British No to Schengen*,1 EUR. J. MIGRATION & L. 441, 441 (1999); Barry Eichengreen, "*The Breakup of the Euro Area*," *in* EUROPE AND THE EURO 11, 18 (Alberto Alesina & Francesco Giavazzi eds., 2010).

426. Nauro Campos & Fabrizio Coricelli, *Why Did Britain Join the EU? A New Insight From Economic History*, VOX-CEPR POL'Y PORTAL (Feb. 3, 2015), https://voxeu.org/article/britain-s-eu-membership-new-insight-economic-history [https://perma.cc/D4LP-KSUS]. *Cf.* Alan Sked, *Why Britain Really Joined the EEC (And Why It Had Nothing to Do With Helping Our Economy)*, LSE BLOG ON BREXIT (Nov. 26, 2015), https://blogs.lse.ac.uk/brexit/2015/11/26/why-britain-really-joined-the-eec-and-why-it-had-nothing-to-do-with-helping-our-economy/ [https://perma.cc/2CZE-95XM] (arguing that the U.K. joined the EEC in support of a European federalist system and "to frustrate the emerging Franco-German alliance").

427. *See, e.g.*, STEPHEN HASELER, SUPER-STATE: THE NEW EUROPE AND ITS CHALLENGE TO AMERICA 2 (2004).

428. *See, e.g.*, Nicholas Startin, *Have We Reached a Tipping Point? The Mainstreaming of Euroscepticism in the UK*, 36 INT'L POL. SCI. REV. 311, 320 (2015).

the failed Constitution Treaty and intended to compensate member states for their expected loss in voice through more exit rights.[429]

The 2016 Brexit referendum presented a target for this unrest. Almost 52% voted in favor of withdrawal,[430] a small margin for such a transformative event. PM Cameron campaigned against Brexit, lost, and resigned a day after the vote.[431] London, Scotland, and Northern Ireland opposed the transformation for different reasons.[432] For London, Brexit jeopardized its position as Europe's financial center and presented Frankfurt the opportunity to supplant it.[433] Additionally, had Scotland foreseen Brexit in 2014, its independence referendum's results might have differed.[434] Northern Ireland feared a hard border with the rest of Ireland, which would violate the Good Friday agreement.[435] Yet, only a hard border would enable Britain to fully withdraw from the EU to avoid the free flow of people and goods from the EU to Northern Ireland. This was a major obstacle to an acceptable Brexit agreement between the U.K. and EU.[436]

Despite this momentous chaos, astonishingly, all political actors treated the Brexit referendum as binding. Gina Miller, an anti-Brexit activist, tried to force a second look at the decision by demanding, through the courts, that the government obtain Parliament's approval prior to notifying the EU of withdrawal, in accordance with Article 50 of the Treaty on European Union.[437] The court did require

429. *See generally* Carlos Closa, *Interpreting Article 50: Exit, Voice and . . . What About Loyalty?*, *in* SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE EUROPEAN UNION 187 (Carlos Closa ed., 2017). For discussion of Brexit as a form of semi-secession, see Weill, *supra* note 57, at 982.

430. Richard Bellamy, *Was the Brexit Referendum Legitimate, and Would a Second One Be So?* 18 EUR. POL. SCI. 126, 128 (2019).

431. *See supra* Section IV.D.

432. Aileen McHarg and James Mitchell, *Brexit and Scotland*, 19 BRIT. J. POL. & INT'L RELS. 512, 512–13 (2017); Bellamy, *supra* note 430, at 128.

433. Kalyeena Makortoff, *London to Lose €800bn to Frankfurt as Banks Prepare for Brexit*, THE GUARDIAN (Nov. 29, 2018, 3:00 AM), https://www.theguardian.com/politics/2018/nov/29/london-to-lose-800bn-to-frankfurt-as-banks-prepare-for-brexit [https://perma.cc/DPD9-RVEV].

434. McHarg & Mitchell, *supra* note 432, at 518.

435. *Id.* at 520.

436. Gabriela Baczynska, *Explainer: A Guide to the Brexit Backstop, and Why There's a UK-EU Standoff*, REUTERS (Aug. 20, 2019, 9:35 AM), https://www.reuters.com/article/us-britain-eu-backstop-explainer/explainer-a-guide-to-the-brexit-backstop-and-why-theres-a-uk-eu-standoff-idUSKCN1VA1ES [https://perma.cc/L9BZ-CS8V].

437. The argument was first advanced by Nick Barber et al., *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, U.K. CONST. L. BLOG (June 27, 2016),

parliamentary approval because withdrawal would have profound implications on U.K. legislation and on the constitutional rights of its people.[438] Some have described this decision as a triumph of parliamentary sovereignty,[439] notwithstanding the irony that this triumph was handed down by a court whose members are not elected. Daily newspapers described the judges involved as "enemies of the people,"[440] not realizing the similar rhetoric of "peers against the people" used in the nineteenth and early twentieth centuries.

At second glance, this decision reflects a triumph of the people more than one of Parliament. It illustrates that popular sovereignty is not about replacing the legislature but, rather, supplementing it. After the referendum and the *Miller I* decision, a reluctant Parliament rubber-stamped the decision to withdraw in 2017.[441] Notably, Parliament felt empowered to influence the EU withdrawal terms but perceived itself powerless to prevent its very occurrence.

However, the Brexit story is even more astonishing than even these chaotic events suggest. Considering the problematic nature of the narrowly won referendum as indicative of the people's decisive opinion,[442] Britain held two elections since the referendum to indirectly determine Brexit's fate. These repeated elections implicitly expressed Britain's acknowledgement that referenda may be an unconvincing expression of the popular will when won by a slim and unstable majority on a particular topic. The British required the deep and lasting opinion of the people as a prerequisite for Brexit. The Conservatives' repeated electoral victories since 2010, as manifested in their ability to win the largest share of the vote and head the

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https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/ [https://perma.cc/E4HN-2Z9J].

438. *Miller I* decision, *supra* note 35.

439. *Cf.* Richard Ekins, *Constitutional Practice and Principle in the Article 50 Litigation*, 133 L.Q. REV. 347 (2017) (treating parliamentary sovereignty as a core principle of British constitutionalism but arguing it did not need the protection of the Court in the *Miller I* decision, as the government was fully authorized to notify the EU of withdrawal).

440. Peter Dominiczak et al., *Judges vs the People: Government Ministers Resigned to Losing Appeal Against High Court Ruling*, THE TELEGRAPH (Nov. 3, 2016, 10:00 PM), https://www.telegraph.co.uk/news/2016/11/03/the-plot-to-stop-brexit-the-judges-versus-the-people/ [https://perma.cc/B3CB-3SMY]; Claire Phipps, *British Newspapers React to Judges' Brexit Ruling: 'Enemies of the People,'* THE GUARDIAN (Nov. 4, 2016, 5:05 AM), https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling [https://perma.cc/4RJJ-8BA2].

441. The European Union (Notification of Withdrawal) Act 2017, 2017 c. 9 (UK). *See* Ringeisen-Biardeaud, *supra* note 414, at 6 (providing evidence for Parliament's aversion of Brexit).

442. Ringeisen-Biardeaud, *supra* note 414, at 6–7.

government[443] and Boris Johnson's landslide victory in the December 2019 election, granted popular legitimacy to Brexit and paved the way for the final withdrawal of the U.K. from the EU.[444]

E. Judicial Enforcement of Constitutional Conventions

In 2005, Britain finally enacted legislation to transfer the Lords' judicial authority into the hands of a separate, independent body—the Supreme Court that was officially established in 2009.[445] Subsequently, the Supreme Court has assumed the Law Lords' role as guardian of the constitution, without acknowledging it. This has manifested in multiple decisions, starting in 2005 with the Law Lords' *Jackson* decision, in which the HL, in its judicial role, recognized the validity of the Parliament Act 1949.[446] It thus accepted the HL's redefined *limited* legislative role in protecting the constitutional status quo. At the same time, the Appellate Committee of the House of Lords suggested, *in dicta*, that it may exercise judicial review and invalidate statutes that attempt to either abolish the HL without its consent or abolish the Court's power to rule on the constitutionality of governmental decisions.[447] The Court suggested that it enjoyed this power inherently as part of the common law.

I argue that there is a deep link between the two parts of the decision, although the Court did not acknowledge it. As the Court recognized that the HL may no longer serve as a potent protector of the constitutional status quo, it became imperative for the Court to assert its role as the substitute of the HL. Both are unelected branches. That

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443. Sam Pilling & Richard Cracknell, *UK Elections Statistics: 1918–2021: A Century of Elections*, UK PARLIAMENT: HOUSE OF COMMONS LIBRARY (Aug. 18, 2021), https://researchbriefings.files.parliament.uk/documents/CBP-7529/CBP-7529.pdf [https://perma.cc/X6LD-9WCN]:

> In 2010, the Conservatives were the largest party and formed a coalition government with Liberal Democrats. In 2017, the Conservatives lost the majority they had in 2015. They had the highest number of seats but were ten seats short of majority and formed a minority government. In 2019, the Party regained its majority position with 365 seats in the House of Commons.

444. Mark Landler and Stephen Castle, *Conservatives Win Commanding Majority in U.K. Vote: 'Brexit Will Happen'*, NY TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/12/world/europe/uk-election-boris-johnson.html [https://perma.cc/C4K7-AFEA].

445. The Constitutional Reform Act 2005, 2005 c. 4 (UK).

446. *See generally Jackson* decision, *supra* note 34.

447. Lord Steyn, *id.* at [101]–[102], and Lord Hope, *id.* at [104]–[107], made the most explicit comments in this direction. Lord Carswell, *id.* at [178], and Lord Brown, *id.* at [194], inclined towards this direction but left it open for future decisions. Lord Bingham in dissent upheld unrestricted parliamentary sovereignty. *Id.* at [9], [32].

structural feature enables them to check the elected powers that are responsible to represent the people. It is also no coincidence that the *Jackson* decision was issued at a time when Parliament passed legislation to transfer the HL's judicial function to an independent Supreme Court. The Law Lords could finally anticipate being relieved of the burden of serving both in that role and as members of the legislature.

The second decision that marks the transfer of the constitutional guardian role from the Lords to the Court is the *Miller II* decision.[448] PM Boris Johnson advised the Queen to prorogue Parliament on the eve of the expiration of the U.K.'s deadline to reach an agreement with the EU on Brexit.[449] Johnson faced fierce parliamentary opposition to his staunch position on completing Brexit, even without an agreement with the EU.[450] Although he did not admit his motive openly, I believe Johnson hoped that proroguing Parliament would give him a window of opportunity to reach an agreement with the EU. He, supposedly, could finally make a credible threat to exit regardless of an agreement. He wanted to enhance his bargaining position vis-à-vis the EU. At the same time, I contend that the prorogation was not intended to prevent Parliament from supervising the executive branch, since it would have reconvened before the Brexit's deadline.[451] Prorogation ends a parliamentary session but does not dissolve it.[452]

Miller petitioned to the courts against this use of prerogative power. She argued that it cannot be used to silence Parliament.[453] The expectation was that the Court would treat the matter as non-justiciable and within the domain of the political constitution, as the PM's advice to the Queen at most amounted to a breach of the constitutional convention of responsible government and its accountability to Parliament.[454] Indeed, the High Court in England and Wales treated the matter as non-justiciable.[455] However, the U.K. Supreme Court in a unanimous decision of 11 justices, the largest possible panel, decided to declare the prorogation invalid and of no effect.[456]

The framework suggested in this Article explains the Court's move. As the Lords lost their power to serve as guardians of the constitutional status quo, the Supreme Court assumed this power.

448. *Miller II* decision, *supra* note 35.

449. *Id.* ¶ 1.

450. *Id.* ¶ 14.

451. *Id.* ¶¶ 2, 17.

452. *Id.* ¶¶ 2–4.

453. *Id.* ¶ 25.

454. *Miller II* decision, *supra* note 35, ¶ 28.

455. *Id.* ¶ 25.

456. *Id.* ¶ 70.

Constitutional conventions guided the Lords when exercising their function. As the Court replaced the Lords, the enforcement mechanisms changed. Now, the Court uses judicial review to exercise the function the Lords once fulfilled. On this occasion, the political constitution converged with the legal constitution.

More broadly, as long as there was a fusion of the legislative and judicial functions, the U.K. system needed to maintain the appearance of a dichotomy between the legal and political constitutions. To preserve legitimacy, the Lords had to exercise the role of guardians of the constitution in their role as part of the legislative, rather than the judicial, branch. Once the U.K. erected an independent Supreme Court and separated the legislative and judicial bodies, the Court could replace the Lords as guardians of the constitution. The political and legal constitutions could finally merge when no other remedy was available, with no loss of legitimacy attributed to the Lords playing a double inconsistent game.

V. ON JUDICIAL AND SENATE REFORM IN THE U.S.

With the conservative composition of the current U.S. Supreme Court, originalism is expected to be a dominant constitutional interpretation method.[457] Originalism grants decisive weight to the public common understanding of the Constitution at the time of its adoption.[458] Although conservative justices reject the use of comparative constitutional law to decide interpretive dilemmas as a breach of popular sovereignty,[459] even they refer to British sources to interpret provisions modeled after laws in the U.K.[460] The U.S. Supreme Court has already resorted to provisions of the British Bill of Rights of 1689 to determine cases dealing with the death penalty, the right to bear arms, and substantive due process.

This Article offers a theoretical and historical basis to justify, even under an originalist approach, the use of British sources beyond their influence on particular constitutional provisions. It lays out the proof that the U.S. and U.K. have shared a common constitutional model, rather than diverged in opposite directions. Existing

457. Tom McCarthy, *Amy Coney Barrett Is a Constitutional 'Originalist'—But What Does It Mean?*, THE GUARDIAN (Oct. 27, 2020, 8:15 PM), https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-originalist-but-what-does-it-mean [https://perma.cc/5H9F-BACK].

458. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

459. *See supra* Introduction.

460. *See* sources *supra* note 23 and accompanying text.

scholarship recognizes that the U.S. model is based on a popular sovereignty model, which requires the people's consent to enact constitutional change, as manifested in Article V of the U.S. Constitution. The prevalent view among scholars, however, is that this popular sovereignty model presents a major break away from the British parliamentary sovereignty model. In contradistinction to this dogma, I proved in Parts II through IV above that the U.K. constitutional system has operated under a popular sovereignty model for the past two hundred years that is similar to that of the U.S.

The two countries' constitutional models share multiple commonalities. First, constitutional change must pass through a different, more arduous, adoption process than regular law. Second, this arduous constitutional change process must manifest convincingly that the people, rather than the legislature alone, endorsed the change. Third, an unelected branch, be it a second legislative branch or a court, must serve as the guardian of the constitutional status quo and exercise judicial review or legislative veto to prevent the legislature from endorsing constitutional change until convinced that the people have consented to it.

U.K. politicians and scholars of the nineteenth century recognized that the British model was similar to the one at play in the U.S. They drew explicit comparisons between the Lords' exercise of their legislative veto and the U.S. Supreme Court's judicial review power.[461] The U.K. constitutional model later replaced the Lords' absolute veto power with a suspensory veto and ultimately referenda. All three mechanisms are different ways of referring constitutional issues to the people prior to their adoption by Parliament.

Both countries share a common model of constitutionalism that demarcates constitutional from regular law and entrenches the former by entrusting an unelected branch with protection of the constitutional status quo. Moreover, both countries share a common historical background. Not only did Englishmen in America rely explicitly on British precedents in molding their new independent Constitution, as recognized by the Supreme Court's most prominent proponent of originalism, Justice Scalia, but the British were following closely and imitating developments in the new world.[462]

It is thus highly valuable to study how institutions shared in both countries, and designed for similar purposes, were intended to operate. Post-ratification constitutional development in both countries may offer insight into the true meaning of institutions at the time of their constitutional adoption. The U.S. may finally shed its armor of

461. *See supra* Part II.

462. *See supra* Introduction.

exceptionalism and engage in serious cross-Atlantic study of constitutional law.[463] I demonstrate the importance of such an approach on two burning dilemmas: judicial reform and Senate reform.

A. The Enforceability of Constitutional Norms

The common Anglo-American constitutional model teaches us that constitutional norms, which protect popular sovereignty, were never meant to be left to the mercy of the faltering desires of politicians. Rather, the model guaranteed their enforcement.

The covert nature of the U.K.'s transformation from parliamentary to popular sovereignty in the nineteenth century, created a large gap between the British practice of popular sovereignty and its narrative of parliamentary sovereignty, which persists to this day. Brexit's dramatic unfolding is symptomatic of this latent shift in the U.K.'s governing framework, which began two centuries ago.[464] Brexit is just the first major political event to force the world to grapple with this reality.

During the subtle, unacknowledged transition, the British system preserved the facade of continuity while the constitution's internal workings were dramatically altered. Parliament's legal ability to make and unmake any law sustained the illusion of an unchanged status quo. However, an internal revolution transpired, in which the people came to supplement the Crown, Lords, and Commons, as the fourth body whose consent was *de facto* required for constitutional change. Contrary to traditional understanding, the British constitution has, in fact, utilized constitutional conventions to bridge this chasm between practice and narrative.

British scholars of the twentieth century distinguished between the legal and political dimensions of the U.K. constitution.[465] The Court was to guard and enforce the legal constitution, while the political constitution was enforced through politics and, eventually, elections alone. These scholars presumed that constitutional conventions were in the domain of the political constitution alone.[466] Constitutional conventions thus supplemented, but did not replace or negate, the legal constitution. In case of conflict between what *ought* to be done under

463. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop trans., 2002) (discussing American exceptionalism in the 19th century).

464. *See supra* Part IV.

465. *See, e.g.*, ADAM TOMKINS, PUBLIC LAW 18 (2003); Graham Gee and Grégoire C.N. Webber, *What Is a Political Constitution?*, 30 OXFORD J. LEGAL STUD. 273, 273 (2010).

466. *See, e.g.*, ADAM TOMPKINS, PUBLIC LAW 6, 10–14 (2003).

the political constitution and what *could* be done under the legal constitution, the legal constitution prevailed. Scholars treated a conflation of the two constitutions as a severe error.

However, this commonly accepted treatment of asserting a sharp division between the political and legal constitutions is a mistake. This Article shows that constitutional conventions emerged and evolved to bridge the gap between the political and legal constitution. Nor were constitutional conventions left to the good will of the political branches alone. The British model has always entrusted defined "named" political institutions with enforcing the conventions via sophisticated enforcement mechanisms. The model endowed unelected branches with the power to both halt and recognize constitutional change depending on the people's endorsement or rejection of change, as manifested through repeated elections and the cumulative action of diverse constitutional branches.

In the U.K., the House of Lords oversaw the enforcement of constitutional conventions. It had to use both a negative power (veto) and a positive power (consent) to serve as guardian of popular sovereignty conventions. When constitutional change did not garner the people's consent, the Lords had to protect the constitutional status quo by vetoing constitutional change. When the people spoke, the Lords had to recognize this by consenting to constitutional change.[467] Since the Lords functioned during this period as both a second legislative chamber and the highest judicial branch, the Lords fulfilled this guardian function up front as a second legislative chamber.[468] This contributed to the impression that, in the Anglo-American constitutional tradition, there is a strict divide between the political and legal constitution. In fact, when the Lords abused their role as enforcers of constitutional conventions in the service of popular sovereignty, the Monarch served as a second tier of enforcement. The Monarch utilized the threat of peer-packing the Lords to incentivize them to abide by the norms of popular sovereignty.[469] When the Lords lost their constitutional power to enforce constitutional conventions, the Supreme Court in the U.K. emerged as the new enforcer, inheriting the Lords' role. The separation between the HL's legislative function and judicial function, now entrusted to the Supreme Court, has, thus, enabled the merger of the legal and political constitutions, on a last resort basis.[470]

The American distinction between the political and legal constitutions is based on the British tradition. American scholars treated

467. *See supra* Parts I–III.

468. Only a sub-part of the Lords functioned as a judicial body. *See supra* Part I.

469. *See supra* Parts I–II.

470. *See supra* Part IV.

conventions as unenforceable based on Dicey's writings. Harvard Law Professor Adrian Vermeule, for example, writes, "The classical approach in Commonwealth legal theory, stemming from the pre-eminent Victorian theorist Albert Venn Dicey, holds that conventions 'are not enforced or enforceable by the Courts.'"[471] However, this Article argues that they misunderstood the British model by treating it as a model of parliamentary sovereignty when it is, in fact, a model of popular sovereignty. They treated conventions as non-enforceable by the courts when, in fact, they have always been enforceable under the British model. They interpreted Dicey as the authority on relieving judicial responsibility for enforcement of conventions. But Dicey, in the very treatment of conventions, explained that their enforcement was entrusted to the Lords and monarch under a popular sovereignty model, as further elaborated below.[472]

This understanding of conventions' enforceability based on an originalist understanding is revolutionary. One of the hallmarks of Trumpism is the severe breach of constitutional conventions left unchecked. Former President Donald Trump subverted many American constitutional norms: from refusing to reveal the President's tax returns, to appointing family members to executive positions, to firing the Director of the FBI to frustrate an investigation.[473] This slippery slope of abusing conventions ultimately led him to attempt to frustrate the peaceful transition of democratic power.[474] This Article suggests that, if other political branches do not step in to fulfill their duty to enforce constitutional conventions on the infringing party, 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.

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471. Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 290 (2015).

472. *See infra* Section V.B.

473. *See* Clare Foran, *'An Erosion of Democratic Norms in America,'* ATLANTIC (Nov. 22, 2016) https://www.theatlantic.com/politics/archive/2016/11/donald-trump-democratic-norms/508469/ [https://perma.cc/XER5-E98F]; Christopher Wilson, *The Trump Standard: The 45th President's Norm-Busting First 100 Days*, YAHOO! NEWS (Apr. 25, 2017), https://news.yahoo.com/trump-standard-45th-presidents-norm-busting-first-100-days-090037028.html [https://perma.cc/8JTP-XNWA]; Erica R Hendry et al., *Everything We Know About Trump's Firing of FBI Director James Comey*, PBS NEWSHOUR (May 10, 2017, 11:02 AM), https://www.pbs.org/newshour/politics/everything-know-trumps-firing-fbi-director-james-comey [https://perma.cc/G4AT-YLZD]; Dahlia Lithwick, *The Nepotism Might Finally Be Too Much to Ignore*, SLATE (June 12, 2019, 5:19 PM), https://slate.com/news-and-politics/2019/06/trump-nepotism-too-obvious-to-ignore-elitism.html [https://perma.cc/NM2D-M2BU]; John Santucci & Veronica Stracqualursi, *Donald Trump Refuses to Reveal His Tax Rate: 'It's None of Your Business,'* ABC NEWS (May 13, 2016, 7:54 AM), https://abcnews.go.com/Politics/donald-trump-refuses-reveal-tax-rate-business/story?id=39086788 [https://perma.cc/C6CC-WN3M].

474. *See, e.g.*, Siegel, *supra* note 26.

I develop the implications of this understanding with a view to judicial reform.

B. Court Packing

1. A Principled Plan

Serious discussion of packing the U.S. Supreme Court has encountered a level of interest that has not been seen since Franklin D. Roosevelt's presidency in the 1930s.[475] President Biden has appointed members to a bipartisan commission that will consider reforming the Court.[476] In my essay "Court Packing as an Antidote," I established the existence of a constitutional convention dating back to the founding of the Republic, which I termed the SCOTUS Bipartisan Convention.[477] This convention demands bipartisan consent as a precondition for the appointment of Justices to SCOTUS during a presidential election year. I define a presidential election year to include all nominations done within the presidential election calendar year or all appointments done within twelve months prior to the president taking office. This nuanced definition takes into account of the fact that the Twentieth Amendment led to a change in the time in which presidents assumed office.[478] It is intended to protect popular sovereignty by guaranteeing that the people may weigh in on such irrevocable, transformative, life-term appointments.[479] It is designed to prevent presidential abuse of appointment power in a way that frustrates election results.[480] I argue that, under the SCOTUS Bipartisan Convention, the Senate is entrusted with guaranteeing that no such appointment is made during a presidential election year without bipartisan support.[481] To establish the existence of the convention, I reviewed all judicial

475. *See generally* Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html [https://perma.cc/A9GN-4TYR]; Amber Phillips, *What Is Court Packing, And Why Are Some Democrats Seriously Considering It?*, WASH. POST (Oct. 8, 2020), https://www.washingtonpost.com/politics/2020/09/22/packing-supreme-court/ [https://perma.cc/9LN7-SL7M].

476. Tyler Pager, *Biden Starts Staffing a Commission on Supreme Court Reform*, POLITICO (Jan. 27, 2021), https://www.politico.com/news/2021/01/27/biden-supreme-court-reform-463126 [https://perma.cc/3JCJ-LEJT].

477. Rivka Weill, *Court Packing as an Antidote*, 42 CARDOZO L. REV. 2705, 2711 (2021).

478. *Id.* at 2711–32.

479. *Id.* at 2727–32.

480. *Id.*

481. *Id.* at 2727–28.

nominations and appointments to SCOTUS done during presidential election years since the U.S.' founding.[482]

I argue that, in recent years, the Senate had breached constitutional conventions regarding SCOTUS appointments twice. In the first case, the Senate denied SCOTUS nominee Judge Merrick Garland a floor vote on his nomination, even though the nomination was submitted before the end of March in a presidential election year.[483] Except for Garland, all nominations to the Court done by March of a presidential election year received some type of an up or down vote.[484] In the second case, the Senate confirmed Justice Amy Coney Barrett mere days before a presidential election, after millions of Americans had already voted, despite a lack of bipartisan support.[485]

This Article furnishes theoretical and historical support for the argument that court packing is the antidote for breaches of the SCOTUS Bipartisan Convention, such as those that occurred during the nominations of Garland and Barrett. Both the U.S. Senate and the U.S. Supreme Court are modeled after the House of Lords.[486] Both the Senate and the House of Lords are second legislative bodies within a bicameral system. Both were intended to be more elitist and less democratic than the lower chamber to force a somber second look on legislation.[487] Therefore, Senators were originally appointed by state legislatures rather than chosen in direct popular elections.[488] Only in 1913, with the ratification of the Seventeenth Amendment, did the U.S. adopt direct popular election to the Senate.[489] Originally, the Senate was intended to represent the wealthier class of society, just like the House of Lords. The treatment of Senators who die or resign before their term expires still reflects this history, as their state governors appoint their successors.[490] Thus, for instance, Governor Gavin Newsom of California could select Mr. Padilla to replace Kamala Harris for the

482. *See id.* app. A & B.

483. For more on Judge Garland's nomination, see Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016).

484. *Id.* app. A.

485. *Id.* at 2732.

486. *See supra* Introduction & Part I.

487. *See infra* Section V.3. *See also* THE FEDERALIST No. 63, at 384 (James Madison) (Clinton Rossiter ed., 1961).

488. The Center for Legislative Archives, *17th Amendment to the U.S. Constitution: Direct Election of U.S. Senators*, National Archives, https://www.archives.gov/legislative/features/17th-amendment [https://perma.cc/M4MQ-7VVV].

489. US CONST. amend. XVII.

490. *Appointed Senators*, U.S. SENATE, https://www.cop.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm [https://perma.cc/97D5-TJFS].

remainder of her Senate term once Harris became the first female Vice President in U.S. history.[491] This elitist design also explains the extended six-year terms on the U.S. Senate.

Court packing, in the common Anglo-American model, offers a second tier of protection against the Senate's failure to enforce constitutional conventions such as the SCOTUS Bipartisan Convention. Court packing is *necessary* to restore the legitimacy of the Court and counter the partisan takeover of the Court achieved through abuse of the appointment power in the cases of Garland and Barrett. Dicey explicitly acknowledged that court packing, or the threat thereof, is justified to guarantee that popular sovereignty prevails in the face of a partisan takeover of non-elected veto power. In the third part of his *Introduction to the Study of the Law of the Constitution*, Dicey deals with constitutional conventions. He argues that the Crown and Lords should exercise their discretionary powers in a way that serves popular sovereignty:

> The same thing holds good of the understanding, or habit, in accordance with which the House of Lords are expected in every serious political controversy to give way at some point or other to the will of the House of Commons as expressing the deliberate resolve of the nation, or of that further custom which, though of comparatively recent growth, forms an essential article of modern constitutional ethics, by which, in case the Peers should finally refuse to acquiesce in the decision of the Lower House, the Crown is expected to nullify the resistance of the Lords by the creation of new Peerages. How, it may be said, is the "point" to be fixed at which, in case of a conflict between the two Houses, the Lords must give way, or the Crown ought to use its prerogative in the creation of new Peers? The question is worth raising, because the answer throws great light upon the nature and aim of the articles which make up our conventional code. This reply is, that the 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. The truth of this reply will hardly be questioned, but to admit that the deliberate decision of the electorate is decisive, is in fact to concede that the understandings as

491. Shawn Hubler, *Alex Padilla Will Replace Kamala Harris in the Senate*, N.Y. TIMES (Dec. 22, 2020), https://www.nytimes.com/2020/12/22/us/politics/alex-padilla-kamala-california-senate.html [https://perma.cc/Z62Q-SF24].

> to the action of the House of Lords and of the Crown are, what we have found them to be, rules meant to ensure the ultimate supremacy of the true political sovereign, or, in other words, of the electoral body.[492]

The British model placed the House of Lords first, the Crown second, and institutional packing third as the enforcers of constitutional conventions. Court packing is a last resort weapon, justified only after other less intrusive enforcement mechanisms fail.

Institutional packing was not only a "potential" weapon to rein in the power of the Lords. The Crown utilized this weapon on various occasions to prevent abuse of unelected partisan power. Queen Anne created twelve new peers in 1712 to overcome Whig opposition in the Lords and enable the parliamentary ratification of the Peace of Utrecht treaties, which ended the War of the Spanish Succession.[493] These treaties expanded American territory, and thus the Americans were well-aware of Queen Anne's method of ratifying them.[494] Moreover, as the Framers debated the drafting of the U.S. Constitution, King George III—whose rule was overthrown in the Declaration of Independence—was creating new peers to promote his political agenda.[495]

The Framers of the Constitution were well aware of this British remedy and intentionally treated court packing as an antidote.[496] Thus, they never set the size of the Court in the Constitution but, rather, entrusted Congress to set the number of Justices.[497] At the same time, the Framers explicitly rejected *executive* power to pack the Court.[498] The Framers engaged in court packing since the very start, beginning

492. DICEY, *supra* note 5, at 286–87.

493. Clyve Jones, *Lord Oxford's Jury: The Political and Social Context of the Creation of the Twelve Peers, 1711–12*, 24 PARL. HIST. 9, 9 (2005).

494. *See* Weill, *supra* note 477, at 2740.

495. *See generally* William C. Lowe, *George III, Peerage Creations and Politics, 1760–1784*, 35 HIST. J. 587 (1992).

496. Weill, *supra* note 477, at 2740.

497. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

498. Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PENN L. REV. 1269, 1355 (2020) (quoting Americanus, *II*, NEW YORK DAILY ADVERTISER, Nov. 23, 1787, *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 287, 288 (John P. Kaminski et al. eds., 1988)).

with the first transition of power from Federalists to Anti-Federalists in 1800.[499]

The Senate breached its historical role of enforcing the SCOTUS Bipartisan Convention. In addition to Barrett, the only other SCOTUS appointee confirmed in breach of this convention was Justice Peter Daniel back in 1841.[500] At the time, no court packing followed because President William Henry Harrison died within a month of taking office and his successor, President John Tyler, even lacked support to fill natural SCOTUS vacancies.[501]

Enlarging the Court by four members would give the Democrats the majority-to-minority gap they would have enjoyed had there been no abuse of the appointment power. It would lead to a composition of 7 "Democrats" and 6 "Republicans" on the Court. A more modest move would be to enlarge the Court by two under the theory that there is no guarantee that Garland would have been confirmed had he received the vote, as the Senate was under Republican control at the time of his nomination. This more moderate move may be preferable if it could be achieved by bipartisan consent.

I, therefore, make a principled argument in favor of court packing based on the common Anglo-American tradition. The rationale for court packing laid out in this Article is based on the *original* constitutional design. It identifies the conditions under which court packing is justified. It thus avoids the dangers of endless *tit-for-tat* exercises of court packing spiraling out of control. Court packing is justified under the Anglo-American model only to counter a partisan takeover of unelected constitutional veto power.

I offer a principled argument that aims to undo a recent partisan takeover of the U.S. Supreme Court in breach of constitutional conventions. It aims to justify the use of the appointment power to counter its misuse. It does not aim to override or undo a particular judicial decision, and it does not depend on promoting a particular type of policy. It thus differs substantially from a similar plan and motive once proposed by Franklin D. Roosevelt, as discussed below.

499. Franklin D. Roosevelt, *March 9, 1937: Fireside Chat 9: On "Court packing"*, UVA MILLER CENTER, https://millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside-chat-9-court packing [https://perma.cc/3VP2-86SN].

500. Earl M. Maltz, *Biography is Destiny: The Case of Justice Peter V. Daniel*, 72 Brook. L. Rev. 199, 202–03

501. Weill, *supra* note 477, at 2719–20.

2. An Ad-Hoc Plan

If a moderate court packing plan is not adopted to counter the partisan takeover of the Court, a time might come when the U.S. will need to resort to a more dangerous court packing plan. Such a plan would attempt to undo particular judicial decisions that frustrate the people's will. The abuse of the Senate confirmation power regarding Barrett and Garland increases the likelihood of the need to resort to this type of court packing. It too is supported by the Anglo-American constitutional model.

In the British context, constitutional conventions not only instructed Lords when to exercise their veto but also installed a defense mechanism against abuse of their power, guaranteeing that the people's will ultimately prevailed on specific issues. The Crown, an additional unelected branch, was entrusted with ensuring that the Lords ultimately succumbed to the people's will on constitutional matters. The Crown had an interest in protecting the peace and stability of the kingdom. It had the power to enforce discipline on the Lords, because it could create Peers to overcome the Lords' veto and facilitate constitutional change.

To threaten the Lords with the creation of Peers, the Crown first required two election cycles that served as semi-referenda by focusing on a constitutional change. The Crown used these elections' results as indicators to verify that the Lords were the ones frustrating the people's will. Twice the King threatened the Lords with the creation of Peers to bring about constitutional change. This occurred in the opening and closing moments of the referendum-model era. In both cases, the Lords were left with the "Masada" dilemma: a choice to either sabotage themselves by vetoing a measure and enabling the creation of Peers to force accountability on the other branches, which would reveal the revolutionary nature of the constitutional change; or accept that the people endorsed constitutional change and join the forces of change by withdrawing their veto.[502]

FDR's threat to pack the Court is considered the prime precedent for current judicial reform. His threat to pack the Court in the 1930s explicitly relied on the British experience. After FDR's second landslide presidential victory in the 1936 election, FDR proposed to pack the Supreme Court.[503] He argued that the "Old-Court" veto was undemocratic and justified court packing in the name of popular sovereignty: "It is the American people themselves who are in the driver's

502. *See supra* Section II.G.

503. Archibald M. Crossley, *Straw Polls in 1936*, 1 PUB. OP. Q. 24, 24 (1937); Michael Comiskey, *Can a President Pack—or Draft—the Supreme Court? FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043, 1046 (1994).

seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse [the Court] to pull in unison with the other two [Congress and the President]."[504] The prevailing scholarly view suggests that, in response to the threat to pack the Court, the Court "switched" its jurisprudence and accepted the constitutionality of the New Deal legislation.[505] This judicial legitimation of expansive government intervention in economic life amounted to "the constitutional revolution of 1937."[506] In light of the Court's retreat, FDR did not act on his threat to pack the Court.

FDR based his approach upon British threats to pack the HL, which convinced the Lords to give up their veto power in the beginning of the twentieth century. On November 13, 1935, Roosevelt discussed with Secretary Harold Ickes the analogy between the crisis with the Supreme Court that he faced and the crisis with the House of Lords that the British Liberal Government confronted in 1909–1911.[507] Ickes recalled that FDR referred again to the British experience at a cabinet meeting on December 27, 1935:

> The President had a good deal to say about what the Supreme Court is likely to do on New Deal legislation. As once before in talking with me, he went back to the period when Gladstone was Prime Minister of Great Britain and succeeded in passing the Irish Home Rule Bill through the House of Commons on two or three occasions, only to have it vetoed by the House of Lords. Later, when Lloyd George's social security act was similarly blocked, Lloyd George went to the King, who was in favor of the bill, and he asked Lloyd George whether he wanted him to create three hundred new peers. Lloyd George said that he did not but that he was going to pass through Commons a bill providing that in the future any bill vetoed by the House of Lords should, notwithstanding that, become the law of Great Britain if passed again by the Commons. He told the King that when that bill was ready to go to the Lords he would

504. Roosevelt, *supra* note 499.

505. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 160–62 (1995)*; see also* Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEG. ANAL. 69, 72 (2010) (showing that Justice Roberts shifted abruptly to the left in the 1936 term).

506. *See generally* Barry Cushman, *Inside the 'Constitutional Revolution' of 1937*, 2016 SUP. CT. REV. 367 (2017).

507. Harold L. Ickes, 1 THE SECRET DIARY OF HAROLD L. ICKES: THE FIRST THOUSAND DAYS 1933–1936, at 468 (1953).

> like the King to send word that if it didn't pass, he would create three hundred new Lords. This the King did, with the result that the bill was accepted by the House of Lords.[508]

While scholars have been blind to the resemblance between the two countries' popular sovereignty structures, the political actors of the time were not. Lacking an understanding of the way constitutional conventions worked, contemporaries argued that President FDR's threats to pack the Court during the New Deal were a breach of constitutional conventions.[509] FDR, however, explicitly relied on the British experience when issuing such threats. He even recognized that, in both countries, politicians needed to resort to these threats to accomplish similar goals, i.e. the adoption of welfare programs.[510] Packing the Court remains a part of the legitimate constitutional arsenal of a popular sovereignty system, which can be exercised when cumulative branches of government, as well as the public, repeatedly endorse constitutional change but face the Court's obstructionism. This is one of the lessons that can be learned from the Anglo-American model of constitutional change.

Yet, this second type of court packing for the purpose of undoing particular judicial decisions, or threats thereof, is more dangerous because it may jeopardize the Court's independence. Instead of deciding according to their understanding of the law, Justices might come to switch their positions and decide in a way that prevents an intrusion on their institution. The public may lose confidence in the Court's objectivity even if the Court ultimately ignores threats of court packing. This type of court packing is thus more open to serious abuse by the political branches.

C. Senate Reform

While Representatives campaign every two years, Senators stand for election every six years. They thus compose a more elitist body, disconnected from immediate constituents' concerns.[511] Senators also represent states rather than the population at large. Thus, small states enjoy disproportionate representation in the Senate. Demographically, most of the population in these states is currently from

508. *Id.* at 494–95.

509. Weill, *supra* note 477, at 2733–35.

510. *Id.* at 2735–39.

511. *Origins and Development*, U.S. SENATE, https://www.cop.senate.gov/artandhistory/history/common/briefing/Origins_Development.htm [https://perma.cc/FUN8-P7G5].

White rural America.[512] In size, it resembles the Lords' representation of the aristocratic class in the U.K.

Senators have become an increasingly obstructionist legislative body, especially since the 1970s.[513] Under the Senate Rules, each Senator has the right to unlimited debate on legislation, even on nongermane matters. Each Senator may, thus, filibuster and prevent a vote on legislation.[514] Rule 22 allows Senators to apply cloture to end debate and overcome a filibuster with the support of three-fifths of Senators (60 Senators).[515]

After intensive filibusters by southern Senators to prevent civil rights legislation in the 1960s, in 1970, the Senate adopted a two-track system for conducting business. It allows the Senate to "discuss" multiple items simultaneously. Thus, the Senate can proceed with business on one item while applying a filibuster to a different item.[516] This reform enables Senators to filibuster legislation without bringing the Senate's work to a standstill. Over time, filibusters became "virtual," requiring Senators to merely communicate their intention to filibuster.[517]

Paradoxically, while the two-track system intended to strengthen the Senate, it achieved the opposite result. Vetoing members did not need to tax their bodies with long speeches or even pay the public price of accountability for filibustering. They could stall simply by indicating to their party leader that they intended to filibuster unless the majority could garner the supermajority needed to impose cloture.[518] Thus, the Senate became an obstructionist body, very much resembling the Lords' behavior in the beginning of the twentieth century.

While the Lords' obstructionist behavior led to rapid curtailment of their power in the beginning of the twentieth century, Congress adopted only the first half of the Parliament Act of 1911. In

512. U.S. CONST. art. 1 § 3. *See also* Neil Malhotra & Connor Raso, *Racial Representation and U.S. Senate Apportionment*, 88 SOC. SCI. Q. 1038, 1038 (2007).

513. GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE 6 (2010).

514. SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE 2 (1997).

515. COMM. ON RULES AND ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 15–17.

516. Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1010 (2011).

517. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 181 (1997).

518. Chafetz, *supra* note 516, at 1010.

1974, Congress exempted the budget process, and specifically reconciliation bills, from the application of the filibuster.[519] Without this exception, the Senate's filibuster would have long been discarded. No government may function without the power of the purse. This is why the British Parliament Act of 1911 removed the Lords' veto power on budgetary matters.[520] To bypass the filibuster, American presidents, at times, enacted major policy items in the form of reconciliation bills. President Obama utilized this process to enact parts of Obamacare, and President Biden followed suit with COVID-19 relief.[521]

Over one hundred years after Britain, the U.S. is currently weighing Senate reform along lines resembling the British model: eliminating the filibuster, reforming the Senate, or recasting the filibuster as a suspensory veto. The Republican Senate Minority Leader Mitch McConnell is so concerned that Democrats will eliminate the filibuster that he refused to cooperate on formulating a power sharing agreement, which intended to transfer control of Senate committees to the new Democratic Senate majority.[522] McConnell ultimately relented after two Democratic Senators publicly announced their current opposition to the filibuster's elimination.[523] However, the new Democratic Senate Majority Leader, Chuck Schumer, did not pledge to preserve the filibuster.[524]

Some suggest reforming the Senate to make it more representative by admitting the District of Columbia and Puerto-Rico into the Union.[525] Others suggest deescalating supermajority of the cloture, such that the filibuster becomes a suspensory, rather than an absolute, veto. Under one proposal, the filibuster may be overcome after eight days of delay.[526] The U.K.'s history suggests that a democracy cannot

519. 2 U.S.C. § 641. *See also* Roy T. Meyers & Philip G. Joyce, *Congressional Budgeting at Age 30: Is It Worth Saving?*, 25 PUB. BUDGETING & FIN. 68, 71–72 (2005).

520. *See supra* Section III.A.

521. Heidi Heitkamp, *Op-Ed: Why Democrats Are Right to Use Budget Reconciliation for Covid Relief Package*, CNBC (Feb. 16, 2021, 2:10 PM), https://www.cnbc.com/2021/02/16/op-ed-why-democrats-are-right-to-use-reconciliation-for-covid-relief-package.html [https://perma.cc/LLR3-E7M3].

522. Carl Hulse, *McConnell Relents in First Filibuster Skirmish, but the War Rages On*, N.Y. TIMES (Jan. 25, 2021), https://www.nytimes.com/2021/01/25/us/senate-filibuster.html [https://perma.cc/7TVF-2WM4].

523. *Id.*

524. *Id.*

525. Matthew Yglesias, *The Democratic Debate Over Filibuster Reform, Explained*, VOX (Apr. 5, 2019, 12:29 PM), https://www.vox.com/2019/3/5/18241447/filibuster-reform-explained-warren-booker-sanders [https://perma.cc/AL2M-M76K].

526. Tom Harkin, *Filibuster Reform: Curbing Abuse to Prevent Minority Tyranny in the Senate*, 14 LEG. & PUB. POL. 1, 8 (2011).

ignore an obstructionist legislative chamber, and removal, or at the very least substantial weakening, of the filibuster is not a question of "if" but "when" in the U.S. as well. Under the Anglo-American model, the second chamber's task is to fulfill its constitutional duty to foster deliberation, not to frustrate the people's will. When its actions become obstructionist to the point of paralyzing the regular course of legislation, it foreshadows the removal of this obstruction power.

CONCLUSION: NEW CONSTITUTIONAL BEGINNINGS

This Article has focused on reconceptualizing the relationship between the U.S. and U.K. constitutional models and its implications for current dilemmas that the two countries face. However, the potential importance of the study reaches beyond the two countries. Because both countries' constitutional systems serve as models for other countries, the misunderstood relationship between the U.S. and U.K. models has hindered the development of constitutionalism worldwide. Countries felt compelled to choose between the two models. The opinion of the Framers of the Australian Constitution in the 1890s, for example, was that a Bill of Rights would negate the tradition of parliamentary sovereignty as enunciated by Dicey. They therefore provided for a constitution that deals primarily with the structure of government alone. The Liberal Prime Minister Sir Robert Menzies reiterated this position in the late 1960s.[527]

After Israel's establishment in 1948, its parliament held a great debate in 1950 regarding the question of whether to follow the American model of a supreme formal constitution with an accompanying judicial review mechanism for primary legislation or adhere to the British parliamentary sovereignty tradition, ultimately opting for the latter. It thus decided to adopt Basic Laws in stages using the same process of enactment as used for regular statutes and forgo Israel's commitment in its Declaration of Independence to adopt a formal constitution.[528]

In 1990, New Zealand opted to adopt a pale statutory Bill of Rights Act, expressly forbidding the courts from invalidating statutes, to remain within the British parliamentary sovereignty tradition.[529]

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527. *See, e.g.*, GEORGE WILLIAMS, THE FEDERAL PARLIAMENT AND THE PROTECTION OF HUMAN RIGHTS 12 (1999), https://www.aph.gov.au/binaries/library/pubs/rp/1998-99/99rp20.pdf [https://perma.cc/Z7BL-ZPWU].

528. Rivka Weill, *supra* note 9, at 465–67. Israel, however, underwent a constitutional revolution in the midst 1990s. *Id*. at 498–504.

529. New Zealand Bill of Rights Act 1990, § 4; GEOFFREY W.R. PALMER, NEW ZEALAND'S CONSTITUTION IN CRISIS: REFORMING OUR POLITICAL SYSTEM 60 (1992).

This Article shows that these countries' constitutional dilemmas were shaped by a misunderstanding of the relationship between the U.K. and U.S. constitutional models. The 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. There was never a need for countries to profess their loyalty to one or the other. The common Anglo-American constitutional model offers new possibilities for countries to develop their own constitutional systems as well as engage in constitutional dialogues on a global level.