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# *The Right Honourable Boris Johnson MP v The Prime Minister: a (fictional) entrenchment problem – and solution (?)*

Ian Loveland

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# ***The Right Honourable Boris Johnson MP v The Prime Minister: a (fictional) entrenchment problem – and solution (?)***

Ian Loveland\*

This paper presents a hypothetical Supreme Court judgment issued in response to a similarly hypothetical entrenchment problem arising in the context of the United Kingdom's withdrawal from the European Union. The article imagines a scenario in which a Conservative government facing electoral defeat presses legislation through Parliament which is intended to entrench - to a very high degree - the United Kingdom's withdrawal. The hypothetical litigation suggests that the Supreme Court would uphold such legislation in the face of a subsequent statute passed in the ordinary way which purports to repeal the earlier Act.

United Kingdom, Parliamentary sovereignty, entrenchment, manner and form

## INTRODUCTION

In a recent study<sup>1</sup> of *McCawley v The King*<sup>2</sup> and *Trethowan v Attorney-General for New South Wales*<sup>3</sup> I posited a hypothetical entrenchment scenario. That scenario was limited to presenting a fictitious entrenchment statute and a discussion of the likely submissions in the ensuing litigation. This paper offers a hypothetical judgment. In

\* School of Law, City, University of London. Email: i.d.loveland@city.ac.uk

1 I Loveland, *McCawley and Trethowan: A Study of the Chaos of Politics and the Integrity (?) of Law: Volume 1: McCawley and Volume 2: Trethowan* (Hart, 2021). This hypothetical problem and fictitious statute were first presented in similar terms to those adumbrated here in ch 8 of *Volume 2*.

2 [1917] St R Qd 62 (Queensland Supreme Court); (1918) 26 CLR 9 (High Court of Australia); [1920] AC 691 (Privy Council).

3 [1930] 31 SR (NSW) 183 (New South Wales Supreme Court); (1931) 44 CLR 394 (High Court of Australia); [1932] AC 526 (Privy Council).

doctrinal terms, the paper's core concern is to re-evaluate the supposedly differing perspectives offered by William Wade and Ivor Jennings<sup>4</sup> as to 'Parliament's' capacity to enact what is loosely called 'entrenching legislation'. Those perspectives were thoughtfully discussed by Michael Gordon in this journal and in a subsequent monograph,<sup>5</sup> and have been revisited by both Michael Gordon and Jeffrey Goldsworthy in articles published in 2019,<sup>6</sup> and I do not propose to add to that debate by engaging with those very insightful analyses at length. The motive and method adopted here concerning the Wade/Jennings dichotomy are rather different to those pursued in Gordon and Goldsworthy's critiques and other contributions addressing those competing positions published in recent (and not so recent) years.<sup>7</sup>

The text of the hypothetical statute presented here is informed by ideas drawn from a deep immersion in the legal and political intricacies of *McCawley* and *Trethowan*. That immersion suggested that those cases have not been terribly well-understood or explained in United Kingdom constitutional scholarship. This in turn raised the question of whether some 'indigenous' authorities of varying vintages bandied about in our pro- and anti-entrenchment discourse have been similarly misunderstood or misrepresented, with the consequence that some jurisprudential pillars on which presumed orthodoxies rest might have wobbly foundations. Those are arguments which I will pursue in a more traditionally academic sense elsewhere,<sup>8</sup> but which are addressed in a cursory form in the 'judgment' below. To which 'judgment', without more ado, we might now turn.<sup>9</sup>

4 HRW Wade, 'The Basis of Legal Sovereignty' (1955) Cambridge Law Journal 172 and Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th edn 1959) 144–171.

5 M Gordon, 'The UK's Fundamental Constitutional Principle: Why the UK Parliament is Still Sovereign and Why It Still Matters' (2015) 26 Kings Law Journal 229; 'Parliamentary Sovereignty and the Political Constitutions: From Griffith to Brexit' (2019) 30 Kings Law Journal 125; *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart, 2015). See also his 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade' [2009] Public Law 519.

6 J. Goldsworthy, 'The "Manner and Form" Theory of Parliamentary Sovereignty' [2019] Public Law 586; M. Gordon, 'The Manner and Form Theory of Parliamentary Sovereignty: a Response to Jeffrey Goldsworthy' [2019] Public Law 603.

7 Among the most helpful being – certainly from the viewpoint of providing teaching tools for enthusiastic students – J Allan, 'The Paradox of Sovereignty: *Jackson* and the Hunt for a New Rule of Recognition' (2007) 18 Kings Law Journal 1; J Goldsworthy, 'Abdicating and Limiting Parliament's Sovereignty' (2006) 17 Kings Law Journal 255; RFV Heuston, *Essay in Constitutional Law* ch.1 (Stevens and Sons 1964); TRS Allan, 'Parliamentary Sovereignty: Lord Denning's Dexterous Revolution' (1983) 3 Oxford Journal of Legal Studies 22; C Dike, 'The Case Against Parliamentary Sovereignty' [1976] PL 283; D Nicol, 'The Legal Constitution: United Kingdom Parliament and European Court of Justice' (1999) 5 Journal of Legislative Studies 135; Han-Ru Zhou, 'Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty' (2013) 129 Law Quarterly Review 610; M Loughlin and S Tierney, 'The Shibboleth of Sovereignty' (2018) 81 Modern Law Review 989.

8 Particularly as to the so-called 'enrolled bill rule' supposedly articulated in the caselaw running from *Wauchope v Edinburgh and Dalkeith Railways* [1842] 8 ER 279 through to *British Railways Board v Pickin* [1974] AC 765; and the 'roots' of the doctrine of implied repeal in *Ellen Street Estates v Minister of Health* [1934] 1 KB 590.

9 Any attribution of status, and/or actions (including but not limited to the acceptance of instructions as counsel) and/or opinions herein to any living person is wholly fictitious.



than a week through the House, where it secured a majority of 60 at second reading and 50 at third reading. In the House of Lords, the bill passed all stages with small majorities. The bill received the royal assent in March 2024.

[iii] The bill had been criticised by opposition politicians both as a morally illegitimate attempt to bind future Parliaments and as a measure which was legally futile. Prime Minister Johnson had defended the bill as a necessary means to ensure that such a momentous decision as the United Kingdom re-joining the European Union should only be made by a carefully conducted lawmaking process which attracted very high levels of political support. The entire text of the Act is reproduced below.

### **The United Kingdom Safeguarding of National Sovereignty Act 2024**

An Act to entrench the United Kingdom's freedom from loss of its sovereignty to the European Union

Whereas the sovereignty of a country's people is their most precious political and legal right, and Whereas the people of the United Kingdom in 2016 chose to reclaim their sovereignty from the European Union, and Whereas that decision is the ultimate political fact underlying the United Kingdom's constitution, and Whereas such sovereignty of the people should be a legally entrenched characteristic of the United Kingdom's constitution, and Whereas the surrender of that sovereignty would be so momentous a political change as to demand approval by an unusual manner and form of lawmaking, and Whereas the orthodox presumption is that Parliament may enact any law by a simple majority in both Houses plus the Royal Assent, and Whereas by a majority of fifty at third reading this measure was approved in the House of Commons, and Whereas the said majority of members in the House of Commons intends that this measure shall in future prevent Parliament in the ordinary way from repealing this Act, and Whereas the said majority of members in the House of Commons accepts that any such unusual manner and form of lawmaking must be defined with meticulous precision if it is to be recognised and enforced by the courts in the face of an attempt by a future Parliament to repeal or amend such entrenchment by a law passed in the ordinary way;

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

#### **1. Control of the prerogative power to sign treaties**

(1) Neither His Majesty the King nor any of his heirs or successors may exercise the prerogative power to ratify treaties in respect of any Treaty concerning the Accession of the United Kingdom to the European Union until such time as this Act has been repealed.

- (2) For the purposes of this Act any reference to 'His Majesty' shall include His Majesty and his heirs or successors.
- (3) For the purposes of this Act 'European Union' shall include any successor body to the European Union.
- (4) This Act may be repealed only by legislation:
  - (a) drafted in the express form herein specified and;
  - (b) enacted in accordance with the manner of legislating herein created.

## **2. Control of Parliament's power to control His Majesty's prerogative power to sign treaties**

- (1) The Parliament of the United Kingdom shall not enact any legislation removing or transferring to any other person or body of persons His Majesty's prerogative power to ratify treaties in respect of any Treaty concerning the Accession of the United Kingdom to the European Union until such time as this Act has been repealed.
- (2) This Act may be repealed only by legislation:
  - (a) drafted in the express form herein specified and;
  - (b) enacted in accordance with the manner of legislating herein created.

## **3. Control of Parliament's power to give domestic effect to European Union law**

- (1) The Parliament of the United Kingdom shall not enact any legislation giving effect to or purporting to give effect in United Kingdom law to any provision of European Union law created after the coming into force of this Act until such time as this Act has been repealed.
- (2) This Act may be repealed only by legislation:
  - (a) drafted in the express form herein specified and;
  - (b) enacted in accordance with the manner of legislating herein created.

## **4. Compliance with specified manner and form of legislating required to repeal this Act**

- (1) No Act or purported Act of the United Kingdom Parliament which repeals or purports to repeal this Act shall be recognised by any court in the United Kingdom as having any legal effect unless such Act is:
  - (a) drafted in the express form herein specified and;
  - (b) enacted in accordance with the manner of legislating herein created.

## **5. Requisite form – express terms**

- (1) For the purposes of this Act, 'express form' means that no Act purporting to repeal The United Kingdom Safeguarding of National Sovereignty Act 2024 shall be valid unless:
  - (a) The title of such Act is The United Kingdom Surrender of National Sovereignty Act [plus year of enactment]; and

- (b) Such Act shall have only one section, which section shall state verbatim and only: ‘The United Kingdom Safeguarding of National Sovereignty Act 2024 is hereby repealed and the sovereignty of the people of the United Kingdom is hereby made vulnerable to surrender to the European Union’.

### **6. Requisite manner – the lawmaking process**

- (1) Any bill purporting to repeal this Act shall originate in the House of Commons and:
- (a) Any such bill shall be entitled The United Kingdom Surrender of National Sovereignty Bill; and
- (b) Clause 1 of such bill shall state verbatim and only: ‘The United Kingdom Safeguarding of National Sovereignty Act 2024 is hereby repealed and the sovereignty of the people of the United Kingdom is hereby made vulnerable to surrender to the European Union’.
- (c) The House of Commons may at any stage of proceedings reject such bill by a simple majority of members voting.
- (d) The House of Commons may not at any stage of proceedings amend such bill in any fashion.
- (2) A period of at least eight weeks shall elapse between the conclusion of such bill’s second reading in the House of Commons and the commencement of the bill’s third reading in the House of Commons.
- (3) Any such bill may not be sent from the House of Commons to the House of Lords unless such bill shall have been approved by no fewer than 400 members of the House of Commons at third reading.
- (4) Should the number of members of the House of Commons at some future date or dates be increased or decreased then the number specified in s.6(3) shall increase or decrease accordingly in proportion to the increase or decrease of the number of members of the House of Commons.
- (a) Any fractional number resulting from such increase or decrease shall be rounded upwards.
- (5) If any such bill is approved in accordance with s.6(2) and s.6(3) above, such bill may not be sent to the House of Lords for passage in that House until at least eight weeks have passed since the third reading vote in the House of Commons.
- (a) The House of Lords may at any stage of proceedings reject such bill by a simple majority of members voting.
- (b) The House of Lords may not at any stage of proceedings amend such bill in any fashion.
- (6) If any such bill is passed in the House of Lords, it shall not be presented to His Majesty for the Royal Assent until the conditions specified in s.6(8)–(11) herein have been satisfied.
- (7) If, notwithstanding the proviso in s.6(6) above, any such bill is presented to His Majesty for assent when the conditions specified in s.6(8)–(11) herein have not

been satisfied, His Majesty shall not give assent until the conditions specified in s.6 (8)–(11) herein have been satisfied.

- (8) On completion of any such bill's passage through the House of Lords the Electoral Commission shall make arrangements in accordance with its powers under the Political Parties, Elections and Referendum Act 2000 for the holding of a referendum at a date no earlier than twelve weeks and no later than twenty-six weeks after the bill has completed its passage in the House of Lords in which referendum the question shall be:

Do you wish

The United Kingdom Safeguarding of National Sovereignty  
Against the European Union Act 2024 to be repealed?

Yes

No

- (a) The Electoral Commission shall have no role in approving or amending the question identified in s.6(8) herein.
- (9) If fewer than three quarters of registered voters vote in the referendum held in accordance with s.6(8) the bill shall immediately lapse.
- (a) For the purposes of this section a blank ballot paper or a spoiled ballot paper shall not be counted as a vote.
- (10) If fewer than 55% of the votes cast in the referendum held in accordance with s.6 (8) are 'Yes' votes the bill shall immediately lapse.
- (11) If 55% or more of the votes cast in the referendum held in accordance with s.6(8) are 'Yes' votes the bill shall be presented to His Majesty by the Speaker of the House of Commons for his assent no earlier than seven days and no later than 21 days after the publication of the report specified in s.6(12) below.
- (12) The Chair for the time being of the Electoral Commission shall within seven days of the conduct of the referendum publish a report certifying the turnout in and result of the referendum.

## **7. Sections 5 and 6 create mandatory requirements**

- (1) The various provisos identified in s.5 and s.6 are mandatory requirements.

## **8. Enforcement of s.5 and s.6 – competent tribunal**

- (1) Any claim under this Act shall be heard by a panel of no fewer than seven members of the Supreme Court save that;
- (a) For the purposes of the grant of interim relief under s.11 and s.13 herein, any application shall be heard by a panel of three members of the Supreme Court.
- (2) In any such claim the Supreme Court shall exercise original jurisdiction.
- (3) In any such claim the Supreme Court shall make such arrangements concerning the conduct of proceedings, including but not limited to the giving of oral evidence and the cross-examination of witnesses, as it thinks fit.

**9. Enforcement of s.5 and s.6 – the claimants**

- (1) The only claimants who shall have standing to bring a claim and seek a remedy under this Act are:
  - (a) The Leader of His Majesty’s opposition for the time being;
  - (b) The First Minister of Scotland, or Wales, or Northern Ireland for the time being;
  - (c) Any group of twenty or more members of the House of Commons for the time being.
- (2) Should proceedings under this Act be issued when Parliament has been dissolved pending a general election, the members referred to in s.9(1)(c) above shall be taken to mean members who held seats at the time of such dissolution.

**10. Enforcement of s.5 and s.6 – the defendant**

- (1) In any claim under this Act, the defendant shall be the Prime Minister for the time being.

**11. Enforcement of s.5 and s.6 – remedies prior to ‘enactment’ – interim relief**

- (1) If, prior to the giving of the royal assent to the bill in issue, in the opinion of the Court the claimant(s) has(have) demonstrated a credible case that one or more of the mandatory requirements specified in s.5 and/or s.6(1)-(10) herein has not been complied with, then;
  - (a) The Court shall order that the passage of the bill shall be immediately suspended until the claim has been finally heard and decided.
  - (2) Any such claim must be issued within 14 days of the alleged non-compliance with the relevant mandatory requirement(s).
  - (3) In granting an interim remedy under this section the Court may injunct any person or persons including His Majesty from taking any step which in the opinion of the Court would have the effect of continuing the passage of the bill.
  - (4) For the purposes of this section, the Court may issue such an injunction against:
    - (a) Any named persons or persons; and/or
    - (b) Any person without specifying the name of such person or persons.
  - (5) An injunction issued under s.11(4)(b) above shall be taken to include His Majesty and any Minister of the Crown and any member or officer of the House of Commons or House of Lords.

**12. Enforcement of s.5 and s.6 – remedies prior to ‘enactment’ – final relief**

- (1) If, prior to the giving of the royal assent to the bill, in the opinion of the Court the claimant(s) has(have) demonstrated that one or more of the mandatory requirements specified in s.5 and/or s.6(1)-(10) herein has not been complied with, then;
  - (a) The Court shall order that the passage of the bill be immediately ended.
  - (2) In granting a remedy under this section the Court may injunct any person or persons including Her Majesty from taking any step which in the opinion of the court would have the effect of continuing the passage of the bill.

- (3) For the purposes of this section, the Court may issue such an injunction against:
  - (a) Any named persons or persons; and/or
  - (b) Any person without specifying the name of such person or persons.
- (4) An injunction issued under s.12(3)(b) above shall be taken to include His Majesty and any Minister of the Crown and any member or officer of the House of Commons or House of Lords.

### **13. Enforcement of s.5 and s.6 – remedies subsequent to ‘enactment’ – interim relief**

- (1) If, subsequent to the giving of the royal assent to the bill in issue, in the opinion of the Court the claimant(s) has(have) demonstrated a credible case that one or more of the mandatory requirements specified in s.5 and/or s.6(1)–(10) herein has not been complied with, then;
  - (a) The Court shall order:
    - (i) That His Majesty shall not exercise the prerogative power to ratify treaties in respect of any Treaty concerning the Accession of the United Kingdom to the European Union until such time as this matter has been finally heard and decided; and
    - (ii) Any statutory provision or provisions passed after 1 May 2024 purporting to make the United Kingdom a member of the European Union or purporting to give effect in United Kingdom law to any provision of European Union law shall be of no force or effect pending this matter being finally heard and decided.
- (2) Any such claim must be issued within 14 days of the granting of the Royal Assent.

### **14. Enforcement of s.5 and s.6 – remedies subsequent to ‘enactment’ – final relief**

- (1) If, subsequent to the giving of the royal assent to the bill in issue, in the opinion of the Court the claimant(s) has(have) demonstrated that one or more of the mandatory requirements specified in s.5 and/or s.6(1)–(10) herein has not been complied with, then;
  - (a) The Court shall order that:
    - (i) The United Kingdom Safeguarding of National Sovereignty Act 2024 retains its full force and effect; and
    - (ii) Any purported statutory provision or provisions passed after 1 May 2024 purporting to make the United Kingdom a member of the European Union or purporting to give effect in United Kingdom law to any provision of European Union law are of no force or effect.

### **15. Jurisdiction of the court – further matters.**

- (1) In finally deciding any claim brought under this Act seeking prior to enactment relief within s.12 herein;
  - (a) The Court shall also issue a declaratory judgment in accordance with s.14 as if the bill in issue had already been purportedly enacted notwithstanding any failure of compliance with any manner and form requirement specified in s.5 and s.6 herein; and

- (b) Any such declaratory judgment shall bind any tribunal or court in the United Kingdom including the Supreme Court.

### **16. Article 9 of the Bill of Rights and parliamentary privilege disapplied**

- (1) Article 9 of the Bill of Rights is disapplied for the purposes of the conduct of any proceedings and/or the grant of any remedy sought by any person or persons under this Act.
- (2) No provision of parliamentary privilege shall be applicable to prevent or restrict in any fashion the conduct of any proceedings and/or the grant of any remedy sought by any person or persons under this Act.

### **17. Evidence**

- (1) For the purposes of s.5 and s.6(1)-(6) herein, the official reports of the House of Commons and House of Lords in Hansard shall be taken as prima facie evidence as to the satisfaction or otherwise of the relevant mandatory provisions; but
- (a) Any party may lead such evidence as the Court thinks fit in rebuttal of that prima facie presumption.
- (2) For the purposes s.6(7)-(10) herein, the report of the Chair of the Electoral Commission required by s.6(11) herein shall be taken as prima facie evidence as to the satisfaction or otherwise of the relevant mandatory provisions; but
- (a) Any party may lead such evidence as the Court thinks fit in rebuttal of that prima facie presumption.

### **18. Interveners**

- (1) The Supreme Court shall admit as interveners any such person or persons identified in s.9 above who is or are not the claimant who wish to be so admitted.

### **19. Commencement and short title**

- (1) This Act shall come into force immediately upon the bill receiving the royal assent.
- (2) This Act may be cited as The Safeguarding of National Sovereignty Act 2024.

[iv] During the May 2024 general election campaign, the Labour, Scottish National and Liberal parties repeatedly emphasised that they wished to see The Safeguarding of National Sovereignty Act 2024 repealed and maintained consistently that the Act's entrenchment provisions were not legally effective and could be repealed by any subsequently enacted statute passed in the ordinary way. The election results were such that Sir Keir Starmer subsequently formed a minority Labour government which attracted support from the Scottish National and Liberal parties and Plaid Cymru on the basis that the government would immediately promote a bill to repeal the Safeguarding of National Sovereignty Act 2024 and thereafter begin negotiations with the European Union to secure the United Kingdom's re-entry to the Union.

[v] That bill, entitled The European Union (Preparation for Re-Entry) Bill 2025, was introduced into the Commons early in July 2024. The bill has just one section, which reads: 'The Safeguarding of National Sovereignty Act 2024 is hereby repealed'. Prior to the bill beginning its parliamentary passage, Prime Minister Starmer announced that he considered – as the Labour Party had maintained during the election campaign – that The United Kingdom Safeguarding of National Sovereignty Act 2024 could be repealed by any statute passed in the ordinary way.

[vi] The bill passed its second reading in the House of Commons with some 330 members voting in favour on 8 July. The House thereupon suspended its usual standing orders and by a majority of 2 voted to take the bill's committee, report and third reading stages in a single six hour session on 9 July. No amendments were made to the bill at the committee or third reading stage, and the bill passed third reading with some 330 members voting in favour.

[vii] On 10 July the Leader of the Opposition – the Right Honourable Boris Johnson MP – issued a claim in the Supreme Court under s.12 and s.13 of The United Kingdom Safeguarding of National Sovereignty Act 2024. The Prime Minister promptly undertook that no further steps would be taken to progress the bill until such time as the Supreme Court had finally heard and decided the matter. Interim relief was nonetheless granted as required by the terms of s.11 of the Act, and the matter was set down for hearing in October 2024.

[3] We heard argument for seven days in October 2024. We are grateful to all counsel for the depth of learning which informed the submissions made and for the candour with which counsel responded to our many questions. In recognition both of the legal complexity of the matter and the constitutional significance of our judgment we have spent considerably more time agreeing both the substance and form of our decision than is usually the case. 'Getting Brexit Done', it seems, is a more complicated matter than some commentators would have had us believe.

[4] The Court is exercising here a most unusual jurisdiction. But in doing so we are following the very precise instructions enacted by Parliament in The United Kingdom Safeguarding of National Sovereignty Act 2024; (hereafter referred to as the 2024 Act). We consider it appropriate to announce immediately that for the reasons we detail below we have decided this matter in favour of the claimant. We stress however that we consider our decision (to borrow the words of Baroness Hale in *Miller v The Prime Minister* [2019] UKSC 41; [2020] AC 373, at [1]) very much a 'one-off', which should not be taken as authority for the proposition that Parliament's 'sovereignty' as that term has traditionally been understood has been altered in any general sense. Our judgment simply answers the question put before us.

### **The issues**

[5] In identifying the issues before the Court today, we again draw on the words of Baroness Hale; on this occasion her judgment in *R (on the application of Jackson) v*

*Attorney-General* ([2005] UKHL 56; [2006] 1 AC 262; hereafter *Jackson*). As is well-known, in *Jackson* the House of Lords concluded that the effect of the Parliaments Act 1911 and 1949 had been to ‘redefine’ ‘Parliament; such that law produced through the Parliament Act procedures was primary legislation in the ordinary sense and that the lawmaker which produced that law, namely the House of Commons and the Monarch, was as much ‘Parliament’ as the legislature comprised of the House of Commons, the House of Lords and Monarch. We shall return to comments made by several members of the *Jackson* court below, but our present introductory purposes are well served by this extract from Baroness Hale’s opinion:

If the sovereign Parliament can redefine itself downwards, to remove or modify the requirement for the consent of the Upper House, it may very well be that it can also redefine itself upwards, to require a particular parliamentary majority or a popular referendum for particular types of measure. In each case, the courts would be respecting the will of the sovereign Parliament as constituted when that will had been expressed. But that is for another day. ([2006] 1 AC 262, at [163]).

That ‘another day’ has now dawned.

[6] In passing the 2024 Act has the United Kingdom’s Parliament ‘redefined itself upwards’? For present purposes, that question may be rephrased more precisely and broken down into two parts. Firstly, has Parliament in enacting that 2024 statute created a set of legal rules which empower this Court to prevent the House of Commons and/or the House of Lords and/or the Monarch from taking certain steps to pass a bill purporting to repeal the 2024 Act? Secondly, relatedly, has Parliament in enacting that legislation created a set of legal rules which this Court would enforce even in the face of subsequently enacted ‘legislation’ which purports to repeal the 2024 Act?

### **The ‘orthodox’ understanding of ‘parliamentary sovereignty’**

[7] There is perhaps no mantra more trite in the lexicon of our constitutional discourse than the proposition that ‘Parliament is a sovereign lawmaker’. The proposition is often accompanied by reference to the works of Professor Dicey and Sir William Blackstone, and an allusion to the presumed consequences of the 1688 revolution.

[8] Most students of law and political science will be exposed early in their studies to the notion that Parliament’s sovereignty has two interlinked elements, sometimes referred to as the ‘positive limb’ and the ‘negative limb’. Professor Dicey characterised his introductory explanation of the matter as a ‘rough description’ (Albert Dicey, *Introduction to the Study of the Law of the Constitution* p4: Macmillan, 5th ed 1915), but that explanation suffices for our purposes:

The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts. The same principle looked at from its negative side, may be thus stated: There is no person or body

of persons who can, under the English [*sic*] constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words), will be enforced by the Courts in contravention of an Act of Parliament (*ibid*).

That initial acquaintance with the idea of Parliament's sovereignty would also stress that Professor Dicey's allusion to 'Any Act' reinforces his earlier observation (*ibid* p3) that Parliament 'has under the English [*sic*] constitution, the right to make or unmake any law whatsoever'. 'To express the same thing in other words', there are no substantive limits to the content of the laws that Parliament may enact. Who may vote in parliamentary elections, the succession to the throne, the imposition or abolition of the death penalty for certain crimes, the United Kingdom's entry into and exit from the European Union are all matters within Parliament's competence to determine. Nothing is beyond the reach of Parliament's power.

[9] These propositions, again in an introductory sense, may be rendered more comprehensible by comparing the position here with that which prevails in relation to sovereign lawmaking authority in the United States. The United States Congress is a lawmaker possessed of very great power. But the boundaries of that power are fixed by the terms of the United States Constitution, and the courts of the United States may invalidate any purported 'Act' passed by Congress which transgresses those boundaries. Should Congress (or indeed the President or the States) wish to acquire powers not granted to them by the Constitution, then the Constitution must be amended by the 'sovereign' lawmaker created in Article V of the Constitution itself. An amendment can only be proposed by two thirds of the States or two thirds of the members of Congress. It can only be 'enacted' with the approval of three quarters of the States. The terms of the Constitution are therefore very deeply entrenched. That they have been altered barely 30 times in over 230 years is powerful testament to the great political difficulties that attach to any attempt to alter the Constitution's text. The Constitution exists beyond the reach of what we might call the ordinary political process. The 'sovereign lawmaker' in the United States is an extraordinary part of the constitutional system, and hardly ever makes law. The sovereign lawmaker in the United Kingdom is an ordinary component of the constitutional system, and makes law hundreds of times every year.

[10] It is however in the nature of trite mantras that they may conceal more than they reveal. Bald statements as to 'Parliament's' 'sovereignty' do not take us very far. The assertion rests on two anterior but often unasked questions: these being that within the notion of what we hereafter refer to as 'the ordinary way' of legislating, what do we mean by 'Parliament' both as a lawmaking institution and as a lawmaking process?

[11] Our constitutional orthodoxies in respect of 'the ordinary way' of legislating (and for the moment we leave aside the issue of legislation produced under the Parliament Acts 1911 and 1949) rest on presumptions operating at varying degrees of elaboration.

[12] At a simplistic level, we accept that the enactment of legislation by Parliament requires that a bill be approved by both the House of Commons and the House of Lords and is then assented to by the Monarch. If we examine the matter more closely we would acknowledge that in passing a bill each House adopts a process containing five distinct parts: a first reading, a second reading, a committee stage, a report stage and then a third reading. Going further still, we accept that the House of Commons and House of Lords may each pass a bill at every stage of its passage by the barest of majorities. An Act is no more authoritative as a source of law because it attracted a majority of 500 votes at Commons second or third reading than a statute which garnered a majority of just one vote. Nor is any distinction made within that law-making process depending on the subject matter of the bill in issue. Statutes dealing with the most profound moral issues are enacted in just the same way as those addressing the most trivial concerns.

[13] We presume too that Parliament may always change its mind concerning the content of our laws. A statute enacted in ‘the ordinary way’ may subsequently be amended or repealed by Parliament legislating in ‘the ordinary way’. Additionally, (albeit with now with some apparent exceptions considered below) Parliament in repealing or amending previously enacted statutes need not do so in express terms. In practice, legislation will often expressly identify previous statutory provisions which that new Act repeals. But such repeal may also be implied if in the later statute Parliament has enacted provisions which are simply irreconcilable with earlier legislation.

[14] It may occasion some surprise among citizens of the United Kingdom that many of these matters have no identifiable legal base, either in statute or common law. Some aspects of the ways in which each House conducts its legislative business are laid down in a textual sense in the respective House’s standing orders. But these standing orders are not laws. Moreover, much of the legislative process lacks, and has always lacked, even that level of textual formality. In the first edition of *Erskine May*, published in 1844, (reprinted, Cambridge University Press, 2015) the lengthy description provided in Chapter XVIII of ‘Proceedings of Parliament in Passing Public Bills: Their Several Stages in Both Houses ...’ indicates that few matters within that lawmaking process were found in standing orders; most were followed simply as a matter of custom and practice. (*Erskine May* also tells that the passage of private bills was, in contrast, largely controlled by standing orders; *ibid* ch. XXIV). As Professor Heuston reminds us (*Essays in Constitutional Law* p21 (Stevens and Sons, 1964)), this continued to be the case in the 1960s.

[15] The 2019 (25th) edition of *Erskine May* (D Nazler and M. Hutton, *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* chs 28–30) (Lexis Nexis, 2019) observes that the lawmaking process in respect of public bills within both the Commons and Lords is now encrusted with many more standing orders and internal

'precedents' than in 1844. However the oft-used phrase in respect of parliamentary proceedings, the 'law and custom of Parliament' has always been in strict terms something of a misnomer. Little of what occurs in either House during the legislative process is 'law' in the sense of being determined by either statute or the common law. The phrase is in part a legacy of the fact that in its initial form Parliament exercised what we would now consider judicial as well as legislative functions (see especially Erskine May (1844) op. cit. chs 3–4), but the notion that Parliament is still a 'court' has long been obsolete.

[16] Nonetheless, the content and conduct of the legislative process have generally been regarded both by Parliament and the courts as matters properly left to self-regulation by each House. That self-regulation is often regarded as an element of 'parliamentary privilege'. For the purposes of resolving this litigation we need not revisit the question of the relationship between parliamentary privilege and the common law. Our constitutional landscape is dotted with instances when that issue has generated considerable political and legal controversy; (consider for example *Ashby v White* (1703) 1 ER 417 and *R v Paty* (1705) 91 ER 431; *Stockdale v Hansard* (1839) 9 Ad & El 1; *Bradlaugh v Gossett* (1884) 12 QBD 271; *Pepper v Hart* [1993] AC 593).

[17] In enacting Art 9 of the Bill of Rights 1689 Parliament provided that the courts had no jurisdiction to 'impeach or call into question' any 'proceedings in Parliament'. The courts have on occasion since 1689 been called upon to interpret the words of Art 9; to decide what is meant by 'impeach' or 'call into question' or 'proceedings in Parliament'. We will address this matter further below. We simply note here that to this point in our constitutional history, should a litigant have sought to plead in court, for example, that a bill had not actually received a majority at third reading in the House of Commons, or that the bill had not actually received the royal assent, there could be no doubt that the courts would not have entertained that argument, whether that argument be directed to preventing the continued passage of a bill or towards having an Act held to be invalid. Art 9 of the Bill of Rights would have precluded that possibility. But we are now in new constitutional territory.

[18] How should this Court respond if, as has apparently occurred in the 2024 Act, Parliament has done something which it has previously never done; if Parliament has enacted a statute which has both imposed a statutory framework on the content and conduct of the legislative process; *and* also explicitly required this Court to decide if that framework has been complied with; *and* also ordered this Court to provide specified remedies if that framework has not been complied with; *and* also expressly provided that Art 9 of the Bill of Rights and parliamentary privilege have no application to such litigation?

[19] It is common ground between the parties that the 2025 bill is not drafted in the form that the 2024 Act requires. The Prime Minister candidly informs us that his government's decision not to adopt the express terms identified in s.5 and s.6(1) is deliberate, and rests on the premise that those provisions are simply irrelevant to the

resolution of this matter. It is also common ground that there is no credible prospect that the 2025 bill would attract the support of 400 members of the House of Commons at third reading as is *prima facie* required by s.6(3) of the 2024 Act. With equal candour, Sir Kier has repeated in this Court the assertion made repeatedly during the 2024 general election campaign that s.6(3) presents no legal obstacle to repealing the 2024 Act in ‘the ordinary way’: the barest of majorities in the Commons for the 2025 bill is all that is legally required. The provisions in s.6 as to the timings of the various stages of the law-making process are, the Prime Minister maintains, similarly irrelevant. Nor, for the same reason, does Sir Keir intend to submit the question of repealing the 2024 Act to the referendum process enacted in s.6(8)-(12) of that statute.

[20] These submissions are particularistic manifestations of the general principle which underlies the Prime Minister’s doctrinal position. Sir Keir does not dispute the validity of the 2024 Act. He does not dispute Parliament’s power, acting in ‘the ordinary way’, to enact all manner of so-called ‘entrenching devices’. What Sir Keir disputes is: firstly, that such legislation can retain any legal effect in the face of subsequent legislation, enacted in ‘the ordinary way’, which repeals any such entrenchment device; and secondly that such ‘entrenching’ legislation can empower a court to prevent enactment in ‘the ordinary way’ of such ‘repealing’ legislation.

### **The parties’ broad lines of argument**

[21] The parties set out their respective stalls broadly in accordance with two supposedly distinct lines of argument lent a polished form in the 1950s. The claimant relies substantially on the so-called ‘manner and form’ analysis of Parliament’s sovereignty promulgated by Sir Ivor Jennings (*The Law and the Constitution* ch IV (University of London Press, 5th ed 1959)). He relies in the alternative on an element of the theoretical analysis on which the Prime Minister takes his stand, this being the seminal article authored by Professor Wade (HRW Wade, ‘The Basis of Legal Sovereignty’ [1955] *Cambridge Law Journal* 172). We hope we do no disservice to the memories of Sir Ivor and Sir William in offering only a brief outline of their respective arguments.

[22] Sir Ivor Jennings’ thesis is succinctly summarised by Professor Wade ([1955] *op. cit.* p185):

The essence of his point is that legal sovereignty is a doctrine of law, and that since Parliament can change the law in any way it likes it can alter the law about itself, and the operation of its Acts, just as well as the law about anything else.

[23] Sir Ivor Jennings explained his argument in this way ((1959) *op. cit.* pp 152–153; original emphasis):

to be made by the Queen “with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same” will be recognised by the courts, *including a rule which alter this law itself*. If this is so, the “legal sovereign”, may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.

Sir Ivor’s view subsequently received strong support in an influential essay by Professor Heuston, which re-labelled the ‘manner and form’ thesis as the ‘new view of parliamentary sovereignty; (RFV Heuston, *Essays in Constitutional Law* ch.1 (Stevens and Sons, 1964)).

[24] Professor Wade’s rebuttal of this thesis rests essentially on the assertion that, in the United Kingdom context, Parliament’s legal sovereignty (and we take him to mean by ‘Parliament’ here enactment of legislation in ‘the ordinary way’) is not a ‘doctrine of law’ at all; and as it is not a doctrine of law it cannot be changed by legal means. On Professor Wade’s view, Parliament’s constant capacity to make law in ‘the ordinary way’ is what he famously called:

the ultimate *political* fact upon which the whole system of legislation hangs ... .If this is accepted, there is a fallacy in Jennings’ argument that the law requires the court to obey any rule enacted by the legislature, *including a rule which alters this law itself*. For this law itself is ultimate an unalterable by any legal authority ([1955] *op. cit.* 188–189; emphases added).

From this perspective, the ‘ultimate political fact’ was the consequence of the 1688 revolution. And as such, the only way to alter it would be through another ‘revolution’.

[25] Professor Wade used the term ‘revolution’ in a guarded sense. He was not suggesting that the ‘ordinary way’ of legislating could only be controlled in the aftermath of a bloody civil war. His concern was with how courts would react to any attempt by ‘Parliament’ to introduce ‘manner and form’ constraints on ‘the ordinary way’ of lawmaking. If the courts upheld such a constraint, a ‘revolution’ would have occurred; a new ‘ultimate political fact’ would have emerged.

[26] The differences between the views espoused by Wade and Jennings have perhaps been rather overstated, at least from a practical perspective, and owe more to questions of nomenclature than substance. Sir Ivor contended that departure from ‘the ordinary way’ of legislating was achievable within the existing constitutional system. Sir William considered that such a result would require that system to be redefined. But we do not understand to him have suggested that such a redefinition could not be achieved in a peaceful and orderly fashion, nor that it would necessarily require wholesale changes to the institutions and conduct of the United Kingdom’s governance. That the constitution might come to recognise a new ‘ultimate political fact’ could be a phenomenon that passed most people by. As argument developed before us, it became clear that Mr Johnson’s case might be equally well-served by either Sir Ivor or Sir William’s analysis.

[27] Sir Ivor died some years before the United Kingdom joined the European Economic Community. But shortly before his own death Professor Wade had accepted not only that such a revolution *could* occur almost – as far as most people were concerned – *sub silentio*, but indeed *had* occurred consequent upon the House of Lords' judgment in *R v Secretary of State for Transport, ex parte Factortame (No.2)* ([1991] 1 AC 603), in which (to frame the matter rather loosely) the Court held that the European Communities Act 1972 had placed limits of form, if not of manner, on Parliament's capacity in 'the ordinary way' to enact enforceable legislation inconsistent with directly effective provisions of community law:

When that Act was nevertheless held to prevail [over the Merchant Shipping Act 1988] it seemed to be fair comment to characterise this, at least in a technical sense, as a constitutional revolution; (HRW Wade, "Sovereignty – Revolution or Evolution?" (1996) 112 *Law Quarterly Review* 568 at 568).

[28] In concluding that analysis, Professor Wade suggested we had entered a period of constitutional uncertainty:

Is it now to be possible at any time, and to any extent, for Parliament to signify its "voluntary acceptance" of limitations on its successors' sovereignty ... Or, at the other extreme, was accession to the community a unique legal event, demanding concessions of sovereignty for political reasons, but otherwise setting no precedent of any kind? Or might there be intermediate positions ...? (ibid at p575).

It is only now that such uncertainties have been put to the test. We shall return to the significance of *Factortame (No.2)* later in our opinion.

[29] The preamble to the 2024 Act invokes the terminology of both Sir Ivor and Sir William in identifying the purposes that the legislation is evidently intended to achieve. Parliament we are told seeks to impose new 'manner and form' constraints on its own lawmaking capacity, and is doing so in response to a new 'ultimate political fact'. The preamble eschews any allusion to 'revolution'. But what it should be taken to mean, as Ms Black has put it in her opening submissions for Mr Johnson, is that both accession to and departure from the European Union were (in different senses) 'unique' political events of such magnitude that they can properly be taken to have empowered Parliament, acting in 'the ordinary way', to enact legislation which prevents Parliament from 'changing its mind' on those issues by enacting repealing legislation in 'the ordinary way'.

[30] Mr Johnson's case is not that Parliament's sovereignty as traditionally understood has become as Sir William rather caustically put it: 'a freely adjustable commodity whenever Parliament chooses to accept some limitations' ((1996) op. cit. p573). The proposition advanced is that the 2024 Act is *sui generis*. More precisely, Mr Johnson invites us to do no more than resolve this particular matter on its own specific merits. He expressly eschew any suggestion that in applying the 2024 Act the Court would abandon centuries of constitutional tradition.

[31] We are grateful to Mrs White, who has the benefit of having been the bill's sponsoring Minister in the House of Commons, for explaining to us the source of the 'meticulous precision' formula in the 2024 Act's preamble. That source is *McCawley v The King*, in which the Privy Council ([1920] AC 691), overturning a majority decision of Australia's High Court, ((1918) 26 CLR 91) held that entrenchment devices within Queensland's constitution could be created only by legislation (be it Imperial or Queensland in origin) which identified such devices in the most explicit of terms; legislation drafted with what Lord Birkenhead LC referred to as 'meticulous precision'. Entrenchment was not a matter which could be inferred by a court from inexactly drafted legislation. Still less could it arise as a matter of common law.

[32] The 2024 Act's terms manifestly satisfy Lord Birkenhead LC's 'meticulous precision' requirement, in respect of the entrenching provisions themselves and the mechanisms through which those provisions are to be enforced. We are not presented here with any difficulties of interpretation occasioned by ambiguities in a statutory text. We are not asked by the claimant to make any innovation at common law. In his submissions, Mr Johnson places great reliance on the care with which the bill his government persuaded Parliament to enact was drafted. But the most meticulously precise drafting will be of no avail if those cleverly formulated words advance substantive propositions which the Court considers it cannot enforce.

[33] On this point, the Prime Minister unsurprisingly invokes Lord Hope's comment in *R (on the application of Jackson) v Attorney-General* ([2005] UKHL 56; [2006] 1 AC 262 at [113]):

[I]t is a fundamental aspect of the rule of sovereignty that no Parliament can bind its successors. There are no means whereby, even with the assistance of the most skilful draftsman, it can entrench an Act of Parliament. It is impossible for Parliament to enact something which a subsequent statute dealing with the same subject matter cannot repeal.

[34] But this analysis too does not take us very far. The primary form of relief sought in these proceedings is to injunct the progress of a bill. There is currently no 'subsequent statute' in existence. Furthermore, in the claimant's submission, a 'measure' (to use a neutral term) to repeal the 2024 Act which has not been or will not be passed in the form and/or according to the manner specified in the 2024 Act would not be a 'statute' at all, but merely a 'purported statute' and as such a legal nullity. The 'measure' would lack any legal status because it had not been passed by 'Parliament', because – in turn – the only 'Parliament' competent to enact such a statute is Parliament as redefined by the 2024 Act.

[35] Having outlined these broad propositions, we now turn to the parties' more detailed assertions. Given the unusual nature of the questions before us, we invited the defendant to make the initial submissions, but we are again grateful to counsel

for accommodating themselves to a style of argument and discussion between themselves and with the Court which often more closely resembled a university seminar than a judicial proceeding.

### **The enrolled bill rule**

[36] The Prime Minister prays in aid at the outset of his submission the judgments of the House of Lords in *Wauchope v Edinburgh and Dalkeith Railways* ((1842) 8 Cl and Fin 710; [1842] 8 ER 279) and *British Railways Board v Pickin* ([1974] AC 765).

[37] Sir Keir has taken us to passages in *Wauchope* which are familiar to any able student of the United Kingdom's constitutional law. Lord Brougham's judgment includes the following observation ((1842) 8 Cl and Fin 710 at 720):

I will only add one word on a point which has been abandoned at this bar, but an idea of the value of which seems to have prevailed in the Court below; namely, that the want of notice in one of the preliminary stages of an Act of Parliament, operates to prevent that Act from affecting the rights of the parties to whom such notice ought to have been given. Such a doctrine is wholly without justification. . . .

Lord Cottenham's opinion on this point was equally forthright (*ibid*):

There is no foundation for such an idea; but such an impression appears to have existed in Scotland, and I express my clear opinion upon it, that no such erroneous idea may exist in future. . . .

The best-known passage comes from Lord Campbell's judgment (*ibid* at 725):

I cannot but express my surprise that such a notion should ever have prevailed. There is no foundation whatever for it. All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.

[38] However it appears to us that *Wauchope* does not assist the Court in resolving the current issue. The difficulty which attends the Prime Minister's submission is that what we might term the 'received constitutional wisdom' as to the principle enunciated there is misconceived. That wisdom is, as Mrs White pithily put it, a public law manifestation of an urban myth.

[39] That myth appears to be that the ratio of *Wauchope* is that a court has not and cannot in any circumstances have any capacity to interfere with the passage of legislation through the House of Commons or the House of Lords or with the granting of the royal assent and that Parliament cannot create such a power. In Mrs White's

submission, with which we entirely agree, there are three obvious objections to these presumptions.

[40] The first is that any comments made in *Wauchope* concerning what is frequently referred to as 'the enrolled bill' are purely obiter. The assertion that the court took pains to rebut was not actually being argued before their Lordships. The second is that the objection initially raised in *Wauchope* as to the validity of the relevant Act (which had been passed through the private bill process) was not that the House of Commons had failed to comply with a *statutory provision*. The objection was that the House of Commons had failed to comply with its own *standing orders*. The third is that Mr Wauchope sought (to borrow from the language of the 2024 Act) 'post-enactment relief'. Mr Wauchope was not asking the courts to intervene to prevent enactment of a measure which had not yet completed its parliamentary passage. It seems abundantly clear to us that had the factual matrix of *Wauchope* been that the plaintiff was asking the court to enforce a precise statutory term in accordance with a precisely identified statutory jurisdiction to prevent enactment of a bill then the case might have stood on much firmer legal ground.

[41] The conspicuous absentee in the *Wauchope* judgment is any explanation as to the legal basis of the courts' supposed incapacity to look behind the parliamentary roll. We think it is clear that *Wauchope* is properly explained as a case in which the House of Lords simply applied the (statutory) provisions of Art 9 of the Bill of Rights. The court was accepting, albeit not with the level of transparency one might wish, that Parliament had legislated to protect the proceedings of the House of Commons from scrutiny by the courts in response to an assertion that the House had failed to comply with its standing orders.

[42] We cannot accept the proposition that parliamentary privilege per se provides a legal source to protect the proceedings of either House against judicial enforcement of clearly defined statutory oversight. We are conscious of the point (considered further below) that in recent years the courts have accepted that Art 9 possesses a normative status that renders it immune to implied amendment or repeal by subsequent legislation. But s.16(1) of the 2024 Act could not be more express in providing that Art 9 is inapplicable in these proceedings. Further, even if we accepted that parliamentary privilege affords the House of Commons and the House of Lords protection against judicial scrutiny which is distinct from that provided by Art 9, that privilege has manifestly been disapplied for the purposes of these proceedings by s.16(2). Sir Keir suggests somewhat faintly that s.16 might be construed to permit the Court to examine the conduct of the lawmaking process but not to provide any remedy should it find that process to have been wanting. We do not consider that argument tenable given the very precise commands in ss.11–14 as to what Court should do if it considers that one or more provisions of ss.5–6 has or have not been complied with.

[43] There is nothing unorthodox in the proposition that the respective Houses of Parliament are not Parliament, nor by extension that the respective privileges of each House can be controlled by statute. This is in essence the point made almost two hundred years ago Lord Denman CJ in *Stockdale v Hansard* ((1839) 9 Ad & El 1 at 107–108):

The House of Commons is not Parliament, but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law.

For present purposes we would replace the word ‘resolution’ with ‘privilege’

[44] Nor does the House of Lords’ more recent judgment in *British Railways Board v Pickin* ([1974] AC 765) assist the Prime Minister’s case. Unlike in *Wauchope*, the validity of an Act was squarely being impugned in *Pickin*. The complaint made in *Pickin* as to the validity of the relevant legislation was that the (private) Act had only been enacted because legislators had been misled by fraudulent representations by the measure’s promoters. Although the Court of Appeal had indicated such scrutiny might be permissible in respect of private Acts ([1973] QB 219), that suggestion was unanimously rejected in the House of Lords. Their Lordships’ views were in part prompted by the obvious practical difficulties in deciding if a legislator’s vote was tainted by fraudulent misrepresentation, but the dominant concern was one of constitutional principle. As Lord Morris of Borth-y-Gest concluded:

The question of fundamental importance which arises is whether the court should entertain the proposition that an Act of Parliament can so be assailed in the courts that matters should proceed as though the Act or some part of it had never been passed. I consider that such doctrine would be dangerous and impermissible. It is the function of the courts to administer the laws which Parliament has enacted. In the processes of Parliament there will be much consideration whether a Bill should or should not in one form or another become an enactment. When an enactment is passed there is finality unless and until it is amended or repealed by Parliament; ([1974] A.C. 765 at 788–789).

[45] But there is no equivalence between the legal question raised in *Pickin* and the issue before us here. In *Pickin*, there was no statutory root whatsoever for the assertion that the House of Commons in enacting a private bill was obliged even to form a view on whether the promotion of the bill had been informed by fraud; and still less that there was any statutory basis for an assertion that the courts were competent to refuse to apply an Act found to have been enacted on such a basis. Indeed, even taken at face value, Lord Morris’ observation in *Pickin* is unhelpful to Sir Keir’s case. It can readily be argued that in this case ‘finality’ is provided by the 2024 Act until the 2024 Act is amended or repealed. And this begs rather than answers the question in issue here.

[46] Furthermore, as is made most clear in the judgment of Lord Simon, the basis for the Court’s conclusion was that: ‘the issues would not be fairly tried without

infringement of the Bill of Rights 1688 and of that general parliamentary privilege which is part of the law of the land'; ([1974] AC 765 at 799). Since the 2024 Act has in the clearest of terms instructed us that neither the Bill of Rights nor parliamentary privilege apply to actions brought under its provisions that rationale has no purchase here.

[47] During argument it became clear that one aspect of the way Mr Johnson puts his case is essentially this. That the entrenchment provided for in the 2024 Act is not seeking to control Parliament; it is seeking to control the component *and subordinate* institutions which together comprise Parliament and in so doing is *redefining* 'Parliament' for particular legislative purposes. The privileges of each House, and the immunity from judicial scrutiny which the Houses enjoy in respect of their internal proceedings bestowed by Art 9, exist at the sufferance of Parliament. And in the 2024 Act Parliament has chosen, and Mrs White apologises for labouring the point, has chosen with 'meticulous precision' to curtail that autonomy. This, Mrs White submits, is the principle at the heart of Sir Ivor Jennings' 'manner and form' thesis and its subsequent reformulation by Professor Heuston. We shall return to this matter below in discussing the relevance of several well-known Commonwealth authorities.

### **Immunity from implied repeal – the *Ellen Street Estates* case**

[48] Sir Keir has also taken the Court to the judgments of Maugham L.J. and Scrutton L.J. in the Court of Appeal in *Ellen Street Estates v Minister of Health* ([1934] 1 KB 590). He offers us those judgments as authority for the proposition that it is not within Parliament's competence to create legally enforceable rules which determine the ways in which Parliament must express itself in subsequent legislation in order to achieve particular specified objectives. Per Maugham L.J.:

The Legislature cannot, according to our constitution, bind itself as to the *form* of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature. ([1934] 1 KB590, at 597; emphasis added).

For Scrutton L.J., the suggestion that Parliament had this capacity was:

[A]bsolutely contrary to the constitutional position that Parliament can alter an Act previously passed, and it can do so by repealing in terms the previous Act – Mr. Hill [counsel for *Ellen Street Estates*] agrees that it may do so – and it can do it also in another way – namely, by enacting a provision which is clearly inconsistent with the previous Act. ([1934] 1K.B. 590, at 596–597).

[49] Sir Keir's proposition has long been another staple ingredient of our orthodox constitutional diet. The defendant's skeleton argument has taken us to various subsequent judgments in the senior courts and to academic analyses which endorse the comments made by Maugham and Scrutton L.J.J.. It does however appear to us that, like *Wauchope*

and *Pickin*, the significance of the *Ellen Street Estates* judgment has been rather exaggerated or misrepresented. Sir Keir's reliance on *Ellen Street Estates* is problematic in two senses.

[50] The first difficulty is case-specific. Sir Keir could not persuade us that s.7 of the Acquisition of Land Act 1919 could credibly be construed as evincing a legislative intent to safeguard any of that Act's provisions from implied repeal or amendment by a subsequent statute. S.7's words simply cannot bear such a meaning:

**7.— Effect of Act on existing enactments.**

(1) The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect . . . .

The very heading of s.7 strongly negatives any such assumption. Neither can we find any express indication in s.7 nor any other part of the 1919 Act that legislators were seeking to render s.7 immune to implied repeal.

[51] We also (exercising the broad discretion created by s.8(3) of the 2024 Act) invited counsel to direct us to any ministerial statements made during the 1919 Act's passage which would suggest that such an intention was in the mind of the Lloyd George government when promoting the bill. Apparently nothing of the sort could be found in *Hansard*.

[52] Close reading of the judgment makes it abundantly clear that such a proposition was merely the hopelessly optimistic and ill-founded submission of counsel for the property owner. There is nothing in s.7's text which remotely approaches the 'meticulous precision' required as to the 'form' of subsequent legislation required by ss 2–5 of the 2024 Act. The comments of Maugham and Scrutton L.JJ., clear and forceful as they are, are also merely obiter, and address a problem with which the Court of Appeal was not actually presented.

**Immunity from implied repeal – *Factortame (No.2)* and 'constitutional statutes'**

[53] The second problem is more generic in character, and of more recent vintage. In a very short space of time we have accepted that our constitution plays host to a number of 'constitutional statutes'. One contention made in respect of such 'constitutional' statutory provisions is that they are immune to implied repeal or amendment; or that, to frame the point rather differently, they can be amended or repealed only by subsequent legislation drafted in a linguistic form which identifies that outcome in express terms. This principle has rapidly become a new orthodoxy. A decade ago, in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* ([2014] UKSC 3; [2014] 1 WLR 324) Lord Neuberger could state quite uncontroversially that:

207 The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of

Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list.

We now also accept that we recognise certain 'constitutional rights' which exist at common law and which can only be overridden or abridged by statutory provisions which evince such an intention in similarly express terms.

[54] In respect of the issue before us today, this line of judicial authority should be treated with care. In many of these cases, (oft-quoted authorities being *Raymond v Honey* [1983] 1 AC 1; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115; *R v Lord Chancellor, ex parte Witham* ([1998] Q.B. 575; *R (Cart) v Upper Tribunal (Public Law Project and another intervening)* [2011] UKSC 28; [2012] 1 AC 663); *Kennedy v Charity Commission* ([2014] UKSC 20; [2014] 2 W.L.R. 808; and *R (Unison) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] UKSC 51; [2020] AC 869) what has been in issue is whether a government body can achieve a certain objective. The question then arising is whether the statutory power which the government invokes to justify its actions is defined with sufficient clarity to overcome the obstacle created by the 'constitutional statute' or the common law 'constitutional right'.

[55] But these are cases concerned with identifying the limits of executive authority. They exist in the realm of administrative law, and as such they may properly be seen as an exercise of the courts' undoubted capacity at common law to develop existing grounds of judicial review of executive action. We consider this area of our constitutional law is now sufficiently well-grounded to require no further elaboration.

[56] Important though these developments are, they have little relevance to the present matter. As Ms Green submits for the Prime Minister, such judgments cannot be taken as affirming the proposition that *Parliament itself* is subject to such constitutional restraints. Mr Johnson places no reliance on such authorities, beyond suggesting they support the general and uncontentious notion that our system of public law is not static. Nor have the parties suggested that this is a case in which the Court should further consider the implications of some of the propositions advanced in *R (Privacy International) v Investigatory Powers Tribunal* ([2019] UKSC 22; [2020] AC 491), and in particular the suggestion that courts might refuse to apply legislation which appeared egregiously inconsistent with long-established understandings of the principle of the rule of law.

[57] This case does not present any conflict between statute and the common law, or to put the matter in more abstract terms, between parliamentary sovereignty and the rule of law. The conflict which is before us is between two differently constituted versions of Parliament. Consequently, counsel have devoted much attention to the House of Lords' judgment in *Factortame (No.2) (R v Transport Secretary, ex parte Factortame Ltd (No.2))* [1991] 1 AC 603). As we noted above (at para 27), Professor Wade regarded this decision as tantamount to a 'revolution'. The presumed nature of that revolution,

the presumed ratio of *Factortame (No.2)*, was that the courts would not apply domestic legislation inconsistent with directly effective European Community (and subsequently Union) law unless that domestic legislation evinced in express terms an intention to override such Community law; or, in other words, that the doctrine of implied repeal was no longer applicable to directly effective Community law.

[58] *Factortame (No.2)* was entirely clear that this constitutional innovation had been introduced by Parliament in the European Communities Act 1972: it was not a development of the common law nor a direct application of the European Court of Justice's *effet utile* jurisprudence. Nor, as has sometimes been suggested, was the Court offering merely an unusual principle of statutory *interpretation*: what was in issue in *Factortame (No.2)* was the question of the *disapplication* of unambiguous statutory provisions. As Lord Bridge put it:

Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty (Cmnd. 5179-II) it 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. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law . . . . Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy; ([1991] A.C. 603 at 658–659).

[59] Sir Ivor Jennings we suspect would have characterised the judgment as a vindication of his 'manner and form' theory rather than a 'revolution'. *Factortame (No.2)* evidently tells us that Parliament in 1972 had managed to 'entrench' the provisions of that Act. The 'ordinary way' of legislating would no longer suffice to empower Parliament to override directly effective provisions of Community law. The nature of the departure from 'the ordinary way' of legislating was seemingly very modest. A particular *form* of words would be required, but beyond that the *manner* of the lawmaking process did not have to be altered. This appears to be the view taken of the judgment even by the most learned of commentators; (see for example P Craig, 'Britain in the European Union' p102, in J Jowell and D Oliver (eds) *The Changing Constitution* (Oxford University

Press, 5th ed (2004)): '[I]f Parliament ever does wish to derogate from its Community obligations then it will have to do so *expressly and unequivocally*'; (original emphasis)).

[60] The correctness of the House of Lords' analysis in *Factortame (No.2)* was not questioned in subsequent judicial decisions. Nor was the judgment overturned or qualified by subsequent legislation. To the contrary, the Court's conclusion was endorsed by Parliament both in the European Union Act 2011 s.18 and in the European Union (Withdrawal) Act 2018, s.1 of which was titled 'Repeal of the European Communities Act 1972' and which provided that 'The European Communities Act 1972 is repealed on exit day'. It is difficult to imagine a form of words more 'express and unequivocal' as to Parliament's intentions.

[61] It is perhaps unfortunate that the Court in *Factortame (No.2)* did not identify precisely the provisions of the 1972 Act which produced this hitherto unorthodox redefinition of Parliament's sovereign lawmaking power. Within s.2(4) one finds the proviso that statutory provisions whenever enacted were to be 'construed and have effect' subject to the forgoing provisions of that section, the most germane of which for present purposes was s.2(1) which drew the European Court of Justice's *effet utile* jurisprudence into the domestic legal system. Whether the Court's conclusion was rooted in the 'have effect' instruction, or in a more purposive reading of ss.2–3 of the Act, or in a combination of such literal and purposive approaches to statutory interpretation was not made clear in *Factortame (No.2)* itself. Certainly the 1972 Act does not identify with the 'meticulous precision' the consequence which it was held in that judgment to have.

[62] The Prime Minister does not invite the Court to re-evaluate the notion that our constitution recognises constitutional statutes which are immune to implied repeal. Nor does he question the correctness of *Factortame (No.2)* and the subsequent characterisation of the 1972 Act as possessing 'constitutional' status. His submissions are rather threefold. Firstly, that the 2024 Act cannot properly be regarded as a 'constitutional statute' at all. Secondly, that if the 2024 Act is so regarded, then the form of words used in the 2025 bill is sufficiently obvious in its meaning to satisfy any requirement of express repeal. Thirdly, most significantly, that the only form of 'entrenchment permissible within our constitution is the prohibition of implied repeal; that Parliament may create legally enforceable rules as to the *form* (or if one prefers the text) of subsequent legislation, but not (as the 2024 Act purports to do) as to the *manner* (concerning such matters as enhanced parliamentary majorities or the use of referendums) of the lawmaking process.

[63] The judgments of the higher courts which embrace the concept of 'constitutional statutes' have not provided a watertight guide for determining whether an Act (or particular provisions within it) should be accorded 'constitutional' status. Laws L.J.'s initial formulation of the principle in *Thoburn v Sunderland City Council* stated that:

In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some overarching manner, or (b) enlarges or diminishes the

scope of what we would now regard as fundamental constitutional rights; (a) and (b) are of necessity closely related; it is difficult to think of an instance of (a) that is not also an instance of (b); ([2002] EWHC 195 (Admin); [2003] QB 151 at [62]).

[64] Sir Keir accepts that the 2024 Act does indeed: ‘condition the legal relationship between citizen and state in some overarching manner’. But that quality, he suggests is a necessary and not a sufficient test for ascribing ‘constitutional status’ to statutory provisions. Account should also be taken of the political circumstances which led to the measure’s enactment, and particularly the extent to which it enjoys non-partisan (in the cross-party political sense) support.

[65] While we acknowledge the ingenuity of these submissions, we are being asked here to step more into the realm of constitutional politics than constitutional law. Within the former context, the substantive effect of the legislation obviously provides an important basis to draw a line between ‘constitutional’ and ‘ordinary’ statutes. Similarly, the circumstances of an Act’s passage, with particular emphasis laid on the size of the parliamentary majorities approving it, the extent to which the measure attracted multi-party support, and whether the policies enacted in the legislation had also been approved in a referendum or were clearly put to the electorate in an election campaign, would be relevant matters. But we doubt that such factors lend themselves readily to producing an objective litmus test of ‘constitutional’ status which can properly be applied by a court. (The evaluative difficulty is obviously compounded by the fact that several of our ‘constitutional statutes’ – Magna Carta, the Bill of Rights 1689 and the Great Reform Act 1832 – emerged onto our constitutional landscape in eras which could not credibly be described as hosting a democratic polity as we now understand that term). These are simply not justiciable matters. As Professor Feldman has suggested (‘The Nature and Significance of Constitutional Legislation’ (2013) 129 *Law Quarterly Review* 343 at 357): ‘On reflection, it turns out to be unexpectedly tricky to separate constitutional from ordinary legislation’. That observation was made in the context of academic debate. To perform such separation in the context of litigation might on occasion, although not on this occasion, be even trickier.

[66] The 2024 Act does not expressly identify itself as being a ‘constitutional statute’, an omission which Sir Keir urges us to accept as confirming that the 2024 Act lacks that status. The argument is that since it would have been an easy matter for Parliament to have attributed that status to the 2024 Act, Parliament’s decision not to do so should be taken to mean that the Act is an ‘ordinary’ statute. But the omission is not surprising given that none of the Acts hitherto recognised as being ‘constitutional’ self-describe themselves as such.

[67] We would not hesitate to conclude that the 2024 Act is a ‘constitutional statute’. If the incorporation of the myriad provisions of European Community (and subsequently European Union) law into our legal system effected by the 1972 Act lent *that measure* ‘constitutional’ status it is difficult to see that the exclusion of such law effected by the 2024 Act is not similarly significant.

[68] Were it necessary to decide the point, we would also conclude that the form of words used in the 2025 bill would satisfy any requirement of 'express repeal' in relation to any or all provisions of the 2024 Act. Sir Keir's assertion is that whether a statutory text is sufficiently 'express' to repeal or amend a 'constitutional statute' is a matter for the courts to determine. 'What could be more express' he asks 'than the form of words used in the 2025 bill?': those words being 'The Safeguarding of National Sovereignty Act 2024 is hereby repealed.' If this were a case where the question of the linguistic sufficiency of a form of words intended to effect express repeal of a statutory provision was a question arising at common law or to be deduced as a matter of interpretation from an inexplicit statutory text, we would not doubt that the phraseology used in the 2025 bill was adequate for that purpose.

[69] But no common law question arises here. Nor is there any difficult question of statutory interpretation. S.5 of the 2024 Act is meticulously precise as to the form in which repealing legislation must be expressed. Unless we are to ignore the Act's plain text or to lend that text a meaning so fantastic as to overstep all credible bounds of linguistic possibility – and neither step is one which this Court could legitimately take – we can reach no conclusion other than that a repealing bill must be drafted in the form that s.5 requires.

[70] As to Sir Keir's third assertion, we think it beyond argument that *Factortame (No.2)* is an authority for the proposition that Parliament acting in 'the ordinary way' has some capacity to empower the courts to prevent the implementation of subsequently passed statutory provisions which were enacted in 'the ordinary way'. As already observed, there appears to be an accepted consensus that *Factortame (No.2)* confirmed that the entrenchment effected by Parliament in the European Communities Act 1972 extended no further than restricting the scope of the doctrine of implied repeal.

[71] However we cannot find in the text of the European Communities Act 1972 (either in s.2 or elsewhere) any overt distinction being drawn by Parliament between implied and express repeal or amendment. Neither do we find any such distinction drawn in any of the judgments delivered in the House of Lords in *Factortame (No.2)* and the House of Lords' subsequent judgment in *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* ([1994] 1 AC 1). It may be that those judgments were taken to be an implicit endorsement of Lord Denning M.R.'s oft-quoted comments in *McCarthy v Smith* to that effect: 'Unless there is such an intentional and express repudiation of the Treaty, it is our duty [under the 1972 Act] to give priority to the Treaty'; ([1979] 3 All ER 325 at 329). Less attention has been given to Lord Denning's final judgment in that litigation, when he did not make any reference to an implied or express repeal dichotomy:

It is important now to declare—and it must be made plain—that the provisions of article 119 of the E.E.C. Treaty take priority over anything in our English statute on equal pay which is inconsistent with article 119. That priority is given by our own law. It is given by

the European Communities Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it; ([1981] QB 180 at 200).

[72] In *Thoburn*, Laws L.J. asserted that the protection afforded to the 1972 Act against implied repeal was an aspect of the common law ([2003] QB 151 at paras 60–62). With respect, while that conclusion has been accepted in respect of many ‘constitutional statutes’ for the purposes outlined above, it is not consistent with the reasoning advanced by the House of Lords in *Factortame (No.2)* to explain the unorthodox impact of the 1972 Act. Laws L.J. also suggested that his conclusion as to the effect of the common law was supported by the House of Lords judgment in *R v Secretary of State for Transport, ex parte Factortame* ([1990] 2 AC 85) (hereafter *Factortame (No.1)*). But as he acknowledges ([2003] QB 151 at para 61) that point was not even argued still less decided in *Factortame (No.1)*. We can perhaps leave to legal scholars a definitive inquiry into the question of how it was that the notion that *Factortame (No.2)* had held that the 1972 Act abolished only the doctrine of implied repeal in respect of directly effective Community law first appeared in the judgments of His Majesty’s courts and the academic press. But this question need not to be resolved in this case.

[73] What appears to us to be the crucial significance of *Factortame (No.2)* for present purposes is its confirmation that the permanence of ‘the ordinary way’ of lawmaking was not beyond Parliament’s control. But if Parliament may create very modest forms of judicially enforceable entrenchment, then on what basis is it to be assumed that Parliament cannot also create less modest, indeed quite immodest, forms of judicially enforceable entrenchment as well? As Mr Johnson qua Prime Minister asked in the Commons’ second reading debate of the 2024 Act’s passage:

The House of Lords having accepted in the *Factortame* case that the dam of Diceyan orthodoxy had been breached once by the 1972 Act, is it for the Court to shove its judicial fingers into any additional legislative holes in that edifice that this Parliament has chosen to drill? (House of Commons Debates, 28 February 2024 col. 689).

Mr Johnson’s answer was ‘No’. And that is the position urged upon this Court by his counsel in respect of the entrenchment provisions in the 2024 Act.

[74] Sir Keir’s response is rooted in this Court’s judgment in *R (on the application of Miller) v Prime Minister* (2019 UKSC 41; [2020] AC 373; hereafter ‘*Miller (No.2)*’). We return to this argument at later stage, since Mr Johnson’s case also rests on several other lines of authority in which the relevant entrenchment devices placed more substantial obstacles in the path of enactment of valid legislation than would be occasioned by a mere requirement that subsequent Acts deployed particular forms of words.

### The *Trethowan* and *Harris* cases

[75] Sir Ivor Jennings and Professor Heuston placed considerable reliance in offering their critique of Professor Dicey's analysis on two cases arising in Commonwealth jurisdictions; these being respectively *Attorney-General of New South Wales v Trethowan* ([1930] 31 SR (NSW) 183 (New South Wales Supreme Court); (1931) 44 CLR 394 (High Court of Australia); [1932] A.C. 526 (Privy Council)) and *Harris v Donges (Minister of the Interior)* ([1952] 1 The Times Law Reports 1245; Appellate Division of the Supreme Court of South Africa).

[76] The *Trethowan* episode has obvious parallels, both political and legal, to the circumstances triggering this litigation. In 1929, the then Conservative government which commanded majorities in the (elected) Legislative Assembly and (appointed) Legislative Council anticipated that it would be defeated by the Labour Party in the forthcoming 1930 Assembly general election. That government also anticipated that a new Labour government would persuade the Governor to exercise his statutory powers to appoint such additional members to the Legislative Council as would give the new government a majority there as well. It was expected that in such circumstances a Labour government would promote a bill to abolish the Legislative Council. In an attempt to safeguard the existence of the Legislative Council, a bill was enacted shortly before the 1930 election which amended the New South Wales Constitution (then contained in the Constitution Act (NSW) 1902, but initially created by Imperial legislation in the Constitution Act (New South Wales) 1855). The amendment (s.7A) required both that a bill seeking to abolish the Legislative Council could not be sent for the royal assent until the bill was approved by a bare majority in a referendum (s.7A(2)), and that a bill seeking to repeal that entrenchment provision could itself not be sent for the royal assent until that bill had also received bare majority support in a referendum (s.7A(6)). This is an example of so-called 'double entrenchment' (ie that the entrenching proviso is itself entrenched), a mechanism which first appeared in British constitutional law in the South Africa Act 1909, which we discuss below. The Labour government, having won the election and secured a majority in both Houses, promoted bills to repeal both s.7A(2) and s.7(A)6 which passed both Houses, but indicated it had no intention to hold a referendum before sending the bills for assent.

[77] *Trethowan* (Sir Arthur Trethowan, the plaintiff, being a member of the Legislative Council) originated in the New South Wales courts as an application for an injunction against the President of the Legislative Council to prevent him sending the repeal bills to the Governor for the royal assent until such time as the bills had been approved in a referendum. The amendments to the Constitution Act 1902 did not make any provision as to how the substantive terms of s.7A were to be enforced, and the initial claim was squeezed into the State courts' general jurisdiction under the Equity Act 1913. In the High Court of Australia ((1931) 44 CLR 394), permission to appeal was granted on the basis that the court would consider only an essentially fictional set of circumstances; namely if the bills

promoted by the Labour government had been ‘passed’ in ‘the ordinary way’, would the courts hold such ‘Acts’ invalid? In the event, the Court also considered whether the progress of a yet to be enacted bill could be enjoined. The Privy Council ([1932] AC 526) also addressed both issues, but appeared to decide the case on the basis of whether or not it would be unlawful for a repealing bill to be presented for assent if it had not previously been approved in a referendum? ([1932] AC 526 at 540–541).

[78] The Privy Council’s answer to that question was ‘Yes’. Lord Sankey’s judgment identified s.5 of the Colonial Laws Validity Act 1865 as the ‘master section’ ([1932] AC 526 at 539). S.5 provided inter alia that a representative colonial legislature as defined by s.1 of the Act (which status the New South Wales legislature was taken to possess) might enact measures affecting its own ‘constitution, powers and procedures’ so long as such legislation:

shall have been passed in such manner and from as may from time to time be required by any Act of Parliament, letters patent, Order in Council or colonial law for the time being in force in the said colony.

S.7A of the Constitution Act 1902 was undoubtedly a ‘colonial law’; and it was equally clearly then ‘in force in the said colony’. It therefore placed legally enforceable restrictions on the manner in which an Act which abolished the Legislative Council or an Act which repealed s.7A could be passed.

[79] The Privy Council did not give any detailed prescription as to how the principle it had enunciated would be enforced in New South Wales. But by the time judgment was given, the Labour government was no longer in office, and the new government had no intention of continuing the bills’ passage. There was thus no need for a remedy to be fashioned.

[80] The *Trethowan* judgments have frequently been dismissed as irrelevant to any analysis of whether the United Kingdom’s Parliament can empower the courts to invalidate an ‘Act’ which has not been passed in accordance with a statutorily specified manner and form, or to prevent the passage of a bill which will not comply with such requirements. The obvious rationale for that dismissal was presented by Professor Wade, who argued: ‘That case may be disposed of in a moment’ ([1955] op. cit. p182), as doing nothing more than illustrating the prosaic points that a statutory body (which the New South Wales legislature was, but which the United Kingdom’s Parliament was not) could be restrained by the courts from exercising a power which it did not possess and that any ‘Act’ thereby produced would be invalid.

[81] The Privy Council in *Trethowan* did not speculate on the relevance of the case before it to the question of entrenchment in the United Kingdom context. Indeed, the judgment is very concise, spanning just a few pages and citing no authority other than the High Court’s judgment in *Trethowan* itself. Their Lordships were invited by counsel to offer opinions on: ‘many different situations which might arise’, but Lord

Sankey firmly declined to do so ([1932] AC 526 at 539). It is therefore entirely correct to say that there is nothing in *Trethowan* which contradicts the use made of the judgment by Sir Ivor Jennings in his 'manner and form' theory in relation to the United Kingdom Parliament. But neither is there anything in the judgment to endorse it.

[82] In Mrs White's submission, the most important judicial observation in *Trethowan* comes from Dixon J.'s judgment in the High Court. Having noted that recourse to Diceyan orthodoxies as to the power of the United Kingdom's Parliament always to be able to legislate in 'the ordinary way' were of little assistance in determining whether New South Wales' courts would enforce entrenching legislation, Dixon J. continued:

It must not be supposed, however, that all difficulties would vanish if the full doctrine of parliamentary supremacy could be invoked. An Act of the British Parliament which contained a provision that no Bill repealing any part of the Act including the part so restraining its own repeal should be presented for the royal assent unless the Bill were first approved by the electors, would have the force of law until the Sovereign actually did assent to a Bill for its repeal. In strictness it would be an unlawful proceeding to present such a Bill for the royal assent before it had been approved by the electors. If, before the Bill received the assent of the Crown, it was found possible, as appears to have been done in this appeal, to raise for judicial decision the question whether it was lawful to present the Bill for that assent, the Courts would be bound to pronounce it unlawful to do so.

Moreover, if it happened that, notwithstanding the statutory inhibition, the Bill did receive the royal assent although it was not submitted to the electors, the Courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside; ((1931) 44 C.L.R. 394 at 426).

[83] Mr Johnson's argument is in part that Parliament has the capacity to control the 'elements' of which it is composed, and in doing so can redefine itself in a fashion which places what Dixon J. calls the 'supreme legislative power' in an institutional setting quite distinct from that used in enacting statutes in 'the ordinary way'. Dixon J. is simply saying here that this is an arguable point in the United Kingdom, but his observation stands as a corrective to any simplistic assumption that the High Court in *Trethowan* dismissed the idea as outlandish.

[84] The judgment of the Appellate Division of South Africa's Supreme Court in *Harris* was also dismissed by Professor Wade as irrelevant to any analysis of the entrenchment issue in the United Kingdom ([1955] op. cit. pp 173, 191–193). Given subsequent developments in our own constitutional jurisprudence that conclusion merits some reconsideration.

[85] In enacting the South Africa Act 1909, the Imperial Parliament created a bicameral legislature with a House of Assembly and a Senate, each elected in different fashions, for the then new British colony of South Africa. The Act permitted South Africa's

Parliament to make law in ‘the ordinary way’, save for several express exceptions. The exceptions pertinent in *Harris* were in s.35, which provided that any law which affected a person’s voting rights on the basis of race had to be passed by a two thirds majority of the House and Senate sitting in joint session, and in s.152, which provided – this being a form of ‘double entrenchment’ – that s.35 (and s.152 itself) could only be repealed by the same unicameral enhanced majority method. No changes were made to these provisions when South Africa became an independent nation following enactment of the Statute of Westminster 1931.

[86] In 1950 the South African government promoted a Separate Representation of Voters bill which purported to create a separate electoral roll for so-called ‘Cape Coloured’ voters. The bill was ‘enacted’ in ‘the ordinary way’, presumably because there was no prospect of the government securing a two-thirds majority for the bill.

[87] Centlivres C.J.’s sole judgment for a unanimous court in *Harris* rested in large part on the importance of recognising that the notion of legal sovereignty was a concept that bore two quite distinct meanings. The first concerns the sovereignty of a State vis a vis other nations; the second concerns the location of sovereign lawmaking power within that State:

A State can be unquestionably sovereign although it has no legislature which is completely sovereign ... In the case of the Union, legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under s.63 and the proviso to s.152 ...

This emphasizes that the only Legislature which is competent to pass laws binding in the Union is the Union Legislature. There is no other Legislature in the world that can pass laws which are enforceable by Courts of law in the Union ... Consequently the Union is an autonomous State in no way subordinate to any other country in the world. To say that the Union is not a sovereign State, simply because its Parliament functioning bicamerally has not the power to amend certain sections of the South Africa Act, is to state a manifest absurdity. Those sections can be amended by Parliament sitting unicamerally. The Union is, therefore, through its Legislature, able to pass any laws it pleases ... ([1952] 1 The Times Law Reports 1245).

Within South Africa, therefore, sovereign lawmaking power was divided between ‘a’ Parliament which existed in two different forms, depending upon the content of the law which ‘Parliament’ was seeking to enact.

[88] This, Mr Johnson contends, is precisely what the 2024 Act has done in respect of the United Kingdom’s Parliament. Enforcement of the 2024 Act would have no effect whatsoever on the sovereignty of the United Kingdom nor on the sovereignty of its Parliament. Adapting Centlivres CJ’s terminology: The United Kingdom is through its legislature able to pass any law it pleases, including a law to repeal the 2024 Act. All that has happened is that Parliament has altered its own lawmaking identity for the purposes of enacting legislation dealing with particular substantive matters. This is indeed in Mrs White’s submission just what the House of Lords in *Factortame (No.2)* concluded

that Parliament had done in enacting the European Communities Act 1972. That alteration was admittedly one of form or text, rather than of process. But we need not look far Mrs White tells us to find well-established authority confirming that our Parliament can alter its lawmaking identity in respect of matters of process as well.

### **The significance of *Jackson***

[89] In Mr Johnson's submission, the reason that *Harris* and *Trethowan* now have much more cogency in the United Kingdom context – and the reason that we should now attach much more force to Sir Ivor Jennings 'manner and form' thesis than would have been appropriate 60 or even 30 years ago – is that the House of Lords in *Jackson* has told us that the United Kingdom's 'Parliament' can have multiple identities. Parliament now exists as a lawmaker in 'the ordinary way'; it exists as a lawmaker in the 'money bill way' provided for in the Parliament Act 1911s.1 and it exists as a lawmaker in the 'other public bill way' provided for in the Parliament Act 1911 s.2 (as amended by the Parliament Act 1949). All three lawmakers are 'Parliament'. We might also add, the point not being relevant in *Jackson*, that by this time our constitution also recognised a fourth 'Parliament', that being what we might call the *Factortame* (No.2) Parliament in the sense we have identified above.

[90] Moreover, to say that the Parliament Act 1911 simply 'redefined Parliament downwards' (as Baroness Hale put it in *Jackson*; para 5 above) is not quite correct. The Act's time limit provisos, in respect both of money bills and other public bills, are seemingly an 'upwards redefinition'; (as is the redefinition effected by the 1972 Act). The 1911 Act provides that Parliament consisting of the Commons and the Monarch is not competent to enact bills almost instantaneously, which is something that Parliament consisting of the Commons, Lords and Monarch can do. The true effect of the 1911 and 1949 Acts is in one aspect to *reduce* the political obstacles to enactment of legislation; but in another aspect to *increase* them.

[91] In the course of argument, we invited counsel to suggest how a court should respond to a claim which sought to injunct presentation of a money bill to His Majesty for assent before the one month period provided for in s.1(1) of the Parliament Act 1911 had expired. Counsel were happily of one mind on this question; as are we. Such litigation would be precluded by Art 9 of the Bill of Rights which, given its recently acquired 'constitutional status', could not have been impliedly disapplied by the 1911 Act.

[92] Counsels' opinions were however divided in response to our next question, which was 'What should a court do in such circumstances if Parliament had enacted a measure equivalent to s.16 of the 2024 Act in the Parliament Acts?'. On Mr Johnson's case, a court should accept jurisdiction and grant an injunction to prevent premature presentation of the bill. And that is, Mrs White insists, this case as well. Sir Keir's reply, as best we understand it, is that if Parliament had intended there to be a judicial remedy in such circumstances it would have provided that remedy in clear terms. But that is of course

just what Parliament has done in the 2024 Act. Consequently, Mr Johnson urges us to accept that *Jackson* provides the Court with the final step it needs to take to resolve this case in his favour.

[93] The question posed by Baroness Hale was answered in *Jackson*, of course on an obiter basis, by Lord Steyn:

[81] ... But, apart from the traditional method of law making, Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for a specific purpose. Such redefinition could not be disregarded.

Lord Hope echoed this point in rather wider terms:

[104]. ... Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.

[105] For the most part these qualifications are themselves the product of measures enacted by Parliament. Part I of the European Communities Act 1972 is perhaps the prime example.

[94] The 2024 Act is demonstrably a measure enacted by Parliament which qualifies that notion of absolute sovereignty in a particular way. The 1972 Act having been repealed, the 2024 Act might now be thought to be ‘the prime example’ of this process. It may be that the qualification enacted in 2024 could be judicially disregarded if the barriers erected by Art 9 and parliamentary privilege remained in place, and if the 2024 Act did not specify the means for enforcement of the qualification. But the 2024 Act both identifies those potential obstacles and removes them in the clearest terms.

[95] Sir Keir does not assert that *Jackson* was wrongly decided and that this Court should reverse that judgment, on the basis that Professor Wade’s characterisation of the Commons and Monarch qua lawmaker as simply a delegated legislature was and remains correct; ([1955] op. cit. pp 193–194). He insists however that *Jackson’s* relevance is and must be limited (save for the caveat as to implied repeal) solely to ‘downwards’ redefinition of Parliament’s lawmaking identity and processes. And the reason for this, it is said, is found in the Supreme Court’s judgment in *R (on the application of Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373; (hereafter *Miller (No.2)*).

### **The significance of *Miller No. 2***

[96] *Miller (No.2)*’s relevance to this matter is not immediately apparent. While that judgment engendered some political controversy, and some fiercely critical analysis

in the academic press, it is properly characterised as applying the orthodox constitutional principle that the Crown's prerogative powers are normatively inferior to laws enacted by Parliament, and consequently those prerogative powers cannot be used to prevent Parliament enacting legislation or preventing the House of Commons and the House of Lords as component parts of Parliament from holding government ministers to effective account. In Ms Green's ingenious argument for the Prime Minister, it is that first point, that Parliament cannot be prevented from enacting legislation, that is in issue here.

[97] In her judgment in *Miller (No.2)*, Baroness Hale observed that:

39. Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.

41. Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply ...

[98] The Prime Minister's case is that the 'Crown in Parliament' has since 1688 produced our country's 'supreme law' through a bare majority in each House and the royal assent. The 'fundamental principle' of legislative sovereignty is said to be rooted unchangeably in this principle of bicameral bare majoritarianism. The Prime Minister accepts that this principle is not threatened by an entrenchment device which requires merely that legislation which seeks to repeal a 'constitutional statute' does so in express terms. Nor is it threatened by the 'downwards' redefinition of Parliament effected by the 1911 and 1949 Acts. The 2024 Act however goes far beyond mere linguistic qualification of Parliament's power. If the Court enforced the 2024 Act it would prevent Parliament legislating in a much more significant sense than if the Court had accepted the Johnson government's five week prorogation of the House of Commons and the House Lords was lawful.

[99] The submission made is in essence that Baroness Hale's assertion that this (bicameral bare majoritarianism) is a principle with which 'everyone ... must comply' embraces not just the government but also the courts and also Parliament itself. If this Court enforced the terms of the 2024 Act it would not be 'complying' with that fundamental principle. Indeed, to the contrary, the Court would be not just subverting but

effectively destroying that fundamental principle. In doing so, the Court would be turning the ‘Crown in Parliament’ into a legislature of limited competence and: ‘shirking the responsibility ... of upholding the values and principles of our constitution and making them effective’.

[100] As with the Prime Minister’s previously considered lines of argument, there are difficulties attending this submission. The first is that in *Miller (No. 2)* the Court did not face a question even remotely similar to the question which is before us today. The purported obstacle to the passage of legislation in the ordinary way which arose in *Miller (No.2)* was the Crown’s deployment of a common law power, not the clear and detailed provisions of an extant statute. Whether ‘Parliament’ might enact judicially enforceable legislation that altered its own identity for the purposes of enacting laws on particular matters was not a matter to which the Court in *Miller (No.2)* gave any attention.

[101] In a more abstract sense, Sir Keir asks us to accept that Parliament’s capacity to legislate in ‘the ordinary way’ is, in effect, beyond law. That is a conclusion that we simply cannot reach, for reasons already given. To do so would also require us to accept that the legislative functions of the House of Commons, House of Lords and Monarch as contributors to ‘the ordinary way’ are also beyond law. It would require us also to accept that both *Jackson* and *Factortame (No.2)* were wrongly decided. We see no basis for reversing either of those decisions.

### **‘Political’ questions**

[102] In his oral submissions the Prime Minister has also invited the Court to deny any effect to the 2024 Act on the basis of what he terms ‘legitimacy considerations’. These rather *ex tempore* submissions are offered in the alternative to the Prime Minister’s main line of argument, which is that *any* statutory attempt to require Parliament to depart from the ordinary way of lawmaking (other than requiring express repeal of ‘constitutional statutes’) is unenforceable. This secondary line of argument concedes the possibility of entrenching legislation being enforceable (and further concedes that such entrenchment may go beyond immunity from implied repeal to include such matters as enhanced majorities within the parliamentary process and/or the use of referendums) but denies that the 2024 Act can have that effect. This alternative proposition has three dimensions.

[103] The first arises from what Sir Keir terms the ‘transactional asymmetry’ between the nature of the entrenching provisions that the 2024 Act introduces and the manner in which that Act itself was enacted. Bluntly stated, the assertion is that the requirement that the 2024 Act can only be repealed by future legislation supported by 400 members of the House of Commons at third reading requires a much higher level of support than was achieved during the passage of the 2024 Act itself. A condition that at least 400 members support a bill requires a majority of at least 150. The third reading majority for the 2024 Act was 50. Furthermore, the 2024 Act requires a

(slightly) enhanced majority at a referendum for any repealing legislation to be valid, while the Act itself was not subject to that requirement.

[104] Sir Keir's second submission here is that there is a lack of what he calls 'electoral symmetry' between the 2024 Act and the 2025 bill. The 2024 Act was – and the claimant accepts this point – in no sense before the electorate at the 2019 general election. Nor in a more general vein was any question then raised about the possibility of a Johnson government promoting any form of entrenching legislation in relation to EU membership. In distinct contrast to this, the issue of repealing the 2024 Act through a statute passed 'in the ordinary way' was a prominent, perhaps indeed the dominant question put before voters by the opposition coalition parties in May 2024. It is said that the 2024 Act has no claim to legitimacy through electoral approval, while the 2025 bill very obviously does. This lack of electoral legitimacy, the Prime Minister asserts, suffices to make the Act unenforceable.

[105] The third contention is presented as something of a self-denying ordinance. Sir Keir asserts that if Mr Johnson is correct in his submissions, then he has succeeded in establishing that the current government, assuming that it can command the barest of majorities in the Commons and Lords, can promote entrenching legislation concerning any matter (other than those dealt with in the 2024 Act) secure in the knowledge that no court would enforce any subsequently enacted statute which was not expressed in the form and passed in the manner that the entrenching legislation required.

[106] By way of example, Sir Keir suggests, Parliament might in 'the ordinary way' enact a statute which gives the ECHR direct effect in the United Kingdom's legal system, which subordinates this court to the ECtHR Grand Chamber and which provides that the Act itself may not be repealed or amended other than by a statute passed with a 4/5 majority in both Houses at third reading on two separate occasions which are at least two years apart. Such power, Sir Keir suggests, could be used for the most unscrupulous or radical of objectives: to rig the electoral system in a fashion which keeps an unpopular government in office; or to create a *de jure* federal system of governance within the United Kingdom; and to make it in effect impossible for any future Parliament to repeal or alter those laws.

[107] These first two points raised by Sir Keir are undoubtedly matters which would provoke extensive discussion in academic and political fora; and we have derived much assistance on this issue from the arguments recently offered on this question by Professors Gordon and Goldsworthy (J. Goldsworthy, 'The "Manner and Form" Theory of Parliamentary Sovereignty' [2019] *Public Law* 586; M. Gordon, 'The Manner and Form Theory of Parliamentary Sovereignty: a Response to Jeffrey Goldsworthy' [2019] *Public Law* 603). But we have great difficulty in seeing how Sir Keir's principles could ever be lent any justiciable character. We cannot as a court distil legal rules from the political ether.

[108] Any entrenchment device ‘defines Parliament upwards’, in that the very purpose of such a device is to place greater obstacles in the path of the enactment of a statute dealing with a particular matter than prevail in relation to an Act passed in ‘the ordinary way’. Sir Keir’s concept of ‘transactional symmetry’ asks us to accept that while in principle some degree of entrenchment is an end within Parliament’s grasp, the 2024 Act has in practice overstepped the boundaries of what is possible. Sir Keir does not suggest that entrenchment is permissible only if the entrenching statute and the entrenchment it creates display perfect congruence; ie that a entrenching device requiring an enhanced majority at some stage of a subsequent statute’s parliamentary passage received the same (or a greater) majority at that stage of its own enactment; or that an entrenching device requiring a referendum was itself approved in a referendum. His submission is that any departure from the ‘ordinary way’ provided for in the entrenching statute must be no more onerous in terms of political feasibility than was achieved in the entrenching legislation itself.

[109] This line of argument presents obvious and substantial evaluative difficulties. Would a requirement for a bare majority referendum with no minimum turnout requirement in addition to parliamentary passage in ‘the ordinary way’ be a more substantial obstacle than requiring a 55% majority at one or more stages of a bill’s Commons passage? Is requiring a two thirds majority at both second and third reading stage in the Commons more onerous than requiring a three quarters majority but only at third reading? How are we to calibrate the degree of difficulty inherent in legislating in a particular form of words? Or compare that obstacle to one which might require that a particular measure be passed in the ordinary way but in two successive parliamentary sessions at dates more than a year apart. These are impossible questions for this Court – for any court – to answer.

[110] The same difficulties attend Sir Keir’s notion of ‘electoral symmetry’. It is certainly true that the provisions of the 2024 Act were not put before the electorate in 2019. It is equally true that the provisions of the 2025 bill were exhaustively debated during the 2024 election campaign. But for the purposes of creating a legal rule, the notion of an electoral mandate deriving from the outcome of a general election cannot be reduced to a single matter. Votes are cast on the basis of each voter’s calculations, whether well-informed, uninformed or misinformed, on myriad factors. Electoral success may very well provide a basis to attach political legitimacy to proposed legislation; it is too imprecise a concept to provide the source for a legal rule.

[111] Counsel for Mr Johnson appear to have been somewhat taken aback by Sir Keir’s third suggestion. As Ms Black put it in her opening submissions, the claimant’s case is that the 2024 Act is a sui generis phenomenon, and has that status because of both the immense political significance of the issue to which it is addressed and the very careful way in which it is drafted. Should this Court resolve this matter in Mr Johnson’s favour no precedent would be created in respect of the type of legislation to which the Prime Minister has alluded. An additional rebuttal of Sir Keir’s proposition, somewhat faintly

argued it appeared, was that the possibility that a power might be abused in a political sense could not be a proper basis for a court to assume that the power did not actually exist. This too is a matter with which we cannot sensibly engage in this litigation. We offer no view here as to the legal merits of any attempt to repeal in 'the ordinary way' such legislation should it ever be enacted.

### **Conclusion**

[112] In short terms therefore, our conclusion is that in the light of the House of Lords' judgments in *Factortame (No.2)* and *Jackson* we must accept that Parliament is competent to create judicially enforceable redefinitions of the way in which the House of Commons, the House of Lords and the Monarch contribute to the lawmaking process. Those redefinitions may be for any or all legislative purposes. They may be effected in either a 'downwards' or an 'upwards' direction. Whether 'Parliament' has succeeded in so doing in any purported 'entrenchment' statute will manifestly be a matter for the courts to determine as a matter of construction as to the true meaning of the statute concerned. In respect of the question before us today, we are persuaded that the meticulous precision with which the 2024 Act has been drafted with respect both to the substance of the entrenching provisions themselves and the mechanisms through which those provisions are to be enforced empowers this Court to injunct the further progress of the 2025 bill.

[113] Our conclusion will likely be seen as a vindication of Sir Ivor Jennings 'manner and form' thesis in respect of parliamentary sovereignty. We leave the accuracy of any such characterisation to be explored in the learned commentaries which this judgment will likely provoke. We see no need to offer a view on Mr Johnson's alternative submission that if the 'manner and form' thesis was regarded as inapplicable in these circumstances the Court should accept instead that the 2024 had triggered – sub silentio – a revolution in our constitutional order which our judgment should confirm.

### **Remedy**

[114] In closing his submissions, the Prime Minister indicated to the Court that if the claimant succeeded the government would immediately withdraw the 2025 bill. Sir Keir has confirmed today that such withdrawal will be effected tomorrow. Were it not for the proviso in s.12(1) of the 2024 Act, we would therefore see no reason to grant any relief. S.12(1)(b) does however require us to make an order, and we consequently do so in the following terms:

1. No person shall take any step whatsoever to continue the parliamentary passage of The European Union (Preparation for Re-Entry) Bill 2025.
2. The persons referred to in para 1 of this order shall be taken to include but are not limited to Her Majesty and any Minister of the Crown and any member or officer of the House of Commons or House of Lords.

We are not required by the 2024 Act to specify any sanctions which may be attached to any person who breaches this order and we see no need to do so.

[115] The Court is also required by s.15 to make what appears to us to be an essentially symbolic, indeed fictional, declaratory order which imagines that the 2025 bill had been ‘enacted’ in a form and through a manner which did not comply with the provisos of the 2024 Act. Counsel for the claimant were unable to enlighten us as to what useful purpose any such order would serve. But given the clear terms of s.15 we accordingly made a declaratory order that:

1. The European Union (Preparation for Re-Entry) Act 2025 is invalid ab initio.
2. The United Kingdom Safeguarding of National Sovereignty Act 2024 retains its full force and effect.
3. Any statutory provision or provisions passed after 1 May 2024 purporting to make the United Kingdom a member of the European Union or purporting to give effect in United Kingdom law to any provision of European Union law would be of no force or effect.

[116] This should not be taken as meaning however that we would necessarily make such an order in circumstances where a statute repealing the 2024 Act had been passed in ‘the ordinary way’ before any such litigation had commenced. That is not the case that is before us today.

[117] Shortly before our judgment was handed down this morning Mrs White invited the Court to exercise its power under s.8(3) and reconvene to hear argument on a further question. That question has arisen in Mrs White’s submission given the terms of two draft bills reportedly prepared by the government which were leaked last night to *The Times* newspaper and the BBC.

[118] Briefly stated, Mrs White submits that the first of these bills purports not to *repeal* the 2024 Act but to *amend* it. The purpose and effect of those amendments is, it is claimed by Mr Johnson, to alter all of what we have termed the 2024 Act’s entrenching provisions in such a way as to reduce the addenda made by those provisions to the ‘ordinary way’ of legislating so as to render any such entrenchment negligible in practical terms, thereby allowing for repeal of the 2024 Act and so restoring Parliament’s capacity to pass in ‘the ordinary way’ new legislation taking the United Kingdom back into the European Union..

[119] Mrs White has urged the Court to express the opinion that any such bill would fall within the scope of the 2024 Act, on the basis that the notion of ‘repeal’ in the 2024 Act should be taken as matter of construction to include what she terms the lesser concept of ‘amendment’. To conclude otherwise Mrs White asserts would render the judgment that the Court has reached in this matter worthless, since the government would easily be able to circumvent the entrenching provisions in the 2024 Act.

[120] It appears that the second leaked bill is intended to place the House of Commons' customary procedures and standing orders on a statutory basis. The bill – inter alia – reputedly empowers a bare majority of members of the House of Commons to specify that any given bill will be regarded as having completed its passage through the House of Commons upon that bill passing its second reading. This provision, Mrs White contends, has been designed to enable the government to circumvent the 'at least 400 members at third reading' provision in s.6(3) of the 2024 Act.

[121] The claimant it seems believes that some members of the House of Commons and the House of Lords might be deterred from supporting these bills if this Court had already intimated that any such measures would be legally invalid insofar as they were deployed as a means to bypass the entrenching provisions in the 2024 Act. Notwithstanding the broad discretion conferred by s.8(3), we do not consider it appropriate to broach either of these arguments in these proceedings. The issues are at present entirely hypothetical. More broadly, as we have already stressed earlier in our judgment, it is not part of this Court's constitutional role to be drawn into such obviously partisan political controversies.

[122] Whether such circumvention of our judgment in this case is the current government's intention, whether such rumoured legislative initiatives could or could not produce such a result, and whether this Court or any other has jurisdiction to consider either or both of those matters are – adapting the above-quoted words (at para 5) of Baroness Hale in *Jackson* questions: 'for another day'.

[123] The 2024 Act makes no provision as to costs. The Prime Minister indicated during submissions that the public interest in this matter was such that no costs would be sought from the claimant should the claim fail. The claimant has not adopted a reciprocal position, and has provided the Court with a costs schedule which while substantial in scope does not appear extravagant given the gravity of the questions that the litigation raised. We therefore see no reason why costs should not simply follow the event ... ..

## CONCLUSION

The problem and solution offered here are designedly full of holes; some big, some small; some obvious, some obscure. I expect there are many more holes that will promptly be apparent to readers which simply did not occur to me. The analysis presented here is offered much more in the way of a question than an answer. I cannot imagine that it will be a question which ever arises in the real world's political arena. But as William Wade suggested back in 1955; 'All writers on sovereignty are bound to deal in improbable examples'.<sup>10</sup> My more modest hope is that in that part of the

<sup>10</sup> [1955] op. cit. fn. 4 supra p178.

real world found in university law schools and in the minds of their teachers and students this article will provide a springboard for interesting debate and discussion in the final weeks of an LLB, GDL or LLM class on constitutional law.

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#### DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).