The European Union Act 2011:
A Failed Statute

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Abstract: If there was one area in which the two coalition parties needed to produce a workable agreement as a matter of priority after the May 2010 election, it was the European Union. The European Union Act (EUA) 2011 builds on a political guarantee in the coalition agreement that there will be no transfers of sovereign powers until the next election (in 2015). That undertaking was intended to pacify the Europhobic wing of the Conservative party that had demanded but failed to get a national referendum on the hated Lisbon Treaty. As a result, the EUA contains all sorts of compromises: it delivers a referendum requirement, but not on the Lisbon Treaty; it affirms that the source of the validity of EU law is a domestic statute, but without mentioning the sovereignty of Parliament; it introduces constitutional safeguards, but without entrenching them against repeal by a future Parliament. Unfortunately, the EUA does not reflect the politics of compromise in a consensus democracy: it reflects dissent between the governing parties and within the Conservative party and, in most respects, is a compromised and failed statute.

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INTRODUCTION

Following the United Kingdom general election of May 2010, in which none of the parties were able to command an overall majority in the House of Commons, the parties that came first and third in terms of votes and seats (the Conservatives and Liberal Democrats) entered into negotiations with the aim of forming a coalition government –the first peacetime coalition since the 1930s. The resultant coalition agreement[1] contained the terms of reference for the government that comprised MPs from both parties. In relation to the European Union, the agreement struck a compromise between the largely Eurosceptic Conservative party and the Europhile Liberal Democrats. On the one hand, it seeks to ensure that 'the British Government is a positive participant in the European Union, playing a strong and positive role with our partners'. On the other hand, it promises to amend the European Communities Act 1972 'so that any proposed future treaty that transferred areas of power, or competences, would be subject to a "referendum lock"', and to 'examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament'.[2]

The resultant European Union Bill, which was introduced in Parliament in November 2010, reflects not only the tension between the two parties but, more interestingly, also reflects the tensions within the Conservative party over the European Union. Hailed as the most important change since the UK joined the EEC in 1973, the Bill was driven to make a number of politically clear, constitutionally bold, and legally innovative features, such as the so-called referendum lock (or condition) 'to which only [the British people] will hold the key'.[3] The Bill received Royal Assent in July 2011, and the European Union Act (EUA) 2011 is an unusual and striking piece of legislation for the following reasons.

First, the Act sends an important political signal to the Europhobic wing of the Conservative party, that had demanded but failed to get a national referendum on the Lisbon Treaty, that its concerns would in the future be taken seriously by the coalition government. In fact, the coalition agreement guarantees that there will be no transfers of sovereign powers until the next election (in 2015).

Second, that political pledge is translated into two legal themes that run through the EUA: (a) the EUA redresses the notion of the EU as an autonomous and supreme legal order by affirming that EU law is only valid in the UK because of the European Communities Act 1972; (b) the EUA amends the European Communities Act 1972 to introduce the novel requirement of a referendum plus Act of Parliament (this is the most controversial part), or only of an Act of

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[1] *The Coalition: Our Programme For Government*, 11 May 2010.
[2] Ibid. Ch.13.
[3] Foreign Secretary William Hague, on completion of the Parliamentary passage of the EU Bill, 13 July 2011.

Parliament, or of some other form of Parliamentary control, with respect to certain amendments to the Treaty on European Union or the Treaty on the Functioning of the European Union.[4]

Third, from a (positive) institutional perspective the EUA enhances and extends Parliamentary control, scrutiny, and accountability over EU decision-making[5] which is coupled with, fourth, the constitutionally momentous introduction of a mandatory national plebiscite. In a fundamental sense, the EUA might be praised for its attempt to protect democracy. In the minds of its supporters, the EUA fulfils the same role as the decisions by the German Federal Constitutional Court in *Maastricht* and *Lisbon* which is that ultimate authority needs to lie with a body established by the national constitution, in the case of the UK: Parliament.[6] In short, the EUA introduces 'protections other countries have but which are missing here in Britain'. Moreover, in a populist sense, the EUA is about empowering the British people by giving them 'a referendum lock to which only they should hold the key – a commitment very similar to that in Ireland'.[7] This is indicative of a shift towards a new and different form of political accountability, as indicated by Prime Minster David Cameron: 'We want to replace the old system of bureaucratic accountability with a new system of democratic accountability – accountability to the people, not the government machine.'[8] Finally, from a (negative) institutional perspective, the government wants to curtail the power of domestic courts lest they come 'to regard ultimate authority as resting with the EU'.[9]

So, to summarise the intentions of the EUA: they are i) to boost the law-making authority (sovereignty) of Parliament; ii) to boost the power of the people; iii) to curtail the powers of the courts. The purpose of this article is to assess whether the EUA succeeds in what it sets out to do. It will not deal with the political and legal aspects of the EUA in great detail, as they have already formed the basis of excellent analytical pieces.[10] Instead, it will focus on the questions of institutional balance and constitutional relevance.

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[4] This development mirrors the response by the German Federal Constitutional Court that the solution to the EU's democracy deficit is to enhance the participatory powers of the *Bundestag*.

[5] Queens Speech 25 May 2010.

[6] David Cameron, 'A Europe policy that people can believe in' 4 November 2009 [all of Cameron's speeches are available from http://www.conservatives.com/News/Speeches.aspx].

[7] Ibid: 'Never again should it be possible for a British government to transfer power to the EU without the say of the British people.'

[8] David Cameron, 'We will make government accountable to the people', 8 July 2010.

[9] David Cameron, 'A Europe policy that people can believe in' 4 November 2009.

[10] M. Gordon and M. Dougan, 'The United Kingdom's European Union Act 2011: "who won the bloody war anyway?"', (2012) 37(1) *European Law Review* 3-30; P.P. Craig, 'The European Union Act 2011: Locks, Limits and Legality' (2011) 48 *Common Market Law Review* 1881.

THE EUROPEAN UNION ACT 2011

As every reader will know, the UK is a representative democracy with a 'historic constitution' (that is the product of evolution rather than design)[11] whose principal and partially-democratic institution (Parliament consists of the hereditary monarch, the largely-appointed House of Lords, and the elected House of Commons) is a law-making body endowed with a disproportionate (theoretically absolute) amount of power in relation to other actors, such as the courts (the Supreme Court of the United Kingdom has no powers of constitutional review) and the people (whose power is channelled through elections and the occasional referendum on matters of constitutional importance, such as devolution or electoral reform, but is otherwise side-lined). Parliament cannot impose procedural or substantive constraints on a future Parliament (there are, for instance, no constitutional requirements for super-majorities or for referendums): the legislature can through statute enact, amend, or repeal any statute it wishes, which may go against international law, EU law, or the common law, and it is the courts' duty to uphold and enforce the domestic statute. There is, moreover, no hierarchy amongst Acts of Parliament: constitutionally significant statutes (such as the European Communities Act 1972 or the Human Rights Act 1998) enjoy no greater protection (in theory) than 'ordinary' statutes. The reality is, of course, more complicated, but a grasp of the theoretical basics is needed to appreciate the legal and political complexities of the EUA.

The EUA (unusually) contains referendum locks in sections 2, 3 and 6. Broad in scope, they create requirements for an Act of Parliament, majority support in a national post-legislative referendum,[12] and a ministerial statement in the cases of ordinary treaty amendments in relation to TEU or TFEU (section 2 EUA)[13] as well as certain amendments using the 'simplified revision procedure' (section 3 EUA) that extend the objectives, competences, or powers of the EU, or facilitate the decision-making procedures by removing the United Kingdom's veto right in the Council or the European Council. The simplified revision procedure is set out in Article 48(6) TEU and allows Member States acting unanimously by means of a Decision of the European Council to revise Part 3 TFEU ('Union Policies and Internal Actions') and to bypass the lengthy procedures of an ordinary revision of the Treaties. There is, however, an important rider: the proposed revision must

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[11] For a brief outline of this idea see V. Bogdanor, *The New British Constitution* (Oxford: Hart, 2009), 10-21.

[12] See House of Commons European Scrutiny Committee, *The EU Bill: Restrictions on Treaties and Decisions relating to the EU*, Fifteenth Report of Session 2010–11, 19 January 2011, para. 12: 'The referendum condition is met if the coming into force of the Act of Parliament approving the Treaty is made conditional upon the result of the referendum; […]. By this means, the referendum is post-legislative and the result of the referendum is made legally binding through statute.'

[13] Provided that sovereign powers or competences are transferred from the UK to the EU.

'not increase the competences conferred on the Union in the Treaties'.[14] This qualification is repeated by the 'significance condition' in section 3(4) EUA: if the proposed revision and transfer of competences are insignificant (which will be for the Minister or even Parliament to decide[15]), a referendum is not required. So the UK position is that the transfer of competences in the proposed revision must not be significant, whereas the EU's position is that the proposed revision can never increase the competences (under the correct use of the simplified revision procedure). While there may be value in incorporating the significance condition into national law, it also needs to be appreciated that section 3 EUA is not an assertion of Parliamentary authority, but the parroting of existing EU law.

Sections 3, 4, and 5 EUA have to be read together. Whereas section 3 sets out the referendum and significance condition, section 4 contains a check list of 13 cases where a transfer of a competence or power to the EU under Article 48(6) would attract a referendum (eight cases deal with the conferral of a new or the extension of an existing competence of the EU). Crucially, section 4(4) contains three important exclusions: codification of an existing competence (even if the Treaties need to be rewritten); competences that apply only to other Member States; the accession of a new Member State. Examining only the last exclusion, EU enlargement clearly involves a constitutionally significant amendment: it will, for instance, impact on the UK's weighted votes in the Council. Yet it is exempted from the referendum requirement because the UK government favours enlargement politically.[16] These exclusions, although politically understandable, obviously undermine the legal integrity of the EUA.

So the significance test only applies to two instances within section 4 EUA. It is important to slow down at this stage and examine the process in some detail. The relevant government minister is to lay a statement before Parliament within two months of either the agreement of a new treaty at an Inter-Governmental Conference or the agreement of an Article 48(6) TEU decision at a European Council. The minister then needs to give a reasoned assessment whether the proposed treaty or Article 48(6) decision falls within section 4 EUA. Section 5(4) EUA makes reference to the 'significance condition' where the minister believes that although the Article 48(6) decision falls within sections 4(1)(i)[17] or (j)[18] EUA

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[14] Art.48(6), third paragraph TEU.

[15] David Lidington MP: 'I think that Parliament will have the right to second-guess the Minister. […]. That amendment, under the simplified revision procedure, still has to come before Parliament for a full Act in order to ratify it. So Parliament then can use that opportunity to second-guess the Minister's opinion': House of Commons European Scrutiny Committee, *The EU Bill: Restrictions on Treaties and Decisions relating to the EU*, Fifteenth Report of Session 2010–11, 19 January 2011, para. 43.

[16] For the Foreign Minister's s.5 EUA statement that Croatia's accession to the EU does not fall within s.4 EUA, see *Hansard*, HC Vol.539 col.77WS (2 February 2012). On enlargement see also Gordon and Dougan, above n 10, 17.

[17] 'The conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body;'

and that a transfer of power from the UK to the EU will take place, that transfer is, however, 'not significant' (section 3(4)(b) EUA). (The significance condition does not apply to any of the other tests listed under section 4 EUA). These would include cases where EU bodies were given the power to impose new requirements, obligations, or sanctions against the UK, save for relatively minor changes that are exempted from the referendum condition.

There is no consensus on what might qualify as a minor issue. How likely is it, say, that a referendum on the movement from special legislative procedure to ordinary legislative procedure for the passage of an EU carbon tax would be made subject to a referendum? The Minister for Europe, David Lidington MP, cites the carbon tax example as one 'that would attract the public to the ballot box'. Simon Hix, by contrast, regards that specific issue as a 'relatively technical' one that could not successfully be made the subject of a national referendum.[19] In any event, it is possible to make a very strong case for a referendum under the EUA regarding the transition from special to ordinary legislative procedure or from unanimity to qualified majority voting with respect to future EU laws[20] that would nonetheless form unorthodox if not downright obscure subject-matters of a national plebiscite.[21]

There is a further twist to the government's tale that the EUA is about boosting national democratic authority in face of an overassertive European Union. It is clear from the EUA that all Treaty changes that are to be subject to the referendum provisions require prior unanimous approval at EU level. Should the UK government not support the Treaty change, it is already empowered to vote against it in the EU institutions; in which case there is no need for a referendum. That means that the EUA is a prospective statute (like the European Communities Act 1972 and the Human Rights Act 1998) that is designed to prevent a future government from either signing up to a new Treaty or amending an existing Treaty without a referendum. Whether the EUA is a violation of the cardinal constitutional rule that tomorrow's Parliament is as sovereign as today's[22] is a claim to which we will return below.

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[18] 'The conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom;'

[19] See House of Commons European Scrutiny Committee, *The EU Bill: Restrictions on Treaties and Decisions relating to the EU*, Fifteenth Report of Session 2010–11, 19 January 2011, paras. 69-70.

[20] Gordon and Dougan, above n 10, 18-19.

[21] The United Kingdom has had eleven national, regional and/or UK-wide referendums since 1973 – all on matters of constitutional importance. Of these, only two have covered the whole UK.

[22] Written evidence from Vernon Bogdanor, *The EU Bill and Parliamentary sovereignty - European Scrutiny Committee*, December 2010.

A REDUCED ROLE FOR THE COURTS?

As mentioned above, one of the rationales of the EUA is to curtail the powers of the courts.[23] David Cameron pledged to 'strengthen the place of Parliament at the heart of our democracy […] over unaccountable bodies [i.e. national courts]. We will make sure there is proper Parliamentary scrutiny of everything that comes out of the European Union'.[24] William Cash MP (a prominent Conservative Europhobe and Chair of the European Scrutiny Select Committee) said in the House of Commons: 'I am concerned to ensure that the courts are excluded from the construction or interpretation of the nature or legal effect of parliamentary sovereignty'.[25]

Since the anti-European faction of the Conservative party did not get what it really wanted (a referendum on the hated Lisbon Treaty), and since it also holds UK judges culpable for accepting the doctrines of direct effect, supremacy of EU law, and state liability for damages without much of a fight (from *Macarthys v Smith* [1979] 1 WLR 1189 to the complete decisions in *Factortame I* to *V*), the meagre compromise[26] was to create further referendum locks on the transfer of powers to the EU and to remind the judges that the validity of EU law is ultimately determined by national statute and not by free-standing and self-serving ECJ doctrinal creations that are applied (without constitutional safeguards) in the national courts.

Returning to the discussion of section 5 in the previous section, the Explanatory Notes of the EUA make clear, 'as with all Ministerial decisions, it would be possible for a member of the public to be able to seek to challenge in the Courts the judgement of the Minister as provided in the statement required under section 5'.[27] Indeed, at second reading in the House of Commons, on December 7, 2010, William Hague MP said:

> The reasoned statement set out in cl.5 makes any such ministerial decision as amenable to judicial review as is possible. That provides a powerful reason for Ministers to stick to both the letter and spirit of the law, and not to seek to sidestep the requirement for a referendum. We have ensured that we are as precise as possible about what would require a referendum.[28]

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[23] There is a website that collates what high-ranking Conservative politicians, including the Prime Minister, have had to say about unelected and unaccountable judges. All of them are desirous in their intent to 'slash' their powers. http://alrich.wordpress.com/2011/06/20/judicial-appointments-politicisation-unaccountable-judges-uk-supreme-court/ [visited 30 April 2012].

[24] David Cameron, 'Rebuilding trust in politics', 8 February 2010.

[25] Hansard HC, Vol.521, col.173.

[26] 'Milk and water…a million miles away from what is required', according to William Cash MP, cited in *The Economist*, 'The British bayonet' Nov 11th 2010.

[27] Para. 67.

[28] Hansard HC Vol.520, col.200.

Allowing individual members of the public to challenge an executive decision in a court of law not only enhances the role of 'unaccountable bodies' (the court's decision may result in further legislation being put forward), it also subjectivises the principles of judicial review and democracy: it gives every voter the power to challenge (and *in extremis* veto) transfers of competences to the EU[29] (providing she has sufficient interest in the matter to which the application relates[30]). But a more stringent legal test had been rejected by the government, as David Lidington MP, the Europe Minister, explains:

> We took the view that that would have left far too much discretionary power in the hands of Ministers. What we have done instead is to introduce a Bill that quite deliberately limits ministerial discretion by specifying those changes that would trigger a referendum and also those limited categories of treaty change that would be exempt from the referendum requirement.

Section 6(5) EUA lists a series of events which would automatically trigger the requirement for approval by Act of Parliament plus national referendum. The list is not particularly surprising and contains issues such as adopting the euro, contributing to a common EU defence force, joining the Schengen agreement, participating in a European Public Prosecutor's Office. The language of the EUA is mandatory, which removes ministerial discretion. A referendum must be held (subject to the exemption condition, the significance condition, and section 4(4) EUA). As a result, the question whether or not to hold a referendum is matter of law (and ultimately judicial review).[31]

But classifying the referendum issue as a matter of law does not tie up loose ends. Craig wants to know what exactly has to be taken into account when deciding 'whether in the Minister's opinion' the effect of a proposal under sections 4(1)(i) and (j) is 'significant? [32] He points out that neither the EUA nor the accompanying Explanatory Notes guide the Minster in that respect. Gordon and Dougan are concerned that even within the main category of measures for which referendums are mandatory, '[…] it is far from evident that *any* such measure should *always* be considered important enough to justify the mandatory holding of a national plebiscite'.[33]

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[29] 'For the first time [the EUA] gives real control to Parliament and every voter in the country over the most important decisions a government can make in the EU': Foreign Secretary William Hague, on completion of the Parliamentary passage of the EU Bill, 13 July 2011.

[30] Section 31(3) Senior Courts Act 1981.

[31] Written evidence from Paul Craig, *The EU Bill and Parliamentary sovereignty - European Scrutiny Committee*, 20 November 2010, para. 15.

[32] Written evidence from Paul Craig, *The EU Bill and Parliamentary sovereignty - European Scrutiny Committee*, 20 November 2010, para. 14.

[33] Gordon and Dougan, above n 10, at 19.

It is surprising, given the background of the Act, that section 5 EUA confers a duty on the relevant government minister to assess whether power is transferred within the meaning of the EUA. The final decision rests with the minister, yet that decision may be challenged by judicial review in court (which empowers the courts, which is why the Labour opposition objected to the Bill in Parliament). In its attempt to curb the power of unelected courts, the EUA would appear (necessarily) to have failed.

THE (IR)RELEVANCE OF SECTION 18 EUA

Section 18 EUA was initially designed as a sovereignty clause (and hence received a disproportionate amount of attention in its draft form). The final version in the Act is much less ambitious, and all references to the sovereignty of Parliament have been cut. (A similar fate befell the UK Parliamentary Sovereignty Bill[34] that was voted down at the crucial second reading stage in Parliament in March 2011). The toned-down section 18 EUA was drafted 'to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK's legal system independent of statute'.[35] Yet it ends up as a mere declaratory provision that affirms the validity of EU law as stemming from section 2(1) ECA (and neglects to address its supremacy which stems from the acceptance by the UK judiciary). If the final text of section 18 EUA is directed at UK judges operating in the post-*Factortame* era of statutory interpretation, it fails to tell them anything they don't already know:

> Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

To be sure, it has long since been suspected in some scholarly quarters that joining the EEC in 1973 triggered a modification of the ultimate constitutional rule (the rule of recognition or *Grundnorm*) in the UK.[36] Worryingly, legal counsel in the

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[34] The purpose of the Bill was to 'confirm the sovereignty of the UK Parliament by prohibiting the Government from signing, ratifying or implementing a treaty or law which increases the powers of the European Union over the United Kingdom, unless it has first been approved in a UK referendum'.

[35] Para 120, Explanatory Notes.

[36] See e.g. H.W.R. Wade, 'Sovereignty: Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568–575.

Metric Martyrs case also tried to argue that EU law had become entrenched rather than incorporated in UK law.[37] But, in the context of the EUA, this argument is clearly driven by political rhetoric rather than legal doctrine: no one seriously believes that EU law is autonomous to the point of having become entrenched.[38] As the Explanatory Notes make clear, section 18 EUA 'does not alter the existing relationship between EU law and UK domestic law; in particular, the principle of the primacy of EU law'.[39] Although Gordon and Dougan see 'some virtue in s.18 reminding us that the domestic supremacy of EU law rests alone on its continuing statutory basis',[40] Lord Hannay of Chiswick was far more scathing of the effects of Sharpston's misconstruction: 'If this Parliament legislates every time a prosecuting attorney makes a bosh like that and it is dismissed by the judge, we would be here every day of the year for about 20 years. Surely it is not a basis for legislation. It is simply unnecessary.'[41]

CONSTITUTIONAL ANALYSIS OF THE EUA

The justifications for Parliamentary sovereignty stem from a variety of sources. There are historical reasons (the Glorious Revolution of 1688/89 transferred sovereignty from the King to the King-in-Parliament), political reasons (the House of Commons is the only elected part of the tripartite Parliament), and the simple legal reason that the courts, in Hart's phrase, 'habitually obey' Acts of Parliament. Sovereignty performs the roles of a historical *a priori*, a political *sine qua non* for democratic law-making, and a legal *ex post facto* justification for the work of the

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[37] See the propositions put forward by Eleanor Sharpston QC in *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin, paras. [53]-[57] (e.g.: 'So long as the UK remains a Member State, the pre-accession model of Parliamentary sovereignty is of historical, but not actual, significance') which were described by the presiding judge Laws LJ as 'false' [58].

[38] See David Liddington MP, the Minister for Europe: 'We have taken advice from lawyers across Government, not just from those in the Foreign and Commonwealth Office […] The Government's analysis has led us to the conclusion that to date there is no persuasive legal authority to support the contention that the doctrine of parliamentary sovereignty in relation to EU law is no longer absolute. However, there is a need to put the matter beyond speculation for the future. By confirming in statute that directly effective and directly applicable EU law takes effect in this country only by virtue of an Act of Parliament, we are putting the matter beyond doubt for the future', Hansard HC, Vol.521, col.173.

[39] See also the German Federal Constitutional Court in BVerfG, 2 BvE 2/08 (*Lisbon Treaty*) of 30 June 2009: 'The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, a concept conferred under an international treaty, i.e. a derived concept which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon' (para. 334; see also 240 and 343).

[40] Gordon and Dougan, above n 10, 8.

[41] *Hansard*, HL Vol.727, col.1670.

judges. The point to take about sovereignty is that it can either be 'continuing' or 'self-embracing'.[42]

If sovereignty is 'continuing', then Parliament's law-making authority is absolute and can neither be limited substantively or procedurally. Put differently, Parliament cannot bind its successor either in substantive terms (with respect to the content of future legislation) or in procedural terms (with respect to the future process of law-making). If the intention of the EUA is to bind a future Parliament in procedural terms, its referendum locks would not be legally binding according to the orthodox understanding of sovereignty.[43]

If sovereignty is 'self-embracing', then there are two variants. The first variant suggests that Parliament has attempted to limit its law-making authority procedurally with the use of referendum locks. We will only know for sure whether this procedural requirement has successfully modified the law-making process if a future Parliament considers itself to be bound.[44] Whether procedural self-embracing is legitimate and whether it could replace the continuing sovereignty depends on whether real distinctions can be made between a) substantive limitations on policy, and b) re-constitution of structure and re-formulation of procedure. If so, then the traditional statements about Parliament's inability to bind future Parliament's and later statutes overriding earlier ones simply dodge the fundamental question how rules defining 'successors', 'Parliament', and 'statute' may be enacted and amended.[45]

The second variant suggests that sovereignty is substantively self-embracing, i.e. that today's Parliament can successfully impose substantive limitations on tomorrow's Parliament. Vernon Bogdanor's radical argument is that the EUA transforms Parliament into a new kind of legislature, a 'tricameral' Parliament that includes the familiar two chambers and, in the context of significant Treaty changes, also the previously ignored electorate.[46] The EUA inserts a new precondition that must be satisfied prior to legislation (approval by the electorate in a referendum): '…the referendum requirement in the European Union Act deprives the legislature of its sovereign power to legislate on certain European Union matters by requiring, for these matters, the assent of a body external to the legislature'[47]. As a result, Parliament has i) partially but substantively limited its legislative authority; and ii) unilaterally altered the rule of recognition (i.e. the *conditio sine qua non* for the validity of law in any legal system).[48] 'In seeking to

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[42] H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), at 149.
[43] Gordon and Dougan, above n 10, 26-29.
[44] Ibid., 23-26.
[45] G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), 53.
[46] V. Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32(1) *Oxford Journal of Legal Studies* 179-195.
[47] Ibid., 190.
[48] See Hart, above n 42.

restore national sovereignty, the European Union Act has, paradoxically, restricted parliamentary sovereignty'.[49]

Bogdanor's general observation is powerful: the EUA injects a new stimulant (direct democracy) into the UK's traditional form of government (representative democracy). But as accurate analysis of the EUA the observation is misplaced theoretically, doctrinally, and empirically. Although the EUA purports to target future Parliaments, they remain unequivocally able, according to theory, to repeal or amend the EUA with a simple majority in Parliament.[50] Doctrinally, the EUA is directed at Treaties amending or replacing TEU or TFEU (section 2 EUA) and the amendment of TFEU under Article 48(6) TEU (sections 3 and 4 EUA). In short, the EUA does not (and cannot) unilaterally change the rule of recognition; but it does seek to condition the exercise of Ministerial power (section 5, but also ss.3, 6, 7, 8 9, 10 EUA). Empirically, the devolution legislation for Scotland, Wales, and Northern Ireland also involved Acts of Parliament preceded by referendums. It is true that the EUA fails as a statute – but not for the constitutional reasons that Bogdanor advances.

CONCLUSION

There are two legal themes that run through the EUA: the reminder of Parliamentary sovereignty and control in relation to EU law, and the subjection of future transfers of significant competences to a national referendum. To be sure, constitutional safeguards on sources of public power are of vital importance: they are a necessary check on the absolute doctrine of supremacy of EU law, and many Member States subject the transfer of competences to the EU to some sort of constitutional check. (The EUA is different in this respect since its lack of entrenchment means that it is subject to repeal by a simple majority by a future Parliament.) It is also important to note that Parliamentary control mechanisms are boosted over a range of issues from the rights of EU citizens,[51] and the use of Article 352 TFEU as a legal base,[52] to decisions in relation to the area of freedom, security, and justice.[53] That can only be commended and it is surely in line with the EU's own provisions to encourage national parliaments to scrutinise the work of their respective governments in EU institutions and, in a variety of ways, to

[49] Bogdanor, above n 46, 190.
[50] See Gordon and Dougan, above n 10, 26-29; see also the response to Bogdanor by Jeffrey Goldsworthy, 'Parliamentary Sovereignty's Premature Obituary', *UK Constitutional Law Group* blog, 9 March 2012.
[51] Art.7(2)(a) EUA.
[52] Art.8 EUA.
[53] Art.9 EUA.

'contribute actively to the good functioning of the Union'.[54] Once again, the EUA is more of a cheerleader for the Lisbon Treaty than a path-breaker for national democracy.

For all the coveting of the neighbours' constitutional safeguards and incorporation of existing EU standards, the bitter taste that the EUA leaves behind stems from the politicisation of legal issues which creates legal uncertainty (internally) and obstructs EU reform (externally). Worse still: the EUA is a failed political statute. The product of compromise within the coalition government, the bill was dismissed by those who had championed it in the first place. The Director of the Euro-sceptic Bruges Group poured scorn over the Act: 'Both the referendum lock and the sovereignty clause are just fig leaves designed to hide Cameron's blushes after he and Hague dropped the "cast-iron guarantee" to hold a referendum on the Lisbon treaty'.[55] William Cash MP was 'absolutely appalled' that the final version of section 18 EUA contained no reference to the sovereignty of Parliament.[56]

The EUA, then, is a *politicised* statute because it makes UK membership in the EU more troublesome by raising the political costs of a transfer of competences to the EU and by calling into question the democratic credentials and legitimacy of the EU. If a new field of EU activity were created under Article 2 TFEU, or an existing field of EU competence were upgraded from complementary to shared, or shared to exclusive, the referendum condition in sections 2 and 3 EUA would be triggered. So, comparatively minor reform that impacts barely on the division of competence between the EU and MS becomes contingent upon popular scrutiny. It makes the future of European integration contingent upon domestic approval, even approval by individual litigants in judicial review proceedings, which runs counter to the European idea: '…the drafting strategy that underpins [sections] 6-8 is simply trying to make approval in accord with national constitutional requirements a pre-condition where the Treaty does not allow it'.[57]

Finally, the EUA undermines the rule of law by creating legal uncertainty. Paul Yowell argues that the EU Act may have inspired Cameron to take the position he did at the summit meeting on 7-9 December 2011. Had Cameron signed the fiscal compact he may have faced a political crisis (persuading his Euro-hostile backbenchers) as well as a legal problem (a mandatory referendum under the EU Act). If the EU's regulatory powers had been enhanced or extended (as demanded by Merkel and Sarkozy), Yowell believes that signing the fiscal compact might have triggered the referendum requirement. 'Such a referendum requirement might well have ended in an embarrassing defeat for Cameron, given

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[54] Art.12 TEU.

[55] Robert Oulds, 'The Government's EU Bill being presented to Parliament on Thursday is "a fig leaf designed to hide Cameron and Hague's blushes"', The Bruges Group, 12 November 2010.

[56] Hansard HC, Vol.521, col.176.

[57] Written evidence from Paul Craig, *The EU Bill and Parliamentary sovereignty - European Scrutiny Committee*, 20 November 2010, para 12 (ii).

the public's Eurosceptic mood. Perhaps Cameron vetoed the treat in part to avoid the possibility of a referendum under the Act'.[58]

However, Yowell's argument is surprising, since the fiscal compact was never intended to apply to non-Eurozone countries. As a matter of law, the EUA was of no relevance to the UK's negotiating position.[59] Gordon and Dougan do highlight, however, that the EUA may be making an impact on the UK's legal and political culture 'by creating a powerful political rhetoric which argues for a referendum on virtually any change to the United Kingdom's relationship with the rest of the European Union – regardless of whether it falls within or outside the strict ambit of the Act'.[60] This is a subtle observation that can be further substantiated: the anti-European rhetoric, for instance, of negotiating opt-outs from the EU treaties on justice and home affairs, the charter of fundamental rights, working time directive, and social policy does not feature in the EUA. But, in the minds of commentators the EUA clearly amounts to a 'Veto Bill' that presents future options in black and white: 'either Britain will have to be offered an opt-out from ambitious new treaties, or British voters will vote No and trigger a monumental row'.[61]

The enhancement and extension of Parliamentary control mechanisms over EU decision-making are the EUA's sole redeeming features. In all other respects, the EUA should be viewed as a failed statute: it is a *valid* piece of legislation (in the sense that it was properly enacted), but that is about all that can be said for it. It does not create fundamental constitutional protection, merely shallow and short-sighted political protectionism. It does not empower the people; it sells them a dummy. Instead of asserting Parliament's ultimate legislative supremacy over EU law as planned and promised at the Bill stage, it falls silent on the matter. In addition, the Act is legally inconsistent (e.g. for potentially allowing referendums on relatively minor matters), constitutionally pointless (it attempts to bind a future Parliament), institutionally botched (it boosts the powers of the courts as well as of Parliament), and politically regressive (the message it sends is that 'the British people have good cause to mistrust the ability of their elected MPs to protect and serve the public interest'[62]). In the long run, it is likely to be damaging: it will be politically very difficult to repeal (the Europhobes will make easy political capital out of trying to retain the currently hated EUA) and diplomatically very difficult to make work and defend. It is a good example of a bad law.

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[58] P. Yowell, 'EU Act 2011', *UK Constitutional Law Group* blog, 19 January 2011.
[59] On this point, see also Gordon and Dougan, above n 10, at 30.
[60] Gordon and Dougan, above n 10, at 30.
[61] *The Economist*, 'The British bayonet', 11 November 2010.
[62] Gordon and Dougan, above n 10, at 29-30.