

The EU Bill is flawed, but it could open up other options for democratic reform

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*Referendums have become an increasingly important part of the process of constitutional change in the UK. In a constitution historically unreceptive to such devices, referendums have been used to gauge the public's appetite for continuing membership of the EEC, devolution, changes to the structure of regional and local government, and now, electoral reform. **Dr Mike Gordon** argues that the European Union Bill might channel the demand for a greater say into a positive force for democratic reform.*

[The European Union Bill](#) presently before Parliament purports to use referendums in a different way. If enacted, the EU Bill would make referendums a necessary part of the future legislative process for the authorisation of further transfers of power or competence from the UK to the EU. A referendum would not be required in relation to every prospective transfer, but the breadth of situations in which recourse to the electorate would be necessary is striking, ranging from a decision to adopt the euro, to an attempt to remove the UK's veto in an array of specified areas.



The European Parliament in Brussels (Credit; Zaf, CC BY 2.0)

It might reasonably be asked whether this is even constitutionally possible. Orthodox constitutional theory holds that Parliament is precluded from 'binding its successors' as to the future exercise of its legislative power, to ensure that all Parliaments throughout time possess what Dicey described as the freedom to 'make or unmake any law whatever'. Previous referendums must therefore be seen as merely advisory in nature, for Parliament remains legally free to disregard the result, even if politically the government can do no such thing.

There is, however, more recent evidence that statutory modifications of the law-making process are constitutionally permitted. Indeed, the courts have held that Parliament created a 'new way of enacting primary legislation' when it passed the Parliament Acts 1911 and 1949. Further, the European Communities Act itself, which provides for the supremacy of EU law within the UK, can be read as having altered the legislative process, for if Parliament now wishes to enact legislation which overrides EU law, it would have to do so in express terms for the new rules to have legal effect. And in seeking to enact the EU Bill, and place 'referendum locks' on the power of future Parliaments, the coalition government seems to have implicitly accepted this alternative interpretation of Parliament's law-making authority.

But even if constitutionally permissible, are the 'referendum locks' which the EU Bill purports to introduce desirable? While there may be a strong democratic case for requiring popular approval of a substantial shift of power from the UK to the EU, the EU Bill seems to go well beyond this in requiring referendums to be held on an excessive range of esoteric issues, with which it may be difficult for the public to engage. ([A government defeat](#) in the House of Lords earlier this week saw the Bill amended so that referendums could be held in relation to only three specific transfers of powers to the EU. However, the government is almost certain to overturn this amendment when the Bill returns to the Commons).

The EU Bill may not be entirely unprecedented in seeking to ensure that political change will only take effect if sanctioned by the people, for the Northern Ireland Act 1998 guarantees that Northern Ireland will not cease to be part of the UK unless approved of at a referendum, but it does represent a dramatic divergence from past constitutional practice. Indeed, the sheer range of situations in which a referendum would be required seems to invite the conclusion that the EU Bill is essentially designed to block the future expansion of the EU rather than to ensure that the public are able to participate in the process of constitutional change.

Yet the EU Bill makes no effort to entrench its 'referendum locks' (by prescribing, for example, that the legislation could only be amended if approved at a referendum). A future Parliament would therefore be free in principle to repeal the legislation, either in part or completely, to avoid its effects. Of course, a future government might well find it difficult in practice to justify any attempt to remove legal rights to popular participation in the legislative process from citizens.

One way out of this conundrum is opened up following a [further government defeat in the Lords yesterday](#). A further amendment to the Bill introduces a 'sunset clause', so that its provisions for a referendum lock would legally 'expire' at the end of this Parliament. Likewise, an [earlier amendment](#) also carried against the government at the report stage in the House of Lords might also partially address concerns about whether Parliament could restrict the exercise of direct democracy, by allowing Parliament to authorise changes to the European treaties in the event that turnout at a referendum fell below 40%.

Yet, even if these amendments survive in the final Act, the legislation would remain flawed. For instance, a referendum would still need to be held before the provision for Parliament to authorise transfers of powers could have effect. This raises the spectre of both voter fatigue, as well as the more serious problem of provoking widespread disenchantment from a popular decision on a low turnout being reversed by Parliament.

Referendums may be a useful democratic tool, but the EU Bill does not make good use of them. That the Bill is focused on a single area of political activity, the UK-EU relationship, may be the critical problem. While UK voters are to be given more of a say than they might want in relation to the future development of the powers and institutional structure of the EU, they are guaranteed no rights to participate in the future development of the powers and institutional structure of the UK.

Nevertheless, the positive message for those interested in domestic constitutional reform to take from the EU Bill is that it demonstrates that Parliament *can* use its legislative power to alter the law-making process. This opens up a range of possibilities for future democratic reform, from replacing the undemocratic institutions which still play a role in producing the law, to creating new opportunities for popular participation (including, but not limited to, the use of

referendums) in the process of effecting constitutionally significant legal change. The EU Bill may be flawed, but it has some intriguing implications worthy of further exploration by those committed to democratic renewal in the UK.

Dr Mike Gordon is a Lecturer in Law at the [University of Liverpool](#). His written evidence to the House of Commons European Scrutiny Committee is printed in the Committee's report, [The EU Bill: Restrictions on Treaties and Decisions relating to the EU](#), published on 19 January 2011.