

# Stretching the Constitution

## *The Brexit Shock in Historic Perspective*

Andrew Blick

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

Copyright © Andrew Blick, 2019

Andrew Blick has asserted his right under the Copyright, Designs and Patents Act 1988 to be identified as Author of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©. All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©. This information is reused under the terms of the Open Government Licence v3.0 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) except where otherwise stated.

All Eur-lex material used in the work is © European Union,  
<http://eur-lex.europa.eu/>, 1998–2019.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Blick, Andrew, author.

Title: Stretching the Constitution : the Brexit shock in historic perspective / Andrew Blick.

Description: Oxford [UK] ; Chicago, Illinois : Hart Publishing, 2019. | Series: Hart studies in constitutional law ; volume 9 | Includes bibliographical references and index.

Identifiers: LCCN 2018055411 (print) | LCCN 2018055856 (ebook) | ISBN 9781509905812 (Epub) | ISBN 9781509905805 (hardback)

Subjects: LCSH: Constitutional law—Great Britain. | Referendum—Great Britain—History. | Representative government and representation—Great Britain—History. | Legislative bodies—Great Britain—History. | European Union—Great Britain—History. | Great Britain—Politics and government—History. | BISAC: LAW / Constitutional.

Classification: LCC KD3934 (ebook) | LCC KD3934 .B55 2019 (print) | DDC 342.41/0412—dc23

LC record available at <https://lccn.loc.gov/2018055411>

ISBN: HB: 978-1-50990-580-5  
ePDF: 978-1-50990-582-9  
ePub: 978-1-50990-581-2

Typeset by Compuscript Ltd, Shannon  
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

To find out more about our authors and books visit [www.hartpublishing.co.uk](http://www.hartpublishing.co.uk). Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

## *The Basis for the 2016 Referendum: Law, Politics and the Constitution*

ON 27 JUNE 2016 the House of Commons discussed for the first time the outcome of the EU referendum that had taken place four days previously. The Conservative Prime Minister, David Cameron, who – in response to the ‘leave’ result – had already announced his intention to stand down told the House that:

[t]he British people have voted to leave the European Union. It was not the result that I wanted, or the outcome that I believe is best for the country I love, but there can be no doubt about the result. Of course, I do not take back what I said about the risks. It is going to be difficult. We have already seen that there are going to be adjustments within our economy, complex constitutional issues, and a challenging new negotiation to undertake with Europe. However, I am clear – and the Cabinet agreed this morning – that the decision must be accepted, and the process of implementing the decision in the best possible way must now begin.<sup>1</sup>

The Labour Leader of the Opposition, Jeremy Corbyn, agreed with this basic premise, stating that: ‘[t]he Opposition Benches put forward a positive case to remain part of the European Union and convinced more than two thirds of our own supporters, but the majority of people voted to leave and we have listened to and accepted what they have said’.<sup>2</sup> The leaders of the two largest groupings in the Commons, then, while professing their regret at the outcome of the vote, were accepting that it bound them. Their acquiescence was representative of a mood that prevailed in both Houses of Parliament and other governmental institutions. A good example of this compliance on the part of the primary chamber of Parliament came with the Resolution the House of Commons passed by 448 votes to 75 on 7 December 2016, including in it the statement that it ‘recognises that this House should respect the wishes of the United Kingdom as expressed in the referendum on 23 June; and further calls on the Government to invoke Article 50 by 31 March 2017’. (See appendix A for the full text of resolution.) Even those who might privately have hoped for a chance to

<sup>1</sup>House of Commons (HC) Debates, 27 June 2016, col 22.

<sup>2</sup>ibid, col 24.

reverse it at a later stage tended publicly at this point to concur with the proposition that Cameron and Corbyn advanced. The referendum result, they agreed, had to be implemented.<sup>3</sup>

But the precise way in which the vote of June 2016 should be put into effect and the process that should be followed in doing so were less clear. Arguments over these subjects – which could be a proxy for continued disagreement about leaving or remaining – were a source of division from the highest level of government downwards. Cabinet might, on the morning of 27 June 2016, have agreed on the necessity of departure, but beyond this basic point consensus was harder to reach. Nonetheless, the consequences for the UK of this broad acceptance of the referendum outcome – whatever, precisely it meant – were immense, both internally and externally; the preceding discussion of the sprawling constitutional issues that arose dealt with just one segment of the whole. There were also important implications for the European Union, and the wider world beyond. This chapter considers the nature of this obligation, so important in its consequences, that the referendum was perceived as creating, and to which politicians in Parliament were willing to subordinate themselves. It asks what was the basis for this requirement, how it came about, and what it meant. In accordance with the methodology of the book, it does so by focusing on two main sources: the European Union Referendum Act 2015, which provided the legal basis for the vote; and the debate that took place in the House of Commons on the Second Reading of the Bill that became this Act. The chapter considers what conclusions might be drawn, from a constitutional and democratic perspective, regarding the Brexit episode as a whole.

## I. THE EUROPEAN UNION REFERENDUM ACT 2015

The bare text of the European Union Referendum Act 2015 provides only slight indication of the momentous sequence of occurrences it helped instigate. It describes itself as ‘An Act to make provision for the holding of a referendum in the United Kingdom and Gibraltar on whether the United Kingdom should remain a member of the European Union’. This title is accurate in as far as the content of the legislation fits within this description. But the popular vote for which it provided, and the result it produced when held on 23 June 2016, extended in their consequences far beyond the strict terms of this remit.

Section 1, ‘The referendum’, tells us that ‘[a] referendum is to be held on whether the United Kingdom should remain a member of the European Union’ (s 1[1]). The vote was not optional – it was a legal requirement. However, the precise day on which it would take place was to be fixed by the Foreign

<sup>3</sup> See eg the position adopted by the Welsh and Scottish governments, discussed in ch 1.

Secretary ('[t]he Secretary of State') 'by regulations'. This statement reveals the importance of secondary powers conferred upon the executive to the practical functioning of government – a subject that would gain heightened controversy in the wake of the EU referendum. It demonstrates, furthermore, that, while referendums are held to be justified as means of ensuring popular engagement in decision making, not only do they rest upon statutory authorisation by one representative institution, Parliament, but their practical implementation falls to another such body, the executive. Matters such as timing are important. They present a variety of different options, that can have implications for the outcome, and that must be resolved by some means.

Potentially ministers who wield such powers possess a significant degree of freedom of manoeuvre: in this instance, to set the date of the vote at a time deemed suitable to securing the desired result. However, any advantage this authority might have conferred did not lead to victory in the referendum for the side endorsed by the government (though with some ministers taking up an option openly to disagree). Furthermore, the Act imposed a specific time restriction. It stated that the referendum would take place 'no later than 31 December 2017' (s 1[3(a)]). In fact, the vote took place well ahead of the final cut-off point. By the time the 31 December 2017 deadline was reached, the referendum had been held, the Prime Minister under whom it had taken place had resigned, Article 50 of the Treaty on European Union had been triggered, and EU and UK negotiators had reached an initial agreement on their first subjects of discussion. Yet much, externally and domestically for the UK, remained to be resolved.

The Act also prohibited the referendum from taking place on 5 May 2016 and 4 May 2017 (s 1[3(b)]; s 1[3(c)]). The reason for this restriction, not stated in the legislation, was the desire to avoid clashes with various elections taking place on these dates including to devolved legislatures (on 5 May 2016) and local councils. These limitations draw attention to an important aspect of the use of referendums in the UK. They are a device of direct democracy, seeking the views of a defined population on a specific issue. Yet they are utilised within a representative system, in which voters are normally asked to choose not whether to endorse a particular course of action, but who should hold public office, making decisions and acting in other ways on their behalf. The insistence that the referendum take place on a day separate from elections does not necessarily indicate a clash between the two approaches. It is better to perceive it as arising from a desire to avoid distractions from the important decision embodied in the referendum, and to ensure that the referendum did not detract from those elections. However, following the vote, difficulties in reconciling direct and representative democracy would become apparent. A Prime Minister resigned; Cabinet and the two main parties divided internally; members of the House of Lords sought to resist the government; devolved and central executives entered into disputes; and a further General Election was held, partly in an effort by

the Prime Minister to lessen some of the disagreements that had arisen.<sup>4</sup> It is wrong to assume that referendums, as mechanisms of direct democracy, have no proper place in or cannot be reconciled with the representative system. But their use can present challenges to it, and did so in the context of EU referendum held in 2016. While politicians might largely purport to wish to act upon the referendum result, doing so in practice proved immensely divisive.

This exclusion of certain days also provided a reminder of the diversity of the UK polity. Potential or actual systemic stresses associated with the referendum extended beyond timetabling clashes or the counterposition of direct with representative democracy. They could also involve different territorial layers within the representative system itself. While the 2015 Act was passed by the UK Parliament, there were other levels of governance within the UK, in possession of their own electoral mandates and democratic legitimacy. Though they were not involved in authorising the referendum, it could (and did) have substantial implications for them, and they would seek to exert influence over the response to the result, insisting that they had a right to do so.<sup>5</sup>

Having dealt with the timing of the referendum, the Act then addressed the primary issue with which it was intended to deal. It stated that the question put to voters would be '[s]hould the United Kingdom remain a member of the European Union or leave the European Union?' (s 1[4]). The options offered would be '[r]emain a member of the European Union' or '[l]eave the European Union' (s 1[5]). The government had initially intended that voters would be asked to answer 'Yes' or 'No' to the proposition 'Should the United Kingdom remain a member of the European Union?' However, the Electoral Commission recommended that it be changed to the version eventually included in the Act on the grounds that some people – especially supporters of leaving – might regard the previous wording as loaded in favour of continued membership. Consequently the government introduced an amendment to the legislation at Report Stage in the Commons.<sup>6</sup> The advent of this modification reveals once again that ascertaining the will of the people through a referendum is not a simple task. It involves decisions of significance to the overall process that are taken within representative institutions, demonstrating the difficulties of achieving exercises in pure popular decision making. Furthermore, that the executive was successfully prevailed upon to change the envisaged wording shows that, while it had discretionary power deposited within it, it was subject to outside influences.

A consideration of the question arrived at itself is central to an understanding of the constitutional issues surrounding Brexit. The proposition that

<sup>4</sup> See Introduction and ch 1.

<sup>5</sup> See ch 1.

<sup>6</sup> *European Union Referendum Bill 2015–16: Progress of the bill* (London, House of Commons Library, 2015) 16.

referendums involve the public meaningfully in the taking of specific decisions is crucial to the supposed democratic value of these devices. If the 2015 Act failed to deliver on this count, then the legitimacy of the decision to leave the EU, founded as it was in the referendum result, was compromised. On the surface it might appear to have offered a straightforward choice to voters. However, closer analysis of this question suggests complexities. It was both expansive and restrictive. The question fit the former definition because it asked voters to choose between options both of which were characterised by uncertainty. To ‘remain’ within the EU was the more knowable of the outcomes, implying more continuity than ‘leave’. However – as we will see – it involved membership on new terms negotiated by the UK government as a prelude to the referendum. Moreover, it entailed sustained presence within an organisation the future development of which was hard to predict. Indeed one of the arguments offered in favour of holding this referendum had been that, following a similar vote in 1975 that supported continued participation in continental integration, the European project had developed in ways that voters in this earlier referendum might not have anticipated.<sup>7</sup> According to this school of thought, the transformation that had taken place required further direct authorisation from the public, based on knowledge of the contemporary EU. This logic was deployed in support of a further referendum. Yet it might also be seen as calling into to question the validity of referendums as devices for the making of decisions – or at least those of a lasting nature, which is held to be their special source of value.

While the ‘remain’ option had a degree of indeterminacy, ‘leave’ was far more nebulous still. It could not be clear to voters what departure from the EU might mean. There were no useful examples of other member states exiting the organisation to draw upon. The question itself gave no clues as to the basis on which the UK would seek to withdraw, and what the internal and external consequences for the UK would be. Furthermore, final outcomes were beyond the immediate control of the UK, since they involved the reactions of and negotiations with outside entities, in particular the EU, with input from the 27 remaining member states. In this sense, the referendum fell short when judged against one of the ‘Davis criteria’ discerned in chapter two: that voters should be given a clear idea of the meaning of the possibilities that face them in a referendum.

It should be noted that post-referendum polling conducted for the Electoral Commission found that 62 per cent of those asked felt they had sufficient knowledge of both sides of the argument to be able to make an informed decision, while 28 per cent did not. When they were asked specifically about the possible consequences of a ‘remain’ result, 65 per cent said they had been provided with sufficient information, and 26 per cent not. However, when asked

<sup>7</sup> See below.

the same question about the ‘leave’ outcome, 45 per cent believed they knew enough, while 46 per cent did not.<sup>8</sup> But what precisely respondents defined as ‘enough information’ is not clear. No-one was able to predict on 23 June 2016 all the ramifications of the result, that remain uncertain at the time of writing (the end of September 2018). In any case, this survey was completed within a few weeks of the vote. The full range of possibilities manifested themselves over a longer time frame. Furthermore, as we will see, though a substantial proportion of those who took part may have believed that they had access to sufficient information, the same research showed a majority demurring from the proposition ‘that the conduct of the campaigns was fair and balanced’.<sup>9</sup>

The referendum sought to compress a complex range of possibilities into a binary choice.<sup>10</sup> There were consequences for the coherence of the result. While we know that 51.9 per cent of those taking part selected ‘leave’, we cannot discern the precise way in which they wished this course of action to be put into effect. Different voters are likely to have had varied opinions on the subject; and some may not have had definitely formed views at all. The referendum had the effect of corralling together all versions of ‘leave’. Yet some possible outcomes coming under this general heading may have had more in common with remaining inside the EU than they did with other variants on departure from it.

Equally, a ‘remain’ vote did not allow for the offering of a view on what the UK stance within the EU should be in future. Should, for instance, it adopt a more enthusiastic approach to accelerated integration? Should the UK reverse its stance of reluctance regarding the prospect of membership of the single currency? Or should it persist with a more resistant approach on such matters? The referendum question legislated for in 2015 did not help discern attitudes in these specific areas. Neither, more generally, can a referendum of this sort, in offering a choice between two options, provide a guide as to the strength of feeling that individuals attach to the issue addressed, and the degree of priority that they afford to it relative to other matters.<sup>11</sup>

Continuing with a reading of the text of the Act, it also contained provision for a bilingual ballot paper in Wales (s 1[6]). This stipulation further underlined the diverse nature of the UK state, discussed above. The UK is characterised by territorial diversity. Each geographical component has a particular perspective of its own and – in turn – its own internal differentiations. No state is entirely homogenous in this sense. But the UK arguably stands out in this regard, especially because of its multinational composition, encompassing Wales, Scotland, Northern Ireland and England. This quality expressed itself in the

<sup>8</sup> Electoral Commission, *The 2016 EU referendum* (London, Electoral Commission, 2016) 46.

<sup>9</sup> *ibid.*, 47.

<sup>10</sup> See ch 1.

<sup>11</sup> For arguments for and against the use of the referendum, see eg House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom* (London, Stationery Office, 2010) 13–20.



referendum result. As we have seen, there was a significant territorial discrepancy in voting patterns, with the balance between ‘leave’ and ‘remain’ votes varying substantially across different parts of the UK.<sup>12</sup> Perhaps one source of this outcome was another, prior, difference: in the way the question was perceived. In Northern Ireland, for instance, it might for some appear to have important connotations for the specific relationship with the Republic of Ireland and for the peace process; while this issue was far less likely to be in the minds of voters in other parts of the UK.

It is possible to extend this interpretation further. The referendum revealed other sharp differentials. Those who were younger, with more formal education, and who were middle class, were more likely to choose the ‘remain’ than the ‘leave’ option, and vice versa. It is possible that two voters can interpret the question in broadly the same way, but reach opposite conclusions for other reasons. However, it might also be that their conceptions of the question differ substantially, even though they could potentially give the same answer. If voters interpret the question differently, the potential for a referendum to deliver on its purpose of providing a definite answer on a specific question is compromised. Different voters may understand – or perhaps fail to understand – the question in diverse ways. Or they may wilfully use their votes for a purpose other than simply expressing a view on the subject matter, for instance, registering a protest of some kind, or following a partisan instinct.

But who exactly would comprise the group of individuals whose views would be sought in the referendum? Section 2 of the Act, ‘Entitlement to vote in the referendum’ dealt with this matter. Clearly, the franchise used in any vote is crucial to its legitimacy. If too exclusive or too inclusive, the democratic appropriateness of the process can be questioned. The basic principle set out in the Act was that those who could ‘vote as electors at a parliamentary election’ could take part (s 2[1][a]). An additional allowance was made for members of the House of Lords (who are not allowed to participate in general elections) (s 2[1][b]). Voters in Gibraltar were also included within the franchise for the EU referendum (s 2[1][c]). This latter provision was an indicator of some of the complications that would become more apparent following the ‘leave’ result of 23 June. If the UK left the EU, Gibraltar would depart with it, but executing this change while protecting the interests of this territory raised particular concerns, especially given its proximity to Spain, an EU member state.<sup>13</sup>

Section 3 deals with the relationship between the 2015 Act and the Political Parties, Elections and Referendums Act 2000. The 2000 Act provides the overall legal framework within which referendums are held, supplemented by

<sup>12</sup>See ch 1.

<sup>13</sup>For issues pertaining to Gibraltar, see: Alastair Sutton, *Relics of Empire or Full Partners of a New Global United Kingdom? The Impact of Brexit on the Crown Dependencies and Overseas Territories* (London, The Constitution Society, 2018).

specific Acts (such as the European Union Referendum Act) as well as further subordinate legislation (for the 2016 vote, ‘the European Union Referendum (Conduct) Regulations 2016, the European Union Referendum (Date of Referendum) Regulations 2016 and the European Union Referendum (Voter Registration) Regulations 2016’).<sup>14</sup> The 2000 Act establishes the Electoral Commission, among the functions of which are to produce reports on the administration of referendums and on the intelligibility of the proposed referendum question. The key focuses of the 2000 Act are on the registration and public financing of campaigning groups; regulation of their expenditure and donations to them; controls on the activities of public authorities during the campaign; and the administration of the vote. The 2000 Act does not, however, deal with higher level constitutional issues, such as on what subjects referendums should be held, can be held, or ought not to be held; whether referendum results should be made legally binding; or whether a bare majority of those voting should always be regarded as settling the matter, or whether higher requirements such as thresholds or supermajorities might be appropriate.

Section 4 of the European Union Referendum Act, entitled ‘[c]onduct regulations, etc’ vested in the minister the ability to issue regulations pertaining to the referendum, subject to consultation with the Electoral Commission. It demonstrated once again that, though a referendum is in theory a direct empowerment of the people, it also involves, like many aspects of government, the delegation of authority by one organ of representative democracy, Parliament, to another – the executive. This general practice, long a source of unease, would become a subject of pronounced controversy in the wake of the referendum. Section 5 dealt with the application of such powers to Gibraltar.

The contents of section 6 of the 2015 Act arose from the political context within which the referendum was being held. David Cameron had first committed himself (in January 2013)<sup>15</sup> to a policy of a popular vote on continued membership of the EU under pressure within his own party and subject to the perceived external threat of the United Kingdom Independence Party (UKIP). But his plan was not simply to hold a referendum. Before calling it, he would engage in a negotiation with the EU. Initially, he presented his intention as being to achieve an overall reform of the EU, but with an objective of changed terms of membership specific to the UK if this primary approach failed. However, by the time he began the process in 2016, the emphasis was firmly upon attaining special arrangements for the UK rather than the wider EU. Cameron held that after negotiations had concluded, depending on their outcome, his government would decide whether the terms were

<sup>14</sup> House of Commons Public Administration and Constitutional Affairs Committee, *Lessons learned from the EU referendum* (London, House of Commons, 2017) 15–16.

<sup>15</sup> The Rt Hon David Cameron, ‘EU speech at Bloomberg’, 23 January 2013: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> last accessed 24 August 2018.

sufficiently satisfactory to recommend a vote to remain. The referendum would then take place.

Section 6, therefore, required the secretary of state to issue ‘information on outcome of negotiations between member states’. It would include an account of the agreement reached ‘following negotiations relating to the United Kingdom’s request for reforms to address concerns over its membership of the European Union’ and state ‘the opinion of the Government of the United Kingdom on what has been agreed’. (s 6[1]). Publication had to take place more than 10 weeks before the vote (s 6[2]). The Secretary of State was required to lay the document before Parliament (s 6[5]). The approach Cameron took – to hold a referendum, but only after a negotiation with the EU – can be seen as attempt to shape the context in which the vote occurred, maintaining some control over the agenda and achieving an outcome that suited him. Political engineering of this type was evidence of the way in which the referendum, while supposedly a means of ensuring the primacy of the popular will, is vulnerable to manipulation from above. However, while section 6 draws attention to the efforts of Cameron to shape the political environment to serve his interests, the actual effect of this part of the Act was to constrain his discretion in so doing, in that it placed a reporting requirement with a deadline upon his government.

Further such imposition came in section 7, entitled ‘[d]uty to publish information about membership of the European Union etc’. It required the Secretary of State to issue, again more than 10 weeks before the referendum (s 7[2]), details of the ‘rights, and obligations, that arise under European Union law as a result of the United Kingdom’s membership of the European Union’ (s 7[1][a]). This statement would also provide ‘examples of countries that do not have membership of the European Union but do have other arrangements with the European Union’ (s 7[1][b]). On the surface, the reports required by sections 6 and 7 might provide valuable information to voters about the decision that they faced, helping them to form a judgement. However, as already noted, the extent to which those who participate in referendums form their opinions through interpreting a shared body of information pertaining specifically to the subject addressed in the referendum question is debatable. Moreover, such publications were always likely to be vulnerable to the claim that they were in some way partial, particularly given that the government took an official stance over which way to vote (in favour of continued EU membership).<sup>16</sup>

The difficulties involved in achieving the public perception that an honest debate has taken place over a divisive issue were illustrated by some of the findings of the Electoral Commission post-referendum opinion survey. It revealed that 52 per cent of people disagreed with the statement ‘that the conduct of the referendum campaigns was fair and balanced.’ Only 34 per cent agreed.

<sup>16</sup> See below and ch 1.

Overall, those on the losing, ‘remain’, side, unsurprisingly, were more prone to objecting in this way: 63 per cent of them opposed the statement that the campaigns were ‘fair and balanced’, while 47 per cent of leave voters shared this negative view. Voters on the remain side who disagreed with the statement were more likely to attribute their opinion to ‘inaccurate/misleading information’ (38 per cent); while supporters of ‘leave’ who were of this outlook tended to hold that they had formed it because ‘the campaign was “one-sided”’.<sup>17</sup>

Section 8 also addressed the issue of information made available to the public. It allowed the minister to alter section 125 of the 2000 Act. This section of the 2000 Act, entitled ‘[r]estriction on publication etc. of promotional material by central and local government etc.’ applies during the 28 days leading up to the vote (see chapter one Appendix B). It means that central and local government, or other publicly funded entities, cannot publicly disseminate ‘in whatever form and by whatever means’ (s 125[4][a]) material pertaining to the referendum. Organisations exempt from this rule include the Electoral Commission and the British Broadcasting Corporation (BBC) and Welsh language television. The role of the media in referendums, especially that of the BBC but also of non-public sector outlets, is always potentially controversial, and once again points to the complications involved in exercises in direct democracy. It is necessary to inform the public about the vote, but difficult to achieve presentation of the issues involved in ways that are widely accepted as neutral, truthful and comprehensive.

Section 125 applied to ‘general information about a referendum’ (s 125[1][a]); ‘any of the issues raised by any question in which such a referendum is being held’ (s 125[1][b]); and efforts to ‘encourage’ participation (s 125[1][d]). Crucially, it also prevented the promotion of ‘any arguments for or against any particular question on which such a referendum is being held’ (s 125[1][c]). This particular provision can be read as intended to prevent the use of public resources for what it treats as improper purposes, including the encouragement of a particular outcome in the vote. It also attempts to protect the fairness of the process as an exercise in democracy, by preventing activity by public authorities that that might give an advantage to a particular side. More broadly, section 125 can be seen as setting out to create a partial quarantine for a referendum, isolating it from governmental interference (the term ‘purdah’ was once used to describe the application of such rules in Whitehall, though it is now considered culturally inappropriate).

Yet this insulation of direct democracy is limited in its extent and duration. The representative system is always present. A referendum takes place because a government wants or feels obliged to bring it about; and it is able to shape the overall context of the vote (though, as we know, it may not succeed). Parliament

<sup>17</sup> Electoral Commission, *The 2016 EU referendum* (London, Electoral Commission, 2016) 47.

provides the regulatory framework for the referendum, the enforcement of which falls to various organs associated with the system of representative democracy. Furthermore, the parties, and individual politicians, can take part – on both sides. Taking this perspective, a referendum appears as a simulation of direct democracy, designed, run and subject to intervention by agents of representative democracy who are also responsible for deciding how to respond to the result of the vote (or prescribing in advance how they should do so). For reasons that will be discussed below, section 8 of the 2015 Act allowed for further relaxation of the restrictions imposed by section 125 of the 2000 Act. The Minister could, in particular, issue regulations permitting defined forms of ‘oral communications and communications with the media’ about the referendum, subject to consultation with the Electoral Commission (s 125[3]; [4]). However, the government had initially intended to allow a full exemption for itself from this rule. Under political pressure it heavily diluted its plans as the 2015 legislation proceeded through Parliament; and provided a commitment that it did not intend to introduce the power it had created to disapply section 125 of the 2000 Act.<sup>18</sup>

Section 9 returned to the issue of delegated powers. It stipulated that all regulations issued under the Act take the form of statutory instruments (s 9[1]). It also required most such legislation to be approved in draft by both Houses of Parliament (s 9[2]). This practice – known as the affirmative procedure – represents the more rigorous form of parliamentary control available for delegated legislation.<sup>19</sup> It means that, though Parliament has vested powers in ministers, it retains the ability to veto their exercise. Section 10 dealt with the financing of the referendum; while section 11 defined terms for the purposes of the Act. Sections 12 and 13 addressed respectively the territorial extent of the Act (UK and Gibraltar); and when it came into force – sections 9–14 as soon as it was passed, but with the remainder implemented, once again, on days determined by the relevant minister, using delegated powers. Section 14 described the ‘[s]hort title’ of the Act as being ‘the European Union Referendum Act 2015’. The Act closed with three detailed schedules, dealing with ‘[c]ampaigning and financial controls’ (Sch 1); ‘[c]ontrol of loans etc. to permitted participants’ (Sch 2); and ‘[f]urther provision about the referendum’ (Sch 3). These schedules totalled 77 paragraphs between them. They demonstrated the inescapable complexity of government, and the attention to detail required from officials attached to representative institutions. This necessity was always present, even – or especially – for the purposes of an exercise presented as transferring political responsibility away from official sites of authority and to the people.

<sup>18</sup>House of Commons Public Administration and Constitutional Affairs Committee, *Lessons learned from the EU referendum* (London, House of Commons, 2017) 16–20; Electoral Commission, *The 2016 EU referendum* (London, Electoral Commission, 2016) 25–26.

<sup>19</sup>Simon Patrick, *Scrutiny of Delegated Legislation in Relation to the UK’s Withdrawal from the European Union* (London, The Constitution Society, 2017) 7–11: <https://consoc.org.uk/wp-content/uploads/2017/10/delegated-legislation-and-brexit-2.pdf> last accessed 24 September 2018.

The final subheading in the Act, above Schedule 3(19), had the intriguing title ‘Restriction on challenge to referendum result’. The existence of a restriction could imply that there was a possibility of a challenge, subject to certain conditions. The legislation allowed for the possibility of review provided:

- (a) the proceedings are brought by a claim for judicial review; and
- (b) the claim form is filed before the end of the permitted period.

The ‘permitted period’ was one of six weeks (s 19 [2][2]). By the time concerns about illegal activity in relation to the referendum began fully to surface, this period had long since lapsed. Moreover, the activities that the Electoral Commission found in violation of the law, referring them on to the police, did not fall within the definition of the basis for a challenge described in the Act. It referred to (s 19 [1]) ‘procedures for questioning the number of ballot papers counted or votes cast in the referendum as certified by the Chief Counting Officer or a Regional Counting Officer or counting officer’. No-one has claimed that the kind of irregularity envisaged in the Act as possibly engaging judicial review had occurred. The UK is genuinely fortunate as regards the integrity of its electoral administration. The chief problems with the referendum lay elsewhere, and most of them involved actions entirely within the law.

#### A. The Limits of the Act

Alongside all the rules regarding campaign regulation and funding, the appointment of counting officers and so on, the Act is as notable for its omissions as its inclusions. While it provided for a referendum the result of which triggered political and constitutional disruption on an historic scale, it did not address the possible consequences of the exercise for which it provided the statutory basis. Issues *not* dealt with in the 2015 Act included (I lean here more towards preparations for the ‘leave’ scenario, since it was the more in need of special arrangements, and transpired to be actual the result of the referendum):

- The status of the vote – in other words, whether it was to be binding or advisory (by implication, as the Supreme Court found, it was therefore the latter, at least in strict legal terms).
- Whether the response to the vote by government and Parliament should take into account matters such as turnout, size of the overall majority in either direction; and territorial voting patterns. In this sense, the Act allowed the referendum to fail to match another of the ‘Davis criteria’: that referendums should include a threshold provision. Moreover, Davis had suggested in his 2002 speech that the threshold should be set at a level commensurate with the significance of the decision. Given the exceptional importance of the issue at stake, the lack of such a provision was, from the point of view of this criterion, a severe omission. It is interesting to speculate on what might

have been the consequences of the application of a threshold in 2016. In 1979, referendums were held on the introduction of devolution to Wales and Scotland. In each case, the automatic implementation of the new system required not only a ‘yes’ result, but for 40 per cent of those who could have voted to support this outcome. The vote in Wales produced a straightforward ‘no’. For Scotland, there was a narrow ‘yes’ majority, but it fell short of the 40 per cent threshold. Devolution was not introduced on this occasion. If one accepts the argument in favour of a 40 per cent rule for devolved institutions of the sort proposed in 1979, then to apply the Davis criteria, a higher minimum might have been appropriate over the EU in 2016, since it was arguably a decision of greater gravity. Yet even if only the 40 per cent stipulation were applied in 2016, the ‘leave’ vote, supported by 37.4 per cent of registered electors, would not have met the necessary level.

- The meaning both of a ‘remain’ and a ‘leave’ vote. In particular, on what terms the UK might attempt to depart from the UK; how it would seek to structure its subsequent relationship with the EU and the rest of the world; what might be the consequences for the internal governance of the UK; and what would be UK policy in areas such as the position of EU citizens’ from other member states within the UK; the same for UK citizens in the EU; and how to handle issues involving Northern Ireland and the border with the Republic of Ireland. (In this sense, two ‘Davis criteria’ were failed: providing a clear view to the public of the possible outcomes, and allowing Parliament a central role through legislating for the potential consequences of the referendum in advance of its taking place.)
- Who would implement leaving, under what authority, according to what processes and on what timetable.
- In the event that the UK pursued a policy of exit from the EU, whether there would be further occasion for democratic approval of this course of action, such as a further referendum, voting in Parliament, or perhaps another General Election. (Arguably, this absence meant that the need Davis once identified to establish the ‘settled will’ of the people was overlooked.)

Perhaps not all of these contingencies could have been dealt with in an Act of Parliament. Some would have been more appropriate as statements of government policy. But as the analysis of the Act above has shown, it did impose reporting requirements upon the Secretary of State. Their particular purpose was to create greater clarity about the meaning of the vote, the lack of which was a serious problem with the referendum. One difficulty in this area was that, in discussing what arrangements might be for the UK outside the EU, rather than suggesting a preferred model, the government presented them all as undesirable in comparison to membership (see Appendix B and Appendix C). This approach was unsatisfactory from the point of view of informed voting. It arose because, through the referendum, the government was offering the possibility of a

dramatic change while seeking to persuade the public to reject it. This ‘bluff call’<sup>20</sup> aspect of the vote was the central defect of the entire exercise.

Moreover, there was no unified ‘leave’ movement with a single programme for which to vote. Different groups and individuals with varied priorities occupied the field. Perhaps the closest equivalent to an official statement of what exit meant from the ‘leave’ side was the leaflet produced and mailed to every UK household by the Electoral Commission on behalf of the nominated lead ‘leave’ campaign, Vote Leave (as part of its information pamphlet that also included a remain leaflet).<sup>21</sup> Yet, even given the space constraints, it was vague about objectives (see Appendix D). Indeed, even though it was in a sense a single entity, Vote Leave was deliberately conceived of as a disparate movement. The legislative framework for the referendum and the way in which it was applied (by the Electoral Commission) overtly encouraged this approach. Designation as the lead campaign group on either side within the terms of the 2000 Act allowed the organisation concerned ‘a spending limit of £7m, one free postal distribution of information to voters, the use of certain public rooms, referendum campaign broadcasts and a grant of up to £600,000’.<sup>22</sup> When deciding whether an organisation was suitable to be designated, the Electoral Commission was required by section 109 of PPERA to judge whether it ‘adequately represents those campaigning for that outcome’. If it had identified multiple applicants meeting this test, the Act stipulated that the Commission should choose the entity that matched this requirement to the greatest extent. In seeking applicants for designated lead status, the Board of the Electoral Commission decided to set out ‘criteria’ that included ‘how the applicant’s objectives’ matched the result it advocated; ‘the level and type of support for the application’; the plans of the organisation concerned to ‘engage with other campaigners’; and its ‘capacity to deliver’ its ‘campaign.’<sup>23</sup>

The Electoral Commission, therefore, did not include an express requirement that designated lead groups should convey a single consistent message about the reasons that voting in the direction they advocated was desirable, or about what the outcome might be. Nor did it refer to a need to support a well-informed, honest and meaningful public deliberation process. Such prescriptions, if they were made, would no doubt be difficult to enforce in a way that was appropriate. But the terms of reference the Commission and the 2000 Act proposed seemed to encourage the opposite forms of behaviour. The requirement to represent campaigners on a particular side entailed incorporating a wide range of opinion

<sup>20</sup> The label subsequently attached to it by the Public Administration and Constitutional Affairs Committee. See ch 1.

<sup>21</sup> Electoral Commission, *The 2016 EU referendum* (London, Electoral Commission, 2016) 94.

<sup>22</sup> Electoral Commission, ‘EU Referendum: designation of lead campaigners’ (London, Electoral Commission, 2016) 3. See further: Independent Commission on Referendums, *Report of the Independent Commission on Referendums* (London, Constitution Unit, 2018) 134–44.

<sup>23</sup> Electoral Commission, ‘EU Referendum: designation of lead campaigners’ (London, Electoral Commission, 2016) 4.



that might be contradictory. In its selection of a ‘leave’ lead campaign group, the Commission chose ‘Vote Leave Ltd’ over ‘Go Movement Ltd’ stressing the ‘depth of representation’ the former had demonstrated.<sup>24</sup>

The breadth of orientation of the supporting organisations ‘Vote Leave’ listed in its application was such that it was hard to imagine they could have agreed about much other than their desire – each for their own reasons – for a ‘leave’ result. But this disparity was the very point Vote Leave was asserting for the benefit of the Electoral Commission selection process. Associated participants included: Conservatives for Britain; Conservatives for Liberty; Conservative Voice; Democratic Unionist Party; Green Leaves; Liberal Leave; Bangladesh Caterers Association; Business for Britain; The City for Britain; Farmers for Britain; Lawyers for Britain; Africans for Britain; Americans for Britain; BeLeave (a youth group); Christians for Britain; Kiwis for Britain; Muslims for Britain; Out & Proud (an LGBT+ group); Vapers for Britain; Veterans for Britain; Women for Britain; Economists for Britain; Historians for Britain; and Students for Britain.<sup>25</sup> The array of groups was a model of contemporary diversity; a curious proposition given the evidence that ‘leave’ voters were less likely to approve of such a quality than supporters of ‘remain’ (and the organisations on the list were perhaps at variance with one-another on this point).<sup>26</sup>

The Electoral Commission noted that Vote Leave would not make ‘support’ for ‘other campaigning organisations ... conditional on ... agreeing to deliver messages or activity on behalf of Vote Leave Ltd’. Go Movement, by contrast, took an ‘approach ... based on other organisations signing formalized agreements as “affiliates”’.<sup>27</sup> A reason Vote Leave was favoured over Go Movement, therefore, was precisely because it seemed to allow for a greater variety of presentation. The criteria, then, promoted the idea of a campaign that maximised its connections within a given cause rather than striving to present a unified coherent case to inform public decision making. They also stated that the ability to ‘deliver’ this inclusive but potentially nebulous campaign was important. In this sense, a campaign that used any available method to win, regardless of ethical considerations (provided it remained within the law), was adhering to the requirements of the 2000 Act and the Commission. It is notable in this regard that Vote Leave presented an aspect of its campaigning that would subsequently attract significant controversy as part of its case to the Commission. Under the heading ‘Online advertising’ it stated that:

[w]e will aim to raise awareness of the referendum and our campaign by using sophisticated analysis of data to get our message to as many voters as possible ... Our data

<sup>24</sup> *ibid.*, 8.

<sup>25</sup> ‘Application to register as a designated lead campaigner – referendum on the United Kingdom’s membership of the European Union’, p 18: [https://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0008/199934/Vote-Leave-ltd-designation-application.pdf](https://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/199934/Vote-Leave-ltd-designation-application.pdf) last accessed 30 September 2018.

<sup>26</sup> See ch 1.

<sup>27</sup> Electoral Commission, ‘EU Referendum: designation of lead campaigners’ (London, Electoral Commission, 2016), 9.

science team will work with social media experts to optimize these campaigns. One of the great things about platforms such as Facebook and Google Ads is that one can measure various metrics precisely and see exactly who is engaged by what. Using this data allows us to spread the word more effectively.<sup>28</sup>

Even had they been more unified in their cause, campaigners for leaving, whether part of the lead group or otherwise, were not primarily seeking to form a government (though some were within it already, and others, who possibly had aspirations in this direction, went on to join it). They were attempting to win a referendum. It was for the UK administration to respond to the result; and it was disparaging regarding the options that would follow a 'leave' outcome, despite committing to abide by it if it occurred.

It is not clear whether the 2015 Act alone could, if differently drafted, have dealt with the lack of clarity. Had legislation sought to bind the government expressly to stating what would be its approach to departure from the EU, there might have been objections that this degree of transparency undermined the UK bargaining position in such a circumstance. But if this argument is decisive, it could call into question the entire concept of a referendum on EU membership, since it would not be possible to provide the public with clear information about what they might be voting for, for fear of weakening the UK in negotiations.

Other concerns omitted from the Act could straightforwardly have been provided for (though I do not necessarily endorse all of the following possibilities). For instance, the Act could have contained a stipulation that, were a simple majority – or perhaps a defined supermajority, or a majority also reaching a threshold of percentage of registered voters – to support 'leave', then the Secretary of State was required to trigger Article 50 of the Treaty on European Union by a specified date. The Act could also have clearly vested in the Secretary of State the power to instigate the Article. It might also have established firm principles regarding reporting to Parliament, and what role it would have – if any – in authorising the approach to departure from the EU. Parliament could, through the Act, have provided for itself (either the Commons or both chambers) the right to a binding vote on whether to approve any final deal, and also defined the options that would be on offer at this point, and whether they would have included seeking to revoke Article 50 and remaining within the EU (though the revocability of Article 50 is a subject of debate). Parliament might also have provided in the 2015 Act for a further referendum at some point in the process, and again specified the choices it would have presented to voters.

But none of these options was taken. The Act had a guarded quality about it. It provided for a referendum but failed to clarify important issues connected to it. Both the meaning of the vote and the means of acting upon it, were, to a

<sup>28</sup> 'Application to register as a designated lead campaigner – referendum on the United Kingdom's membership of the European Union', p 47 [https://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0008/199934/Vote-Leave-ltd-designation-application.pdf](https://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/199934/Vote-Leave-ltd-designation-application.pdf) last accessed 30 September 2018.

significant extent, retrospective inventions. That an Act could create the potential for such momentous events in the UK and beyond, yet be so indeterminate as to the consequences, raises difficult questions about the Brexit process – both from the point of view of its democratic legitimacy and the preparedness of government. In addition to the content of the Act, then, the process by which it was passed is also an important area of constitutional study, addressed in the following sections.

As a postscript, following the Supreme Court judgment in the Miller case,<sup>29</sup> Parliament was, almost despite itself, given the opportunity to create a more comprehensive statutory basis for the response to the referendum than it had for the vote itself. It could, in theory, have denied the government the authority to activate Article 50. Perhaps more realistically, it could have imposed conditions regarding negotiating positions, provision of information, further parliamentary consultation, or even another referendum. Seemingly embarrassed by the sovereignty the courts had upheld on its behalf, it passed – in the European Union (Notification of Withdrawal) Act 2017 – a law only two sections in length, reproduced here:

European Union (Notification of Withdrawal) Act 2017.

An Act to confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.

1 Power to notify withdrawal from the EU

- (1) The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.
- (2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment.

2 Short title

This Act may be cited as the European Union (Notification of Withdrawal) Act 2017.

With the European Union Referendum Act, Parliament surrendered itself to a flawed referendum process; with the European Union (Notification of Withdrawal) Act, it once again chose to renounce power, in this instance to the executive.

## II. THE PARLIAMENTARY PERSPECTIVE: SECOND READING DEBATE IN THE HOUSE OF COMMONS

Through the European Union Referendum Act, Parliament subjected itself to a supposedly irresistible, far reaching but vague obligation. As a consequence, many members of both Houses felt obliged to follow a course of action to which

<sup>29</sup> See ch 1.

they were opposed. To understand this outcome, and assess its implications, it is worth considering the process by which this legislation was produced. If seeking to discern the key impulses lying behind a measure and the dynamics surrounding it, a valuable source to consider is the Second Reading debate in the House of Commons. It provides the opportunity for the discussion of the general principles of a Bill in the primary parliamentary chamber. At this point in its passage through Parliament, the European Union Referendum Bill was agreed to by a substantial majority of 544 to 53. A consideration of the debate leading to this firm endorsement – the rationales offered, the exchanges that occurred and the issues that were and were not addressed – can help us to appreciate, from a constitutional perspective, the Brexit episode and its implications.

The task of moving for a Second Reading of the European Union Referendum Bill in the Commons on 9 June 2015 fell to the Foreign Secretary, Philip Hammond. As Chancellor of the Exchequer in the May government, Hammond – who supported ‘remain’ in June 2016 – would become the most powerful advocate inside Cabinet of a form of Brexit that retained as much continuity as possible in the relationship between the UK and the EU.<sup>30</sup> In a sense he was seeking to minimise the impact of the very referendum the legislative basis for which he had shepherded through Parliament. Analysis of the speech he gave in June 2015 helps to expand upon and understand this tension, connected to political dynamics of the time, that in turn had consequences of a constitutional nature.

Hammond, though among the more well-disposed towards it within his party, presented the EU in negative terms. The EU was, in his account, a failing organisation, in need of reform for all its members, and from which the UK must seek some degree of disengagement, even if not leaving altogether. It might seem odd that a government contemplating recommending a ‘remain’ vote in the referendum (though reserving the possibility that it would take a different stance) should depict the EU in this way. This circumstance had arisen because, since the early 1990s, Euroscepticism had become an increasingly powerful force within the Conservative Party, influencing the way in which successive leaders presented and approached the EU.<sup>31</sup>

During this time, opinion among the more vigorous Eurosceptics had increasingly shifted towards the idea of exiting the EU altogether. The holding

<sup>30</sup> eg Chris Giles, ‘Hammond calls for soft Brexit to safeguard economy’, *Financial Times*, 25 January 2018: <https://www.ft.com/content/cb08996a-01d3-11e8-9650-9c0ad2d7c5b5> last accessed 25 September 2018.

<sup>31</sup> See eg Philip Lynch and Richard Whitaker, ‘Where there is discord, can they bring harmony? Managing intra-party dissent on European integration in the Conservative Party’ (2013) 15(3) *The British Journal of Politics and International Relations* 317–39; Brendan Donnelly, ‘On the edge: Britain and the European Union’ (2012) 11(1) *European View* 31–37.

of the referendum represented the latest in a succession of attempts to conciliate the firmly Eurosceptic wing of the party.<sup>32</sup> The referendum, from this point of view, rather than a neutral exercise in democratic engagement, was intrinsically an expression of the movement to achieve UK departure from the EU. Some supporters of membership (in the Conservative Party and elsewhere) formed the view that such a vote could resolve the dispute about membership in favour – they hoped – of continued participation; and the government that provided for the referendum officially supported remaining (though with ministers allowed publicly to dissent from this position).<sup>33</sup> But the referendum came about not because of pressure from those who wished to retain membership of the EU, but from those who wished to end it. The vote was judged necessary to achieve exit – hence those who wanted to attain this outcome, both inside and outside the Conservative Party, were the main drivers of it.<sup>34</sup> Euroscepticism had been the dominant viewpoint among Conservative members for some time,<sup>35</sup> and a referendum had been promoted determinedly by an organised minority of Conservative MPs.<sup>36</sup> The perceived electoral threat posed by the UK Independence Party had advanced this cause.<sup>37</sup> Reflecting these tendencies – that had led to the commitment to a referendum that Cameron first made in January 2013 – the Conservative government began preparation for the vote with an outward posture of negativity regarding the EU. Yet senior figures in the party were also seeking to create conditions within which they might achieve a ‘remain’ victory. This dual stance, and the complexities inherent within it, helps to explain some of the decisions about the content of the European Union Referendum Act 2015 and associated issues.

Hammond opened by describing the bill as ‘a simple, but vital piece of legislation’ with ‘one clear purpose: to deliver on our promise to give the British people the final say on our EU membership in an in/out referendum by the end of 2017’.<sup>38</sup> The ‘promise’ he referred to had been included in the Conservative manifesto for the General Election that had taken place just over a month previously, on 7 May (see Appendix E). From the perspective of the UK constitution, that the Conservatives had won the election on such a pledge invested the bill introduced to implement it with a special status, sometimes encapsulated by

<sup>32</sup> eg Nathaniel Copsey and Tim Haughton, ‘Farewell Britannia? “Issue Capture” and the Politics of David Cameron’s 2013 EU Referendum Pledge’ (2014) 52 *JCMS: Journal of Common Market Studies* 74–89.

<sup>33</sup> This attitude can be found eg: in Tony Blair, *A Journey* (London, Arrow, 2011) ch 16.

<sup>34</sup> See eg Ian McAllister, and Donley T Studlar, ‘Conservative Euroscepticism and the Referendum Party in the 1997 British general election’ (2000) 6(3) *Party Politics* 359–71.

<sup>35</sup> eg Tim Bale, ‘Between a soft and a hard place? The Conservative Party, valence politics and the need for a new “Eurorealism”’ (2006) 59(3) *Parliamentary Affairs* 385–400.

<sup>36</sup> For further analysis see Conclusion.

<sup>37</sup> For UKIP see eg Philip Lynch and Richard Whitaker ‘Rivalry on the right: The Conservatives, the UK Independence Party (UKIP) and the EU issue’ (2013) 8(3) *British Politics* 285–312.

<sup>38</sup> HC Debates, 9 June 2015, col 1047.

the label ‘Salisbury-Addison convention’.<sup>39</sup> It meant that, though the House of Lords did not contain a government majority within it, the Lords would in practice not block its passage. Peers might, however, seek to amend the legislation, though subject to the understanding that they would not do so in a way that negated its core purpose.<sup>40</sup> Ultimately, the Lords passed various relatively minor amendments that were retained, but its most radical alteration – to extend the vote to 16 and 17-year-olds – was rejected.<sup>41</sup> The Lords can do much to modify legislation. But the decisive political drive over major issues comes from the Commons.

Hammond sought to explain why, given that a referendum was held on EEC membership in 1975, a further vote was needed now. Speaking as someone who had ‘cast my vote in favour of our membership of the European Communities’ on that earlier occasion, he claimed that in doing so he ‘believed I was voting for an economic community that would bring significant economic benefits to Britain, but without undermining our national sovereignty. I do not remember anyone saying anything about ever-closer union or a single currency’. Yet in the intervening period ‘the institution that the clear majority of the British people voted to join has changed almost beyond recognition’. This statement suggested a fine balance. Referendums had to be recognised as having force, otherwise the use of the device now anticipated would lack purpose. But at the same time, Hammond needed to demonstrate that the mandate of the previous vote had expired, justifying a further such exercise.

To challenge this argument, therefore, was to call into question the premise for the referendum as presented by the government. Kenneth Clarke, a senior Conservative who was now a backbencher, and a longstanding supporter of UK participation in European integration, immediately mounted such a criticism. Recalling the 1975 campaign, in which he was ‘active’, he said that ‘[m]ost of the debates I took part in were about the pooling of sovereignty and the direct applicability of European legislation without parliamentary intervention, which was a very controversial subject, and, besides, ever-closer union was in the treaty to which we were acceding’.<sup>42</sup> Hammond responded that ‘as an 18-year-old voter in that election, I did not actually read the treaty before I cast my vote’.<sup>43</sup> This remark inadvertently highlighted a possible criticism of referendums: that they seek the views of the public on issues the complexity of which they are not fully aware. If Hammond – who was in fact 19 by the date

<sup>39</sup> Andrew Blick, *The Codes of the Constitution* (London, Hart Publishing, 2016) 175–76.

<sup>40</sup> See Richard Reid, *The House of Lords: conventions and Brexit* (London, The Constitution Society, 2017) 11–12: <https://consoc.org.uk/wp-content/uploads/2017/12/HoL-Brexit-A4-web.pdf> last accessed 23 September 2018.

<sup>41</sup> *European Union Referendum Bill 2015–16: Progress of the bill* (London, House of Commons Library, 2015) 22–26.

<sup>42</sup> HC Debates, 9 June 2015, col 1047.

<sup>43</sup> *ibid.*, col 1048.

of the EEC vote (which took place on 5 June 1975) and had been studying Politics, Philosophy and Economics at Oxford since the previous October<sup>44</sup> – was unfamiliar with the contents of the Treaty of Rome, how many participants in the referendum he was now advocating might be expected to be aware of the existence let alone the details of such documents as the Treaty on European Union?

Hammond then listed a succession of treaties – ‘the Single European Act, Maastricht, Amsterdam, Nice and Lisbon’ – that had ‘added hugely to the’ authority of the EU in spheres ‘unthinkable in 1975’. Such developments, Hammond concluded, had ‘eroded the democratic mandate for our membership to the point where it is wafer-thin and demands to be renewed’.<sup>45</sup> As we will see in chapter three, transformations Hammond seems to have held as being ‘unthinkable’ at the time of the previous referendum had in fact been conceived of, in the UK, long before 1975. Alongside claims about the implications of change in the EU, the Foreign Secretary offered a second set of justifications for the holding of a referendum. It rested in the observation of such votes being held on EU-related matters in various other member states; and on issues other than the EU within the UK. As he put it:

Since our referendum in 1975, citizens across Europe from Denmark and Ireland to France and Spain have been asked their views on crucial aspects of their country’s relationships with the EU in more than 30 different national referendums – but not in the UK.

We have had referendums on Scottish devolution, Welsh devolution, our electoral system and a regional assembly for the north-east, but an entire generation of British voters has been denied the chance to have a say on our relationship with the European Union. Today we are putting that right.<sup>46</sup>

None of the European states to which Hammond referred, having joined the EU or predecessor organisations, had held a referendum expressly on whether to leave or remain within it.<sup>47</sup> The UK already stood out among them in this regard following the 1975 vote, and was about to repeat the exercise. But Hammond was correct to portray referendums as a cross-European phenomenon.<sup>48</sup> In using them since 1973 the UK had in some ways demonstrated that it was a European polity, even if, for some, the purpose of the referendums on EEC and EU membership was to assert divergence from the continent. Hammond was also correct to recognise that referendums had become, since 1975, a relatively

<sup>44</sup>Information derived from the Conservative Party website: [https://www.conservatives.com/OurTeam/Members\\_of\\_Parliament/Hammond\\_Philip](https://www.conservatives.com/OurTeam/Members_of_Parliament/Hammond_Philip) last accessed 3 March 2018.

<sup>45</sup>HC Debates, 9 June 2015, col 1048.

<sup>46</sup>*ibid.*

<sup>47</sup>For referendums internationally, see Matt Qvortrup, *A comparative study of referendums: Government by the people* (Manchester, Manchester University Press, 2005).

<sup>48</sup>See eg Matt Qvortrup, ‘The three referendums on the European constitution treaty in 2005’ (2006) 77(1) *The Political Quarterly* 89–97.

familiar part of the UK political system (notwithstanding an 18-year gap under the Conservative governments of 1979–97).<sup>49</sup> Hammond then introduced a third strand in his case for the referendum. He described the Conservatives, in May 2015, as ‘fighting and winning the general election as the only major party committed to an in/out referendum, in the face of relentless opposition from the other parties’.<sup>50</sup>

Hammond set out the plan for a negotiation with the EU that would precede the referendum. It was his intention both to reduce the concentration of powers at EU level in general, and to achieve a special arrangement for the UK.<sup>51</sup> He presented reform as essential for the whole EU, but also argued that the UK had special requirements:

For the good of all 28 countries, there are things that need to be done to reform the way in which the European Union works to make it more competitive, effective and democratically accountable. However, the British people have particular concerns, borne of our history and circumstances. For example, we are not part of the single currency and, so long as there is a Conservative Government, we never will be. We made that decision because we will not accept the further integration of our fiscal, economic, financial and social policy ...<sup>52</sup>

The Labour MP, Andrew Gwynne, inquired if the Foreign Secretary would ‘tell the House which powers affecting the United Kingdom Brussels has too much of?’ Hammond protested that he was being asked ‘to set out a list of powers for repatriation, then ... to say that the Prime Minister would have failed if we did not achieve the repatriation of every single one of them. No sensible person with any negotiating experience would approach a complex negotiation in that way.’<sup>53</sup> While this response was sensible, it highlighted the difficulties in holding referendums in connection to a diplomatic process. If members of the public were being asked to endorse the outcome of a negotiation, how were they to judge whether it was successful without an original set of objectives against which to measure it? This fault was a source of problematic ambiguity for the ‘remain’ option. But, from this perspective, the ‘leave’ outcome was more difficult to assess still. If selected by voters, its precise form would depend upon negotiations taking place after the referendum was held, and therefore could not be known at the time of the referendum. Hammond was in effect asking Parliament to legislate for a vote that offered a choice between what were at that point two unknown quantities.

Another Labour MP, David Hanson, raised a question that pertained to two features of the referendum: that the government sought to premise it on

<sup>49</sup> Lucy Atkinson, Andrew Blick and Matt Qvortrup, *The People’s Veto: the history of referendums in the United Kingdom* (Oxford, Oxford University Press, 2019 forthcoming).

<sup>50</sup> HC Debates, 9 June 2015, col 1048.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*, col 1049.

<sup>53</sup> *ibid.*, col 1050.



a negotiation; and that it was binary in nature. Voters would be able to choose between two possible changes, but not to retain the existing position. They could select either the new arrangement the government planned to obtain, or to leave the EU altogether. Hanson asked: '[s]hould we not have a specific vote on the Prime Minister's recommendations as well as on the retention of membership of the European Union?' In response, Hammond fell back on the argument that the Conservatives had 'made a proposal to the British people, it was put to the test in the general election and we have received an overwhelming mandate to progress'.<sup>54</sup> This argument was significant not only to the particular point Hanson raised, but also in demonstrating the necessary and complex relationship between referendums and the overall system of representative democracy. It implied that the authority to hold a referendum on a particular subject in a given way derived from victory in a General Election, attained while winning well under 50 per cent of total votes cast for Conservative candidates in individual constituencies (36.9 per cent on a 66.2 per cent turnout). In this contest, the referendum pledge was one of a number contained in a manifesto, that that most voters anyway had surely not read (though it is fair to say that this particular policy was more widely publicised than most). The term 'overwhelming mandate' employed by Hammond was difficult to justify. Advocacy of the use of referendums is often founded in criticism of the idea that general elections can resolve particular issues.<sup>55</sup> Yet the justification for a referendum, Hammond argued, rested in just such a process. The concept subsequently advanced – and accepted by many in Westminster – that the EU referendum had a moral force superior to the authority of Parliament is curious given that the supposed initial basis for holding it, and the particular way in which it was framed, rested in a parliamentary election.

A central argument in favour of referendums is that they are a means of soliciting the views of the people on a given issue.<sup>56</sup> But who 'the people' are is open to interpretation in each particular instance. The definition arrived at can have implications for the result and for the perceived fairness of the exercise. It is a topic that has generated controversy in the past. For instance, there have been disagreements over whether referendums on home rule or devolution for parts of the UK should be held only in the specific territory concerned, or – because of the wider constitutional implications – across the whole UK. To date, the narrower, territory-specific electorate has been used for such votes. Similar discussions have taken place – resolved in the same direction – over referendums on possible secession from the UK, which have been held in Northern Ireland in 1973 and Scotland in 2014.<sup>57</sup> In the late nineteenth and

<sup>54</sup> *ibid*, col 1052.

<sup>55</sup> See ch 4.

<sup>56</sup> See ch 4.

<sup>57</sup> Lucy Atkinson, Andrew Blick and Matt Qvortrup, *The People's Veto: the history of referendums in the United Kingdom* (Oxford, Oxford University Press, 2019 forthcoming) chs 2–3.

early twentieth centuries in the UK, the idea of holding a referendum on the right of women to vote was sometimes proposed. It raised difficult questions about who should take part. To limit participation to men would be objectionable to supporters of female suffrage, who could argue it was unjust for men to be able to deny the vote to women, and would entail acceptance of the principle that women were unfit for such engagement. To allow women to vote might appear as acceptance in advance of a principle that it was the purpose of the referendum to decide (A further problem beyond who could participate, was the question of whether it should be possible for a majority voting in a referendum to deny any group the ability to vote).<sup>58</sup>

In introducing the Bill, when discussing the envisaged electorate, Hammond explained that '[s]ince this is an issue of national importance, the parliamentary franchise is the right starting point. It means that British citizens in the UK or resident abroad for less than 15 years and resident Commonwealth and Irish citizens can take part'. Added to this regular list of potential voters in a General Election for the purposes of the referendum would be members of the House of Lords and Commonwealth citizens who resided in Gibraltar (to facilitate the arrangement, the government of Gibraltar would bring forward referendum legislation of its own).<sup>59</sup> Hammond acknowledged the existence of a view that 16 and 17-year-olds should be able to vote in the EU referendum. He rejected this outlook on the grounds that '[t]his is an issue of national importance about Britain's relationship with the European Union and it is right that the Westminster parliamentary franchise should be the basis for consulting the British people'. While there was also support for the idea of extending the franchise for elections to the House of Commons down from 18 to 16, it should be kept separate from the present discussion, Hammond held.

The Foreign Secretary also overtly dismissed any notion that EU citizens who lived inside the UK should be permitted a vote. He insisted that: '[t]he referendum is about delivering a pledge to the British people to consult them about the future of their country. It would be a travesty to seek to include EU nationals whose interests might be very different from those of the British people.'<sup>60</sup> A possible response to this point might have been that all elections and referendums involve people with different interests taking part – indeed that is their essence in a democracy. To exclude a group on the grounds that its 'interests might be very different' could seem puzzling. Moreover, the inclusion of people living in Gibraltar in the vote was difficult to reconcile with the case Hammond presented. They had no part in the UK General Election at which the Conservative Party made a commitment to a referendum. Moreover, they surely would have fitted within the category Hammond proposed of those whose

<sup>58</sup> *ibid.*, ch 2.

<sup>59</sup> HC Debates, 9 June 2015, col 1052.

<sup>60</sup> *ibid.*

‘interests’ were ‘very different’ from British people, as reflected in the result in Gibraltar – just under 96 per cent supported ‘remain’ (compared to 48.1 per cent in the UK).

However, as with proposals for a referendum on female suffrage, there was a connection between the question of who should be able to take part and the subject of contention towards which the vote would be directed. Those who saw the EU as an undesirable external imposition upon the UK and therefore wished to leave (and were the main source of pressure for the holding of a referendum) would naturally reject the idea of EU citizens from other member states participating as equals alongside British citizens. So too could others who might favour continued membership on pragmatic grounds (the position of the Conservative government during the referendum) but who did not view the EU as a genuine supranational polity.<sup>61</sup> Those who were more convinced of the EU ideal might believe that all EU citizens residing in the UK, whether British or otherwise, should share in the decision over the future position of the UK (though they might also prefer that there was not a vote on this subject at all). Since the occurrence of the referendum itself largely represented a capitulation to forces hostile to the EU, it was logical that the selection of a franchise should be in accordance with a Eurosceptic frame of thought. The decision had obvious material implications, making a remain victory less likely.

The approach Hammond advocated to the franchise was challenged in debate. The sole Green Party MP, Caroline Lucas, referring to ‘the question of extending the franchise to 16 and 17-year-olds’ suggested that ‘[t]he answer he gave about why we should not do it – because it is an issue of national importance – is the main reason he should do it ... Why not let young people have a say on their future, which is what this Bill is about’. On the exclusion of EU citizens from other member states, a point offered in support of the bill as drafted was that, elsewhere in Europe, it was not the practice to let individuals from elsewhere in the EU vote in referendums. Hammond also noted that Luxembourg had recently opted not to allow citizens from other EU states to vote in parliamentary elections.<sup>62</sup> But as Angus MacNeil of the Scottish National Party noted, the Scottish independence referendum in 2014 had been more inclusive, allowing EU citizens resident in Scotland to take part. MacNeil asked why his constituent from Germany who had ‘lived in North Uist for 25 years’ had been able to vote ‘in the Scottish referendum, but ... cannot vote in this referendum.’<sup>63</sup>

Moving on to the contents of the bill that dealt with regulatory matters, Hammond observed that ‘running a referendum is not straightforward’.<sup>64</sup>

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*, col 1048.

<sup>64</sup> *ibid.*, col 1054.

This comment reflected an important quality of referendums that we have already noted (though Hammond did not expressly make this elaboration). On the surface they might seem a means of directly connecting voters with given decisions, bypassing representative processes. But in practice they are subject to the very system they might appear intended to circumvent. Moreover, decisions about the precise application of rules presented as intended to achieve a fair contest can generate controversy, especially because they might have implications for the outcome. Introducing the regulatory aspects of the European Union Referendum Bill, Hammond noted that while some of the content was more technical, there was a contentious aspect. As he put it ‘some media attention’ had been devoted to the plan to disapply section 125 of the Political Parties, Elections and Referendums Act 2000. As discussed above, it prevented central and local government and other public agencies from publishing material pertaining to the referendum, including the advocacy of a particular side. Hammond held that there were ‘operational and political’ justifications for the relaxation of this rule. Section 125, were it to remain fully intact, would prohibit the government from carrying out regular ongoing interactions with the EU. This point related to the ‘operational’ justification. The ‘political’ aspect to the proposed amendment of section 125 involved ‘a clear manifesto commitment and a mandate won at the general election.’<sup>65</sup>

Hammond argued that the ‘mandate’ attained at the recent poll had been ‘to renegotiate the terms of the UK’s relationship with the European Union’ and to then ask the public to vote on them. The government anticipated that it would ‘take a position’ in the referendum, and ‘if we have been successful, as we expect to be’, it would wish to set out the arrangement secured and how it dealt with the needs of the UK population: in other words, make the case for remaining on a basis of the deal. It would ‘want to make a recommendation on where the national interest lies, and Ministers will want to be able to continue making the case, up to referendum day, without being constrained by fears that, for example, the posting of comments on Twitter accounts could constitute publication’.<sup>66</sup> In presenting this case, Hammond demonstrated how discerning what, precisely, people had voted for in a democratic contest could involve a degree of inference or even creative interpretation. The Conservative manifesto had made no express reference to the possibility that the government would campaign on a particular side. Yet Hammond claimed that to do so was somehow implicit in the mandate it had won, assuming it achieved goals it regarded as satisfactory (which were themselves not precisely described in the manifesto) from the EU negotiations, an outcome he anticipated would be achieved. Following the referendum itself, further efforts to read from the result of a vote more than was contained in the exact words put to the electorate would take place. The reference Hammond made to Twitter was also significant. It was a

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*, col 1055.

reminder that communications technology and its application to campaigning and politics in general had developed significantly since the 2000 Act was passed.<sup>67</sup>

At this point, Peter Bone, a Conservative Member and a prominent Eurosceptic, intervened, asking: '[i]s that not what a lot of people are concerned about – that the Government will use the apparatus of state to push a case, rather than letting the two sides have equal and fair access?' Hammond addressed his point by emphasising that the nominated campaigns on either side, as selected by the Electoral Commission, would 'lead the debate'. They would 'receive a number of benefits, including a public grant and eligibility to make a referendum broadcast and send a free mailshot to voters'. The government had 'no intention of undermining these campaigns' or of incurring substantial expenses 'during the purdah period' set out in the 2000 Act. He insisted that '[a] vibrant, robust debate in the best traditions of British democracy is in all our interests'. The government would display 'proper restraint' and provide for 'balanced debate during the campaign'.

Another Conservative, Dominic Grieve, a former Attorney General, then entered the debate. After the referendum, at which he supported the remain side, he would become the leading figure of a dissident group of Conservative MPs who sought to enhance the role of Parliament in the process rather than allowing the government to dominate proceedings; and who sought to avoid a highly disruptive Brexit, as well as possibly keeping open the option of not leaving at all. Its members were depicted by their opponents as in practice setting out to frustrate the will of the public.<sup>68</sup> But when taking part in the debate on the legislation providing for the EU vote, Grieve did not address matters pertaining to the force that the referendum result would have, how a vote to leave might be implemented, or what would be the proper role of Parliament, on this occasion. Rather, he dealt with the same subject as Bone. Grieve recalled that, during the passing of the 2000 Act, the Conservative position, for which he had been spokesperson, had been that the 'purdah' phase should be made longer. He said he anticipated that, subject to the outcome of the forthcoming diplomacy, he would support continued membership of the EU in the popular vote on the subject. Yet he held it was important to 'provide a level playing field and make it clear that the Government will not abuse their position'.<sup>69</sup> To loosen further a control included in the 2000 Act that the Conservatives had previously criticised as excessively lax might 'convey an impression that the Government will come in and try to load the dice' – a perception Grieve regarded as undesirable.<sup>70</sup>

<sup>67</sup> See: Electoral Commission, *Digital campaigning* (London, Electoral Commission, 2018) esp 4–6.

<sup>68</sup> 'Leading Remainer Dominic Grieve insists he is not part of anti-Brexit conspiracy', *Daily Mail* online, 14 June 2018: <http://www.dailymail.co.uk/wires/pa/article-5843191/Leading-Remainer-Dominic-Grieve-insists-not-anti-Brexit-conspiracy.html> last accessed 5 July 2018.

<sup>69</sup> HC Debates, 9 June 2015, col 1055.

<sup>70</sup> *ibid*, cols 1055–56.

These exchanges involving Hammond, Bone and Grieve were revealing regarding their attitudes towards the purpose of the referendum. For Hammond, and presumably for others within the government (though some members of it would later exercise the option granted to them publicly to dissent over this issue), the referendum was a means of settling the debate over membership of the EU, in favour of its continuation. They had decided in advance that there was at least a strong chance they would be able to secure a package that they could present to the electorate as satisfactory, and sought to avoid certain problematic regulatory restrictions on their ability to do so. This attitude connected directly to one of the most important characteristics of the EU referendum, and the most significant source of its defects: that it was a 'bluff call'.

Bone and Grieve both registered concerns about the relaxation of restrictions that the Bill entailed. Yet, beneath this apparent similarity, their motivations differed. Bone sought to convey the idea of a government using its position to advantage the side it supported. It might seem that his main motive was to secure a change in the legislation, thereby removing an advantage for his opponents, and increasing his chances of victory. But equally he could be seen as promoting the idea that the referendum was somehow held on a flawed basis. This concept could be rhetorically useful to the Eurosceptic side, both during a campaign and afterwards. Indeed, if the referendum produced a vote in favour of remaining, the idea that this outcome had somehow been manipulated could be useful to those planning to continue to promote the objective of leaving in future. If the government did not amend the bill and retained the relaxation of pre-election rules, such claims would be strengthened. Even if the plan was removed from the legislation, the opportunity to create an impression that this provision was a symptom of a broader desire on the part of the government to skew the contest in favour of continued EU membership was useful to advocates of exit.

Grieve seems to have opposed this relaxation of the rule set out in the 2000 Act precisely because he did not want Bone and others to be provided with such ammunition. It can be assumed that his hope was that the referendum would settle for some time arguments, especially within his own party, about the EU. (Indeed, Hammond confirmed the intra-party nature of the issue when telling Grieve that he shared his basic desire to avoid the impression of unfairness and that he had made efforts to 'reassure colleagues who have such concerns, and that the Government will continue to seek to reassure colleagues.')

<sup>71</sup> Grieve seemingly suspected winning the vote might not be enough. Challenges to its legitimacy had to be, as far as possible, pre-empted. The use Grieve made of phrases such as 'make it clear' and 'an impression' suggests a focus on appearances: that the primary requirement was being able to claim that the process was equitable, as much as ensuring that it actually was fair (though perhaps

<sup>71</sup> *ibid.*, col 1056.

he perceived fulfilment of the latter requirement as the means of securing the former). It may well have been for Bone that perception was of equal importance, though in an inverted sense: the ability to assert that the contest was in some way flawed was perhaps as important as achieving an amendment to the Bill.

A further aspect of this particular discussion was that, in the way it addressed referendum campaigning, it focused on the attainment of balance as between the two sides rather than how to ensure that the public was properly informed about the options being presented to it and their implications. How fully politicians themselves were assessing the possibilities is also open to question. Hammond, speaking for the government, had expressed the view that the government anticipated it would be able to recommend a vote to continue EU membership. It was focused, therefore, on securing this outcome. By implication, it was neglecting the possibility of a vote to leave. The intervention from Grieve was motivated by a desire to ensure that a result in favour of EU membership could be presented as the product of a fair contest. Even Bone appeared to be seeking partly to establish grounds on which he could query the appropriateness of the process, suggesting that the possibility of a vote in favour of remaining in the EU was prominent in his thinking. The Second Reading debate on the Bill seems to have been conducted to a significant extent on the premise that it was a reasonable proposition that voters might choose to remain in the EU, and even that this outcome was the more likely of the two (though opinions on the probability must have differed among participants). This foundation for discussions was connected to the general phenomenon of the government not desiring the more radical option of the two it was offering, and believing that it could win. It seems to have mitigated against discussion of the force that a referendum vote might have (since an outcome in favour of continued membership would not raise the possibility of further specific action by government and Parliament); and what exit from the EU, if adopted as a policy, would entail.

Hammond then concluded his speech by asserting that:

whether we favour Britain being in or out, we surely should all be able to agree on the simple principle that the decision about our membership should be taken by the British people, not by Whitehall bureaucrats, certainly not by Brussels Eurocrats; not even by Government Ministers or parliamentarians in this Chamber. The decision must be for the common sense of the British people. That is what we pledged, and that is what we have a mandate to deliver. For too long, the people of Britain have been denied their say. For too long, powers have been handed to Brussels over their heads. For too long, their voice on Europe has not been heard. This Bill puts that right. It delivers the simple in/out referendum that we promised, and I commend it to the House.<sup>72</sup>

<sup>72</sup> *ibid.*

The use of such negative rhetoric regarding the EU, its democratic legitimacy and UK participation within it by a minister who hoped to advocate continued membership was indicative of the nature of the referendum project from the Conservative point of view. To express enthusiasm in this regard was difficult from inside a party within which hostility to continental integration was such a powerful force that it had led to the policy of holding a public vote. This stance of criticism was not the ideal place from which to mount a campaign for a vote to remain within.

This closing statement was also significant in that it appeared to endorse the idea that the referendum would produce a popular verdict superseding all other authority, including even that of the House of Commons. Yet it did not resolve ambiguities, involving various matters such as the nature of the ‘mandate to deliver’ such a vote; and the franchise that appropriately represented the ‘British people’. Moreover, what might appear to be a ‘simple in/out referendum’ would, when it delivered an ‘out’ verdict, lead to political and policy challenges of unsurpassed complexity. Though the ‘British people’, however defined, were the participants in the referendum, they had no direct role in the process that followed, the nature of which few of them (voting on either side, and including the present author) could have anticipated. ‘Whitehall bureaucrats’ acting under the instruction of ‘Government Ministers’ were responsible for devising and implementing policy; while the Commons (and Lords) came to play a part, although its members were often reluctant to act upon their own opinions. Furthermore, ‘Brussels Eurocrats’ were important players in the negotiations that would determine the way in which the UK exited the EU and the relationship between the UK and the outside world that followed. Indeed, given the relative balance of power between the UK and the EU, it could be held that the ‘British people’, through voting (by a majority of those who took part in the referendum) for ‘leave’, had placed their future to a significant extent in the hands of officials acting on behalf of the EU, rather than escaping their supposed dominance.

### A. The Labour Response

Responding for Labour was the Shadow Foreign Secretary, Hilary Benn. His father, Tony Benn, had been a primary instigator of the previous European referendum, held almost exactly four decades previously, on 5 June 1975. In many ways, circumstances of 2016 would be similar to those of 1975, though it was the Conservatives rather than Labour that held office – and, crucially, the result was different.<sup>73</sup> During the 1975 campaign Benn senior, then a member of the

<sup>73</sup> Robert Saunders, ‘A tale of two referendums: 1975 and 2016’ (2016) 87(3) *The Political Quarterly* 318–22.



Labour Harold Wilson Cabinet, campaigned for exit. In doing so Benn made use of the allowance provided for ministerial dissent from the official stance of the government, which – like that of Cameron in 2016 – had recommended a vote to remain on a basis of the renegotiated terms of membership it had secured.<sup>74</sup> In the Second Reading debate in 2015 Benn senior was referred to as an influence both by Labour<sup>75</sup> and Conservative advocates of departure from the EU. Almost immediately after Hilary had finished his speech, for instance, the Conservative Bernard Jenkin described Tony as one of his ‘mentors’ on the European subject when he had first joined the House.<sup>76</sup> Tony Benn was a key influence on Jeremy Corbyn,<sup>77</sup> who secured the Labour leadership in September 2015. While technically Corbyn supported ‘remain’ at the referendum, he seemed at most lukewarm about the EU.<sup>78</sup> Tony Benn had first advocated a referendum on membership before the UK joined the European Communities, not from a position of hostility, but as a means of securing genuine popular consent, if it could be obtained, prior to such a major constitutional change.<sup>79</sup> His son promoted a similar view when speaking on the Bill in 2015. Hilary Benn argued that it would serve to ‘set before the British people a clear and simple question’. Yet the answer reached would have ‘profound consequences’ for the UK. Seemingly referring to the 1975 vote, he described the forthcoming referendum as entailing the public making ‘the most important decision on our place in the world for 40 years’. In describing the significance of the choice, Benn used the phrase ‘our proud and great islands’.<sup>80</sup> In using the plural of island, he avoided an error often made. Though he did not elaborate on this point, it was not only Great Britain, but also Northern Ireland (along with various other smaller islands) that was involved – and that would come to be an immensely complicating factor in the Brexit process.<sup>81</sup>

Having emphasised the importance of the decision, Benn confirmed that his party supported the Bill, while also favouring continued UK participation in the EU. Previously Labour had not supported a public vote on this subject. In deciding to acquiesce in the referendum legislation, and stating an intention to participate in the campaign, Labour was contributing to the authority

<sup>74</sup> Lucy Atkinson, Andrew Blick and Matt Qvortrup, *The People’s Veto: the history of referendums in the United Kingdom* (Oxford, Oxford University Press, 2019 forthcoming), ch 3.

<sup>75</sup> HC Debates, 9 June 2015, col 1118.

<sup>76</sup> *ibid*, col 1065.

<sup>77</sup> Daniel Boffey, ‘Jeremy Corbyn’s world: his friends, supporters, mentors and influences’, *Guardian*, 15 August 2015: <https://www.theguardian.com/politics/2015/aug/15/jeremy-corbyn-world-supporters-mentors-influences> last accessed 25 September 2018.

<sup>78</sup> ‘Corbyn: I’m “seven out of ten” on EU’, 11 June 2016, *BBC*: <https://www.bbc.co.uk/news/av/uk-politics-eu-referendum-36506163/corbyn-i-m-seven-out-of-10-on-eu> last accessed 25 September 2018.

<sup>79</sup> For the early views of Tony Benn on referendums, see ch 9. For his later opinion on European integration, see ch 3.

<sup>80</sup> HC Debates, 9 June 2015, col 1056.

<sup>81</sup> See ch 1.

of the process. Regardless of whether it supported 'leave' or 'remain' when the time came, in agreeing to the legislation and treating the vote for which it provided as a proper occasion for pursuit of a particular end, Labour could be seen as having enhanced the credibility of the referendum. It would certainly make any efforts from within the party to block leaving after the outcome more problematic.<sup>82</sup> John Redwood, a Conservative and firm Eurosceptic, then intervened to insist that 'the British people want a very substantial reduction in migration into this country', an objective necessitating that 'Parliament ... regain control of our borders from Brussels'.<sup>83</sup> In response, Benn contrasted Labour support for membership with the position of some 'hon. Members on the Conservative Benches'. He nonetheless went on to list areas in which Labour wanted the EU to function differently: over 'benefits, transitional controls, the way the EU works and how it relates to national Parliaments. We also want to see the completion of the single market in services to boost jobs and economic growth here in the United Kingdom'. While attainment of those objectives required more integration, at the same time, Benn held, there existed rising support within different member states 'for greater devolution of power'.<sup>84</sup>

Jim Cunningham, a Labour MP, though engaging in partisan rhetoric, drew attention to the arbitrary aspect to the holding of the referendum. He complained that '[t]he Conservatives criticised us when we were in office for taking the people further into Europe'. Yet, Cunningham went on, 'let us remind them when they complain about the free movement of labour that they signed up to the single market and the British people never got a referendum then; they signed up to Maastricht and the British people never got a referendum then'. In response Benn agreed that Cunningham was 'entirely right'. Moreover, Benn went on '[t]here are lots of people who have changed their minds on Europe. I remind the House that as recently as June 2012 the Prime Minister told a press conference in Brussels: "I completely understand why some people want an in/out referendum ... I don't share that view. That is not the right thing to do."' <sup>85</sup> The implication that this exchange encouraged was that the referendum was being instigated at a time when there was no obvious substantive reason related to the EU itself to do so – especially in comparison to previous moments of genuine transformation in the continental integration project over which no popular vote was held in the UK. The Prime Minister could be viewed as having taken the decision in contradiction of his earlier claimed principled opposition, for reasons of political convenience.

The Labour Member, Diane Abbott, then asked Benn whether he agreed 'that those of us who were in the House for John Major's Administration watched the Government party fall apart under the pressure of their rows on Europe,

<sup>82</sup> HC Debates, 9 June 2015, col 1056.

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

and that we look forward cheerfully to it happening again?’<sup>86</sup> This intervention demonstrated how the referendum could be seen from all sides as a component in the party political contest, involving the management of problems, the promotion of factional causes, or an opportunity to enjoy the spectacle of an enemy inflicting self-harm, rather than a means of consulting the people on a major decision. The prominence of such attitudes helps explain why consideration of the full implications of the referendum – and what ‘leave’, if it were the result, actually meant – was neglected.

Benn responded to Abbott by remarking that it was ‘clear that my hon. Friend takes great pleasure from the discomfort that is already evident on the Government Benches’. Delving partly into his own family history he then noted that ‘it is interesting that here we are, 40 years on from 1975, and the same thing is happening, but in mirror image. It is the Conservative party that has agreed to a referendum in order to try to deal with splits.’<sup>87</sup> The implication was that he and his party were accepting or even welcoming the holding of a popular vote the primary driver of which was a struggle between Conservatives. Benn and others in Labour might criticise Cameron for placing partisan interest ahead of principle. Yet, it could be observed, a plausible explanation for the reversal of Labour policy since the recent General Election was political calculation. To oppose the vote might expose the party to criticism for seeking to deny the public the chance to pass a verdict on UK membership of the EU. It would be harder for Labour to campaign credibly in a referendum that they had voted against in Parliament. Aside from a desire to avoid such problems, some in Labour – such as Abbott – saw in the vote the opportunity to inflict damage on the Conservatives. Sectional interest seemed to be crucial. The perception that Brexit was chiefly a problem for the Conservative Party would persist within Labour. It encouraged an irresponsible attitude – shared at senior level during the Corbyn leadership – that it was better for Labour to allow the government to persist with ill-advised policy if to do so might lead the Conservatives to suffer, regardless of the wider consequences.<sup>88</sup>

Douglas Carswell, the sole UKIP MP, alluding to the intention to create an exemption from section 125 of the Political Parties, Elections and Referendums Act 2000, asked Benn if he concurred ‘that if this referendum is to be considered free and fair it would be wise to ensure the neutrality of the civil service and the machinery of government’ and whether he would ‘look sympathetically at any amendments to try to enshrine in the legislation an appropriate period of purdah’. This question showed a politician in the vanguard of the drive for departure focused not on the meaning of leaving, but on process surrounding

<sup>86</sup> *Ibid*, cols 1057–58.

<sup>87</sup> *ibid*, col 1058.

<sup>88</sup> Stephen Bush, Barry Gardiner’s Brexit tweet is unwise, damaging to Labour – but right’, *New Statesman*, 22 September 2018: <https://www.newstatesman.com/politics/staggers/2018/09/barry-gardiniers-brexit-tweet-unwise-damaging-labour-right> last accessed 25 September 2018.

the vote. Benn responded that he agreed with Hammond that ‘once the Government eventually reach a view, they are entitled to explain it to the British people.’ Perhaps foreseeing the coming suspension of collective responsibility, he went on to remark that the government ‘will have to explain their view to some of the members of the Cabinet.’<sup>89</sup> Bernard Jenkin then maintained the pro-leave concentration on process and the suspension of section 125 by asking Benn ‘what he thinks Ministers will have to be able to do that they were not doing during the Scottish referendum or the AV referendum? I seem to remember Ministers giving lots of explanations of their view.’ Jenkin suggested a hidden agenda, with the Bill as drafted creating ‘an opportunity for the Government to call the referendum so soon after the deal has been concluded that the British people do not have a chance to digest what has occurred – a snap referendum designed to get a certain result?’<sup>90</sup>

Continuing the theme, Ian Austin, a Labour MP, insisted that:

for the result to be accepted and for it to be long lasting and settle the question for a generation, it is very important that the process is seen to be fair on all sides. Ministers are perfectly at liberty to say what they like in interviews and as they go round the country making speeches, but there is a big difference between that and public money being used to send out leaflets and promote one side of the debate. It is very important that the spending limits are designed to ensure that spending is equal on both sides and both sides have a fair say.<sup>91</sup>

Benn responded that there was universal agreement in the Commons ‘that the referendum must be fair and must be seen to be fair, but at the same time the Government – any Government – are entitled to argue their case’.<sup>92</sup> This exchange served to emphasise the difficulties of conducting a pure exercise in direct democracy, into which representative institutions and their agendas do not intrude. Governments in the UK have not held referendums solely – if at all – to discern the views of voters. The motivations that drive them to bring about the vote will impact on the way in which they frame it and conduct themselves during campaigns. It also shows that the Commons was focused on the way in which the vote was to be regulated to a greater extent than what the result might mean.

There followed discussion of the wording of the question, which at this point was drafted with possible answers of ‘yes’ or ‘no’, rather than ‘remain’ or ‘leave’.<sup>93</sup> Benn continued his speech, advocating that 16 and 17-year-olds be allowed to take part.<sup>94</sup> Expanding on this view in some detail, he received a range of supportive comments, including from Sarah Wollaston, Conservative

<sup>89</sup> HC Debates, 9 June 2015, col 1058.

<sup>90</sup> *ibid*, cols 1058–59.

<sup>91</sup> *ibid*, col 1059.

<sup>92</sup> *ibid*.

<sup>93</sup> *ibid*, cols 1058–59.

<sup>94</sup> *ibid*, col 1061.

Member for Totness, who suggested that ‘since nearly one in four 16-year-olds can expect to live to 100 years of age and will be living with the consequences of this decision for far longer than Members of this or the other House, and given that they have the mental capacity to weigh up these decisions and the enthusiasm to take part, we should extend the franchise’.<sup>95</sup> Benn proposed that the vote take place ‘on a separate day’ from any other poll.<sup>96</sup>

He also held that ‘the Government have a responsibility to ensure that voters have enough information to be able to make an informed decision’. It ‘should include an independent assessment of the economic consequences of leaving the European Union and what that would mean compared with our remaining a member’.<sup>97</sup>

This superficially reasonable and straightforward request, when examined more closely, was complex. The basis on which the UK would seek to leave was not made clear in advance of the referendum. Later in the debate, the Conservative, Damian Green, would draw attention to this indeterminacy when insisting that ‘[t]hose who argue that we should pull out of the EU need to set out what Britain would look like – what our economy and country would look like – in their alternative, because there are many alternatives’.<sup>98</sup> However, it was not a collective of those who had campaigned for exit that would take on the task. It was a Conservative government – of which Green would for a time be a senior member – composed of people who had taken both sides in the referendum. As already discussed, the UK administration (with dissenters) had supported remaining and had not set out a specific programme for departure that could provide a basis for an assessment of the type Benn advocated.

Even had the government indicated the basis on which it wished to leave, achieving its goals would depend on a successful negotiation with the EU. Discussion of the EU-defined process by which the UK would depart was largely absent. Cheryl Gillan, a Conservative, held that it was ‘important that the necessary intricacies of article 50 of the treaty on European Union be spelt out to people. On both sides of the argument, we need to know what would govern the processes and negotiations of unilateral withdrawal.’<sup>99</sup> But the Second Reading debate did not properly address such important matters as the difference between an exit agreement and a post-departure Free Trade Agreement between the EU and the UK; or the distinction between the Single Market and the Customs Union, and how the UK attitude towards each might affect negotiations. In any case, even were circumstances more certain, economic forecasting cannot guarantee accuracy, and is always open to challenge, as is the independence of those who produce it, and the very premise of the activity in

<sup>95</sup> *ibid*, col 1062.

<sup>96</sup> *ibid*.

<sup>97</sup> *ibid*, cols 1062–63.

<sup>98</sup> *ibid*, col 1086.

<sup>99</sup> *ibid*, col 1104.

which they are engaged.<sup>100</sup> It is not clear how a process for the prediction of ‘economic consequences’ that Benn envisaged which satisfied both sides could have been devised. Finally, while Benn identified a need for public awareness as to the economic context in advance of voting, there were many other areas in which a ‘leave’ result in particular would impact, including of a constitutional character, as became apparent – though largely after the referendum had taken place.

## B. Other Contributions

More fundamental interrogation of the referendum bill on a constitutional basis came from beyond the two main parties. Unlike Labour, the SNP, since the General Election of the previous month the third largest party in the Commons, opposed the Second Reading. The amendment it moved held that the Bill was unsatisfactory ‘in terms of inclusivity and democratic participation, in particular because the Bill does not give the right to vote to 16 and 17 year olds or most EU nationals living in the UK’. It also registered objection to the absence of ‘a double majority provision to ensure that no nation or jurisdiction of the UK can be taken out of the EU against its will’. Finally, the Bill lacked ‘provision to ensure that the referendum vote cannot be held on the same day as the Scottish, Welsh or Northern Ireland elections’.<sup>101</sup>

Speaking for the SNP, Alex Salmond referred to what he described as ‘the essential nonsense of this referendum’. He argued that:

[w]hen someone proposes a referendum, it should be because they are proposing a significant constitutional change, whether it be the alternative vote, Scottish independence, Scottish devolution or Welsh devolution, and they are looking for democratic sanction – the sovereignty of the people – to back that change. That is not the position of the Prime Minister. Nobody seriously believes that he wants to take this country out of the European Union. The referendum is a tactic that is being deployed as a means of deflecting support from UKIP and as a sop to Back Benchers. Nobody believes that the Prime Minister wants to take the country out of the European Union.<sup>102</sup>

Salmond queried the way in which the Labour Party had reversed its position on the subject, professing to be ‘surprised by its argument, “We lost an election, and we therefore have to change our policy”’, as the acting Leader of the Opposition said just the other day. Does that apply to all the policies that Labour fought the election on, or just to the policy on the referendum?’<sup>103</sup> On the matter of the voting rights of European citizens, Salmond criticised

<sup>100</sup> See ch 3.

<sup>101</sup> *ibid.*, col 1067.

<sup>102</sup> *ibid.*, col 1069.

<sup>103</sup> *ibid.*, col 1070.

the Conservatives for ‘their narrow-minded nationalism and narrow view of people’s interests’. The SNP, he held, took ‘a broad view of the matter. We believe in civic nationalism – we believe that if someone engages in a country, lives in a country, works in a country and pays tax in a country, they are entitled to vote on the future of the country’.<sup>104</sup> Regarding what he described as ‘the double majority or quad lock’, Salmond asked ‘why should it be the case that Scotland, Wales or Northern Ireland – or, for that matter, England – should be taken out of the European Union against the will of that nation?’<sup>105</sup>

Perhaps the fullest exposition of potential constitutional difficulties came from Mark Durkan of the Social Democratic and Labour Party. Noting that his was ‘a border constituency in Northern Ireland’ he observed that ‘the implications of the UK leaving the EU would be pretty fundamental, not just for my constituency but for the political institutions in Northern Ireland’. Durkan held that ‘[t]he common experience of EU membership provided the very context in which there were changed British and Irish relations, which in turn provided the context for the peace process’.<sup>106</sup> He cautioned that ‘the institutions of the Good Friday agreement’ took as ‘givens’ not only ‘the human rights provisions of the Human Rights Act and the European convention on human rights, but the common EU membership of the UK and Ireland’. Indeed, ‘some of the cross-border institutions that were set up as a result of the Good Friday agreement directly address and reflect our common membership of the EU. Fundamental damage and change may be done when serious questions are raised about our commitment to human rights and to our membership of the EU. If we are facing a referendum, we will have to address those issues and carry forward the arguments responsibly’.<sup>107</sup>

Durkan also argued that ‘people have more questions about the sovereignty of this Parliament than just where it stands vis-à-vis the European institutions’. He observed ‘clear tensions and ambiguities around what the notion of parliamentary sovereignty means for this Parliament, and around the implications for devolved institutions and the rightful authority that they should have’. He would preferred ‘to have had something like a constitutional convention before the referendum’. Such an initiative could have fulfilled two basic functions. The first was to consider ‘the longer-term democratic relations within the UK and create a new democratic charter between this Parliament and the other elected institutions in different parts of the UK’. The second was to produce ‘a new democratic charter that clearly creates a delineation between this Parliament and the various EU institutions’. Durkan concluded by warning of:

a danger that we will end up with a referendum campaign in which the yes side includes people who want to be both half in and half out, and a no side that is also confused because it includes some people who want to be totally out, as well as

<sup>104</sup> *ibid.*, col 1071.

<sup>105</sup> *ibid.*, col 1073.

<sup>106</sup> *ibid.*, col 1103.

<sup>107</sup> *ibid.*, col 1104.

people who say that if we reject it, we can be half out and renegotiate in the way that Ireland did. The danger is that we will end up with a referendum that does not settle the question at all in the terms in which Members believe it will.<sup>108</sup>

The two most concerted constitutional critiques of the referendum policy, then, came from MPs (Salmond and Durkan) whose parties (the SNP and SDLP) and territorial bases (Scotland and Northern Ireland) gave them a special perspective from which to view the matter. The UK-wide parties did not grasp, or wish to recognise, the problems that might await. Even those who might have been expected to have been more critical of the way in which the referendum was being handled conveyed the impression of resignation. Kenneth Clarke professed ‘fundamental doubts about referendums’. He explained that ‘[I]ike every politician of my generation, I prefer parliamentary democracy’. However, Clarke went on, ‘we are where we are and it is obvious that we will have a referendum. I probably will not vote in favour of the Bill tonight, but I shall do nothing to stop it going ahead in principle’. Contrary to the optimism of others, who hoped to resolve the EU controversy for a lasting period, however, Clarke warned that popular votes in the UK had not proved successfully to ‘settle any question’.<sup>109</sup> He also counselled against a belief ‘that we can somehow have all the advantages of the European Union and the market without complying with any of the obligations. I know of no trading bloc that allows anybody entry to its markets on the basis that they will decide whether to comply with its rules’.<sup>110</sup> In this sense he was calling into question a premise on which he felt leaving might be based.

Of issues that might be termed constitutional, those that were most prominent in the debate pertained to the fairness of the process, in a relatively narrow administrative sense, and focusing on the period of the campaign. Concerns in this area – raised both by advocates of leaving and of remaining, with different motives – tended to turn on the possibility of perceived or actual skewing of the contest in favour of continued membership. Alongside the UK government itself, a variety of other potential culprits were identified. Gillan, for instance, asked whether:

the Front-Bench team know what plans any of the devolved Governments within the UK have for spending money on this referendum, or indeed what plans the European Commission or other European institutions have? I think we might find money being spent from other directions that will slant the results of the referendum.<sup>111</sup>

Another institution identified as a possible source of unfairness in the contest was a perennial target for allegations of bias: the British Broadcasting Corporation.<sup>112</sup> While the use of social media by the government was touched

<sup>108</sup> *ibid.*, col 1082.

<sup>109</sup> *ibid.*, col 1074.

<sup>110</sup> *ibid.*, col 1075.

<sup>111</sup> *ibid.*, col 1104.

<sup>112</sup> *ibid.*, col 1086.



upon, the debate did not fully foreshadow the role that the Internet might play (or be construed as doing) as a source of information and persuasion. Some have argued, as is discussed elsewhere in this book, that the overall impact of online campaigning was to favour the ‘leave’ rather than ‘remain’ side.<sup>113</sup> Given hindsight, this omission from the Second Reading debate is conspicuous. But it would be fair to hold that controversies in this area would have been harder to predict than in others – such as the impact of Brexit on Northern Ireland. Ultimately, even if the contest was slanted against it, the ‘leave’ side won and did not need to account for defeat, in these terms or any other. Supporters of ‘remain’, following this reverse, had an interest in explaining it as in some way improper and illegitimate, and found helpful material in the form of revelations about data and social media.<sup>114</sup> Concerns about the fairness of referendums and other democratic processes can, of course, be proper, and many reasonable points were raised on both sides. But political imperatives, hiding behind arguments about process, often provide the primary motivation in such discussions. Moreover, regardless of the integrity or otherwise of the campaign, there was a more fundamental problem with the vote of 23 June 2016. It offered an option of radical change that was not and could not be clearly defined in advance; but which the UK government then insisted had to be pursued, in a way that it discerned, and that involved radical and controversial change, including of a constitutional nature, that had not been prefigured. That the vote was close in percentage terms, and that there were sharp divisions on territorial and other lines, served to aggravate the problems inherent in the referendum.

Beyond a bare stipulation of the wording, the legislation providing for the referendum offered no guidance as to what the result might mean; and what should follow it. Legally, it had no force. Only politics, shaped by various forces, calculations and understandings (and subject to basic legal principles), could fill this gap. Leading politicians, however, fell short in considering some of the most important aspects. They proved more willing to suggest that the vote would bind them than they did to give attention to what it would bind them to. Analysis of the Second Reading debate in the Commons shows that MPs did not sufficiently acknowledge the ambiguity of the decision that they agreed to ask voters to make. They did not fully recognise the way in which this uncertainty was intrinsic to the choice (especially the ‘leave’ option) and could not simply be dispelled by expert forecasting or position statements. Moreover, their discussion suggested a lack of insight into how far this uncertainty extended, reaching into multifarious policy areas and the configuration of the system itself, or how complex were the implications of the doubt created. Nor, given

<sup>113</sup> See ch 9.

<sup>114</sup> See eg Rob Merrick, ‘Brexit result has been thrown into question by the Cambridge Analytica data scandal, says Tory MP’, *Independent*: 30 April 2018 <https://www.independent.co.uk/news/uk/politics/brexit-vote-result-second-referendum-cambridge-analytica-antoinette-sandbach-mp-a8325636.html> last accessed 24 August 2018.

this failure to recognise how much the referendum could leave unresolved, did they deal with the issues of who and by what process the necessary answers might be provided.

Politicians created a vacuum. At the time of writing, more than three years later, and more than two years after the referendum, desperate and conflicting efforts to fill it continue. In the process, the UK courts diplomatic and economic disaster, the promotion of regional instability in Europe, and a wider undermining of structures of international cooperation. Those who object to the country having found itself in this position might ask how it came about. The reasons were largely of a tactical nature. A consensus had formed – taking in major parties and both sides of the argument about EU membership – around the holding of a referendum. The motives of those who shared this outlook, as well as their private degree of enthusiasm for the vote, might differ. But the coalescence that existed was sufficiently broad to ensure not only that the referendum was provided for, but it was authorised without sufficient attention being devoted to its constitutional aspects. Some amendments were made, most notably involving the intended disapplication of section 125. But more difficult issues were overlooked. Labour could not alone have stopped the Bill from passing. But it might have forced more scrutiny of its problematic features, perhaps working with the Lords and members of other parties. In the adversarial system of the UK, a principal role of the Opposition is to oppose. If it fails to do so, problems can follow. Had Labour offered resistance to the Bill, the questionable claims subsequently made regarding the obligation the referendum created would have been less credible. It is an irony that two non-Unionist parties – the SNP and SDLP – offered advice, overlooked by supporters of the continuation of the Union – that might have helped protect the integrity of the UK and served its interests more generally.

While the behaviour of politicians contributed to the outcome, it is necessary to consider the framework within which they operated: the constitution. It allowed the instigation of a process whereby a major decision was taken first and its meaning was worked out – in a non-consensual way – afterwards. Such a process is difficult to reconcile with basic democratic requirements, for instance the need to provide voters with the possibility of grasping satisfactorily decisions they face; and that constitutional change should ideally involve a higher than normal level of agreement. These principles found expression in what I have labelled the ‘Davis criteria’, derived from the parliamentary speech David Davis gave on the subject of referendums in 2002.<sup>115</sup> (On the occasion of the Second Reading of the European Union Referendum Bill, Davis, who voted in favour of it, did not assert these principles. His only contribution to the debate was to raise an unrelated point of order about the publication of a report by the Independent Review of Terrorism Legislation<sup>116</sup>).

<sup>115</sup> See ch 1.

<sup>116</sup> HC Debates, 9 June 2015, col 1132.

The system failed to prevent this approach to the referendum from being followed. Though representatives of the SNP and SDLP sought to raise important systemic issues, there was no mechanism to ensure their territorial perspective was taken into account: they were simply minorities in a House of Commons set upon a referendum. Now, as a consequence, the system is being forced to change, to accommodate the consequences of the decision arrived at. But this stretching of the constitution could present an opportunity. It could be the occasion for reform that prevents the future reoccurrence of the very problems that made it necessary.

## APPENDICES

### Appendix A

**Opposition Motion, as amended by the government, passed by the House of Commons on 7 December 2016 (Division number 103, Ayes 448, Noes 75)**

That this House recognises that leaving the EU is the defining issue facing the UK; notes the resolution on parliamentary scrutiny of the UK leaving the EU agreed by the House on 12 October 2016; recognises that it is Parliament's responsibility to properly scrutinise the Government while respecting the decision of the British people to leave the European Union; confirms that there should be no disclosure of material that could be reasonably judged to damage the UK in any negotiations to depart from the European Union after Article 50 has been triggered; and calls on the Prime Minister to commit to publishing the Government's plan for leaving the EU before Article 50 is invoked, consistently with the principles agreed without division by this House on 12 October; recognises that this House should respect the wishes of the United Kingdom as expressed in the referendum on 23 June; and further calls on the Government to invoke Article 50 by 31 March 2017.

### Appendix B

Excerpts from *Why the Government believes that voting to remain in the European Union is the best decision for the UK* (London, HM Government, 2016)

[p 8] What happens if we leave?

Voting to leave the EU would create years of uncertainty and potential economic disruption. This would reduce investment and cost jobs.

The Government judges it could result in 10 years or more of uncertainty as the UK unpicks our relationship with the EU and renegotiates new arrangements with the EU and over 50 other countries around the world.

Some argue that we could strike a good deal quickly with the EU because they want to keep access to our market.

But the Government's judgement is that it would be much harder than that – less than 8% of EU exports come to the UK while 44% of UK exports go to the EU.

**No other country has managed to secure significant access to the Single Market, without having to:**

- follow EU rules over which they have no real say
- pay into the EU
- accept EU citizens living and working in their country

A more limited trade deal with the EU would give the UK less access to the Single Market than we have now – including for services, which make up almost 80% of the UK economy. For example, Canada's deal with the EU will give limited access for services, it has so far been seven years in the making and is still not in force.

[p 14] This is your decision. The Government will implement what you decide.

If you're aged 18 or over by 23rd June and are entitled to vote, this is your chance to decide.

## Appendix C

Excerpts from *Alternatives to membership: possible models for the United Kingdom outside the European Union*, 2016 ('Presented to Parliament pursuant to section 7 of the European Union Referendum Act 2015')

[p 41] Chapter 4 – conclusion

4.1 If the UK voted to leave the EU, the Government would do all it could to secure a positive outcome for the country. We would seek the agreement of the remaining 27 EU Member States for the best access for UK companies and consumers to the Single Market. We would start the slow process of agreeing Free Trade Agreements with countries outside of the EU. We would aim to keep those elements of non-economic cooperation that serve our national interest, enhance UK power in the world and increase our ability to get our way. And we would use all the levers at our disposal to achieve such an outcome.

4.2 It would, however, be hard even to come close to replicating the level of access and influence from which the UK currently benefits as a result of our special status in the EU.

In addition to the pressure imposed on the UK by the Article 50 process to secure a deal quickly, reaching agreement on a wide range of issues with 27 Member States, each of which would seek to fight for their own interests, is

likely to be challenging and involve difficult trade-offs. If we failed to reach agreement within two years under the Article 50 process, our membership of the EU – including our access to the Single Market and to Free Trade Agreements with 53 markets around the world – would lapse automatically, unless all 27 other Member States agreed to an extension.

4.3 The UK would therefore have to make some difficult decisions about its priorities. Each possible approach would involve a balance between securing access to the EU's Single Market, accepting costs and obligations and maintaining the UK's influence.

4.4 In particular, we would need to decide if we wanted full access for UK companies to the EU's free-trade Single Market. If we did, we would have to accept the rules of the Single Market. But outside the EU, we would not have a vote on those rules. And full access to the Single Market would almost certainly require us to accept many of the costs and obligations of EU membership, including the free movement of people and substantial contributions to EU budgets and programmes (but without the UK rebate, which we would lose upon leaving the EU).

4.5 Alternatively, we could seek a relationship based on a Free Trade Agreement. Even the most advanced of these agreements offers less access to the Single Market. In particular, they offer less access for services, which make up almost 80 per cent of the UK economy.

4.6 In the absence of any agreement, we would have a relationship based on WTO membership alone. This would provide the most definitive break with the EU. It would mean we did not have to follow EU rules when exporting outside the EU (though UK companies exporting to the EU would still have to comply with EU Single Market rules, such as on [p.42] the environment or safety, in order to trade with the EU). We would not have to accept the free movement of people and we would not have to contribute to the EU's budgets and programmes. But this would come at a serious price for UK businesses and jobs.

4.7 Every alternative to membership would involve the UK losing its vote and vetoes over how EU laws are written. And regardless of our preferences and choices, the EU will continue to be the UK's biggest export market (at present, UK exports to the EU are worth more than two and half times UK exports to the United States – our next largest overseas market).

So those EU laws will continue to be of fundamental importance to UK companies. At the moment, the UK has a significant voice in how these rules are written...

4.9 Despite our negotiating advantages, the UK would not get a free choice on its future relationship with the EU. Any model except a basic WTO arrangement would need to be agreed with the other Member States and approved by the European Parliament. Some of the models described in the paper could also

require unanimous agreement by the remaining 27 Member States and ratification by their national parliaments. Reaching agreement on such a wide range of issues with a large number of negotiating partners, each of which would seek to defend their individual interests, is likely to be difficult and could involve potentially unpalatable trade-offs.

4.10 It would not be quick or straightforward to establish a new relationship.... We should expect this process to take up to a decade or more to complete.

...

4.12...It is the assessment of the UK Government that no existing model outside the EU comes close to providing the same balance of advantages and influence that we get from the UK's current special status inside the EU.'

## Appendix D

Text of leaflet by 'Vote Leave', designated lead campaign for the 'leave' side in the 2016 EU referendum, distributed by Electoral Commission. Text produced by Vote Leave with no control over content exercised by the Electoral Commission.

### OUR LAST CHANCE TO TAKE BACK CONTROL

#### Some facts

EU law controls UK migration policy. More than a quarter of a million people came to the UK from the EU in the last 12 months – the equivalent of a city the size of Newcastle. If this continues for a decade, there will be over two million extra people. EU law means all members must accept 'free movement of people'. Many migrants contribute to society. They also affect public services.

The EU is growing. When we joined, there were 9 member states. Now there are 28, the most recent being Romania, Bulgaria and Croatia. Five more countries are in the process of joining, including Turkey. When they join, they will have the same rights as other members.

We pay about £350 million a week to the EU budget. That's about the same as the cost of building a new NHS hospital every week or hiring 600,000 nurses. We get less than half of this back and have no control over how it's spent.

[inset] The EU costs us £350 million a week. Let's take back control and spend our money on our priorities like our NHS

If we vote 'remain'... The EU will continue to control migration, trade, VAT, and vital security policies such as counterterrorism. EU law will carry on having ultimate authority over British law. The European Court will continue to overrule our laws and will keep taking powers over how our intelligence services fight terrorism. We will not be in control of who comes in to our country, on what terms, and who we can remove. We will keep handing over £350 million of your taxes to Brussels every week.

If we Vote Leave... We will take back control. We will stop sending £350 million of our money to Brussels every week and instead spend it on our priorities like the NHS. We will control our borders. We will trade with Europe without handing over permanent control to people we cannot vote out. We will control our own economy and trade. We will retake our seats on international bodies. We will have more international influence and use it to encourage more friendly international cooperation.

We pay about £350 million a week to the EU budget. That's about the same as the cost of building a new NHS hospital every week or hiring 600,000 nurses. We get less than half of this back and have no control over how it's spent.

It's safer to take back control than to keep giving away power and money every year to the EU.

## Appendix E

### Excerpts from the Conservative Party 2015 General Election manifesto, *Strong Leadership, A Clear Economic Plan, A Brighter More Secure Future*

[pp 29–30] [‘Controlled immigration that benefits Britain’] We will negotiate new rules with the EU, so that people will have to be earning here for a number of years before they can claim benefits, including the tax credits that top up low wages. Instead of something-for-nothing, we will build a system based on the principle of something-for-something. We will then put these changes to the British people in a straight in-out referendum on our membership of the European Union by the end of 2017...

[p 49] [‘Making government work better for you’] We will respect the will of the British people, as expressed in the 2011 referendum, and keep First Past the Post for elections to the House of Commons...

[p 69] [‘Stronger together: a Union for the 21st century’] [W]e held the referendum on Scottish independence. It was the right thing to do, and the question of Scotland's place in the United Kingdom is now settled...

[p 72] [‘Real change in our relationship with the European Union’]

For too long, your voice has been ignored on Europe. We will: give you a say over whether we should stay in or leave the EU, with an in-out referendum by the end of 2017...

We believe in letting the people decide: so we will hold an in-out referendum on our membership of the EU before the end of 2017...

The EU needs to change. And it is time for the British people – not politicians – to have their say. Only the Conservative Party will deliver real change and real choice on Europe, with an in-out referendum by the end of 2017...

The EU is too bureaucratic and too undemocratic. It interferes too much in our daily lives, and the scale of migration triggered by new members joining in recent years has had a real impact on local communities. We are clear

about what we want from Europe. We say: yes to the Single Market. Yes to turbocharging free trade. Yes to working together where we are stronger together than alone. Yes to a family of nation states, all part of a European Union – but whose interests, crucially, are guaranteed whether inside the Euro or out. No to ‘ever closer union.’ No to a constant flow of power to Brussels. No to unnecessary interference. And no, of course, to the Euro, to participation in Eurozone bail-outs or notions like a European Army.

It will be a fundamental principle of a future Conservative Government that membership of the European Union depends on the consent of the British people – and in recent years that consent has worn wafer-thin. That’s why, after the election, we will negotiate a new settlement for Britain in Europe, and then ask the British people whether they want to stay in the EU on this reformed basis or leave. David Cameron has committed that he will only lead a government that offers an in-out referendum. We will hold that in-out referendum before the end of 2017 and respect the outcome.

So the choice at this election is clear: Labour and the Liberal Democrats won’t give you a say over the EU. UKIP can’t give you a say. Only the Conservative Party will deliver real change in Europe – and only the Conservatives can and will deliver an in-out referendum.

Our plan of action:

[pp 73–73] We will let you decide whether to stay in or leave the EU We will legislate in the first session of the next Parliament for an in-out referendum to be held on Britain’s membership of the EU before the end of 2017. We will negotiate a new settlement for Britain in the EU. And then we will ask the British people whether they want to stay in on this basis, or leave. We will honour the result of the referendum, whatever the outcome.