HOUSE OF COMMONS

ORAL EVIDENCE

TAKEN BEFORE THE

EUROPEAN SCRUTINY COMMITTEE

EUROPEAN UNION BILL

THURSDAY 25 NOVEMBER 2010

PROFESSOR TREVOR ALLAN and PROFESSOR ANTHONY BRADLEY

PROFESSOR ADAM TOMKINS

Evidence heard in Public Questions 45 - 111

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Oral Evidence

Taken before the European Scrutiny Committee

on Thursday 25 November 2010

Members present:

Mr William Cash (Chair)
Mr James Clappison
Michael Connarty
Tim Farron
Chris Heaton-Harris
Chris Kelly
Penny Mordaunt
Jacob Rees-Mogg
Henry Smith

Examination of Witnesses

Witnesses: Professor Trevor Allan, Professor of Public Law and Jurisprudence, Pembroke College, University of Cambridge, and Professor Anthony Bradley, Research Fellow, Institute of European and Comparative Law, University of Oxford, gave evidence.

Q45 Chair: Good morning Professor Allan and Professor Bradley. It is extremely good of you to come. We had a very interesting session with Professor Paul Craig and Professor Trevor Hartley. No doubt you have had an opportunity to look at some of that material. We think we are getting somewhere, but we have important questions to ask you as well. We will start with the same questions, barring a few that we think we have disposed of, so that we can have some consistency. The opening question is first for Professor Bradley and then for Professor Allan, although if you wish to answer the questions together, as you are together, that might be a good way of dealing with them. You might want to interchange, and if you do have differing views, that will no doubt emerge in the course of the discussion.

My first question is: has the question of whether European law has supremacy over the constitutional doctrine of parliamentary sovereignty been finally resolved by the decision of the divisional court in Thoburn? Following on from that—I will repeat it later if you want me to—can we be sure that European law is only directly effective and applicable in national law because of the European Communities Act?

Professor Bradley: I don’t think that the decision in Thoburn has finally resolved all the questions that may come up. I, personally, support the general effect of Thoburn. The idea that there should be a category of constitutional statutes of a status such that the courts should be slow to find that they have been repealed inadvertently seems to me an important step forward. It is not a huge step forward, but I none the less welcome that development. I am a little surprised that some commentators have found the statement that a constitutional statute cannot be impliedly repealed a matter of shame or surprise. I do not share that view; to me, that is a satisfactory development.
This does not answer all the future questions that there might be about the relationship between European Union law and United Kingdom law for this reason: the European Communities Act provides the doorway through which European Union law is received, but it is a very short Act, and European Union law is very complex, being a legal system of a kind to which we have not been exposed before. Therefore, there is the European dimension which cannot simply be controlled by the European Communities Act. So long as the European Communities Act remains in force, at a European level, European law will prevail. The difficulties come—they were seen in the Thoburn case to be difficulties that the courts could deal with—if it is the intention of Parliament to depart from European Union law, how it should do that and, when it has done that, what the effects of it will be as a matter of United Kingdom constitutional law. Those difficulties have not been fully resolved by the Thoburn case.

Q46 Chair: Professor Allan, would you like to add anything to that?

Professor Allan: I broadly agree with what Professor Bradley has said. The Thoburn judgment seems to be a very good attempt to reconcile the problem of the constitutional basis of EU law with the European doctrine of the primacy of EU law. It seems to make just enough adjustment to existing understanding as regards implied appeal to accommodate those competing supremacies. For that reason, it is probably the correct solution but, as Professor Bradley says, it does not really answer all the problems that may arise.

For example, we still do not know what would happen if a statute purported to operate, notwithstanding EU law, when the implied repeal solution would not apply. It is not clear what the court would do in that situation, so I do not think that the problems are completely resolved. The assumption just seems to be that we can maybe survive because, in practice, perhaps they will not arise.

Q47 Chair: Can I ask another question coming from that very issue? You have raised the notwithstanding formula, and that is quite a potent question. Professor Allan, you have written that, “Parliament cannot be accorded unqualified authority to change the law”. In your evidence, you refer to “our conceptions of democracy…based on the Rule of Law” and the “legal order itself”. Who decides these conceptions? Which legal order and which law? Is a United Kingdom parliamentary statute, as clearly expressed from time to time, derived from the democratic consent of the UK electorate, or is it EU law based on the voluntary acceptance by Parliament in 1972, some of which derives from an unelected Commission, some from majority voting of other member states, and some from the activism of the European Court itself?

In the circumstances arising from your view of the legal order and the rule of law, do you consider that an EU directive, such as the Working Time Directive, could be legally overridden or amended by UK statute by such express words as “notwithstanding the European Communities Act 1972”, unlike, of course, in Factortame, when the Merchant Shipping Act 1988 contained no such notwithstanding formula? Do you see where I am going?

Professor Allan: I would argue that parliamentary sovereignty is ultimately a common law doctrine, if only because the courts will have to reconcile the conflicting instructions that, in your example, Parliament would be giving. If the European Communities Act gives instructions to the judges to respect the primacy of EU law—which, in effect, it does—and a subsequent statute says that EU law is not to apply in a particular instance, the judges are
faced with a conflict of instructions. They then have to decide what the United Kingdom legal order requires them to do in those circumstances. It is very hard to know the correct answer.

Q48 Chair: Is that why Professor Bradley thinks that the bet has not been resolved?

Professor Allan: Yes, in a sense. As you say, the Factortame case was an easy case because one could assume Parliament’s continuing intention not to legislate in conflict with EU law. An express notwithstanding clause would simply raise a doubt. The judges would have to decide whether it really made sense to allow departures from EU law short of a full repeal of the European Communities Act. No one doubts that Parliament retains ultimate sovereignty in the sense that the 1972 Act could be amended or repealed. The difficulty lies in the area between where Parliament has not clearly done that, but has none the less purported to legislate inconsistently with EU law. That simply creates a conflict of legislative instructions that the judges will have to resolve as best they see fit. It might depend on the circumstances. If there were very good constitutional reasons why Parliament objected to the application of a particular rule of European law, that would give the judges good reason to say, “Well, we ought to respect Parliament’s more recent instructions to override European law.”

Q49 Chair: That is of course in line with what Diplock and Denning have said in Garland and in Macarths, which are not quoted, it appears, in the explanatory notes, although that is a separate political question for us. Professor Bradley has of course in the past—in “The Changing Constitution”, edited by Jowell and Oliver—posed the question about the efficacy of “the democratic process in the UK”, asking whether it works “so perfectly as to justify the absence of any limit upon the authority of Parliament to legislate.” So the question really is: is it a question ultimately for Parliament to decide, because there resides the democratic process for determination? I simply invite you, Professor Bradley, to tell us whether you agree with that, and whether clause 18 fails to resolve the question.

Professor Bradley: I did have the benefit of reading Professor Tomkins’s paper in which, early on, he declares a commitment and a belief in parliamentary sovereignty. I have a qualified belief in parliamentary sovereignty, because it would be remarkable, if we were creating a new constitution for the United Kingdom, that it would proceed on the basis of the ability of Parliament to make any law whatsoever, and this in my view has been recognised. In other words, parliamentary sovereignty goes further than we need in a democracy. This has been recognised. I would give the instance of the Human Rights Act, which goes a very long way towards meeting one of the arguments against parliamentary sovereignty.

There is a democratic argument to be made for parliamentary sovereignty. I must point out that it is not the House of Commons that is sovereign; it is the Queen in Parliament. It is a bicameral system. If the House of Lords has a function in the legislature, which it most certainly has, and is not democratically elected, that suggests that the democratically elected House of Commons is not on its own able to discharge the burden of being sovereign. While I understand that there is a democratic argument for the sovereignty of Parliament, and while I believe that it is for a democratically elected Parliament to make and approve key changes of national policy—you mentioned that quotation from my chapter, Chair—it cannot be said that our democratic system is working so beautifully that it can be trusted on its own to avoid sometimes committing abuses of a sovereign power.

Chair: Jacob, would you be kind enough to ask the next question, please?
Q50 Jacob Rees-Mogg: Yes, certainly. It leads on to who should really decide—whether parliamentary sovereignty is going to be decided politically by Parliament or by the courts—in this continuing discussion. Is the absolute legislative supremacy of Parliament something that you think the courts will be keener to challenge in future?

Professor Bradley: I would answer that—maybe not completely—by saying that parliamentary sovereignty is quite a complex concept. It is not one that you can boil down to a single rule that one could put into a statute, for example. It concerns foundations of our legal system, foundations of our democratic system, and relations between Parliament and the courts, Government, and so on. That is why in my paper I have tried to say that one cannot say that it is for Parliament to create the doctrine of parliamentary sovereignty and it is not simply for the courts alone to do so. It is a much more complex constitutional relationship, which has come about through history. Finding the ultimate source of parliamentary sovereignty is, in my view, a very interesting theoretical speculation, but not a very important one.

What is of great interest—and it is the work that the Committee is involved with at the moment—is trying to explore the implications of it today and how it is going to develop, because I do not believe that our constitution in its essential elements has come to the end of the road; it is still developing and evolving. That is why the relationship between the courts and Parliament is a dynamic one, in which I would hope that the courts would respect what they see as the proper role of Parliament and, equally, that Parliament will respect what it should see as the proper role of the courts.

Q51 Jacob Rees-Mogg: How do you see this changing? Do you feel that there has been any shift from one to the other, particularly in the European context? Has European law allowed the courts to become more powerful relative to the legislature?

Professor Bradley: There is no doubt that the public law role of the courts is more prominent today than it was, say, 40 years ago. Those who write about the development of public law talk about the period of the '40s and '50s as being the great sleep. It was the revival of public law in the courts in the late '60s and onwards—that had been enormously important as a constitutional development, coming of course at the same time as European development. In the European system, the decisions of the Court of Justice are extremely important as a source of principle and application.

I do not think that I have answered your second question, but maybe Professor Allan could come in at this point.

Professor Allan: On the first question about where ultimate sovereignty lies, it can be misleading to think that all the power must lie with either the courts or with Parliament, because they are interdependent. Parliament’s power depends on judicial recognition. Without judicial willingness to recognise and enforce statutes, Parliament would have no sovereignty. Inevitably, the courts have a great deal of authority, if only by way of interpreting statutes, so there must always be a balance of power. That is why I prefer to say that sovereignty inheres in the legal order itself rather than in Parliament alone.

Parliament and the courts are in an interdependent relationship. The courts necessarily have to interpret statutes and decide what they mean and, in some cases, interpretation may go a long way towards imposing constraints on what statute can achieve. An obvious example is the case of the ouster clause. If Parliament confers powers on a public body and then says that there can be no judicial review, that confronts the court with a dilemma, because that appears to be setting up a body that is able to abuse the rule of law—to exercise powers that are not constrained by law—and indeed to flout Parliament’s own instructions in setting up
that body with a particular task. There the court has to say, “In our allegiance to Parliament itself, we have to make sure that the public body obeys its statutory instructions,” even if that means giving the ouster clause—the clause excluding judicial review—a very narrow interpretation. I see the power between Parliament and the courts as interdependent, and that’s why I think one should say that the legal order itself is sovereign, rather than any one institution within it.

Chair: Chris Heaton-Harris would like to ask a question.

Q52 Chris Heaton-Harris: Yes, on this very point.

Professor Bradley, you have talked about the evolution that has been going on. I was a Member of the European Parliament for 10 years, so I have seen this from a different view from the one I’m looking from now. Will clause 18 go down as an important part of this evolution of our constitutional development, or is it just fairly irrelevant?

Professor Bradley: I’ve been interested to see the form that clause 18 takes. I have to say that I find it difficult to see what its practical impact would be on assisting the courts, or Parliament for that matter, in these situations. It is true that an extreme position was advanced by Sunderland council’s QC, Eleanor Sharpston—it was really the entrenchment view that one did not need to worry about statutory position in Britain because EU law was entrenched. Plainly, clause 18 would have made it impossible to advance that argument, but it seemed to me a rather weak argument at the time, and it was rightly rejected by Lord Justice Laws. I don’t see clause 18 having a huge impact myself. Is it being unfair to say that it is almost stating the obvious that matters derived from treaty cannot operate as law in Britain without some support that gives them effect within Britain?

Q53 Chair: Professor Allan, would you like to add to that?

Professor Allan: I don’t quite agree with Professor Bradley about that, and I will just explain why. I agree with his approval of the Thoburn judgment, but I wonder about if the alternative argument were accepted. The EU Treaty is a very special kind of treaty. The counsel’s argument that was rejected in Thoburn is not unarguable, it seems to me. As I have mentioned in my evidence, Professor Mitchell and others have supported it—indeed, I have colleagues who think this is the correct explanation of how the two legal orders should operate in harness. If that argument is correct, it’s hard to see how clause 18 could make any difference, because if one accepts the view that the EU order is an autonomous legal order, binding in the UK so long as we remain a member of the EU, clause 18 would simply be incorrect. That would follow, I think, from that viewpoint. I am not saying that that view is correct, but if it were, clause 18 would make no difference. It is very hard to see how it can protect us from the success of the autonomous legal order argument if people find it compelling on other grounds.

Q54 Henry Smith: This is really an extension of the points and questions that have already been put. If this Bill were to be enacted broadly in its present form, there is a decision as to whether to hold a referendum on the transfer of future sovereignty—we are talking about a balance between Parliament and the courts. Do you think that that decision would largely be political, or would it be a decision largely of the courts, and, crucially, would it be subject to the rigours of judicial review in your opinion?

Professor Allan: Well, Professor Bradley raises this issue in his evidence. Of course, it would be perfectly possible for any later statute simply to amend the Bill and state that any requirement for a referendum is removed. It is difficult to see how the referendum lock can be
made secure. What is less certain is what would happen if there were no requirement for a referendum, but there was no express repeal of the requirement for a referendum. That would be somewhat uncertain. My guess would be that the court would say that the later statute simply implied the repeal of the need for a referendum, in which case it would be ineffective.

Professor Bradley: Could I make a rather more general reflection on that point? It turns into raising aspects of the referendum lock in part 1 of the Bill. Going back to the early ‘70s, when Britain was joining the EEC, its unwritten constitution made it easy to have a simple Act of Parliament, but it also made it difficult for Britain to give the guarantees needed.

What, I think, constitutional courts in a good many countries in Europe are now realising is that there is another difficulty. The German constitution, for example, provides certain guarantees for German constitutional law against excessive acts by Europe, but there is nothing comparable in Britain. In the past day or two—and I am in no way an expert on these matters—I’ve come across references not only to the German constitutional court’s decision but to decisions in Poland, Czechoslovakia, Hungary and possibly other countries. Through their constitutional courts, they are having to grapple with how one deals with the conflicting primacies and whether national laws give way in every case to European Union law. In a sense, this Bill is responding to a need for the unwritten constitution possibly to be articulated in one or two ways that could protect British constitutional law and institutions from excesses by the European Union. That wouldn’t be welcome to the mandarins in Brussels perhaps, but there is a more general feeling across Europe than there was, shall we say, 30 years ago.

Q55 Michael Connarty: I find this very interesting. As I said in a previous session, I’m tempted to go back to when I used to study and teach the British constitution at high school. It is dangerous territory; we end up where you are speaking about. May I clarify something for the record? You may have seen that I have a particular interest in what advice we, as a Committee, would give after all this evidence has been given and sifted through to the Bill Committee, which will meet on the Floor of the House. What you seem to be saying, Professor Bradley and Professor Allan, in what you’ve written and said is that clause 18 in reality does not change anything. You’ve said that the Dician principle has been eroded and that clause 18 would not lead to any change in that. I think you, Professor Allan, said something similar, and therefore clause 18 makes no difference, whether or not Thoburn was right. It doesn’t matter; clause 18 doesn’t make any difference. Basically, would you say that clause 18 would not change how the courts interpret their duty to review legislation in light of EU law under the European Communities Act? Clause 18 would make no difference to that in court.

Professor Bradley: I know Professor Craig in his paper considers one or two scenarios in which it might have an effect. I don’t repeat that. On the general questions, there might be a case in which an EU regulation of some level was the basis for action taken in the United Kingdom. Is it arguable that on a particular topic it falls outside the scope of section 2(1) of the European Communities Act? If that is a possibility, clause 18 would have some application and it would make a difference. The judge could then say, “The only authority here is the European rule, which is not within the definition of European law within section 2(1).” Whether a judge would have said that anyway, I cannot say. Plainly clause 18 would assist the judge to say, “In that case, find a statute, Mr So-and-So.” I think that is an unlikely example because section 2(1) is drafted in very broad terms, as is clause 18, which simply brings in the broad terms of section 2(1). I am not ruling out that there could be a case in which it would have an impact, but my view is that it is unlikely to have much practical effect. It may have a symbolic effect.
Q56 Michael Connarty: I’ll ask about symbolic in a minute. Professor Allan, could you comment on the case of actual rather than symbolic effects?

Professor Allan: I can’t myself see that it could have any effect at all, because it simply restates the dualism principle, which Thoburn accepts, that EU law ultimately has effect in the UK as a result of the European Communities Act. If there were some reason to question whether the relevant measure did fall within the provisions of section 2 of the European Communities Act, that question could already be raised without clause 18.

If the Supreme Court were minded to reject Thoburn and say that in its view Britain is a loyal member of the EU, had indeed accepted all the jurisprudence of the European Court of Justice, so that until Britain withdrew from Europe altogether, we were bound by all of the European jurisprudence, and therefore unable in any circumstances to resist the primacy of EU law, clause 18 would make no difference, because the Supreme Court would be driven to the conclusion that this was an erroneous declaration—it did not change the law. I can’t see any circumstances in which clause 18 could be significant other than perhaps in a purely symbolic way, as a restatement.

Q57 Michael Connarty: Can we turn to symbolic both of you? What would be the value of something that is symbolic but does not make a difference?

Professor Allan: I’m very sceptical.

Q58 Chair: Not Eurosceptical.

Professor Allan: No. Sceptical of the point of clause 18. I can’t see that it adds anything in practice.

Q59 Chris Heaton-Harris: Does it not make a political statement of Government intent?

Professor Allan: That doesn’t change the legal position; that’s the problem. Perhaps we want to be more confident that the court will uphold the Thoburn judgment and not accept the theory that EU law has an autonomous existence within the UK. That seems to rest on legal arguments about the merits of the rival cases. Clause 18 is no different from the European Communities Act itself. It does not solve the legal problem.

Q60 Michael Connarty: You mentioned symbolic. What is the purpose of it being symbolic?

Professor Bradley: Could I give an example of a symbolic provision, which I think is of real value? The Constitutional Reform Act 2005, which dealt with the reform of the judiciary and the position of the Lord Chancellor and so on, makes provision that Ministers should be concerned to uphold the rule of law.

Q61 Chair: It says the same about judges as well.

Professor Bradley: And judges, yes, and judicial independence. Those are huge concepts constitutionally, with a lot of ramifications. I don’t know precisely what the rule of law means. I know Professor Allan has written much more about it than I have. There is a symbolic value in reminding everyone that it is not just the latest clause in an Act of Parliament that should carry the day.
Could I give an example that the Committee might find relevant, although ultimately I conclude that clause 18 would make no difference? That is the way in which the European arrest warrant was transposed into UK law. The British regulations were pretty complex and added in requirements that were not in the terms of the European arrest warrant, which caused all manner of difficulties.

Q62 Michael Connarty: That is what’s called gold-plating.

Professor Bradley: Ultimately, the Supreme Court said that it was not permissible, because one had to go by the European law. I don’t think clause 18, in that situation, would make any difference.

Q63 Jacob Rees-Mogg: Professor Allan, following on from what you’ve been saying and paragraphs 10 and 11 of your evidence, if you take the view, which I would absolutely see the logic of, that Thoburn is right, clause 18 becomes unnecessary. If it is wrong, and there is this higher level of European law, it is pointless. The question I would ask is whether we are moving along. In 1972, it was absolutely clear that European Union law had effect only because of an Act of Parliament. As times have developed, there is more of a feeling and more of an argument that European law actually has a status of its own.

If that is the move that we’re having, does clause 18 help to move the tide back? What you’re saying in paragraphs 10 and 11 makes complete and logical sense, but are we actually somewhere in between? Therefore, do we need to say to the courts, “Let’s go back to 1972. Let’s reassert this basic principle as an aide-mémoire, because otherwise European law is coming in as a fount of justice in its own right”?

Professor Allan: That is a very good question, and I am very tempted to agree with that, although, I think, in the end I am resistant to it. The problem is that it is not like affirming the rule of law or the independence of the judiciary, which is a very important symbolic act; the problem is that this touches the sovereignty of Parliament itself. That is the difficulty. It is impossible to take the responsibility to decide how to reconcile these conflicting supremacies away from the judges. This seems to be just adding further instruction into the mix. It doesn’t seem to be able to resolve that potential conflict.

Even if it is a strong assertion of Parliament’s view of the current position, I don’t see logically how it could restrain a judge who thought that development was such that there was now very little prospect of Britain leaving the EU, for example, and that it was better to have a unified legal order where there wouldn’t be potential conflicts and where the judges would know precisely what they should do in the event of conflicting instructions and, therefore, accepted this alternative autonomous theory. I think that is rather unlikely to happen.

Q64 Chair: Well, as a matter of fact, Professor Bradley, in his works, has actually already dealt with the question of the extent to which it would be unlikely for such an occurrence to occur. In the discussions that we’ve had, there is a certain difference of opinion between the two of you in respect of some of these issues.

Coming to the point, if a statute derogates from an EU legal obligation—repeating my point about the Working Time Directive, for example—by using a notwithstanding section, in respect of the European Communities Act, it would appear that the Working Time Directive would not apply in the UK. In your judgment, how would the courts interpret that?

Professor Bradley: I didn’t comment earlier on the notwithstanding point. It is not an easy one, but my view at the moment is that if the intention is made very clear in the new
United Kingdom statute that this is to operate, notwithstanding the particular rule of European Union law, that is what the courts would apply. They would enforce that.

Q65 Chair: That is very clear. Would it follow that if clause 18, which you regard as being of little effect other than declaratory, was needed to be altered in any way to ensure that it achieved an objective that was to reflect the will of Parliament, a clear, inconsistent, subsequent enactment, including the word “notwithstanding,” would actually be necessary?

Professor Bradley: It’s the difficulty of marrying together the general proposition with the specific instance. The logic that follows from the laws argument in Thoburn is that for Britain to depart from EU law would need a very specific provision like “notwithstanding a certain directive”. Then, to me, the answer is decided by the terms of that statute so I don’t think the clause would help. Had this clause been in existence before the Merchant Shipping Act 1988, I don’t think it would have been of any effect because section 2 of the European Communities Act is still operative and therefore there is still statutory support for the EU rules.

Q66 Mr Clappison: I think you dealt with my question when responding to Mr Rees-Mogg. I was wondering about the practical side of this. You were dealing with how things have changed over time since Britain’s entry to the European Community and in successive treaties and other ways since then. We have seen a huge shift of competence to the EU, particularly through the most recent treaties, and also of law making and decision making. What effect do you see that having on the constitutional position just because so much competence, so much power and so much authority is vested in European institutions. How do you see that shaping the future of the constitutional doctrine, which I think Professor Allan said would remain intact in his view? How would you see that shaping the doctrines?

Professor Allan: I think it does make it more difficult to be confident about what the court would do in the event of a notwithstanding clause, to go back to the previous question. Professor Wade argued very strongly at the time of Factortame, that he rejected the reasoning in Thoburn, or reasoning of that kind put forward at the time, that this was simply a matter of construction and that the court would try to read the statute compatibly with European law so far as possible. He took the view very strongly that that was simply inconsistent with membership of the Union. I argued and disagreed with that, but I do think he had a point.

I think that the halfway house, keeping the European Communities Act unamended but then having a notwithstanding clause in relation to a later measure, sets up a real contradiction. The longer we remain a member of the European Union and the more powers that are transferred, the less realistic it becomes, probably, for judges—not to deny that Britain could not withdraw altogether—but the more unrealistic it becomes to expect judges to disapply or, rather, to override EU law in particular instances. I do think there is some possibility there that doctrine may shift in that respect and so we might then see Thoburn as one step towards a larger modification whereby the judges would say, “Well, we must have an explicit repeal or amendment of the European Communities Act.”

Q67 Chair: But then it would be a political question of democratic consent, wouldn’t it?

Professor Allan: Yes, I think that if Parliament makes it clear that the whole basis on which Britain’s membership of the European Union is being changed, then the judges would certainly respect that.
**Q68 Chair:** But that’s a very big question. It’s a huge leap from saying leave the community, on which so many of these constitutionalist arguments seem to be constructed, to modifying the application of a particular law which is causing problems in the economy or in the national interest by using the notwithstanding formula, such as the Working Time Directive, some would argue, which seems to me to be of a different order. Whereas the broad landscape question about leaving the European Union is a huger question, the other one raises questions of principle, which also need to be addressed, surely?

**Professor Allan:** Well, I think that is right, but it may be that the judges are not the right forum. It may be that we have to rely on political measures to resolve the problem in the machinery of the Union. Otherwise we are giving judges conflicting statutory instructions and they have some duty to ensure that the rule of law, in the sense that people know what their obligations are, has reasonable certainty. Professor Bradley may be right. At the moment I think that a clear notwithstanding clause would probably be accepted, but I don’t think we can be confident that that will remain the case for ever.

**Chair:** That’s a big question.

**Q69 Henry Smith:** To extend that point about having had almost four decades of competencies transferring to the European Union, and the opinion that, as you have said in evidence, clause 18 in itself would not be strong enough to take us back to the 1972 situation before the European Communities Act, does it therefore follow that, to take us back to that position, would take the establishment of something akin to the German constitutional court or constitutional courts that exist in other EU member countries, and therefore something more akin to a written constitution solution?

**Professor Bradley:** I was in fact wondering about adding my answer to what Mr Clappison had asked. If one were looking for guidance of what kind of principles or values one wishes to protect, the German constitutional case law could provide some examples. They do have protection of rights. They have certain aspects of the German constitution that cannot be amended. There are other federal matters. It is a little difficult to see how these could be translated into something specific for legislation by Parliament. But I can understand the feeling that, “Well, don’t we have some of our constitutional history and experience that it is important to continue to stress, even if European law is developing in certain fields?” I wonder whether one would get any guidance from what one would put into a British Bill of Rights; whether trial by jury, for example, might be something that isn’t shared with most of our European partners and isn’t protected by the European Convention on Human Rights, but one would think that most of us would like to preserve trial by jury against inadvertent European change.

**Q70 Jacob Rees-Mogg:** Moving back to what Parliament now may not do, if it passed an Act that revoked or amended the European Communities Act and withdrew the UK from the EU or part of the EU, could it be argued on the basis of the obiter observations of the three Law Lords in the case of Jackson that the courts could disapply the revoking or amending Act?

**Professor Allan:** I wouldn’t have thought so. I read Jackson as just, in a way, stating what I said earlier in the sense in which parliamentary sovereignty itself is a doctrine linked with the rule of law. I think the judges were saying that even the supremacy of Parliament is accepted on certain very basic assumptions about upholding the rule of law. I don’t think that they were laying any basis for resisting a move by Parliament to withdraw or repeal the European Communities Act. So I don’t think that’s any basis for that.
Professor Bradley: I felt in regard to the speech of Lord Steyn, for example, that I admired some of the ideas he was expressing, but I don’t see how they came to be justified in the particular circumstances of the litigation before them. The courts at that level should surely deal with the issues they have to deal with and not go into unnecessary matters that may deprive their decisions of something of their force if people get concerned. There was, I think, a simple clear-cut solution in the Jackson case. I don’t think it was necessary in that case to get into those wider considerations. I wouldn’t have thought, with all respect to Lord Steyn, Lord Hope and Lady Hale, that what they were saying would be a baton for other judges lower down in the system to pick up and run with. I think it would be clearly judged as wide obiter, and shouldn’t be taken as typical of judicial views.

Q71 Chair: But that is important, because after all they are in the Supreme Court, or at any rate two of them remain. Lord Bingham felt it was necessary in his book “The Rule of Law” and in his commemoration lecture, most unusually, to make some very strong comments in defence of Jeffrey Goldsworthy’s view and his own regarding the question of the defence of parliamentary sovereignty.

If I could just quote what Lord Steyn said, because I think it is important to get this on the record. You have referred to him, saying you weren’t quite sure that he’d perhaps got it entirely right, if that is not unfair of me. The wording he used was, “The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.” That sounds awfully like what Professor Trevor Allan said in a book he wrote some time ago.

I just wonder whether that isn’t also to be weighed against Lord Hope’s comment, which you have mentioned as well. It is quite categorical: “Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute.” And then he goes on. We are talking about some very, very important judicial statements, which I would suggest go beyond the suggestion of pure obiter. They are making a claim about the sovereignty of Parliament, which is what this inquiry is looking into. Their being in the Supreme Court raises certain questions about how they might, for example, apply similar principles to these vexed questions that we are looking at on clause 18.

Professor Bradley: I would respond, I fear, slightly to disagree. Not if one looks at the paragraph from the Laws judgment that is quoted in the explanatory notes, for example, the categorical statement that “Parliament cannot bind its successors...cannot stipulate as to the manner and form of any subsequent legislation.” Lord Justice Laws went on to state, “Being sovereign, it cannot abandon its sovereignty.” I have in my writings tried to show why I think those ideas are overstated. If there is a vote in Northern Ireland in favour of unification with the Republic, the British Parliament will abandon sovereignty over Northern Ireland. It has, I think, abandoned sovereignty over many Commonwealth countries, and it is pointless to ask whether one could repeal the independence legislation.

Particularly on manner and form, I was very interested, Chairman, as you have mentioned Goldsworthy’s work, that in his most recent book he is not against the possibility that Parliament can govern future form and procedure of legislation. I would say it does, anyway. If Parliament today reconstructs the House of Lords—maybe turns it into a senate—Parliament in future will be the Senate and the House of Commons. There is no way that the present House of Lords could come into being again. By altering the composition of
Parliament, Parliament could alter matters of form and procedure. It may not wish to do so and it may not always succeed, but the fact is that it could do so. To take part 1 of the present Bill, I am not saying that Parliament cannot enact part 1 of the Bill as it stands. What I would say is that one cannot be certain in all circumstances of what its effect will be, as Professor Allan has already mentioned, if there is future legislation.

Professor Allan: Can I just add a comment on these interesting dicta in the Jackson case? Part of the problem is that some of those judgments appear to be suggesting that some important constitutional change is in the offing. We are told that, step by step, the principle derived from Coke and Blackstone is being qualified. Another way to understand this is that perhaps we are getting a better grasp of the nature of parliamentary sovereignty. If you go back to Dicey, he was clear that there was a balance between the sovereignty of Parliament and the rule of law. He laid a lot of stress on the powers of the courts to interpret legislation. I think that one could read Lord Steyn and Lord Hope as not advocating revolution or any major constitutional change, but simply underlining the point that all along there has been an implicit understanding that legislative supremacy is exercised in the context of a constitution built on the rule of law. That goes back to the point that I made about ouster clauses and so on beforehand. It would be a contradiction for Parliament to confer wide powers on a public body and then deny all judicial review, because that is to take the body outside the rule of law, and that is probably what Lord Steyn primarily has in mind.

Q72 Chris Heaton-Harris: Bearing in mind the problem that clause 18 is trying to solve, in a way, what should it contain, what should it look like and how should it be drafted? Or is it actually impossible to draft something that makes such a profound change in just a paragraph?

Professor Bradley: My guess is that, when the European Communities Bill was being considered—

Chris Heaton-Harris: I am after help with my amendments.

Professor Bradley: —in Parliament, it had been seen. Mr Heath’s Government had sent it to Brussels, and Brussels had said, “Well, this is all right. This is a sufficient guarantee that the United Kingdom will observe the requirements of Community law.” That is possibly one reason why the Government refused to allow any amendment to be made to that Bill. If clause 18 or some equivalent is enacted, I would be astonished if Brussels immediately said, “Well, this puts the United Kingdom in breach of its fundamental obligations towards the Union.” Professor Craig might say that a lot of specific instances—a referendum—might do that, but I have no authority on that at all.

I find it difficult, I’m afraid, to answer your question. Clause 18 is making a certain point and let it be made. Whether one could redraft it or reform it in a way that meets more essential concerns, I find it very difficult. I’m afraid I’m not going to offer a constructive answer to your question.

Professor Allan: That would be my answer as well, I’m afraid. I think that while the European Communities Act 1972 is on the statute book, it is hard to see how one could draft a clause that would make any significant difference. All one can do is try the notwithstanding clause in respect of a particular piece of legislation. To try and do it in a general way, however, just sets up a contradiction with the effect of the European Communities Act. That is the difficulty.

Professor Bradley: A further thought came to me while saying that I could not give a constructive answer to Mr Heaton-Harris. Maybe, now that we have a Scottish Parliament, if one wanted to, one could put a clause in that would in some way preserve the Sewel
convention in matters of European law. That is not unlike what has happened in Germany. I do not know whether the Scottish Government have complained that they have been left out of discussions over EU matters that concern them, but a clause of that sort—to preserve the interests of the Scottish Ministers, the Scottish Parliament and to work similarly for Wales—could surely be added and it could not be said to be in breach of any fundamental obligation towards the EU.

**Chair:** That is a good moment to bring in Michael Connarty.

**Q73 Michael Connarty:** Yes—och aye.

I found a lot of the contributions very interesting and tempting, but not always particularly relevant. I loved the debate about where we’re going in our changing constitution and what the purpose was of parliamentary democracy in the first place, but I’m much more interested in the evidence you’ve given about the possibility that this Act in general—if it’s enacted—saying there must be a referendum, attempts to bind future Parliaments and therefore has to be, you say, a constitutional law; and you could not have an implied repeal by having a future Act of Parliament that did not contain a referendum in relation to something to do with Europe. Can I just ask a question on the very principle? You say in paragraph 11 that, basically, “the common law recognises a category of constitutional statutes.” Can I just ask very simply for the layman—I am very much a layman—what makes a constitutional statute in common law, in relation to any other, which then has this problem that it cannot have implied repeal?

**Professor Bradley:** Somewhere I had a note of what Lord Justice Laws said constituted a constitutional statute—

**Chair:** He’s coming to see us.

**Professor Bradley:** His examples were matters that concern the relationship between the state and the citizen, and the people; or—and he said it is likely to be the same thing—that concern the fundamental rights of the people. So the Scotland Act 1998, creating a new democratic system in Scotland, the European Communities Act, the Bill of Rights, the Parliament Act—these are all—

**Q74Michael Connarty:** I recognise them by their being there, but what I’m trying to get at, and what I’m really interested in, is that you seem to imply that this Act, if it’s passed, containing the referendum could be interpreted by the Supreme Court as a constitutional Act and therefore would bind a future Parliament, unless a future Parliament Act specifically repealed the referendum section of this Act. Is that what you’re saying?

**Professor Bradley:** I think that’s unlikely, but suppose on one of the matters covered by referendum lock a future Parliament says, “This shall be approved,” and the Act does not include a referendum clause, I don’t see that any elector will have a legal ground for saying that there should be a referendum, except in the unlikely chance that you would go to the court, and the court would say, “Ah, there should have been a notwithstanding clause to make it a matter of express repeal, rather than just assuming.” That was what I had in mind.

As I said in my evidence, it’s one thing to say that Ministers should not do anything without an Act of Parliament; it’s the same thing to say that certain changes in EU law should not be approved without an Act of Parliament. It’s another thing to say that Parliament must itself do something and must include a clause to that effect, because if Parliament doesn’t include that clause then I would think it would take precedence over what is now proposed in this Bill.
Q75 Chair: Could I ask—in the light of that interesting exchange, which relates to the question of referendum locks and whether they would limit the sovereignty of future Parliaments to enact legislation on the EU—the Government have stated that there will be no transfer of power or competence from the United Kingdom to the European Union in the lifetime of this Parliament, so how does this affect your view of whether the Bill is intended to bind future Parliaments, and whether it therefore might be said to be unconstitutional?

Professor Bradley: The Government are perfectly entitled to say what they have done, and if Parliament wishes to incorporate that statement in legislation it is entitled to do so as well. What I think cannot happen is that it would be binding on future Parliaments. I have in mind a similar point in the Fixed-term Parliaments Bill. It is one thing for this Government and Parliament to say that the next election is going to be on such and such a date in five years’ time. It is not really competent for this Parliament to say that the next Parliament also has to have a fixed term of five years, because that Parliament will surely be able to make up its own mind.

We are not far off the manner and form, or the form and procedure—in some circumstances I would say, as I have said already, that Parliament can legislate for the future form and procedure of legislation. My immediate reaction to the referendum lock provision contained in part 1 of the Bill is that it hasn’t done so here, therefore there could be future legislation that ignores the referendum lock. Politically, there could be a huge comeback to that, but this is the kind of statement in an Act that is ultimately backed up by a political decision and wouldn’t ultimately be backed up by a legal one.

Q76 Chair: Professor Allan, do you have a further point before I ask Michael Connarty? Do you have a further reflection on that point?

Professor Allan: No, I very much agree with what Professor Bradley has just said. I do think that the whole question of what is a constitutional statute is a very interesting issue, but it seems to be quite a fuzzy notion. It applies very well in the context of the 1972 Act, because one can see the reason there for saying, “Well, you need express repeal to have clear instructions,” but it doesn’t really seem to apply with the Human Rights Act, I think, because the Human Rights Act in any event requires an interpretative process. It doesn’t prevent legislation overriding any of the conventional rights, so actually I don’t think that Lord Justice Laws’ reasoning applies very well to the Human Rights Act.

Q77 Chair: But then, of course, under the European Court’s own rulings in Van Gend, Handelsgesellschaft, Costa and all the rest, as set out in Declaration 17, it is quite clear that, contrary to the human rights position, the European Court asserts constitutional supremacy over our Parliament. That raises a huge and bigger issue, does it not?

Professor Allan: Yes, but that’s why, in a sense, I think the Thoburn judgment affords quite a useful reconciliation. We go as far as we can to accept the primacy of the EU law, but without accepting the constitutional basis put forward by the European Court of Justice. So, in some ways, it is quite a special and unique problem. The constitutional statute idea may be largely a resolution of that particular question. I am not sure how far it readily extends to other areas, because it doesn’t seem to me to apply to the Human Rights Act, because of the nature of that Act. I am not sure how far we can extend the reasoning.

Professor Bradley: Could I add a comment? Lord Justice Laws’ judgment suggests that we should classify an Act of Parliament in its entirety as either being a constitutional Act or not. That would work better if we had a written constitution, so that we knew that amendments to the constitution were coming in as an identifiable package. But our system of
legislation does enable an ordinary Act of Parliament to include a constitutional clause of quite some significance—experienced parliamentarians probably know that. Certainly, when I was advising the House of Lords Constitution Committee, one of the things that we were looking out for was clauses in Acts of Parliament dealing with such things as, perhaps, cockle fishing, dentists or whatever, but that none the less had immense implications constitutionally.

If I may be forgiven for referring to a matter of current controversy, I think that the Public Bodies Bill might appear to be unconstitutional. It needn’t be classed as a constitutional Act, but look at the effects of it. Take an uncontroversial example—a clause that gives excessive powers to a Minister, a Henry VIII clause on a matter that shouldn’t be dealt with in that way. Isn’t that of constitutional significance as well? Maybe Lord Justice Laws has helped us with the very clear Acts that can all be identified as constitutional, but I don’t know whether he would agree to a similar approach being taken to clauses of Acts that were of similar constitutional significance.

Q78 Michael Connarty: It’s good that we are talking about Ministers, who probably don’t follow the tortuous work of this Committee in its normal form. We try to get Ministers to adhere to the wishes of Parliament when they go to Council meetings and agree things, but they tend to go native, shall we say, when they get there. There is a conundrum. For example, were a Minister inadvertently, or for whatever reason, to agree, in breach of a provision of this Bill, to a new proposal that extends EU competence or power, and that proposal is directly effective or applicable, as so often they are, without the referendum law being used, in the UK, under section 2(1) of the European Communities Act, it would become applicable. Case law suggests that the European Communities Act is not an Act that can be impliedly amended—you said repealed or impliedly amended. In your view, should a provision—and if so, what provision—should be put in this Bill to clarify that an EU proposal that extends competence of power in breach of part 1 of the Bill can never become an enforceable right for the purposes of 2(1) of the European Communities Act? How would we put a safeguard in the Bill to prevent a Minister inadvertently increasing the power of the EU by agreeing something in Council?

Professor Bradley: That’s a difficult question, but an important one. What has been done in part 1 of the Bill, as far as I understand it, is to specify a number of specific instances where the referendum lock would apply. Your implied question is: could this become a general clause that stated that power should not be added or transferred without an Act of Parliament? Isn’t that a perfectly draftable provision to imagine—that no Minister can extend the powers and competence of the European Union? We are talking about what Ministers may do; we’re not talking about what a future Parliament may do. Given the great breadth of section 2 of the European Communities Act, which also includes the very wide delegated legislation powers, it seems perfectly proper to draft a general provision that would achieve an object of that kind.

Chair: I need to ask Chris Heaton-Harris about this, but I would just like to qualify the expression if I may, because it was a bit ambiguous, where it states that case law suggests that the European Communities Act is not an Act that can simply be amended. That is ambiguous, I think. It really should have said “some case law,” because that is a fairly controversial question.

Q79 Chris Heaton-Harris: I am interested in the transfer of competences angle. In practical terms, there are very few vetoes for a British Government Minister to use. Could it be argued that in areas where we have a future veto, if we choose not to play it, it would extend a competence? Post-Lisbon or with the passerelle clause, you could argue that the
European Union has as many competences as it needs. Surely, if it is an area where we have a veto on future power, we are extending a competence. If that could be argued, are we not constantly binding—‘and have we not constantly bound in the past—future Parliaments with things such as the budget negotiations in terms of the financial perspectives that last for seven years. That is always going to be longer than a term of any Parliament.

**Professor Bradley:** I fear that that question takes me out of my depth. For example, the matters that Professor Craig addressed in evidence related to the difference between competence and powers. I am afraid I have nothing to contribute on that at all. It would depend on the terms of treaty, would it not? If it says that the European Union body may do X or Y but shall not do so without a vote whereby the UK has a veto, it must be arguable whether that is really an extension. We are not talking about an extension of the EU powers; we are talking about whether or not the veto should be given. The example you gave, in very general terms, I will answer as generally as I can by saying I don’t think this would be treated as an extension of powers. But that is said without any knowledge of the detailed operation of European Union law. I suggest that would be a question worth addressing to others than myself.

**Q80 Chair:** Professors Allan and Bradley, thank you very much for coming. It has been very interesting. I think there still remain some uncertainties, and I think there is a slight difference of opinion between you on a number of matters, but it has been very helpful to us. Thank you for coming.

**Examination of Witness**

*Witness:* **Professor Adam Tomkins**, John Millar Professor of Public Law, University of Glasgow, gave evidence.

Q81 **Chair:** Professor Adam Tomkins, thank you very much for coming along to see us. We now have overrun our time slightly, but I think it’s been worth it, because an extra 20 minutes on a matter which goes back several centuries is probably not time wasted, particularly having regard to the Civil War, the 1648 and 1649 problems of constitutional law, sovereignty and supremacy, which ended with the execution of the King, followed by the problems which arose in the 1680s and so on. I think we can afford an extra 20 minutes of our time—not to mention the Reform Act 1867.

Professor Tomkins, we’re trying to get a kind of template by asking more or less the same questions, so forgive me for starting off with a question that’s already been put. Can you answer this question? Has the question of whether European law has supremacy over the constitutional doctrine of parliamentary sovereignty been finally resolved by the decision of the court in Thoburn, in your opinion?

**Professor Tomkins:** Mr Chairman and members of the Committee, good morning. Thank you for inviting me. I will answer that question in one second, but before I do so, I must say that as well as being a Professor of Law at Glasgow, I am also a legal adviser to the House of Lords Constitution Committee, but I appear before this Committee this morning purely in a personal capacity. Nothing that I say here is to be deemed to represent the view of any Committee or Member or Officer of the House of Lords.

My answer to your question, Mr Chairman, is the same, I think, as the answer that you already received from your previous witnesses, which is to say that no, it would be dangerous
to represent Thoburn as the definitive answer to anything, because it’s a first-instance decision of the divisional court.

It’s a first-instance decision of the divisional court that was given by a very highly respected but none the less sometimes quite controversial public law judge, Sir John Laws. I’ve heard you say, and I’m delighted to know, that he’s coming to your Committee to give evidence later on. I have no particular reason to believe that the Court of Appeal or the Supreme Court wouldn’t uphold the reasoning that Lord Justice Laws employed in the Thoburn case, but it’s dangerous, I think, to regard first-instance decisions as anything other than first-instance decisions, even where they weren’t appealed and even where they are decisions by judges as eminent in public law as Sir John Laws undoubtedly is.

**Q82 Chair:** Leading on from that, could you be sure that European law is only directly effective and applicable in national law because of the European Communities Act 1972?

**Professor Tomkins:** That’s my view, and that was my view long before Lord Justice Laws decided the Thoburn case. That was my view when I first read and tried to understand the Factortame litigation from 10 years previously. I think that it’s an uncontroversial position to take. I’m not aware of anybody taking the alternative position seriously, apart from Eleanor Sharpston QC—as she then was—who put the argument to the contrary on behalf of her clients in the Thoburn case.

**Q83 Chair:** And she is Advocate General?

**Professor Tomkins:** Yes. She is now one of the Advocates General.

**Q84 Chair:** You ought to bear in mind that the power of the EU is sometimes reflected by the appointments.

**Professor Tomkins:** Indeed.

To go back to the point about Thoburn, it seems to me axiomatic and elemental to a fairly basic understanding of British constitutional law that treaties have force as a matter of domestic law only if and in so far as they are given force by Acts of Parliament. There is nothing special or different about the EU treaties in that regard. I think it’s a fairly straightforward issue.

In the light of that, Mr Chairman, I must say that I find clause 18 baffling, because it is addressing only that little bit of what is actually a much bigger set of concerns, and it is addressing the little bit of a much bigger set of concerns that does not seem to be problematic. That was perhaps why your previous witnesses have said to you, and I agree with them, that it’s unlikely to be of any real practical effect.

If this is the attempt—I don’t know if it is—by the UK Parliament to reassert or reclaim some kind of sovereignty in the face of European competence creep, it “don’t do what it says on the tin.”

**Q85 Chair:** But of course, you said “Parliament”—I think you possibly meant “Government”.

**Professor Tomkins:** Well, of course Parliament has not debated the Bill, apart from the deliberations in this Committee.

**Chair:** That is why we are looking into their assertions.
Q86 Jacob Rees-Mogg: So you’re absolutely sure, effectively, that EU law is only directly effective and applicable in national law because of the European Communities Act?

Professor Tomkins: I have no doubt about that, in my mind, as a matter of legal analysis of UK law. Now, the European Court of Justice and, indeed, other institutions in the EU may or may not take a different view. But with all respect, their view as to this question being a question of UK law is immaterial. Questions of UK law are determined by UK authorities, not European authorities.

Q87 Jacob Rees-Mogg: It follows from that point that the UK courts will therefore remain sympathetic to the legislative supremacy of Parliament, or do you think that the judges may be willing to assert more power because of the development of European law?

Professor Tomkins: I think that gauging the level of continuing commitment in the UK judiciary to the sovereignty of Parliament is obviously and necessarily a speculative exercise. However, I think that the clearest signs are that the courts are not sure how committed they want to continue to be to the legislative supremacy, in that sense, of parliamentary sovereignty.

The leading case on this is the Jackson case, which you talked about with your previous witnesses and which I wrote at some length about in my written submissions to the Committee, for the reason that, although it is a case that on the face of it does not have anything to do with EU law, one of the things that that case most sharply and, to my mind, alarmingly indicates is that even our highest court, as was, is not sure what to do with parliamentary sovereignty. It isn’t sure what the legal basis for parliamentary sovereignty is. It isn’t sure how much parliamentary sovereignty is under challenge. It isn’t sure how much parliamentary sovereignty continues to represent the group “norm” or the “bedrock” or the “keystone” of the constitution—all of those words are used.

The reason why the Jackson and the Attorney-General case is so long, although so little was decided in it, is that so many of the judges who decided that case, not only in the House of Lords but also lower down, wanted to use the case as a vehicle for the expression of a bewildering variety of different views about the past, present and future state of parliamentary sovereignty. The case, I think, is authority for not much, but it is authority for the proposition that we have the right to be concerned about what is going to happen to parliamentary sovereignty in the hands of the courts.

Q88 Chair: Would it not also be the case that that was what prompted the late Lord Bingham to take such an unusual step in both a very important lecture and chapter 10 of his book, The Rule of Law, specifically—I have to use the word—attacking the basis on which those assertions were made by certain current Supreme Court judges? Then again, you have Lord Judge, the present Lord Chief Justice, saying in the Judicial Studies Board lecture in March this year that we must beware— I know that this is in the context of Strasbourg decisions—of the fact that some of our judges are directly applying Strasbourg precedents, which he effectively condemned. For practical purposes, it seems that we are getting to where the Supreme Court is beginning, as Professor Drewry said in his previous Toulouse lecture, to enter into territory that no previous generation of judges has ever seen fit to go, which rather endorses the view that you have just expressed in broad terms.

Professor Tomkins: I am glad you said that, because I was just about to say that I agree with what Professor Drewry said, although I haven’t read that lecture. Yes, what Lord Bingham seems to do in his commemoration lecture at King’s College London in 2007, which I referred to my written submission, was to ally himself with the outspoken criticisms of Lord
Steyn’s dicta, particularly in Jackson, which were published in the *Law Quarterly Review*—a journal that is not normally regarded as being among the more radical law journals. In that, what Lord Steyn said about the sovereignty of Parliament in Jackson was described as “unargued and unsound, historically false and jurisprudentially absurd”. Those aren’t Lord Bingham’s words, but those of the author of the article in the *Law Quarterly Review*, Richard Ekins. But Lord Bingham seemed to ally himself with those, and made the point very clearly in his commemoration lecture that what Lord Steyn said in Jackson—these are Lord Bingham’s words now—“did not bear on an issue which had to be decided in the case, and therefore have no authority as precedent”.

**Q89 Chair**: That wouldn’t sound very much to me as if he was endorsing those propositions as being reflective of—let’s call it—the rule of law.

*Professor Tomkins*: Lord Bingham’s view in Jackson was that the bedrock of the British constitution is—not just was—the supremacy of the Crown and Parliament. It is the dissent of that view, which you can see in the opinions of Lord Steyn, Lady Hale and Lord Hope, which I think Lord Bingham is coming back to in his 2007 lecture.

**Q90 Chair**: Would you like to give us some of your views? You had the opportunity to listen to a variety of views expressed today and also, no doubt, to look at some of the evidence that has already been put on the website. Would you like to give us your views about the efficacy of clause 18, against the background of not merely the revocation of repeal of the European Communities Act, which some would say is an extreme Act, but the question of dealing with a disapplication of individual provisions by the use of the expression “notwithstanding the European Communities Act 1972”, with specific reference to, for example, a highly political but none the less important question, such as the Working Time Directive, on which the Prime Minister himself has indicated in a lecture in recent years is something that some people would like to see, to use the vernacular, repatriated?

*Professor Tomkins*: I agree with the evidence that you’ve heard already this morning that it is very difficult to know whether clause 18 adds anything very much to the current legal and political debate about what the effect of a “notwithstanding” clause is likely to be. The short answer is we simply don’t know what the British courts would do with a “notwithstanding” clause, as it hasn’t been in legislation that has been litigated. I agree with the evidence of Professors Bradley and Allan that, assuming that the “notwithstanding” clause was sufficiently robustly and tightly drafted, as you would expect it to be, the British courts, on current evidence, would be highly likely to give effect to it.

**Q91 Chair**: In your written evidence you gave an instance of an Act where there was a disapplication that used language that you indicated could have the desired effect.

*Professor Tomkins*: Yes, in a Bill, not in an Act. That Bill was never passed.

**Q92 Chair**: It was a Bill, of course, yes. It happened to be my Bill.

*Professor Tomkins*: Yes.

**Q93 Michael Connarty**: Can I follow that up? It seems, having watched the procedures of the European Union, that if you passed an Act that had a notwithstanding clause in it that then contradicted or denied some part of European legislation that we had agreed to in Council in some way, surely the European Court of Justice would judge on that and someone
would apply to the British courts to have a judgment on whether that was binding. Presumably, under the '72 Act it would be binding, because it’s really an implied amendment or rejection of that Act.

Professor Tomkins: There are two claims to supremacy on the table here and there have been since 1964, when Costa v. ENEL was decided by the Court of Justice eight years before the UK joined. These two claims to supremacy compete with one another. So far in the history of the European Union, quite remarkably, these two claims to sovereignty have never clashed. The nearest they came to clashing in the UK case, of course, was the example of Factortame. But they have never actually clashed, so we don’t know what will happen if or when they do. It’s necessarily a speculative exercise.

The immediate question for this Committee and the House is whether clause 18 will make any difference to any of this. My respectful submission to you is that it doesn’t. I read Professor Craig saying to you on Monday that if and in so far as clause 18 is a sovereignty clause, it’s not a primacy clause and doesn’t deal with the question of which has primacy in the event of a direct clash between these two different competing claims to supremacy.

Some things are more likely than others. One thing that is likely to happen in the event of this sort of scenario is that the Commission would take action in the European Court of Justice, which would find that the UK was in material breach of European Community law and it might then be subjected to a penalty payment. What if the UK didn’t pay it—refused to pay it? Not only are we speculating now, but we’re outside the domain of law. There won’t be a legal solution to these sorts of questions, should they ever arise. There would be a political or diplomatic solution of some sort. These are ultimately not questions of law.

My view, however, is that if the UK Parliament passes legislation that clearly articulates that a particular piece of legislation is to have effect and be available in the UK, notwithstanding any provision to the contrary in the ECA 1972, and notwithstanding any provision to the contrary in European Union law, the UK courts would, for the time being, give effect to that notwithstanding clause, notwithstanding the fact that in doing so they would know that they would be in breach of EU law. However, even if that prediction turns out to be correct—even if that analysis is legally correct—I don’t think I would be relaxed about the Committee taking the conclusion from there that we could afford to be blasé about this for the foreseeable future. There’s no guarantee that 15 or 20 years down the line the same sort of legal advice as you’ve heard this morning would be given to a Committee such as this.

This is an area of law—by that, I mean constitutional law generally and specifically the relationship between member states and the EU within our British and European constitutional arrangements—that is changing. It’s changing all the time. It’s changing partly because of things that are happening in this House, partly because of things that are happening in the courts and partly because of things that are happening in Europe. We are in a—this is going to sound a bit pompous; sorry—prolonged moment of constitutional fluidity.

Q94 Michael Connarty: I have a minor supplementary question. It seems somewhat trivial, but does clause 18 therefore have any symbolic value? I suppose the question coming out of that is, why put it in at all? Is it necessary if it doesn’t have some value?

Professor Tomkins: Let me answer the second question first, if I may. Why put it in? I think it’s extremely dangerous, as I say in the closing paragraphs of my written submissions. The rule that I would respectfully urge you to bear in mind in dealing with this or any other question of constitutional reform is the most powerful law of constitutional reform, which is the law of unintended consequences. The more I think about this, the smaller clause 18 seems. It seems to be dealing, as I said a few moments ago, with one aspect of a big problem that is
not itself particularly problematic, because it was fairly clearly dealt with by the Thoburn judgment. Yes, we can’t be overly relaxed about the fact that the Thoburn judgment is definitive for all intents and purposes. None the less, it’s the state of the law for the time being, and nobody is really suggesting to you that it shouldn’t be the state of the law for the time being. It deals with that. That’s an issue that doesn’t really need to be dealt with. It doesn’t deal with any of the problems that do really need to be dealt with, in my respectful judgment, relating to questions of sovereignty in the context of the relationship between the UK and the EU. Nor does it deal with any other of the challenges to parliamentary sovereignty outwith the context of the EU that again do, in my submission, need at least to be considered or examined, if not necessarily legislated for.

**Q95 Henry Smith:** Which begs the question: if the intent of clause 18 is to have the effect that your evidence and the previous evidence, which we have been privileged to hear, suggest it does not have, what would need to be enacted, in your opinion?

**Professor Tomkins:** That really depends on what you want to do. I’m sure that in this context, the parliamentary draftsmen have drafted exactly what their ministerial instructions told them to draft. This is a question of Government policy or, if you prefer, a question of parliamentary policy, rather than a question of legal advice—he said, backtracking. But the serious answer to your question—well, that is a serious answer to your question. The further answer to your question is that it depends on what you want to try to do.

You’re parliamentarians. You, together with your fellow parliamentarians in this House and in the House of Lords, may feel that your collective sovereignty is under threat—is under challenge—in ways that you’re not comfortable with, whether that’s from Brussels, Luxembourg or Strasbourg or whether it’s from Scottish devolution, human rights jurisprudence or the global economy. Whatever the source of your sense that your sovereignty is somehow under threat in a way that you’re not comfortable with, that source needs to be dealt with. If you take the political decision to address that in legislation—that’s a political decision—the legislation has to deal with that source.

**Q96 Chair:** But don’t you agree it’s also a democratic decision, because the basis on which we are elected is to reflect the views of the voters? You’ve touched on the question of the relationship between the United Kingdom and Europe in the more general sense. If, for example, the assumption that the single currency was a good idea has turned out to be questionable or wrong then quite clearly, in so far as we’re bound into Treaty obligations and the rule of law, these are highly charged political questions that can be resolved only as a matter of democratic consent. I would have wondered whether it could really be dealt with by some idea of the rule of law, because these are questions that ultimately depend on the democratic consent of Parliament, do they not?

**Professor Tomkins:** Mr Chairman, you are quite right. Again, what I would say is that these are matters about which political judgment is required. Sometimes, the political judgment will be that these are matters with which we should deal as a nation through our representative institutions, such as our systems of parliamentary government. Sometimes, the political judgment will be that we need to put the question to a referendum. Sometimes, the political judgment will be that these may appear to be, temporarily, in the heat of the moment, important questions that touch on national sovereignty, whereas actually there are precedents and we can allow them to be dealt with in the usual way through the Council of Ministers or court action. The point is that these are questions of political judgment.
Q97 Chair: And indeed—if I may just add one last thought on that—the Bill is predicated on the assumption that it will deal only with future circumstances relating to European law and its development. There are circumstances in which, to go back to Lord Denning in Macarthy's and Lord Diplock in Garland, one may need to look back to the question of whether or not the assumptions on which it was constructed need to be re-evaluated. At that point, Parliament may decide that it wishes to make a change in order to bring the jurisprudence in line with political reality.

Professor Tomkins: Well, indeed, and as I understand it, there is nothing in the Bill that would enable that to be done. Again, whether you want to put something in the Bill to that effect is a question of political judgment. Remember my law of unintended consequences. Such a declaration by a Parliament of a member state that it wishes to seek to reclaim the power, perhaps for the first time, to unpick decisions that have been made previously is, I would have thought, likely to have significant consequences.

Q98 Chair: It could have very important consequences, but it might also be necessary if “notwithstanding” was effectively the only route that could be adopted to achieve the correct legal result.

Professor Tomkins: How so?

Q99 Chair: Well, to use the expression “notwithstanding” creates the circumstances in which you are excluding yourself from the automatic application of sections 2(1) and 3.

Professor Tomkins: On the other hand, perhaps one should not get too excited about the unintended consequences—perhaps they are sometimes intended consequences. After all, at least since Nice, if not since Amsterdam, we have had what has sometimes been called multi-speed Europe. We have complex systems in Lisbon of opt-ins and opt-outs.

Q100 Chair: Enhanced co-operation.

Professor Tomkins: Exactly. Enhanced co-operation, closer co-operation, the Schengen area and so on. Perhaps in a Europe of 27 member states, there is room for different member states to proceed in different directions and/or at different paces with regard to certain policy areas, without the whole house collapsing.

Q101 Michael Connarty: This is a very interesting discussion, but is any of that in this Bill? We’re not here to discuss the philosophy of the constitution, but to take evidence to give advice on the Floor of the House when it sits as a constitutional Committee on this Bill. I don’t see in this Bill the Chair’s former Bills on sovereignty that he has tried to bring forward. You have said more than others about your concerns about clause 18 in the Bill that we have before us—that it does not have any effect in real terms on the relationship with the EU and does not change the interpretation of the European Communities Act 1972.

Professor Tomkins: Can I just respond very quickly to that?

Michael Connarty: I want to ask about something that is far more important.

Professor Tomkins: I am sure that there are many more important things to be talking about. However, if the House of Commons were to proceed to legislate this Bill into law without considering what the implications of legislating on a little bit of parliamentary sovereignty might be on the rest of the areas that I have highlighted in which parliamentary sovereignty may be perceived to be under challenge, there may be very grave consequences in
terms of the way in which such incomplete and partial legislation would subsequently be used in case law. I tried to sketch that out in the closing paragraphs of my written submission.

**Q102 Michael Connarty:** I understand now what you mean by dangerous. Can I move to the question of binding Parliaments? If this Bill is passed and is seen as a constitutional law, a future law relating to the EU passed by a future Parliament will look as if it is an implied repeal of this Act, because it does not have a referendum clause in it. Will it, in fact, bind future Parliaments, unless it specifically has a clause stating that we must have a referendum on future Bill?

**Professor Tomkins:** There are lots of foggy areas over the sovereignty of Parliament, but the foggiest of them all is the idea that Parliament cannot bind its successors.

There are two big cases in which the expression “constitutional statutes” has been used by judges. The first is the Thoburn case, where Lord Justice Laws said that the European Communities Act 1972 was a constitutional statute. That was the first anybody had heard of it. The expression “constitutional statute” was, for these purposes, invented by Lord Justice Laws in his judgment in the Thoburn case. You can ask him about this yourself, but as far as I understand it, the reason why he invented it in the Thoburn case was to deal with an argument that had been put to him by counsel about implied repeal.

In my understanding, the argument was, in any event, misconceived, because the doctrine of implied repeal is much more straightforward, much simpler and much narrower than most people think. One Act of Parliament can be held to have impliedly repealed a prior Act of Parliament only if the two Acts are about the same thing. That is clearly set down in the leading judgment, by Lord Justice Maugham, in the leading case, Ellen Street Estates, in the 1930s. In the material case, the Thoburn case, the two statutes we are talking about are the European Communities Act 1972 and the Weights and Measures Act 1985. They are not about the same thing. No one could have held—absent any rhetoric about constitutional statutes—that the Weights and Measures Act 1985 impliedly repealed the European Communities Act 1972. The idea that Parliament would legislate to renegotiate the relationship between the United Kingdom and the EU without express reference to the European Communities Act 1972 is, anyway, preposterous.

Implied repeal happens when Parliament has forgotten that it has already legislated about something, or where there is an oversight, so that when there are two pieces of legislation that are mutually incompatible, judicial preference is given to the latter over the former. That is not going to happen with regard to the European Communities Act 1972, I would have thought.

The second circumstance in which “constitutional statute” as a phrase has been used—I think it is much more important, although it may be less important for this particular Bill—is the case of Robinson v. Secretary of State for Northern Ireland. It was a House of Lords case, in which the House of Lords split by three to two, with Lord Bingham in the majority. It was about the correct interpretation of the Northern Ireland Act 1998, which Lord Bingham and the majority held in that case to be a constitutional statute.

There the issue is not about implied repeal; it is about statutory interpretation. The rule or principle that Lord Bingham ushered in, in the Robinson case, is that the Northern Ireland Act 1998 is to all intents and purposes the constitution of Northern Ireland, and it should be interpreted constitutionally, rather than through the perhaps narrower or stricter constraints of regular statutory interpretation. So, constitutional statutes should be interpreted “generously and purposively”, in his words.
That has been picked up in subsequent litigation in Scotland, where there have been challenges to various decisions and enactments by Scottish Ministers and the Scottish Parliament on Scotland Act grounds. This is a much more important growth of the idea of “constitutional statutes”—that they might be interpreted differently from other statutes, or that they might be interpreted in accordance with different principles from the principles that the courts ordinarily use for regular statutes. That is the law on constitutional statutes.

If this Bill is passed, will it count as a constitutional statute for either of those purposes? I do not know. I very strongly agree with the suggestion that was being put to you by Professor Bradley. There are all sorts of constitutionally terribly important provisions in bits of legislation that might not be classed as constitutional statutes as such. I agree with him that the Public Bodies Bill is a good current controversial example.

Q103 Michael Connarty: Clause 4 lists a large number of things that would attract a referendum. For example, a future Act might be passed by Parliament in line with an EU wish or decision in Council to do something in tandem with the EU as a shared competence that is not at the moment a shared competence, but it does not say that in so many words. Rather it says that it will do something in relation to, let’s say, fishing. That is a sole competence of the EU, but I am thinking, in particular, of an area where we do not have a competence with the EU entirely and we decide to share it with them—let’s say border policing or something like that—and there is no referendum on it. Is that an implied repeal? Are they saying this is a constitutional Act, you cannot do that? Where do we go from there? It seems to stick us in a list of situations where they are all constitutional Acts. We cannot imply a repeal of them and, therefore, we cannot do anything except to have a referendum on what is merely a sensible, administrative arrangement.

Professor Tomkins: I am really glad that you asked this question, Mr Connarty, because it raises another big concern I have with this Act as a whole. The immediate answer to your question is no one knows. Any answer to that question is purely speculative and, therefore, it would be litigated. The chances are that it would be litigated a long way up and that it would cost a lot of money and take a lot of time. It would generate legal uncertainty. That is not the only instance where this Bill, if it is passed in its current form, invites litigation. It goes out of its way to invite litigation.

The other big example is in clause 5(4), which relates to ministerial statements being laid before Parliament on whether a particular issue is or is not significant—or sufficiently significant to attract the various locks or mechanisms. I think that I am right in saying that the explanatory notes state that ministerial decisions to make or not to make these statements will be judicially reviewable. Again, it is inviting the courts to become more significantly involved than they hitherto have been.

Q104 Chair: This raises the jury point.

Professor Tomkins: With respect, it is not quite the same as the jury point. This is not the court saying, “We want to have a view.” This is a Bill before Parliament that invites the courts to come in. This is not judicial activism.

Chair: I see that.

Q105 Mr Clappison: I am glad that you mentioned that, because that is one of the things that I wanted to come on to following Mr Connarty’s earlier question. It is one of the things that caught my eye. I am not in any way a constitutional lawyer or an expert, but as a Member of Parliament I find it rather strange to be asked to legislate on something that then
leaves it open to a member of the public to go before the courts in a judicial review. Do you think that this would be improved slightly if we took the decision away from the Minister and made it subject to a vote in both Houses of Parliament? At the moment, there is the decision by the Minister. Once that decision is taken, the only thing that could happen is for a member of the public, or whoever, to go off to the courts.

Professor Tomkins: That may be one alternative. Another may be—although he may not thank me for saying this—to have a structure such as the one in the Fixed-term Parliaments Bill whereby the Speaker certifies that a particular statement is conclusive for all purposes, and you use parliamentary privilege to keep that out of the court. Various mechanisms could be employed if Parliament wanted to employ them to ensure that these statements or decisions were not judicially reviewable. That might be something that the House will want to consider as the Bill progresses.

Q106 Chair: I would only add that I have the lead amendment on that in the Fixed-term Parliaments Bill and the wording that was chosen expressly excludes the wording in the 1911 Act. The question of whether it would get to the courts is a very contentious issue that will be discussed next Wednesday. We will be going into that in some depth.

Will you throw your mind back to the explanatory notes on this Bill. Curiously, in respect of Macarthys v. Smith, which is quoted, and also in regard to Thoburn, the explanatory notes leave out the reference to what Lord Denning said about expressly inconsistent enactments. When they get on to Thoburn, they refer to the sovereignty question in terms that you, Professor Bradley and Professor Allan have already described, but they leave out the references to the question of the status of constitutional statutes. So we have this extraordinary situation in which, as you indicate, there is the severe possibility that this might be litigated, but on the basis of trying to get it through Parliament, the Government explanatory notes almost—let us be blunt—deliberately leave out the two elements that would move the argument in the other direction. That suggests to me a sleight of hand that they may have thought that we might not have noticed.

Professor Tomkins: I don’t know whether it is a sleight of hand or not, but that is on the record.

Chair: Well, I can say that.

Professor Tomkins: I have never seen a Bill about which I am so concerned about the explanatory notes as I am with regard to this Bill. Explanatory notes are cited in court these days. There are contrary dicta about the extent to which you can do it, but it is a bit like the Pepper and Hart rule about ministerial statements. It is clear that, as usual, these explanatory notes have been very carefully drafted, but it is not clear that these explanatory notes have the sole purpose of explaining what is in the Bill.

For example, I think that there are mistakes in paragraph 8 of the explanatory notes, which states: “Clause 18 of the Bill places on a statutory footing the common law principle of Parliamentary sovereignty” and so on. First, there is great controversy, as we have already seen, about whether parliamentary sovereignty is a common law principle. Secondly, clause 18 does not place on a statutory footing the common law principle of parliamentary sovereignty, not even with respect to directly applicable or directly effective EU law. It doesn’t deal, as you have already heard, with the primacy issue; it deals only with the source issue, which isn’t really a question of sovereignty.

Most importantly with regard to that particular sentence, I think, again, that it is potentially extremely dangerous for the Government and/or Parliament to signal to the courts that they now accept that parliamentary sovereignty is simply a common law principle. If it is
a common law principle, it follows, doesn’t it, that, like any other principle of the common law, it can be changed by the courts? That was precisely—the words unsound, absurd, unhistoric have been used—the position that was taken by Lord Steyn in Jackson and the Attorney-General that Lord Bingham found to be so problematic. The explanatory notes, not just with regard to the detail of what is said about clause 18 from paragraph 104 onwards, but much earlier on in this particular instance, are very worrying indeed.

Chair: I am very grateful to you because I referred in my opening statement to these assertions contained in the explanatory notes for this very good reason. Of course, we have invited the Secretary of State himself to come to give evidence, and we have also asked for the legal adviser to come with him so that we will be able to ask these pertinent and extremely important questions.

Q107 Mr Clappison: As the Chair has rightly said to you, this begs a question for Back-Bench Members to ask: what can we do to remedy this situation?

Professor Tomkins: I am afraid that my answer to that question is going to be the same as the one I gave in response to Mr Smith’s earlier question. That really depends on your political judgment about what you want to achieve, what you want this legislation to achieve and the problems. One kind of classic approach to statutory interpretation that the courts have taken in the past is what’s called the mischief rule—what is the mischief that the legislation is designed to remedy, address, deal with or tackle? Once that question is clarified in your minds, the rest naturally follows. I can’t tell you what the question is that you want to be addressed in legislation. As I keep saying, that is a question of political judgment.

Chair: Michael Connarty.

Michael Connarty: No, I’m happy. I read through your contribution and listened to what you have said, and it has been very useful. I have noticed at the back Professor Bradley nodding in one direction and Professor Allan sometimes nodding in the other. It is clear that there are discussions to be had among the people who teach these things, but we have had a very helpful triangulation this morning of three opinions.

Q108 Chair: Could I ask you another question? We have already put it to Professor Bradley and Professor Allan and we would like to ask you the same question. Suppose a Minister was inadvertently to agree, in breach of the provisions of the Bill, to an European proposal that extends competence or power, and that the proposal is directly effective or applicable. It would automatically become an enforceable right under section 2(1) of the European Communities Act in the United Kingdom. Some case law suggests that the European Communities Act is not an Act that can be impliedly amended. May I invite your opinion as to whether provision should be made in the Bill to clarify that if a European Union proposal extends competence or power, and is breach of part 1 of the Bill, it can never become “an enforceable right” for the purposes of section 2(1) of the European Communities Act 1972? What is your view on that?

Professor Tomkins: My view is that that is a very difficult question. The scenario that you paint raises in an acute form a problem of legal certainty. Legal certainty is a ground of judicial review in European Union administrative law, and it is a legal principle that also becomes more important in domestic UK administrative law cases. There will also be arguments about legitimate expectation and the extent to which legislation laid down an enforceable right and expectation that a particular procedure should be followed, quite apart from the question of whether such provisions bind future Parliaments.
Having identified the potential loophole gap in the Bill as currently drafted, I am not sure what the wisest legislative solution is. Were you to include in the Bill a provision that qualified the definition of directly effective or directly applicable European Union law as a matter of UK law, so as to put the UK's understanding of directly effective or directly applicable law at odds with the ECJ’s understanding of directly effective or directly applicable law, that might put the United Kingdom in breach of its Treaty obligations in the view of the European Court of Justice.

**Q109 Chair:** That in turn would raise the question, would it not, of the role of the ECJ in the context of Costa and the other cases that you’ve already mentioned in asserting its constitutional supremacy over Westminster, and therefore our ability to make that kind of judgment? That in turn would probably end up in the Supreme Court and be left to the judgments of the Supreme Court judges, some of whom have already been referred to.

**Professor Tomkins:** Indeed. It is inevitable—well, nothing is inevitable, but it seems very highly likely—that were such a scenario to manifest itself in practice, it would be litigated all the way up the food chain.

**Q110 Chair:** Do you think it possible that given the manner in which the Bill has been constructed, and in light of the apparent deficiencies in the explanatory notes, it is not merely an invitation for those persons who might wish to litigate in future under this, but it also invites the answers that some people might think they would get from the Supreme Court?

**Professor Tomkins:** I don’t know if I would go as far as saying that. Turning my mind to alternatives, one might want to rewind from this Bill a little bit and say, “If we are worried about Ministers agreeing under clause 8 to an extension of EU competence through Article 352, as it now is, and we want to check that in some way, without legislating for it and thereby potentially creating these very grave hazards of legal uncertainty, how would we do it?” The answer is: this place—Parliament. It is Parliament that constitutionally holds Ministers to account. Parliament has to find ways of making its accountability for what Ministers decide in Council—with regard to Article 352 or anything else—more effective. If we had truly robust, vigorous and detailed accountability in Parliament of ministerial decision making in Council, there would be no need for this at all, because we could trust Parliament to do the job.

**Q111 Chair:** But you know, Professor Tomkins, that when you get on to the question I put to Professors Bradley and Allan, decisions are taken that have legislative effect that come from regulations made by the European Commission direct. We have majority voting, which is not something that we are even able to trace in terms of the decision-making process, because it happens behind closed doors, and then there is the judicial activism of the European Court itself. In all these contexts, what you are really saying, I suspect—if I do not invite you to make a comment by a leading question—is that the ultimate issue, as far as the supremacy or sovereignty of Parliament is concerned, must be dependent on democratic consent, and that in the rule of law, that should be the guiding principle, and not some constitutionalism.

**Professor Tomkins:** Exactly. So it depends on the ability of Parliament, which specifically means this House—the House of Commons—to hold Ministers meaningfully to account for decisions that are taken in the national name in Brussels or in Luxembourg.

**Chair:** Chris Kelly, did you want to ask a question?

**Chris Kelly:** No.
Chair: Are there any further questions that anyone would like to ask?

Professor Tomkins, thank you very much indeed, and I thank all the other witnesses. I am glad to say that all this is on record, and if I may say, I am grateful to Hansard for the speed with which it puts the transcript on to the website so that all witnesses are able to evaluate the position as we move forward. Thank you all very much.