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In these write-ups, issues raised in the discussions are collected into an essay including references to relevant research and exploring some questions in more depth. The authors are encouraged to elaborate and reflect, so they should not be read as an unvarnished record of the discussion.



The Withdrawal Agreement and a 'Meaningful Vote': The Limits of Parliament's Sovereignty over Brexit?

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Introduction: The Two-Level End-Game of Brexit

On Sunday 25 November 2018, the European Council [endorsed](#) the [Withdrawal Agreement](#) between the United Kingdom and the European Union. Pending the legal formalities of the Agreement being adopted by the Council of the EU following the consent of the European Parliament, this political action concluded the European dimension to the ['two-level game'](#) of the Brexit negotiations. The Brexit end-game has now shifted back to the initial domestic level with the announcement that Parliament will hold its 'meaningful vote' on whether to accept the Agreement on 11 December 2018. The impasse within Parliament on the deal secured by the Prime Minister means that there is great uncertainty regarding the outcome of this vote. This has opened up a [complex decision tree](#) with numerous branches and sub-branches. These encompass three broad categories: the possibility of a 'no deal' withdrawal, acceptance of the government's deal in some form, or 'no Brexit' at all. Although it may be argued that Parliament has re-asserted its sovereignty in theory through the role it has carved out for itself in the Brexit end-game, in practice this is constrained by procedural limitations.

The Strengths and Weaknesses of the 'Meaningful Vote'

It has been claimed that Brexit has opened fissures in the informal constitutional process upon which the United Kingdom relies. First, the paucity of deliberation on the [EU Referendum Act 2015](#) led to a lack of clarity concerning the popular vote on 23 June 2016. The legal nature of the referendum as 'advisory', and the transposition of the General Election franchise prompted [legal claims](#) of inequity from those disenfranchised. Secondly, following the confirmation of the [Miller judgment](#) that the authority to provide notification under Article 50 lies with Parliament rather than executive prerogative power, the legislature promptly acted to confer statutory authority upon the Prime Minister through the [EU \(Notification of Withdrawal\) Act 2017](#). Parliament thus abdicated the right to shape the mandate for the negotiations and to scrutinise the conduct of the government. These failures have been mitigated, however, by the scrutiny of parliamentarians during

the reading of the [EU \(Withdrawal\) Act 2018](#). This resulted in the ‘bespoke mechanism’ to scrutinise the Withdrawal Agreement provided for in [section 13\(1\)\(b\)](#) of the Act.

The requirement that the Withdrawal Agreement may only be ratified upon fulfilment of the condition of approval through a resolution of the House of Commons has led to the claim that this is the moment of modern history in which Parliament is in its most powerful position in relation to the executive. The strengths of this meaningful vote provision are evident when compared to the processes for the [accession](#) of the United Kingdom in 1972. On that occasion the decision to accede was approved by Parliament without any sight of the accession treaty. By contrast, the publication of the draft agreement on 14 November 2018 means that Parliament will have had full access to the content for nearly a month before the vote. This is supplemented by the concession by the government to publish the [legal position](#) of the Attorney General on the Agreement, though [controversy](#) has arisen over the exact means of fulfilling this obligation. The gap between publication and the vote has also allowed space for the process of scrutiny in the [Procedure Committee](#). The government’s [Business of the House motion](#) allows for five days of debate with up to 8 hours of debate on each day. The motion allows for six amendments to be selected by the Speaker and voted on at the end of the final day of debate. These amendments could play a crucial role in shaping the outcome of the vote, as will be discussed in the following section.

Despite these features, weaknesses with the meaningful vote procedure have also been identified. The crucial issue is that the structure of section 13 has ostensibly left the Commons with a binary choice between the Prime Minister’s deal and no deal. Furthermore, the government has treated the [political declaration](#) on the framework for future relations as equivalent to the Withdrawal Agreement. This does not reflect the reality that, whereas the Withdrawal Agreement signifies the end of a treaty negotiation, the political declaration signifies the start of a new process. This point is exacerbated by the complete lack of any timetable for the negotiation of the future agreement. Article 184 of the Agreement provides the linkage between the two documents, and it will remain to be seen what approach the government takes towards Parliament’s treatment of the political declaration. Finally, Article 13(1)(d) clarifies that a further condition for the ratification of the Withdrawal Agreement is the passage of an Act of Parliament for the domestic implementation of its provisions. No draft Bill of this Act has been provided to parliamentarians and therefore it is unclear how the ratification of the Agreement could change the domestic constitutional order. These weaknesses in the procedure do not change the fact that, in theory, Parliament finds itself in a position of great power in relation to a question which will shape the nature of the United Kingdom polity for the coming generation. As will be seen below, however, the procedures for the functioning of the House of Commons may prevent the realisation of the full range of options in practice.

The Possible Outcomes of the Meaningful Vote

Option 1: (Conditional) approval of the deal

The first and simplest potential outcome, despite its unlikelihood in light of the [current parliamentary arithmetic](#), is that the House of Commons passes a resolution to approve the Withdrawal Agreement and the political declaration for the future relationship. It has been suggested that concessions by the government could be offered to parliamentarians reluctant about the deal in three main areas.

First, increasing the rights for Parliament over the future relationship negotiations could be offered. This could offer an opportunity to implement the lessons learned from the lack of scrutiny over the withdrawal negotiations. For example, concessions could be extracted whereby Parliament would need to formally approve the substantive mandate for the future relationship negotiations, in addition to ensuring for itself greater procedural rights such as access to negotiating documents.

Secondly, the government could offer Parliament more control over the manner in which the Withdrawal Agreement is implemented domestically. An aspect of this could pertain to the open question of Parliament's role in the decision to extend the transition period envisaged in Article 133 of the Withdrawal Agreement. This could be particularly salient for the potential control that Parliament may have over a decision whether or not to enter into the highly controversial ['Northern Ireland backstop'](#) Protocol.

A final concession could be to provide parliamentarians with more control on the actual policy choices concerning the future relationship with the EU. Such a move could help to unite the diverging factions behind the deal. Those who support a far looser relationship with the EU through a reversion to [WTO terms](#) and those who support a closer relationship through a ['Norway style'](#) relationship by joining the European Economic Area (EEA) could both be persuaded to support the Withdrawal Agreement. The logic would be that this preserves the space to fight for their vision in the future.

This raises the live question of how extensively the motion can be amended so as to propose changes in relation to the political declaration whilst still allowing for the ratification of the Withdrawal Agreement. A strict position would hold that the statements on respecting the result of the 2016 referendum, including 'with regard to' the ending of free movement, contravenes concessions towards an EEA-style arrangement. A counter-argument is that the Commons can suggest any change in relation to this document because it is not legally binding and is only a statement of intent for a future negotiation. This differentiates the situation from attempts to amend the Withdrawal Agreement itself, which would require re-approval at the European level that the Presidents of the Commission and European Council have [explicitly ruled out](#). The language used presents any option for the future relationship as a 'sliding scale' which allows for great flexibility. It should be noted, however, that shifting contestation to the future could still jeopardise the ratification of the Agreement should there be a failure to agree to the terms of the domestic legislation. These concessions have been described as 'low hanging fruit' for MPs who oppose Brexit and/or the government. These politicians may be more interested in the 'forbidden fruit' of a General Election or a People's Vote. However, these options may only come into play once the capacity for the more modest options to secure consensus is exhausted. Such a situation would move the end-game into the second possible outcome of failure to approve the deal.

Option 2: Rejection of the deal

The Labour leadership has already [published](#) the substance of its amendment to the motion. The Opposition would decline to approve the negotiated withdrawal agreement, whilst simultaneously declining to approve the United Kingdom leaving without an agreement. Accordingly, they would pursue 'every option' as an alternative to these two scenarios. It has been suggested that this wording obscures the fact that the vote of the House of Commons is only legally meaningful in the negative sense that it can torpedo the Agreement. The amendments can only have a positive effect in a political sense. Parliament missed the opportunity of seeking to lay down legally-binding conditions on how the UK's

exit from the EU should be negotiated when it passed the Notification Act without amendments imposing such conditions. Consequently, the suggestion that parliament could 'decline to approve' the United Kingdom's departure without an Agreement obscures the reality that this is not an active choice that is within the direct control of Parliament. The reality is that withdrawal without an agreement is the default legal position upon failure to ratify the Agreement, due to the automatic operation of EU law per Article 50(3) TEU. However, this is not to argue that the political effect of such an amendment would be insignificant.

Subsections 13(4)-(6) of the EU (Withdrawal) Act 2018 make provision for the situation in which the House of Commons does not pass a resolution approving the Withdrawal Agreement and the framework for the future relationship. Within 21 days a Minister is obliged to make a statement on how the government 'proposes to proceed in relation to negotiations', and within 7 sitting days after that statement the Minister must make arrangements for a 'motion in neutral terms', meaning that no amendment may be tabled, that the House of Commons has 'considered the matter of the statement'. This period of up to a month of reassessment following a rejection could open up the possibility of the Government making concessions to try and secure support in a possible second vote. However, as discussed above, it would seem that the route back to the European negotiation table has been foreclosed and thus such concessions could only operate within the domestic level (e.g. as to the future domestic role of Parliament in approving the later treaty on the future relationship). Indeed, the possibility has also been raised by the Prime Minister of asking the same question again of MPs without any amendments and in contravention of the usual convention in the Commons.

One possibility is that the result of the failure of the Government to secure the Commons' agreement on the biggest issue of the day would be for the Government to fall, despite the detailed procedure in the Act for the Government's response to a negative vote. This is based upon the constitutional convention that the Prime Minister must be able to command the support of the House, and if not, then the Government should resign or there should be a General Election. This situation has now been [complicated](#) by the legal procedures mandated for such events in the [Fixed Term Parliaments Act 2011](#). Early parliamentary general elections are provided for in two situations: an explicit motion to hold a General Election passed by two-thirds of the House, or a simple motion of no confidence that is not overturned within 14 days. It is assumed that the Government would resign upon losing such a vote; the Act does not deal with this point because government resignation has always been a matter of constitutional convention not law. However, as the Act provides for a General Election if a no confidence is passed and no other Government can procure the passage of a *positive* confidence motion within the statutory 14 day period, such an avenue would not suit Conservative MPs who may oppose the Prime Minister and her deal, but do not want to take a risk of a General Election that could see their party lose power. Such MPs could therefore table a non-statutory no confidence motion (which might force the PM to resign but would not trigger the 2011 Act's provisions for an early General Election). Alternatively, dissatisfied Conservative MPs could trigger a leadership contest through the Conservative Party's [internal processes](#), challenging Theresa May's role as party leader, rather than as PM.

Option 3: Rejection of Brexit

The momentum for a third option that rejects both the Government's deal and a 'no deal' exit has been building. The campaign for a ['People's Vote'](#) calling for a second referendum

on the United Kingdom's membership of the European Union has been [explicitly endorsed](#) by numerous backbench MPs and former ministers. Furthermore, the possibility of 'no Brexit' has now ostensibly been recognised by the Prime Minister, and the European Union's institutions. The Labour party's leadership, whilst coy to endorse any one strategy, has left the door open to a second referendum through its party conference [pledge](#) to 'keep all options on the table'. This has now found its way into the amendment proposals for the 11 December vote.

Such an option would, however, be subject to tight procedural constraints. It has been [forecast](#) that in order to enable sufficient time for legislation on a referendum to be passed and to hold a period of purdah it could take 22 weeks before a second referendum might be held. In the first instance this would require the unanimous consent of the EU27 following a request from the United Kingdom to extend the Article 50 period. There have been [intimations](#) from the European level that such a decision could be made in order to enable democratic re-appraisal within the United Kingdom. Such an extension of the UK's membership beyond 29 March 2019 would, however cause spill-over effects into the governance timetable of the European Union. The United Kingdom would be obliged to participate in the European Parliament elections held from 23-26 May 2019 if it were still a Member. The European Council has attempted to 'internalise' this negative externality in its [decision](#) on the re-allocation of the composition of seats in the European Parliament following Brexit. Such an eventuality could also raise the domestic issue of the EU (Withdrawal) Act possibly requiring amendment. [Schedule 9](#) makes provision for the additional repeal of the European Parliamentary Elections Act 2002 in addition to the European Communities Act 1972 on 'exit day'. It is therefore unclear whether the retention of existing EU law provided for in section 2 and section 3 could currently provide the legal basis for the elections. There has been a counter-argument that such considerations would not arise in practice because the timetable of 22 weeks is overstated. Instead, it is suggested that the question of how quickly a second referendum could be held is simply an issue of sufficient political will.

Just as Parliament's initial power to authorise an Article 50 notification was confirmed through a court challenge, so too the question of whether the United Kingdom has the power to revoke that notification has become the subject of [judicial proceedings](#). On 27 November the Court of Justice of the European Union hearing in the *Wightman* case took place. This seeks to answer the [question](#) referred by the Scottish Court of Session of whether a Member State may unilaterally revoke its notification of intention to withdraw. The petitioners in the case include Scottish MPs, MSPs, and MEPs who are explicitly seeking legal certainty in order to guide their voting on the Agreement in the various chambers. The expedited procedure adopted by the European court has also shown sensitivity to the timeframe of the House of Commons vote – the non-binding Advocate-General Opinion was issued on 4 December with the possibility of the full judgment being published before the vote on 11 December. The Advocate-General has [proposed](#) that the Court of Justice should declare that Article 50 allows the unilateral revocation of the notification through a formal act to the European Council before the expiry of the two-year period. Such a revocation would have to be in accordance with the national constitutional requirements and would also have to respect the principles of good faith and sincere cooperation at the EU level.

In the event that the Court of Justice follows this Opinion and finds that the United Kingdom may indeed unilaterally revoke its notification without the requirement of the approval of the European Council, the issue of the legal basis for revocation in domestic

law [arises](#). It has been [suggested](#) that a fresh Act of Parliament would be necessary for revocation; alternatively, the argument has been made that the exercise of such a power could fall within the terms of the 2017 Notification Act. Given the clear parliamentary intention to leave the EU manifest in various provisions of the EU(Withdrawal) Act 2018, legislation authorising revocation would be needed to avoid legal uncertainty. In either situation, however, the dramatic possibility emerges of such a revocation being exercised without the requirement of a popular mandate through a second referendum. The argument is that Parliament *could* consider such a move if it were ‘staring down the barrel’ of a no deal exit in the New Year. What may appear as a barrel of a gun to those opposed to Brexit, however, may appear as an escape hatch to freedom for hard Brexiteers drawn towards a no-deal Brexit.

Despite the options canvassed above for preventing Brexit in theory, the rejection of the Withdrawal Agreement and the political declaration on the framework for the future relationship with the European Union could lead to a situation in which Parliament is ultimately disempowered in practice. Parliament is undoubtedly sovereign, but there remains the practical question of how it would take control of the end-game of Brexit. Under Standing Order 14, the business of the House of Commons remains under the control of the government of the day, which also has control of when Opposition days or back-bench days are granted. The only operative convention would be that any decision to hold a no confidence vote under the Fixed Term Parliaments Act would take precedence over the ordinary business of the House. It has been claimed that it is fanciful to imagine that Parliament could suddenly gain control of the business of the House of Commons to such an extent that it could pass the legislation necessary to revoke Article 50 and/or hold a second referendum. Even in the moment in which the government could be facing near unanimous disapproval of its policy on Brexit, the procedural rules may still ensure that it ultimately retains control over the direction of the end-game. Therefore, it may be suggested that the only realistic ways in which the catch-22 could be broken is if the Prime Minister herself decided that the only escape route would be to go back to the public or if a new Government emerged following the resignation or defeat of the old.

Conclusion: The Procedural and Substantive Limitations on Parliament

The ‘Meaningful Vote’ of the House of Commons on 11 December will see Parliament occupy a position of great political power in relation to the executive. Indeed, the effects of this position have already been witnessed in the unprecedented barrage of [criticism](#) that the Prime Minister has faced in her defences of her deal in the House of Commons since the end of negotiations. Crucially, however, the capacity of this political power to secure legal results is constrained by the procedural rules of Parliament, which maintain the government’s control over the business of the House of Commons. The power is further constrained by the operation of EU law contained in Article 50 that is beyond the direct control of Parliament and will see the United Kingdom automatically leave on 29 March 2019 regardless of whether the Withdrawal Agreement is ratified or not. These are the explicit formal constraints on Parliament. One may also detect a more implicit yet no less powerful substantive constraint that has constrained Parliament over the government’s policy on Brexit. Despite Parliament’s theoretical sovereignty to make or change law as it wishes, it may be argued that in the context of withdrawal the legitimacy of the exercise of this power has been bound by the political obligation to respect the ‘will of the people’ expressed in the decision to leave on 23 June 2016. It remains to be seen whether the only way to resolve the present impasse and disjuncture between popular will and parliamentary

sovereignty is through a reversion to the people on the question of membership of the European Union.

List of participants:

Andrew Benito	Goldman Sachs
Stephen Castle	The New York Times
Kevin Featherstone	London School of Economics
Stephen Fidler	The Wall Street Journal
Jonathan Freedland	The Guardian
Oliver Garner	European University Institute
Helen Goodman MP	House of Commons
Sara Binzer Hobolt	London School of Economics
Baroness Kennedy**	House of Lords
Baroness Ludford	House of Lords
Denis MacShane	Former Europe Minister
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* Introductory remarks

** Chair