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It is no doubt crudely reductionist to see argument in a constitutional order in terms of variations on a single theme – 'liberty' in the case of the United States, 'ever closer union' for the EU, 'the Republic' in France and so on. But students of the British constitution may be forgiven for falling into the trap such is the pull of parliamentary sovereignty, a dominant theme if ever there was one. The Article 50 litigation, recently concluded in the UK Supreme Court (UKSC),[1] does little to dispel this impression, so persistently is the doctrine invoked. For all this surface familiarity the UKSC judgment contains innovative elements, notably on constitutional change and the status of international law in domestic legal order. *Miller* is conservative in the best sense in that it manages to stay true to fundamental principles while finding ways to reanimate them. But beneath this assured reworking of existing constitutional materials, it is possible to trace a degree of anxiety about the pressures the old constitutional structures are being asked to bear.

THE CASE

The UK joined what became the European Union in 1973. The European Communities Act, the statute through which that process was giving effect, was passed by Parliament in the previous year. In June 2016, a UK-wide referendum held under the European Union Referendum Act 2015. It produced an overall majority in favour of leaving the EU, although the populations of semi-autonomous Scotland and Northern Ireland (but not Wales) voted to remain. The government subsequently sought to notify the EU institutions of its intention to withdraw the UK from the Union. The relevant legal provision is Article 50 of the Treaty of European Union,[2] the key part of which provides: 'Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.' *R (Miller) v Secretary of State for Exiting the EU* concerned

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[1] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[2] Given effect in UK law by the European Union (Amendment) Act 2008.

those constitutional requirements, specifically by challenging the government's position that it could lawfully trigger Article 50 in the absence of an authorizing statute using the royal prerogative.

A strong High Court decided for the claimants.[3] Its unanimous judgment addressed two principal questions. First, could the government trigger Article 50 in the exercise of its foreign affairs prerogative? There were reasons for thinking so. The conduct of international relations and the making and unmaking of treaties on behalf of the UK are normally matters for the Crown in the exercise of its prerogative powers. But that arrangement is subject to the rule that 'the Crown cannot, in ordinary circumstances, alter domestic law by using such power to make or unmake a treaty … It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights'.[4] Since that rule is a manifestation of parliamentary sovereignty in the foreign affairs context,[5] as a superior constitutional norm it must take precedence.[6] The parties conceded that a notice under Article 50 once issued could not be withdrawn.[7] So, for the government to engage the process through the prerogative would have the effect of removing 'rights of major importance created by Parliament.'[8]

This answer to the first question led to the second: was there any statutory basis for the executive to trigger Article 50? The High Court followed the normal practice of interpreting statutes against background constitutional principles. Especially where those principles are strong, courts will apply the *ex p Simms* principle of legality[9] which presumes that 'Parliament intended to legislate in conformity with them and not to undermine them',[10] all the more so where a constitutional statute, like the European Communities Act, is in play.[11] Construing the statutory text, the Court found that

[3] *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), before the Lord Chief Justice Thomas of Cwmgiedd, Sir Terence Etherton Master of the Rolls and Lord Justice Sales.
[4] [32].
[5] [86].
[6] [88]: 'the powerful constitutional principle that the Crown has no power to alter the law of the land by use of its prerogative powers is the product of an especially strong constitutional tradition in the United Kingdom'.
[7] [10].
[8] [66].
[9] *R v Secretary of State for the Home Department, ex p Simms* [2000] 1 AC 115, cited at [83]. See also [84] responding to the government's argument that the onus should fall rather on the claimants to show express language in the ECA removing the Crown's foreign affairs prerogative in the EU context.
[10] [82].
[11] [44] & [81]. See *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

'Parliament intended EU rights to have effect in domestic law and that this effect should not be capable of being undone or overridden by action taken by the Crown in exercise of its prerogative power.'[12] The statute's silence was determinative. 'Either the Act reserves power to the Crown' to take action on the international plane to undo EU rights 'or it does not. In our view, it clearly does not.'[13]

The High Court decision was polarizing – how could it have been otherwise? – the reaction in some quarters vitriolic.[14] A month later, the Supreme Court heard the appeal, giving judgment in late January. Constituted for the first time as a panel of 11 justices, the UKSC upheld (8-3) the High Court decision that ministers can only lawfully issue a notice of withdrawal from the EU with prior legislation passed by both Houses of Parliament. The UKSC also heard detailed argument from a series of interveners[15] about whether consultation or agreement of the devolved administrations was required before Article 50 could be triggered, a claim it unanimously rejected. The consent of devolved legislatures is not legally required for triggering the withdrawal process.

PREROGATIVE AND STATUTE

The UKSC framed the central issue in now familiar terms as a tension between two core constitutional features: (i) 'ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament'; (ii) 'ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law, unless statute, i.e. an Act of Parliament, so provides.'[16] The majority's solution in many ways replicates the High Court judgment. But it also adds a layer of reasoning, one not without complications but which properly understood amounts to a significant restatement of basic elements of UK constitutional law.

With the aid of extensive academic commentary,[17] the argument on prerogative had been polished to a fine sheen in the gap between High Court and Supreme Court proceedings.

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[12] [94].
[13] [94].
[14] See e.g. Ailsa McNeil, 'Miller and the Media' (The Constitution Unit Blog, Feb 9, 2017), comparing press reactions to the High Court and Supreme Court decisions.
[15] Interveners also addressed how certain individual and group interests would be affected by withdrawal from the EU.
[16] *Miller*, [5]. See also [277] (Lord Hughes).
[17] The UKSC referred to this debate, and its focal point the UK Constitutional Law Association Blog: [11].

David Feldman was prominent among those who argued that the 'prerogative in general' could be exercised validly 'to affect people's legal rights'.[18] The argument basically relied on *Bancoult (No.2)* – other cases cited related to war or armed conflict and so were inappropriate as authorities[19] – where the House of Lords held that the decision not to repatriate former inhabitants of the Chagos Islands, a British overseas territory, was lawful.[20] However, that case in fact applied rules of imperial law and as such had no direct application to domestic law, a fact that the judges in *Bancoult* were at pains to spell out and which Feldman's analysis overlooked.[21]

The Supreme Court rejected the argument. There was no warrant under prerogative to displace statutory rights: 'it is a fundamental principle of the UK constitution that, unless primary legislation permits it, the Royal prerogative does not enable ministers to change statute law or common law. As Lord Hoffmann observed [in *Bancoult (No.2)*, para 44] "since the 17th century the prerogative has not empowered the Crown to change English common or statute law".'[22] The Court refused to create new exceptions to the rule that prerogative does not change the law beyond the two very limited categories already recognized – neither of which, though they may have legal *consequences*, in fact change the law.[23] To have held otherwise would have been to establish a troublingly over-broad precedent – a peacetime case in which rights were overridden by 'general' prerogative – at odds with foundational elements of the constitution.[24]

Attention turned next to statute. Here again the UKSC majority followed the High Court, but with some significant differences in emphasis. Prominent elements within the earlier judgment had included its focus on rights and the identification of techniques of statutory interpretation that respected core constitutional principles. The UKSC specifically upheld the High Court's judgment on the inability of prerogative to remove

[18] David Feldman, 'Brexit, the Royal Prerogative, and Parliamentary Sovereignty' (UK Con Law Blog, Nov. 8, 2016).
[19] *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75.
[20] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2009] AC 453.
[21] See e.g. Lord Hoffmann at [44].
[22] [50].
[23] The two categories are: 'where it is inherent in the prerogative power that its exercise will affect the legal rights and duties of others' (e.g. *Burmah Oil*, above n 19) and 'where the effect of an exercise of prerogative powers is to change the facts to which the law applies. Thus, the exercise of the prerogative to declare war will have significant legal consequences' [52-53].
[24] See e.g. William Blackstone, *Commentaries on the Laws of England: Vol. 1* (Chicago: University of Chicago Press, ed. Stanley Katz, 1979), Book I, Chapter 2, VI.

statutory rights.[25] It also invoked the *ex p Simms* principle of legality[26] to interpret the ECA in light of fundamental constitutional principles. Taking the ECA as it was – the text silent on whether ministers were authorized to withdraw the UK from the EU – the majority concluded that the *Simms* doctrine required a clear statutory authorization to trigger Article 50 because of the far-reaching consequences on rights.[27]

SOVEREIGNTY AND GOVERNMENT

But the UKSC judgment contained an additional element that goes beyond the range of the punchy and compact High Court decision, namely the idea that the ECA introduced into UK law 'an entirely new, independent and overriding source of domestic law'[28] the loss of which amounts to a fundamental legal change[29] that can only be authorized by Parliament.

> We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.'[30]

Why did the Supreme Court adopt this new position, given that it accepted the High Court's reasons for deciding the case? The starting point is to be found in a reference to an image John Finnis had developed in a series of blog posts of the 'conduit pipe' through which EU law flows into UK domestic law.[31] Repeated by Mark Elliott[32] and adopted by counsel, Finnis's argument was that statutes which give effect to obligations sourced from an international treaty are conduits or channels for the obligations that enter our legal order rather than being the true authors of those rights, and for that

[25] See [83]: 'the Divisional Court was also right to hold that changes in domestic rights acquired through [EU law] … represent another, albeit related, ground for justifying' the conclusion reached by the UKSC; [67]: the ECA 'has a constitutional character'.
[26] Above n 10.
[27] [87]. See also [77].
[28] [80].
[29] [83].
[30] [82].
[31] [65].
[32] Mark Elliott, 'Article 50, the royal prerogative, and the European Parliamentary Elections Act 2002' (Public Law for Everyone, 21 Nov. 2016).

reason these statutes are not subject to normal rules governing the relationship between prerogative and statute.[33] The argument ran counter to important precedents[34] and Parliamentary statements (e.g. section 18, the 'sovereignty clause', of the European Union Act 2011). But its basic problem was to suggest that EU institutions and not Parliament were the real authors of UK law obligations.[35] That claim put the argument at odds with constitutional dualism, especially the rule that 'a treaty is not part of English law unless and until it has been incorporated into the law by legislation'[36] which as the Supreme Court pointed out is itself a 'necessary corollary of parliamentary sovereignty'.[37]

The UKSC rejected Finnis's argument. (It also dismissed his analogy between the ECA and double taxation treaties.[38]) The obvious fall-back position would have been orthodox dualism. The Court could have said simply that EU law is only authoritative for UK law because the ECA made it so. That would have been sufficient to resolve the case while staying within a familiar parliamentary sovereignty paradigm. The majority justices instead chose to pick up the 'conduit pipe' image in order to completely rework it. Their point in doing so was to escape the binary logic of strict dualism.

Subject to what I have to say on the matter in the conclusion, it is true that much of the analysis looks backwards to the period we seem on the cusp of leaving. The rejection of strict dualism enabled the UKSC to capture more of the legal realities of what we might call the *Factortame* era.[39] British constitutional theory struggled in this period to make sense of the relationship between UK law and EU law. The predominance of parliamentary sovereignty tended to polarize answers. Either the ECA made no real difference to the constitution – since Parliament could always exercise its sovereignty by repealing it.[40] Or the ECA amounted to a constitutional revolution – the recognition of

[33] John Finnis, 'Terminating Treaty-based UK Rights' (UK Con Law Blog, 26 Oct. 2016) and 'Terminating Treaty-based UK Rights: A Supplementary Note' (UK Con Law Blog, 2 Nov. 2016).
[34] *R (Jackson) v Attorney General* [2005] UKHL 56; *HS2* above n 11.
[35] For criticism see Thomas Poole, 'Losing our Religion? Public Law and Brexit', LSE Law, Society and Economy Working Paper 24/2016, 6-10.
[36] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 518, 500 (Lord Oliver of Aylmerton), cited at [56].
[37] [57].
[38] [98].
[39] *R v Secretary of State for Transport, ex p Factortame (No. 2)* [1991] 1 AC 603.
[40] See e.g. Lord Reed at [227]: 'Since EU law has no status in EU law independent of statute, it follows that the only relevant source of law has at all times been statute.'

the primacy of EU law over UK statute meant that Parliament was no longer sovereign, at least in the way orthodox theory stipulated.[41]

The UKSC looked for more nuance. 'In one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without that Act, EU law would have no domestic status. But in a more fundamental sense and, we consider a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law.'[42] Strict dualism misses what is most distinctive about the ECA – that it introduced 'a new constitutional process for making law in the United Kingdom'.[43] The novelty of the *Factortame* era lay in how 'a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts.'[44] That process radically altered UK laws, but it also helped to reshape the UK constitution, not least because the new source of law had precedence over all other sources of domestic law including statute.[45] However, since it was at all times accepted that Parliament could terminate the arrangement the ECA did not alter the 'so-called fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated)'.[46] A central criterion of that rule continued to be parliamentary sovereignty, 'a fundamental principle of the UK constitution'[47] (note the indefinite article), which has perhaps its most potent expression in Parliament's capacity to repeal any statute.

This additional argument provided the majority with its preferred basis for dismissing the appeal. Substantial constitutional change must be 'effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.' Withdrawing from the EU amounts to a substantial constitutional change, so it must be authorized by statute. The distinctiveness of this additional ground can be brought out with the help of two distinctions. The first disambiguates the key term 'source' into *derivation* (the point of origin of a norm) and *authorization* (the act or process by whose warrant or say-so the norm is binding). Strict dualism would hold that while EU law within UK law might be

[41] See H.W.R. Wade, 'Sovereignty: Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568.
[42] [61].
[43] [62].
[44] [90].
[45] [60] & [86].
[46] [60]. The reference is to H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2nd ed., 1994), chapters 5 and 6.
[47] [43].

derived from EU sources (the Treaties), it could not be authorized by those sources, only by statute. The UKSC held, by contrast, that EU norms in UK law was not only *derived* from the Treaties but were also in part *authorized* by the Treaties.

It is hard to argue that the majority's approach does not capture the juridical essence of the *Factortame* era better than strict dualism. But it leaves open the question – if the Treaties and statute are both authoritative sources, and EU law takes precedence over domestic sources including statute, can it also be true that the rule of recognition remained largely unaffected? This is where a second distinction comes into play. General constitutional theory distinguishes between two different registers on which public law operates – government (ordinary law) on one hand, the realm of constituted powers, and sovereignty (constitutional law) on the other, which is the realm of constituent power.[48] The apparent paradox within the majority's position largely dissolves once this distinction is applied. It is perfectly coherent to say that EU law has primacy at the level of ordinary law (government) but that this in itself did not alter the fundamentals of constitutional order (sovereignty). Parliament did not relinquish its sovereignty by passing the ECA. Sovereignty does not require continuous exercise. As Hobbes noted, the sovereign can go to sleep, leaving the reins of government in the hands of its agent even for a long period, without it ceasing to be sovereign.[49] The logic of this principal-agent relationship arguably entails certain limitations on the ability of the agent to effect legal change. In other words, certain constitutional changes might be said to require a return to the sovereign.

The Supreme Court's position still needs some finessing. Deploying the same framework of analysis derived from H.L.A. Hart, Neil McCormick observed that parliamentary sovereignty was not the rule of recognition for the UK so much as 'the supreme criterion of validity' within its rule of recognition.[50] A rule of recognition will usually contain more than one criterion of validity of law, though when more than one criterion are included they are then ranked in priority. While the ECA effected profound constitutional change, it stopped short of amounting to a constitutional revolution in the technical sense. The

[48] See e.g. Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2009).
[49] Thomas Hobbes, *On the Citizen* (Cambridge: Cambridge University Press, 1998), 98-100. See Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016), 89-97.
[50] Neil McCormick, 'A Very British Revolution?' in *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), 83. See Hart, *Concept of Law*, 148.

ECA did not introduce a whole new 'rule of recognition', McCormick explained, rather section 2(1) inserted 'a new criterion of recognition into an already functioning rule of recognition. Section 2(4) indicates it ranking above other criteria.'[51] This analysis results in an overall interpretation of the ECA very close to the majority's in *Miller* but slightly more convincing: 'the 1972 Act made a valid change in the rule of recognition, as it purported to do, but with the implied condition that Parliament retained its power to reverse that change. That is, there is an implied condition that it could repeal section 2(1) and 2(4) if in future it should choose to do so.'[52]

In engaging the distinction between constituent authority and legislative capacity, the majority judgment exhibits a degree of innovation and sophistication. The judgment provides some clarity on the vexed subject of Parliament's dual identity as a constitutional authority (constituent agent) and a creator of general norms (legislator). Commentators have long recognized the tension between these roles. 'In England', Tocqueville wrote, 'the constitution may change continually, or rather it does not in reality exist; the Parliament is at once a legislature and a constituent assembly.'[53] The UKSC outlined in *Miller* the germs of a general theory of constitutional responsibility. Highlighting the proposition that where Parliament's constitutional capacity is invoked the courts will not recognize the validity of a lesser agent's attempt to effect significant constitutional change, the Supreme Court also appears to accept the conclusion Ines Weyland drew from a probing Kelsenian analysis of British constitutionalism: that Parliament as a constitutional body may bind Parliament as an ordinary legislature. [54] Since that responsibility is from the legal perspective primarily formal, what it entails in practice may amount to no more than a 'very brief statute' authorizing the executive to do what it will.[55]

VOX POPULI VOX … ?

There is a degree of innovation here, but the novelty in *Miller* must not be overstated. The theory emerges seamlessly from the tradition that it hopes to sustain. It does not

[51] 'A Very British Revolution?', 87.
[52] 'A Very British Revolution?', 88.
[53] Alexis de Tocqueville, *Democracy in America* (Barnes & Noble, 2003), 81.
[54] Ines Weyland, 'The Application of Kelsen's Theory of the Legal System to European Community Law – The Supremacy Puzzle Resolved' (2002) 21 *Law and Philosophy* 1, 16.
[55] [122].

deviate in any significant way from the parliamentary sovereignty paradigm, although in certain ways it redescribes it. One implication is that its analysis of constituent power is necessarily limited. To discuss Parliament's constitution-changing functions from within a constitutional tradition in which Parliamentary sovereignty is the highest norm is to exclude genuine consideration of the constituent capacity of 'the people'. Dicey's subtle formulation of the constitutional position emerges essentially unscathed from *Miller*, although the UKSC judgment puts its key elements into sharper relief. 'The electorate is in fact the sovereign of England. It is a body which does not, and from its nature hardly can, itself legislate, and which, owing chiefly to historical causes, has left in existence a theoretically supreme legislature.'[56] Reverting to the taxonomy of general constitutional theory we might finesse his point by distinguishing between *original* and *derived* constituent power. [57] Parliament is not and cannot be the fundamental source of political authority.[58] As a constituted authority, Parliament exercises derived constituent authority. Its constitution-changing (sovereign) authority has a deeper source, a point Dicey recognized.[59] Ultimate sovereignty must rest with the people ('the electorate') and the referendum provides them with an institution through which it may in a non-technical sense 'legislate'.

To focus on Parliament's constituent capacity is to remain within a familiar constitutional metaphysics, excluding from consideration deeper questions of constituent capacity. We see these exclusionary dynamics in operation at two points in the judgment, first in respect of the constitutional role of the referendum. All 14 judges in *Miller* rejected the idea that the institution of the referendum had any independent constitution-changing function recognized by law besides what may have been ascribed to it by an authorizing statute. Interpreting the European Union Referendum Act 2015 'in light of the basic constitutional principles of parliamentary sovereignty and representative parliamentary

[56] A.V. Dicey, *The Law of the Constitution* (Oxford: Oxford University Press, ed. J.W.F. Alison, 2013) 191.
[57] On this distinction see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017), chapter 4.
[58] This is certainly true according to the logic of the 'modern' post-revolutionary concept of constituent power as defined by Emmanuel Sieyès and refined by Carré de Malberg, Carl Schmitt and others. For a more inclusive conceptual historical analysis see Joel Colón-Rios, 'Five Conceptions of Constituent Power' (2014) 130 *Law Quarterly Review* 306.
[59] A.V. Dicey, 'The Referendum' (1894) 23 *National Review* 65, 69, proposing that Bills which affect fundamental aspects of the constitution should be submitted to the UK's electors for their approval prior to becoming a law. This idea of a referendum, Dicey claimed, would emphasis 'the difference between any ordinary law and the fundamental laws of the realm'. See also 'Ought The Referendum To Be Introduced Into England?' (1890) 57 *The Contemporary Review* 489, 505: 'the Referendum supplies, under the present state of things, the best, if not the only possible, check upon ill-considered alterations in the fundamental institutions of the country'.

democracy' – note the double-counting of Parliament – the High Court concluded that 'a referendum on any topic can only be advisory for the lawmakers in Parliament unless very clear language to the contrary is used in the referendum legislation in question.'[60] The UKSC likewise dismissed the claim that government should not be constrained by legal limitations that would have applied in the absence of the referendum. 'The effect of any particular referendum', the majority said, 'must depend on the terms of the statute which authorises it.'[61] Since the 2015 Act contained nothing that obliged Parliament to act on the occasion of a 'leave' vote, the law can change 'in the only way in which the UK constitution permits, namely through Parliamentary legislation.'[62]

The second point of exclusion relates to the devolution question, specifically to the argument that the UK government had a legal duty to secure the agreement of devolved legislatures on withdrawal from the EU. In Scotland's case, the argument was based on the convention that the UK Parliament would not normally legislate on devolved matters in Scotland without the Scottish Parliament's consent.[63] The decision that a political convention of this sort does not give rise to a legal obligation reflects constitutional orthodoxy[64] – it is hard to see how the judges could have decided otherwise without considerable innovation,[65] particularly given the (Westminster) Parliamentary sovereignty-preserving clauses within the devolution statutes.[66] A different approach would have risked self-contradiction given the serious attention paid elsewhere in the judgment to the text of the ECA, and would have taken the judges, 'neither the parents nor the guardians of political conventions … merely observers',[67] outside their constitutional role. But *Miller* nonetheless confirms that constitutional law has little to say, even in the context of a 'major change in UK constitutional arrangements', about the allocation of powers and responsibilities within the UK's centralized federal

[60] *Miller and Dos Santos*, [106].
[61] *Miller*, [118]. The minority declined to address the point directly, suggesting that the Court had not heard full argument on it: [171] (Lord Reed).
[62] [121]
[63] Given statutory recognition through section 2 of the Scotland Act 2016.
[64] [242] (Lord Reed); [151] (majority).
[65] But see Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) *Modern Law Review* 1019.
[66] See especially Scotland Act 1998 s.28(7); Northern Ireland Act 1998 s.5; Government of Wales Act 2006 s.107(5), discussed at [136].
[67] [146].

arrangements.[68] If we are serious about stabilizing the arrangements between the UK and its constituent units, this arguably represents a significant flaw.

I am not suggesting that the UKSC got these two matters wrong, quite the contrary. A more assertive move would have broken with existing constitutional principle to an unacceptable degree. The Court consistently framed *Miller* as a (UK-level) separation of powers case – paying attention not only to the horizontal separation of powers between the branches of government but also the vertical separation of powers between the people and government (Parliament).[69] As the Cinderella principle of UK constitutional law,[70] separation of powers is relatively easy overlooked. Something of the sort occurred in the *Miller* dissents, as we will see. But in reaching a conclusion about the relative competencies of the executive and legislature, the Court did not forget to reflect on the limits of the distinctive contribution of the judicial branch in securing constitutional order.

Commentators may reasonably disagree about where lines are to be drawn in practice, but the basic position is uncontested at the level of principle. It is the province of the court to pronounce authoritatively on existing constitutional law (adjudication). This power includes the capacity to prevent a constitutional agent – here government – from acting beyond its competences, even where to do so in effect means compelling another constitutional agent – here Parliament – to act (or at least to consider acting). By extension, the court has authority to determine where the limits of law lie. A central function of constitutional adjudication, we might say, is to define the point at which constitutional law becomes constitutional politics, a function exercised several times in *Miller*. But the court has little constitution-changing power, beyond an interstitial capacity inherent in the duty to adjudicate constitutional disputes. In that role, the court must connect old principles to new scenarios, a task which necessarily implicates a process of realigning the already existing elements of the constitution.

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[68] A point of comparison here is the considerably more ambitious decision of the Supreme Court of Canada in *Reference Re Secession of Quebec* [1998] 2 SCR 217.

[69] For the connection between the two see Maria Cahill, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' (2016) 75 *Cambridge Law Journal* 245, 249-50, discussing in particular Carré de Malberg, *Contribution à la Théorie Générale de l'État: spécialement d'après les données fournies par le Droit constitutionnel français, Tome deuxième* (Paris 1920).

[70] Robert Craig, 'Black Spiders Weaving Webs: The Constitutional Implications of Executive Veto of Tribunal Determinations' (2016) 79 *Modern Law Review* 147, 171. The *locus classicus* is Walter Bagehot, *The English Constitution* (Cambridge: Cambridge University Press, ed. Paul Smith, 2001).

The Court stayed within its constitutional powers so described. You see this both in what it did positively decide – that government could not trigger Article 50 without an authorizing statute – and in terms of what it negatively decided – that the consent of the devolved legislatures was not required and that the referendum had no independent legal salience. I think the Court was right on all these elements. Those who see judges as a shortcut to constitutional reform will be disappointed, especially on the devolution question. But these are matters that call for political resolution – that is, by 'we the people' acting through constituent agents, whether prosaically through our Parliaments or more ambitiously by engaging a more bespoke constituent process.

BALANCE OF POWER

What about the dissents? Lord Reed (with whom Lords Carnwath and Hughes agreed) thought that the majority's analysis ignored the conditional basis on which the ECA gave effect to EU law. A close textual analysis of the statute showed, he said, that 'the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU.' Since the effect of EU law in the UK is dependent on the 1972 Act, 'no alteration in the fundamental rule governing the recognition of sources of law has resulted from membership of the EU, or will result from notification under article 50.'[71]

Like the majority, Lord Reed used extra-textual presumptions in interpreting the ECA – but these were the opposite of theirs. All the judges agreed that the case raised a basic tension between the rule that government cannot change the law and the rule that government has competence in foreign affairs[72] and that statute was silent on how to tension ought to be resolved. To find, as Lord Reed did, that there was no evidence in the ECA 'that Parliament intended to depart from the fundamental principle that powers relating to the UK's participation in treaty arrangements are exercisable by the Crown'[73] is to read the silence of the text in light of a presumption in favour of the foreign affairs prerogative rather than parliamentary sovereignty. That seems to get things the wrong way around. If there is a genuine conflict here, and the minority judges accepted that

[71] [177]. See also Lord Hughes at [281].
[72] [277] (Lord Hughes).
[73] [203].

there was, then the *lex superior* rule ought to apply. The principle that prohibits the use of prerogative power to change the law as a manifestation of parliamentary sovereignty is clearly the superior norm. The right conclusion must be that while Parliament does not need to use clear words to preserve its sovereignty, clear words are needed for it to be taken to have given a portion of it away to the executive. The same conclusion is reached if we frame the question as essentially about rights. The principle of legality, confidently applied by Lord Reed in other constitutional cases,[74] stipulates that where as here rights are at stake express statutory language is required to remove them.

For all their surface dryness, the dissents are ultimately supported by a normative theory of the constitutional politics of Brexit. Lord Carnwath, whose judgment is clearest on this point, calls this theory the 'balance of power'. It has two main components. First, the idea that the case raised essentially a political question in relation to which the court's role should be minimal.[75] Second, that it was a mistake to see the constitutional politics as a binary 'choice between Parliamentary sovereignty, exercised through legislation, and the "untrammelled" exercise of the prerogative by the Executive'. Parliamentary sovereignty or a near equivalent can be exercised in other ways. 'No less fundamental to our constitution is the principle of Parliamentary accountability. The Executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law.'[76]

A similar argument appeared in academic circles just before the UKSC proceedings.[77] In its fullest exposition, Timothy Endicott urged that the Blackstonian virtues of unanimity, strength and dispatch are paramount in the current climate given the 'momentous constitutional importance' of the politics surrounding Brexit and the 'huge consequences' that attend.[78] (Lord Reed quoted precisely the same passage from Blackstone's *Commentaries* used by Endicott to ground his theory.[79]) Endicott's message was not without internal tensions. He sought in part to minimize the significance of *Miller*,

[74] In the context of specifying the legal limits of the legislative competence of the Scottish Parliament, *AXA General Insurance Ltd v The Lord Advocate* [2001] UKSC 46, [153]: 'Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.'
[75] [273]; [240] (Lord Reed).
[76] [249].
[77] Lord Carnwath also drew extensively on Gavin Phillipson, 'A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament' (2016) 79 *Modern Law Review* 1064.
[78] Timothy Endicott, 'This Ancient, Secretive Royal Prerogative' (UK Con Law Blog, 11 Nov. 2016).
[79] [160].

emphasizing rightly that Brexit will be a protracted and complex process, on parts of which Parliament will have a say. But his main contention was that the exceptional political nature of Brexit called for 'scrutiny in extraordinary forms that respond to the extraordinary situation' and the centralization of decision-making in the Prime Minister and Cabinet.

Endicott's position – or the portion of it adopted by the dissenting judges – rested on a questionable premise. The majority judgment had quoted with approval Dicey's quip about the UK constitution being 'the most flexible polity in existence'.[80] But the majority justices almost immediately disproved that statement – though they seem not to have recognized this – by applying a rule they say existed since the constitution's founding. It was the minority justices who stayed truer to the spirit of constitutional *laissez faire* embodied in that quote. They would have left the question up to the political branches of government to decide. Now, on some questions that is precisely what UK constitutional law requires. A central feature of constitutional adjudication, as we have observed, is to draw the line between law and politics. The British constitution tends to define the law part somewhat more narrowly than most modern constitutions, though the line has been significantly redrawn over the last five decades largely as a result of legislative enactment. But to conclude that the constitution is normatively spineless is wrong. When something falls within its legal dimension, the UK constitution can be very rigid – both in the sense that it does not readily invite compromise or allow for exception and that it has been that way for a long time.

Endicott's argument that the sensitivity of the negotiations and other functional considerations 'support the conclusion that the decision making will be carried out better or more accountably through the process of legislation' mistakes this more rigid, rules-based side of the constitution for public law in its more discretionary or principles-based mode. The same mistake undermines the minority justices' parting shot – that the majority's position solves none of the 'many practical issues' associated with the withdrawal process and so amounts to 'an exercise in pure legal formalism'.[81] The balance of power theory stipulates that a House of Commons resolution might be a suitable way forward. But that misses the legal point. If it is beyond the power of

[80] [40].
[81] [273] (Lord Carnwath).

ministers to trigger Article 50 via prerogative, then 'only legislation which is embodied in a statute will do. A resolution of the House of Commons is not legislation.'[82]

The criticism that the majority's judgment amounts to an exercise in legal formalism is also wide of the mark. We have seen how the majority framed *Miller* as a separation of powers case. Separation of powers involves consideration of constitutional form. Rules about prerogative and statute are primary ways in which the constitution arranges the institutional allocation of public power. Any resolution of such matters can only be formal. But that does not mean that the majority's position was not *purely* formal, if by that we mean that it was devoid of constitutional value. The point of constitutional rules of the sort invoked in *Miller* is precisely to sidestep *ad hoc* trade-offs. To say with the minority justices that ministers should be allowed to exercise prerogative powers to withdraw from the EU because they remain at all times accountable to Parliament was 'a potentially controversial argument constitutionally' since it justified 'all sorts of powers being accorded to the executive, on the basis that ministers could always be called to account for their exercise of any power.'[83] Arguably the design of the 1688 was to avoid precisely this declension. The formal rules protect constitutional goods.

The UKSC's decision in *Miller* is not activist, then, in any meaningful sense. But it is a compelling example of the Court adopting a 'forward position' on constitutional questions. [84] Innovation in the judgment was real but limited. The Court managed to assert itself as a distinctive agent instead through the reanimation of received constitutional tradition. Some critics might like to paint *Miller* as a juridically unmoored court going out on a political limb. But this is a fabrication. The decision is more reminiscent of classic High Court of Australia decisions, its 'devotion to legalism' evidenced in a confident application of formal rules, the attention to separation of powers, and the awareness of the distinctiveness of judicial power.[85]

CONCLUSION

[82] [123].
[83] [92].
[84] Phillip Allott, 'The Courts and the Executive: Four House of Lords Decisions' (1977) 36 *Cambridge Law Journal* 255, 282.
[85] See e.g. Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2007). The phrase 'a strict and complete devotion to legalism' comes from the great Australian judge Sir Owen Dixon, speaking on his appointment as Chief Justice: 'Upon Taking the Oath of Office as Chief Justice' in Dixon, *Jesting Pilate* (Sydney: The Law Book Company, 1965), 247.

For all the public attention, *Miller* always had something quixotic about it. It may be seen in time as a strange but necessary spasm reflective of the nation's confused and divided mood after the referendum. In direct political terms it achieved next to nothing. The European Union (Notification of Withdrawal) Act 2017, the 'very brief statute' that *Miller* required, passed without incident. How constitutional politics will develop after this episode is all but impossible to predict. But it could be that the case helps cement the status of the Supreme Court as a distinctive constitutional actor.

The constitutional historian Charles McIlwain wrote over a century ago that when 'the referendum really comes, the sovereign Parliament must go.'[86] We may be about to witness the political validation of that prediction. But the UKSC in *Miller* was certainly not going to allow itself to be the agent of such change. The judgment offered instead a rigorous defence of the traditional constitution, a position that entailed a restatement of constitutional fundamentals. In terms of doctrine the case is most obviously a substantial contribution to a line of jurisprudence that aims to embed parliamentary democracy within a constitutional frame.[87]

The most intriguing aspect of the judgment, though, is the way it projects forward while having its face turned to the past, to paraphrase Walter Benjamin.[88] The UKSC made more sense of the *Factortame* era we are leaving than any case during that period. And it did so in part by looking back beyond the ECA to a reconstruction of the terms of the 1688 constitution and the constitutional norms that may be said to derive from it. But this was not idle antiquarianism – *Miller* is a case focused on the past but thinking about the future. As such, its most enduring feature may well be its softening of constitutional dualism. The idea of EU law as 'a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law' and the EU Treaties as an independent source of normative authority has general relevance. At the time the UKSC heard *Miller*, it also decided a trio of legally complex and politically sensitive cases involving the exercise of executive power in the field of foreign affairs.[89] These cases

[86] C.H. McIlwain, *The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England* (New Haven: Yale University Press, 1910) xv.
[87] See *Jackson v Attorney General* above n 34; *AXA Insurance v Lord Advocate* above n 74; *HS2* above n 11.
[88] Walter Benjamin, 'Theses on the Philosophy of History' in *Illuminations: Essays and Reflections* (New York: Schocken Books, ed Hannah Arendt, trans Harry Zohn, 1969).
[89] *Rahmatullah (No.2) v Ministry of Defence* [2017] UKSC 1; *Al-Waheed v Ministry of Defence* [2017] UKSC 2; *Belhaj and Rahmatullah (No. 1) v Straw* [2017] UKSC 3

often involved overlapping bodies of domestic and international law, especially humanitarian law and human rights. Cases like these may make the UKSC alert to the idea that withdrawing from the EU does not mean isolating the UK more generally from the interpenetration of normative orders that has been such a feature of the age.