

DEMOCRACY, LIBERALISM, AND BREXIT

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“The question is, said Humpty Dumpty, ‘which is to be master—that’s all.’”¹
“Europe was set up by clever, Catholic, left-wing, French bureaucrats. Most Brits have got problems with at least three of those five.”²

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INTRODUCTION

Just over seventy-two percent of voters participated in the United Kingdom’s (U.K.) Brexit referendum, some 33.6 million people in all.³ To put that in perspective, compare to a 66.2% turnout in the preceding U.K. general election in May 2015; 65.1% in the general election of May 2010; 61.4% in the general election of May 2005; and even the post-

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¹ LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 57 (Susan L. Rattiner ed., Dover Publ’ns, Inc. 1999) (1872).

² Peter Hennessey, *PM: ‘Never Have So Many Dials Been Reset’*, BBC RADIO 4 (June 24, 2016), <http://www.bbc.co.uk/programmes/p03zc6x4>.

³ Barney Henderson, *Huge Turnout of 72.2 Per Cent for EU Referendum with 33.6 Million Voting*, TELEGRAPH: NEWS (June 24, 2016, 2:29 AM), <http://www.telegraph.co.uk/news/2016/06/23/high-turnout-for-eu-referendum-vote-could-break-uk-records>.

referendum June 2017 general election had a lower turnout of 68.8%.⁴ While 17,410,742 people voted to “Leave” the European Union (E.U.), 16,141,241 voted to “Remain.”⁵ In what was clearly a very large relative voter turnout the final tally was fifty-two percent Leave to forty-eight percent Remain.⁶ Almost 1.3 million more voters wanted to leave the E.U. than to remain.

In contrast to the majority of voters who wanted out of the E.U.:

[O]nly 25 percent of MPs [i.e., elected Members of Parliament] are thought to have voted the same way (excluding undecideds) [and] [t]he four main political parties (Conservative, Labour, SNP and Lib Dem), which account for 96 per cent of all MPs, all backed Remain. Only UKIP, with one MP, and the Democratic Unionist Party, [which only fields candidates in Northern Ireland], with eight MPs, backed Leave.⁷

Then there were the top judges. As far as their personal preferences were concerned, the evidence—such as it was—pointed to these top judges breaking even more one-sidedly for the Remain side of the debate than the elected legislators and members of Cabinet did.⁸ The U.K. Supreme Court decision in *R v. Secretary of State for Exiting the European Union*⁹ (*Brexit Case*) did nothing to weaken or rebut those suspicions. For those inclined towards Remain, this case was at best, or at most, the sort that fell into what H.L.A. Hart dubbed the “penumbra of doubt”¹⁰ or “open texture”¹¹ of the law—the sort of case in which

⁴ *Electoral Data: Valid Votes Turnout at UK Parliament General Elections: 1922–2017*, ELECTORAL COMM’N, <https://www.electoralcommission.org.uk/our-work/our-research/electoral-data> (last visited Dec. 28, 2017).

⁵ *Elections & Referendums: EU Referendum Results*, ELECTORAL COMM’N, <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> (last visited Dec. 28, 2017).

⁶ Jon Holbrook, *Turning the Law Against the People*, SP!KED (Jan. 30, 2017), <http://www.spiked-online.com/newsite/article/turning-the-law-against-the-people-supreme-court-brexit-article-50/19399#.WbR62FKZOgR>.

⁷ Holbrook, *supra* note 6.

⁸ For instance, Lord Neuberger’s wife, Angela Holdsworth, made a series of anti-Brexit tweets before the case reached the UKSC. Some pro-Brexit MPs urged Lord Neuberger to stand down from the case: “Each Justice . . . will bear in mind that political activity by a close member of a Justice’s family might raise concern in a particular case about the judge’s own impartiality and detachment from the political process.” UNITED KINGDOM SUPREME COURT, GUIDE TO JUDICIAL CONDUCT, 2009, § 3.3, https://www.supremecourt.uk/docs/guide-to-judicial_conduct.pdf. Again, Lady Hale made a speech a month before hearing *R v. Secretary of State for Exiting the European Union (Brexit Case)* [2017] UKSC 5, in which she stated that the “referendum was not legally binding on Parliament.” Lady Hale, Deputy President, Supreme Court, Speech at the Sultan Azlan Shah Lecture 2016, Kuala Lumpur: The Supreme Court: Guardian of the Constitution? (Nov. 9, 2016) (transcript available at <https://www.supremecourt.uk/docs/speech-161109.pdf>). Both Lord Neuberger and Lady Hale heard the case in the UKSC.

⁹ [2017] UKSC 5.

¹⁰ See H.L.A. HART, *THE CONCEPT OF LAW* 123 (3d ed. 2012).

there are plausible legal arguments going both ways; and hence, a case that to outside observers looks as though it can defensibly be resolved in accord with the judges' own discretion, how those at the point-of-application of the law prefer it to be resolved. Here these top U.K. judges, eight to three, resolved the *Brexit Case* against the outcome that was most in keeping with the referendum result and, as it happened, was most in line with the apparent druthers of the preponderance of the unelected top judges.

I will return later to the *Brexit Case*. For the purposes of this introduction it suffices for readers to find plausible the generalized assertion that when it came to the E.U.—and Britain's continued membership in that supranational body—there had grown a difference of opinion, or a disconnect, between the views of the majority of U.K. voters and the views of its judicial and political classes. They were estranged. There was a fission. The predominant view of the one had uncoupled from that of the other.

One goal of this Article is to use the Brexit example as a case study of the built-in tension in liberal democracies between democracy and liberalism and to consider what can and should happen when that tension is resolved too often against democracy. And to be abundantly clear, by “democracy” I do *not* mean some morally pregnant, thick understanding that builds in—nay demands—virtually every rights-respecting substantive outcome going in order to qualify as being “democratic.” To the contrary, I mean by “democracy” the procedural process of fair voting that seeks to produce a government on the core basis of letting the numbers count with the norm being that majorities ultimately trump minorities. In other words, democracy is a procedural virtue, not some expansive, morally-laden, substantive virtue.¹²

If we accept that thin, procedural account, then one element in any liberal democracy is the letting-the-numbers-count democratic commitment to elections that aims to produce governments that will decide at least the preponderance of debated and disputed social policy and other core issues in society—with the losers not being free to don the clothing of victimhood and scream “tyranny of the majority” each time they come out on the losing side of a vote.

The other element in a liberal democracy is those various institutions that in part can be understood as upholding the liberal order. The judiciary can be seen in such terms. Courts protect enumerated liberal rights. Some aspects of international law might

¹¹ *Id.* at 124.

¹² I argue at length that this procedural understanding of democracy is much to be preferred to the substantive, morally pregnant understanding. See JAMES ALLAN, *DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION* (2014); James Allan, *Thin Beats Fat Yet Again: Conceptions of Democracy*, 25 L. & PHIL. 533 (2006).

expand to cover individuals. Judges may appeal more and more to that international law, while also adopting an approach to constitutional and even statutory interpretation that has the effect of taking ever more things off the democratic table. Further, there may be supranational bodies—most obviously the E.U.—that intrude ever more expansively on the decision-making of domestic democratic governments.

Clearly there is no zero-sum, “you can only pick one or the other” choice here; clearly there are myriad different bargains that can be struck between the democratic element and the liberal element in a modern liberal democratic state. For instance, New Zealand has struck a very different bargain to the United States. The former has no written constitution, is unicameral, is not a federal system, since the 1996 election has used the German-style and highly proportional MMP voting system, and despite having a statutory bill of rights its judges cannot strike down or invalidate any laws passed by its legislature.¹³ The latter, by contrast, has a written constitution that entrenches bicameralism—indeed a bicameralism that produces in its Senate one of the democratic world’s most powerful Upper Houses, possibly the most powerful one—and federalism; not as decentralized a federalism as Switzerland, but much more so than Australia’s federalism that started out as a blatant copy of the U.S. version.¹⁴ It also entrenches the world’s second oldest national bill of rights—the oldest justiciable one—that has the effect of handing considerable social policy decision-making power to the top unelected judges, to the point that these top judges are amongst the democratic world’s most powerful with regard to second-guessing and gainsaying the elected branches.¹⁵

The U.K. has struck a different bargain again between democracy and what I am here calling liberalism or the institutions that aim to uphold a liberal order—though that bargain has changed considerably from the very early 1970s just before entry into what is now the E.U. to mid-2016, just before the Brexit referendum. It has moved from a very New Zealand-looking bargain with parliamentary sovereignty—not just in form but in substance—at its heart, to one where the democratic elements were for many being overwhelmed by the liberal ones.

Put differently, the built-in tension in the U.K. between democracy

¹³ See James Allan, *Against Written Constitutionalism*, 14 OTAGO L. REV. 191 (2015); see also ELECTORAL COMMISSION, REPORT OF THE ELECTORAL COMMISSION ON THE REVIEW OF THE MMP VOTING SYSTEM (2012). MMP was adopted by referendum in 1993. It was first used in an election in 1996. *Id.*

¹⁴ See Nicholas Aroney & James Allan, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, 30 SYDNEY L. REV. 245 (2008).

¹⁵ Perhaps surprisingly, the New Zealand bargain has produced more economic freedom than the U.S. bargain, at least in recent years. In the 2016 international rankings, New Zealand ranked third in the world, while the United States ranked sixteenth. See JAMES GWARTNEY ET AL., FRASER INST., ECONOMIC FREEDOM OF THE WORLD: 2016 ANNUAL REPORT (Sept. 15, 2016), <https://www.fraserinstitute.org/studies/economic-freedom-of-the-world-2016-annual-report>.

and liberalism worked moderately well until the non-accountable liberal institutions—let us be blunt, I mostly mean the courts and the supranational E.U. itself, which as we will see is certainly itself deficient in democratic terms—grew too ambitious. Once they moved from occasionally restraining the majority to regularly dictating law and policy on things big—such as migration and Euro-integration—and things small—such as the need to use the metric system¹⁶ or the acceptable size of cucumbers¹⁷—which the majority opposed, there was a problem. That problem could, more or less, be papered over as long as all the main political players in all the main political parties shared the consensus of the liberal elites. But that was politically unstable and presented a gap in the political landscape that was filled by the United Kingdom Independence Party (UKIP) whose sole *raison d'être* appeared to be to get the U.K. out of the E.U. Take the resulting pressure on the Conservative Party, spice it up with perceived backdowns regarding the failure to hold a referendum on the Lisbon Treaty¹⁸ and untruths as to whether the Charter of Fundamental Rights would be binding on the U.K.¹⁹; throw in a David Cameron promise to hold a referendum on continued membership in the E.U. in the lead-up to an election back when few people gave the Conservatives any chance of winning a majority; then leaven it all with an unexpected, narrow Conservative majority election win; an early date for that Brexit referendum; and negotiations by David Cameron with the E.U. that everyone could see produced no compromises by the latter. Bingo! We have the Brexit result.

In my view that Brexit result was a good thing; it was a desirable outcome. Had I been eligible I would have voted for Brexit as I made plain before the fact.²⁰ I continue to think that the fifty-two percent who voted Leave got it right, and indeed that in world terms this was one of the most important votes of my life.

This Article will try to make that case, that the Brexit result was a good and desirable one. It will briefly examine the E.U. itself, how its institutions operate and have grown in decision-making importance, against the criterion of democratic deficiencies. It will then consider why fifty-two percent of Britons might have voted as they did, noting that the most frequent reason—by some considerable way—given to pollsters for voting Leave was a “wanting to govern ourselves”

¹⁶ See David Campbell et al., Case Comment, *The Metric Martyrs and the Entrenchment Jurisprudence of Lord Justice Laws*, 2002 PUB. L. 399.

¹⁷ See Commission Regulation 1677/88 of June 15, 1988, Laying Down Quality Standards for Cucumbers, 1988 O.J. (L 150) 21 (EC).

¹⁸ See *infra* Part II.

¹⁹ See *infra* Part II.

²⁰ See, e.g., James Allan, *Australian Notes*, SPECTATOR: AUSTL. (June 25, 2016, 3:00 AM), <https://www.spectator.com.au/2016/06/australian-notes-2>.

democratic one, and that much of the Brexit referendum campaign pitted democratic arguments from the Leave side against economic “we will all be poorer if we leave” arguments from the Remain side, with few of those economic arguments being easily characterized as understated. Next, it will move to the aftermath of the Brexit vote and the attempt to slow down the Government’s triggering of the Article 50 “notification of withdrawal” by going to the courts and will consider the *Brexit Case* through this lens of tension between democracy and liberalism. Finally, this Article will conclude by going back to first principles and argue that when the tension between democracy and liberal, non-democratic institutions becomes too great, democracy should prevail in the vast preponderance of situations. Having democracy prevail is the preferable outcome in consequentialist terms and not just because legitimacy matters, though it does.

I. TESTING THE READER’S COMMITMENT TO WHEN ECONOMIC CONCERNS SHOULD TRUMP DEMOCRATIC CONCERNS—A TEST FOR AMERICAN “REMAINERS”

Let me first indulge in a digression for American readers, and in particular for American readers who dislike Brexit’s Leave result and think Remain would have been the better option. As I will set out below, much of the Brexit referendum campaign pitted democratic “we want to govern ourselves” arguments by Leavers against economic “we will all be poorer if we go” arguments by Remainers. As Daniel Hannan pointed out many times in various ways,²¹ there are no plausible grounds for thinking the scope for democratic decision-making by Britons is greater inside the E.U. than it would be outside of it as a stand-alone nation-state. Nor did any leading Remainers that I know of attempt to make that case, that life in the E.U. is more democratic for the citizens of the U.K. than life outside was pre-1972 and that it would be post-Brexit. Accordingly, the most fertile ground for the Remain case was economic, all the various permutations and variations—many of them anything but understated—on the theme of “you will be poorer if you go.”

Of course, many Leave campaigners disagreed with that pessimistic economic prognosis of what would follow from the U.K.’s departure from the E.U.²² But for the purposes of this digression let us assume that

²¹ “At least when I oppose Tory policies, I can vote on them. We can’t do this with the EU. The EU is an attempt to replace the democratic power of the people with a permanent administration in the interests of big business.” Daniel Hannan, Speech at The Spectator Debate: Should Britain Leave the EU? (Apr. 26, 2016) (transcript available at <https://blogs.spectator.co.uk/2016/04/live-from-the-london-palladium-the-spectators-brexit-debate>).

²² The disagreement was over the economic prospects in the short, medium, and long-term when many pro-Brexit people were optimistic about the U.K.’s economic prospects; the

that economic pessimism of Team Remain is wholly warranted. *Ex hypothesi* then, the Brexit Leave choice means that you will be opting for more “govern ourselves” democracy and democratic input, but that it will come at the cost of the country being poorer for at least the next decade or two, maybe a good deal longer. Would you make that bargain?

Now I would make that deal to get out. I think many of those Britons who voted Leave were prepared to make it too, if need be, to take an economic hit as a price worth paying for more self-government. My digression amounts to wondering if most American Remain supporters base their support on the premise that the economic argument and effects should trump the self-rule democratic argument and effects; and I wonder this because it strikes me that what we in the Commonwealth world call the War of American Independence—your Revolutionary War—is pretty easily characterized as an “economy versus wanting-to-govern-ourselves” struggle. The analogy of remaining part of a larger economic grouping—in the present case, the E.U., and in that eighteenth-century case, the British Empire—at the cost of some democratic self-government makes me wonder if today’s American Remainers would have sided with Benjamin Franklin’s son²³ back then and come out for the Loyalists against George Washington. Sure, the analogy is not perfect, but then it is not all that imperfect either; and sure, one might quibble that the longer-term economic benefits—forget the immediate first few post-departure years—of leaving the British Empire, would end up being positive. Though, of course, that is precisely what many Leave people believe about post-Brexit life in the

disagreement was *not* about the immediate aftermath of the vote when most Leavers conceded there would be immediate but not long-lasting economic costs. Sam Bowman, the Executive Director of the Adam Smith Institute, describes himself as a “short term pessimist but a long term optimist about Brexit.” See Lianna Brinded, *Brexit Is Killing the Pound but It’s Having a Really Productive Side-Effect on Britain’s Economy*, BUS. INSIDER (Apr. 23, 2017, 3:45 AM), <http://uk.businessinsider.com/adam-smith-institute-brexit-impact-on-the-pound-uk-economy-jobs-2017-4>. Over one year on from the Brexit vote and thus far Britain’s GDP growth is faster than the E.U.’s and its unemployment rate has gone down and done better than the E.U.’s; however, the pound sterling currency has taken a noticeable devaluation, so if that is judged as a negative then thus far that has been an economic cost.

²³ Benjamin Franklin’s son sided with the British. After the War of American Independence—that is how he would have described it—he fled to Canada as part of the large number of United Empire Loyalists who went there. Sadly, but perhaps inevitably, he became estranged from his father. See SHELIA L. SKEMP, WILLIAM FRANKLIN: SON OF A PATRIOT, SERVANT OF A KING 201–02 (1990); Sheila L. Skemp, *Benjamin Franklin, Patriot, and William Franklin, Loyalist*, 65 PA. HIST. 35 (1998). An enervated version of that breaking of old and close relationships due to which side you were on was one of the effects of the Brexit vote. See Melissa Kite, *I Can’t Afford to Lose Another Friend to This Referendum*, SPECTATOR (July 9, 2016, 9:00 AM), <https://www.spectator.co.uk/2016/07/i-cant-afford-to-lose-another-friend-to-this-referendum>; Allison Pearson, *The Brexit Row Is Pulling Friendships and Families Apart*, TELEGRAPH: OPINION (Apr. 26, 2016, 4:44 PM), <http://www.telegraph.co.uk/opinion/2016/04/26/the-brexit-row-is-pulling-friendships-and-families-apart>.

U.K. But at the time of having to choose sides, in both instances, for many people this would have seemed to come down to a “wanting to govern ourselves” versus a “we will all be poorer if we go” dispute.

Well, actually, it is worse than that. Using the standards of the respective times, the democratic credentials for those in the thirteen colonies look comparatively better *vis-à-vis* the degree of self-government afforded them within the British Empire,²⁴ than do the democratic credentials left to Britons today in the E.U. Put bluntly, the American colonists had more of what passed for self-government in the eighteenth century than the share of self-government left by the E.U. to U.K. voters using today’s standards of what counts as democratic decision-making. Heck, the economic advantages of membership in the larger grouping—British Empire then and E.U. now—were arguably bigger back then too.²⁵ Hence, it is eminently plausible to think it was easier to be a Remainer back then on democratic and economic grounds and without doubt on defense grounds, which is why there could be no War of Independence until after the British defeated the French in 1759 in the Battle of the Plains of Abraham and effectively drove them out of much of North America.

My point in this digression is simply this. If, like former President Obama, you are an American who favored Remain, and if your reason for taking that side were largely economic, then as the descendant of Scots-Canadian United Empire Loyalists I retrospectively welcome you to the Loyalist side. It seems to me that if the two main criteria for deciding are democracy and the economy, then it is easier and more plausible to have been a Remainer back in 1776 and a Leaver today than

²⁴ See NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* 73 (2004).

Indeed, the “Glorious Revolution” encouraged the colonists to regard their own assemblies as equivalent in status to the Westminster Parliament By 1739 it seemed to one royal official that the colonies were effectively “Independent Common Wealths”, with legislatures that were effectively ‘absolute within their respective Dominions’ and barely ‘accountable for their Laws or Actions’ to the crown.

Id.

²⁵ *Id.* at 70, 73.

There is good reason to think that, by the 1770s, New Englanders were about the wealthiest people in the world. Per capita income was at least equal to that in the United Kingdom and was more evenly distributed. . . . And, crucially, they paid far less tax. In 1763 the average Briton paid 26 shillings a year in taxes. The equivalent figure for a Massachusetts taxpayer was just one shilling. To say that being British subjects had been good for these people would be an understatement. . . . On close inspection, then, the taxes that caused so much fuss were not just trifling; by 1773 they had all but gone. In any case, these disputes about taxation were trivial compared with the basic economic reality that membership of the British Empire was good—very good—for the American colonial economy.

Id.

vice versa. Or if nothing else, then this digression might at least elicit the concession that democracy, self-government, and wanting-to-govern-ourselves concerns do matter a good deal; however, much reasonable people might differ on when they should lose out to other concerns. At which point—at the risk of begging the question—counting us all as equal and voting seems a good way of deciding what to do.

II. THE DEMOCRATIC DEFICIENCIES OF THE E.U. PROJECT

One way to think of the E.U. is as a club for democracies, albeit one admittedly with geographic prerequisites. At the level of the member states democracy is a *sine qua non* of joining—and remaining in—the club. Hence, any democratic deficiencies occur not at the level of the nation-states, which have come together to form the supranational E.U. No, any such deficiencies—any complaints about a lack of democratic input from the vantage, say, of the U.K. voter—are focused at the level of the E.U. itself. There are two, or if you like two and half, main grievances. One has to do with how the E.U. itself makes decisions: it is about the enervated nature of democratic decision-making within this supranational body's institutions. The second has to do with the extent of centralized decision-making in the E.U. together with the process used to expand such centralization of decision-making. Think here of how the Lisbon Treaty came into being over the heads of the U.K. voters or how in many E.U. countries the euro currency came into being. The big decisions—and plenty of not-so-big ones—seem to flow from the top down, not vice versa. Related to both of those, so in a way a half-item of its own, is the centralizing power of the Court of Justice of the European Union (CJEU)—a potent power for moving ever more decision-making to E.U. institutions and one that will expand further due to the Charter of Fundamental Rights, which the British government promised its voters would not apply directly to the U.K. but which the CJEU later said would.²⁶

The basic outline of how E.U. institutions operate is well known, as is the enervated or emasculated nature of the democratic credentials of those institutions.

These shortcomings are far from trivial. The elected E.U. Parliament cannot initiate any legislation. Instead, this is done by the unelected bureaucrats in the European Commission, having a near monopoly on proposing new laws and being solely responsible for

²⁶ See *infra* note 52. Note, too: “It is absolutely clear that we have an opt-out from both the charter and judicial and home affairs.” Tony Blair, Prime Minister, U.K., Oral Answers to Questions at the European Council Public Accounts Commission (June 25, 2007) (transcript available at <https://www.theyworkforyou.com/debates/?id=2007-06-25b.21.0>).

drafting all E.U. law. The Parliament has only a veto over proposed laws. As for the elected Parliament being able to bring down a government—or if you like the current Executive Branch Commission—something that is a fundamental aspect of all Westminster-type democracies, it is theoretically possible with a two-thirds vote of Parliament but has never been done. At the time of appointment or investiture of each Commission the E.U. Parliament also has a veto, used once in 1999 and threatened in 2004, over the whole package of nominees²⁷; these people being the nominees of the Council of Ministers of the member states, but in practice being the nominees of the heads of state or of government, confusingly called the European Council. In this sense, the E.U. legislature is not, in practice, able to bring down the government and force fresh elections. The E.U. set-up looks more like a U.S. or French-style presidential system, save that there is no direct election of the E.U. President, so there too the democratic credentials are weaker in the E.U. set-up.

In fact, I would say that if we were to compare how decisions are made today by the E.U. to how decisions are made in Hong Kong,²⁸ using the thin, procedural, “letting the numbers count” sense of democracy noted above as our criterion for choosing, then it is far from clear that the E.U. would emerge from that comparison as obviously the more democratic of the two. In the E.U., the Parliament cannot propose laws; its Parliament has never brought down the government; and no member of the Executive—the Commission and President—is directly elected by citizens on any franchise basis whatsoever. By contrast, in Hong Kong only half the legislators are directly elected and half indirectly elected. The Chief Executive is chosen by a 1200 person electoral college that effectively gives China a veto over disliked candidates, and once chosen, the legislature largely has Westminster type powers.²⁹ If the E.U. comes out of that comparison looking to have more robust, “thin” democratic credentials than Hong Kong—which is not a particularly high comparative bar—then it does not do so by very much. Put differently, at the level of the E.U. itself, there are undeniable democratic deficiencies in how it operates.

Meanwhile decision-making within the E.U. leaves far too many decisions with the center. It is too centralized. In a cumulative sense it is claimed that “[o]ver the 70 years of [the E.U.’s and its forerunners’] existence, it has produced a vast body of legislation said to cover 80,000

²⁷ There are no individual vetoes save for E.U. President of the Commission.

²⁸ Since 1997, when Hong Kong ceased to be a colony of Britain, it has been a Special Administrative Region (SAR) of the People’s Republic of China.

²⁹ See CONSTITUTIONAL & MAINLAND AFFAIRS BUREAU, THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA 53 (Apr. 2017), http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

pages of the statute book: treaties, court decisions, regulations issued directly by Brussels, and directives, which all have to be incorporated into national law.”³⁰ Also remember that until the U.K. leaves the E.U., E.U. law trumps domestic U.K. law.³¹ In percentage terms there is much debate over just what fraction of the total laws in Britain emanate from the center—the democratically deficient E.U. There are so many factors to weigh that you can find estimates of how much U.K. law comes from the E.U. which say the answer ranges somewhere between fifteen percent and fifty-five percent.³² Others say that it ranges between thirteen percent and sixty percent,³³ with plenty opting for more precise estimates on either side of those ranges.³⁴ Suffice it to say that the extent of centralized decision-making in the E.U. is considerable and from the point of view of many, many U.K. voters believe it is far too great.

Related to that is the fact that some extremely important decisions that carry with them the effect of mandating even more centralization of decision-making in the future, even more final power flowing up to the E.U., have been taken or made in the U.K. in very unsatisfactory ways. Unsatisfactory in terms of the democratic credentials of how these E.U. inflating decisions were themselves made. Consider the Lisbon Treaty. Its forerunner was the treaty establishing a constitution for Europe, often referred to as the European Constitution or the “TCE.” The TCE was highly contentious. It was rejected by French and Dutch voters in May and June of 2005 in national referenda.³⁵ The British voters had

³⁰ *The Legal Vacuum*, WEEK, July 2, 2016, at 13.

³¹ As was made clear in *R v. Secretary of State for Transport Ex Parte Factortame Ltd* [1990] UKHL 7.

³² See Dan Bloom, *How Many of Britain’s Laws REALLY Come from the EU? The Brexit Question No One Can Answer*, MIRROR (June 21, 2016, 11:06 PM), <http://www.mirror.co.uk/news/uk-news/how-many-britains-laws-really-7420612>. The factors making any estimate highly contentious include: that some “single” laws include massive lists of separate legal changes; that some E.U. laws are only marginally relevant or applicable to the U.K.; that not everyone agrees how to count the applicability of particular instances of E.U. judge-made law; and so on. *Id.*

³³ See Clive Coleman, *Reality Check: How Much UK Law Comes from the EU?*, BBC NEWS (June 8, 2016), <http://www.bbc.com/news/uk-politics-eu-referendum-36473105>. Similar such variables are noted here too. *Id.*; see *supra* note 32.

³⁴ A report from the pro-Brexit group *Business for Britain* “[t]outing itself as ‘definitive’, . . . decreed that between 1993 and 2014, 64.7% of UK law was EU-influenced, and EU regulations accounted for 59.3% of all UK law.” Michael Dougan, *Fact Check: Are 60% of UK Laws Really Imposed by the EU?*, CONVERSATION (Apr. 27, 2016, 9:08 AM), <https://theconversation.com/fact-check-are-60-of-uk-laws-really-imposed-by-the-eu-58516>. On June 4, 2009, Labour Minister Lord Malloch-Brown, in response to a question in Parliament, put the figure at 9.1%. See Vaughne Miller, *How Much Legislation Comes from Europe?* 1, 16 (House of Commons Library, Research Paper 10/62, 2010) (“[T]here is no totally accurate, rational or useful way of calculating the percentage of national laws based on or influenced by the EU.”).

³⁵ See *French Say Firm “No” to EU Treaty*, BBC NEWS (May 30, 2005, 11:12 PM), <http://news.bbc.co.uk/1/hi/world/europe/4592243.stm>; *Dutch say “No” to EU Constitution*, BBC NEWS (June 2, 2005, 3:03 AM), <http://news.bbc.co.uk/2/hi/4601439.stm>.

been promised a referendum of their own on the TCE,³⁶ but in June 2007 at a European summit meeting the TCE was abandoned with an eye towards negotiating a new treaty.³⁷ This new one became the Lisbon Treaty upon its signing in December of 2007.³⁸ The degree of overlap between the new Lisbon Treaty and the cast aside TCE was considerable.³⁹ But for the purposes of this Article the point is this: prior to the May 2005 general election, British voters had been promised by the winning Tony Blair Labour Party a “yes-no” referendum on the TCE to be held in early 2006. Shortly thereafter, the TCE was abandoned by the E.U., and the move was made toward what would become the Lisbon Treaty—an alternative that in effect had much the same content and DNA as the preceding TCE.⁴⁰ In June 2005, one month after its big election win, the U.K. Labour Government announced that the plans for a referendum on the TCE had been shelved.⁴¹ However, before the next general election was fought or held, this same Labour Government opted to ratify the Lisbon Treaty without giving the voters a referendum on whether to do so.⁴² Also remember, not only was this Lisbon Treaty much like the abandoned TCE, it also had considerable centralizing effects.

Meanwhile, in light of this withdrawal of a referendum by the Labour Government, the then Tory Opposition leader David Cameron gave a “cast-iron guarantee”⁴³ that any newly elected Tory Government would hold a public vote on the Lisbon Treaty—that there would in fact be a referendum if his party were elected. Four years later in 2009, a year before the 2010 election,⁴⁴ Cameron and Tories went on to win as a

³⁶ See *Blair Confirms EU Constitution Poll*, BBC NEWS (Apr. 20, 2004, 11:02 PM), http://news.bbc.co.uk/2/hi/uk_news/politics/3640949.stm.

³⁷ See Presidential Conclusions of the Brussels European Council (EC) No. 21/22 of 21/22 June 2007, D/07/2, 15.

³⁸ See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, Dec. 13, 2007, 2007 O.J. (C 306) 1 (entered into force Dec. 1, 2009).

³⁹ Estimates vary with some people even saying that in terms of content, the two are basically the same. See Valéry Giscard d’Estaing, *Valéry Giscard d’Estaing: The EU Treaty Is the Same as the Constitution*, INDEPENDENT (Oct. 30, 2007, 12:00 AM), <http://www.independent.co.uk/voices/commentators/valeacutery-giscard-destaing-the-eu-treaty-is-the-same-as-the-constitution-398286.html>.

⁴⁰ See *id.*

⁴¹ “We will put [the TCE] to the British people in a referendum . . .” LABOUR PARTY, MANIFESTO 2005, BRITAIN FORWARD NOT BACK 84 (2005), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/13_04_05_labour_manifesto.pdf.

⁴² See *UK Ratifies the EU Lisbon Treaty*, BBC NEWS (July 17, 2008, 6:31 PM), http://news.bbc.co.uk/1/hi/uk_politics/7511281.stm.

⁴³ Nicholas Watt & Patrick Wintour, *David Cameron To Shed “Cast Iron” Pledge on Lisbon Treaty*, GUARDIAN (Nov. 3, 2009, 5:34 PM), <https://www.theguardian.com/world/2009/nov/03/david-cameron-lisbon-treaty-referendum> (David Cameron made the pledge in an article in *The Sun* on September 26, 2007).

⁴⁴ This was the very next election to be held in the U.K. after the 2005 general election. Five years between elections is not unusual there.

minority Government and Cameron conceded there would not be a referendum after all under a future Tory Government.⁴⁵ It was too late, he argued, since the Lisbon Treaty had by then progressed to being incorporated into E.U. law.⁴⁶ In David Cameron's view, the fault lay with the Labour Government and the Liberal Democrats for this transfer of significant power to the E.U. without the consent of the British voters, either directly in a referendum or indeed indirectly in a general election campaign with this issue at its heart.⁴⁷ Not everyone absolved Cameron of fault though.⁴⁸

However, my goal here is not to assess or apportion blame for the way in which the Lisbon Treaty came into being, nor for the manner in which power was centralized up to the E.U. institutions without any direct U.K. voter input on such a change. There is enough blame comfortably to go around. No, here I merely give this as one main example of a democratically deficient process used to drain decision-making power from the hands of U.K. voters. It illustrates how more centralization was brought about in an opaque and democratically deficient way. To the extent that the political elite saw the Lisbon Treaty as encapsulating liberal values and outcomes—a debatable judgment, I know—the tension here between liberalism and democracy was resolved in favor of the former. But this was an overreach, at least it looks that way with the benefit of post-Brexit vote hindsight. As Robert Tombs put it:

What galvanised the vote for Brexit, I think, was a core attachment to national democracy: the only sort of democracy that exists in Europe. That is what “getting our country back” essentially means. . . . Britain has long been the country most resistant to ceding greater powers to the EU: opinion polls in the lead-up to the referendum showed that only 6 per cent of people in the UK (compared to 34 per cent in France, for instance, and 26 per cent in Germany) favoured increased centralisation—a measure of the feebleness of Euro-federalism in Britain.

In contrast, two-thirds wanted powers returned from the EU to the British government, with a majority even among the relatively Europhile young. This suggests a much greater opposition to EU

⁴⁵ See Deborah Summers, *David Cameron Admits Lisbon Treaty Referendum Campaign Is over*, GUARDIAN (Nov. 4, 2009, 12:01 PM), <https://www.theguardian.com/politics/2009/nov/04/david-cameron-referendum-campaign-over>.

⁴⁶ *Id.*

⁴⁷ David Cameron said: “We will make sure that the British people remember who it was that broke their promise—Labour.” *Id.*

⁴⁸ See Press Release, Barry Legg, Co-Chairman, Bruges Group, *Cameron Is Breaking His Pledge to Hold a Lisbon Referendum*, <https://www.brugesgroup.com/the-conservative-party/57-issues/the-conservative-party/259-cameron-is-breaking-his-pledge-to-hold-a-lisbon-referendum> (last visited Dec. 29, 2017).

centralisation than shown by the 52 per cent vote for Brexit.⁴⁹

An ancillary aspect of the Lisbon Treaty was the legal status it gave to a rights charter or bill of rights known as the Charter of Fundamental Rights (Charter). The Lisbon Treaty gave this the same legal value as the E.U. treaties. The prospect of that alone would certainly have driven me to vote Leave regardless of virtually all economic arguments.⁵⁰ This delivers strong judicial review by the CJEU, which amounts yet again to decision-making taken out of the hands of U.K. voters and transferred to E.U. institutions, in this case the top E.U. judges. It enervates democracy in the U.K. More to my immediate point here, the way this came about in the U.K. was again less than democratically satisfactory. Yes, the same Blair Labour government as above did secure a protocol (Protocol 30) to the Lisbon Treaty that purported to be an opt-out for Britain regarding the effects of the Charter of Fundamental Rights. Article 1(1) of Protocol 30 states that the

Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.⁵¹

But this opt-out was never likely to survive contact with the CJEU, and so, it soon transpired.⁵²

⁴⁹ Robert Tombs, *The English Revolt: Brexit, Euroscepticism and the Future of the United Kingdom*, NEW STATESMAN (July 24, 2016), <http://www.newstatesman.com/politics/uk/2016/07/english-revolt>. Another way in which this might be characterized is that the U.K. electorate, in 1975, voted to join a Common Market, a liberal and relatively decentralized project. But from that time on all moves were toward an ever more centralized E.U. that no one in 1975 had voted for, that few had envisaged, and that, as it happened, no voters got a say in.

⁵⁰ I have criticized bills of rights at length and in a host of contexts. For a selected few instances, see, e.g., JAMES ALLAN, *DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION* (2014); James Allan, *Rights, Paternalism, Constitutions and Judges*, in *LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW* 29 (Grant Huscroft & Paul Rishworth eds., 2002); James Allan, *A Modest Proposal*, 23 OXFORD J. LEGAL STUD. 197 (2003); James Allan, *An Unashamed Majoritarian*, 27 DALHOUSIE L.J. 537 (2004); James Allan, *Bills of Rights and Judicial Power—A Liberal's Quandary*, 16 OXFORD J. LEGAL STUD. 337 (1996); James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1 (2006); James Allan, *Jeremy Waldron and the Philosopher's Stone*, 45 SAN DIEGO L. REV. 133 (2008); James Allan, *Meagher's Mischaracterisations of Majoritarianism: A Reply*, 20 K.L.J. 115 (2009); James Allan, *Oh That I Were Made Judge in the Land*, 30 FED. L. REV. 561 (2002); and James Allan, *Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century*, 17 K.C.L.J. 1 (2006).

⁵¹ Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union art. 1(1), Sept. 5, 2008, 2008 O.J. (C 115) 314. Also, note that Article 1(2) indicates that the economic and social rights of the Charter will not be justiciable unless domestic law provides for such rights. *Id.* art. 2.

⁵² See *Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't (NS v. Home Sec'y)*, 2011 E.C.R. I-13991. Here, the court ruled that this protocol was not intended "to

A more backdoor, opaque, and democratically deficient way of adopting an entrenched and potent bill of rights is hard to imagine. More centralization of decision-making, this time to the unelected top judges. Along with me, Richard Ekins also believes that one of the main virtues of the Brexit Leave vote is directly related to how it will free U.K. voters from this Charter and the CJEU:

Brexit promises to free the UK from subjection to the rule of the CJEU, which is an important dimension in the restoration of parliamentary democracy. It will also end judicial review of legislation on human rights grounds by way of the Charter or by way of general principles of EU law. This mode of review is much more hard-edged than the equivalent procedures under the Human Rights Act 1998 (HRA) and ECHR, for it can culminate in setting even statutes aside. It bears noting that the Charter is particularly problematic. It is wider than the ECHR, extending to a broad range of socio-economic rights. It was adopted by way of a deficient lawmaking process, with the UK initially objecting to the Charter giving rise to justiciable rights at all. The UK's accession to the Charter was rationalised by reference to Protocol 30, which was sold to [the UK] Parliament as an opt-out but which was never likely to achieve this end and was soon declared by the CJEU to be entirely empty.⁵³

The purpose of this Part of the Article has been simply to lay out a brief scorecard of some of the democratic deficiencies of the E.U. project and to indicate why U.K. voters might have—and might have had—reasonable grounds to worry about those deficiencies and to think that too often decisions were being resolved in a way contrary to how a “letting the numbers count” democratic process would have resolved them. The built-in tension between comparatively non-accountable E.U. institutions on the one hand and British democratic decision-making on the other, had reached a point where the former had too much scope to dictate policy. For many British voters, the E.U. had grown too ambitious. In other words, a concern for democracy and “wanting to govern ourselves” was not unwarranted when British voters went to the polls to vote in the Brexit referendum. Such a concern could easily have pushed many voters to vote Leave.

The next Part argues that that is precisely what happened in fact—that the main cause of the Leave vote was precisely this concern for democracy. It will be very brief.

exempt . . . the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.” *Id.* at I-14031.

⁵³ RICHARD EKINS, POLICY EXCHANGE, BREXIT AND JUDICIAL POWER 2 (2016).

III. WHAT WAS THE BIGGEST REASON FOR VOTING “LEAVE” IN THE BREXIT REFERENDUM?

It was a core attachment to national democracy that won it for the Leave campaign, or so opined Robert Tombs above.⁵⁴ I agree with Tombs. Daniel Hannan, the Euro-MP⁵⁵ who was a senior campaign board member of the successful “Vote Leave” campaign and who participated in many public debates during that campaign, points to the data that confirm this:

Leavers, we keep being told, were voting against immigration, or political elites, or inequality—anything, in fact, except the EU membership specified on the ballot paper.

Against the various theories offered by pundits, we have one massive data set. On polling day, Lord Ashcroft’s field workers asked 12,369 people why they had just voted as they had. The answer was unequivocal. By far the biggest motivation for Leave voters was “the principle that decisions about the UK should be taken in the UK”, with 49 per cent support. Control of immigration was a distant second on 33 per cent.⁵⁶

John O’Sullivan agrees with that assessment too.⁵⁷ You can even find a few of those who were on the Remain side of this debate who agree.⁵⁸ For me it is the concern for democratic self-government that is the decisive ground for thinking the Brexit Leave vote was a good and desirable outcome and why I, had I had a vote, would have voted Leave. Indeed, it bears repeating that the Remain campaign was forced to shift overwhelmingly to the economic argument, so weak was its position in terms of democratic self-government.⁵⁹

So, I am unashamedly with the fifty-two per cent who voted Leave, which for a law professor like me is very much a minority taste. Okay, it is more than that, as the vast preponderance of legal academics were for Remain.⁶⁰ So were U.K. academics as a whole,⁶¹ and as noted at the start

⁵⁴ See *supra* text accompanying note 49.

⁵⁵ Since 1999, Hannan has been a Member of the European Parliament for South East England for the Conservative Party.

⁵⁶ Daniel Hannan, *Brexit Means That Britain Will Be Boss Again*, SPECTATOR (Aug. 6, 2016, 9:00 AM), <https://www.spectator.co.uk/2016/08/brexit-means-that-britain-will-be-boss-again>.

⁵⁷ See John O’Sullivan, *Curses Be upon the Sweaty Masses*, QUADRANT (Jan. 4, 2017), <https://quadrant.org.au/magazine/2017/01-02/65038>.

⁵⁸ See Debbie Abrahams, *No, the Brexit Vote Wasn’t Just About Immigration*, NEW STATESMAN (Jan. 17, 2017), <http://www.newstatesman.com/politics/staggers/2017/01/no-brexit-vote-wasnt-just-about-immigration>.

⁵⁹ See O’Sullivan, *supra* note 57.

⁶⁰ In a survey conducted by the *Times Higher Education*, support for Remain by British academics was overwhelming across all university disciplines. For business/law academics, the Remain side was favored by ninety-one percent. See John Morgan, *EU Referendum: Nine Out of 10 University Staff Back Remain*, TIMES HIGHER EDUC. (June 16, 2016), <https://>

of this article, so were all the main political parties in the U.K.; so were some three-quarters of the Members of Parliament; and so most likely were most of the top judges. I could probably add to this list the top civil servants too.⁶² Put bluntly, when it came to the E.U. a noticeable difference of opinion or disconnect had grown between the views of the majority of U.K. voters on the one side and the views of the political, judicial, and academic classes on the other.

In the last two Parts of this article I want to shift gears and consider, firstly, one of the things that can happen in a liberal democracy when elite opinion severs in this way from majority opinion and then, secondly, what should happen. If you wish you can think of Brexit as a sort of case study of the built-in tension in liberal democracies between democracy and liberalism, at least insofar as it does not stretch plausibility too greatly to think the Remain case, and its elite supporters, would better deliver liberal outcomes.

IV. THE UKSC *BREXIT CASE*

If you lose in the democratic arena it is tempting to look to win—or at least to delay the other side’s victory elsewhere. One obvious place to do that in a liberal democracy is in the courts. Whether or not that was the actual motivation of the applicants who sought to delay the Government’s triggering of the Lisbon Treaty’s Article 50 “notification of withdrawal” provision in the UKSC *Brexit Case* decision, the case can

www.timeshighereducation.com/news/european-union-referendum-nine-out-of-ten-university-staff-back-remain. It was this fact of the immensely lopsided pro-Remain sympathies held by the vast preponderance of legal academics that spurred David Campbell, Maimon Schwarzschild, and me originally, to come up with this idea for a special law review issue on Brexit, with our initial notion being that we might just fill it solely with Leavers like the three of us. But we were far from confident that we could find eight or nine top law professors who were in the Leave camp. It soon became clear to us that having a balanced cross-section of views would make for a better special issue.

⁶¹ *Id.* The *Times Higher Education* survey divided U.K. academics into one of these disciplines: (1) biological and physical sciences; (2) arts and humanities; (3) social sciences; (4) business and law; (5) medicine and health; (6) engineering and technology; and (7) education. Support for Remain was highest in business and law and social sciences, both at ninety-one per cent. It was lowest in engineering and technology, at eighty-four per cent. Surprisingly, to me at least, the U.K. university with the highest support for Leave (this is a relative claim remember) was Cambridge University. *Id.*

⁶² Though my strong sense that this is true admittedly rests on anecdotal evidence only, the government did ban civil servants from helping Ministers who had opted for the Leave camp. See Letter from Sir Jeremy Heywood, Sec’y of the Cabinet & Head of the Civil Serv., Cabinet Office, to Sir Nicholas Macpherson, Permanent Sec’y, HM Treasury (Feb. 23, 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502580/Jeremy_Heywood_to_Permanent_Secretaries_-_EU_Referendum_Guidance.pdf (“[I]t will not be appropriate or permissible for the Civil Service to support Ministers who oppose the Government’s official [Remain] position by providing briefing or speech material on this matter.”).

certainly be examined in that light and in terms of the tension between democracy and liberalism.

On its face, the *Brexit Case* was about the reach of the prerogative power: the Executive power. Could Article 50 be triggered by the Government's prerogative power to make and unmake treaties; or is there first needed Parliament's statutory authority to do so? That was the nominal legal issue in this case, and, as I indicated at the start of this Article, I believe that there are plausible legal arguments going both ways. The *Brexit Case* is one of those Hartian⁶³ penumbral cases that falls within the open texture of the established rules. Hence, if you are a Hartian rather than a "one right answer" Dworkinian⁶⁴ in how you understand hard or difficult legal cases, then you would say that from the outside observer's vantage this case could have been defensibly resolved either for or against the Government. The judges effectively had discretion and so for them, in a big constitutional case like this, "all that succeeds is success."⁶⁵

That said, I myself found the dissenting judgments of Lords Reed, Carnwath, and Hughes more convincing, and by that I mean they were more convincing to my way of thinking on the nominal legal issue of the proper reach of prerogative power in the year 2017. Some legal academics agree with me. Some do not.⁶⁶ However, I am not here concerned with that sort of detailed exegetical analysis of this case. Rather, I want to focus on what was treated as irrelevant to the legal outcome of this case—treated as such in the way the Government argued its case and treated as such in the reasoning of the majority judgment in this case. I refer to the Brexit referendum that was authorized by a statute of Parliament,⁶⁷ that after a long and highly public campaign inspired some 33.6 million people—or seventy-two percent of those eligible—to vote; and that had a 1.3-million-person majority—fifty-two percent to forty-eight percent—for Leave. It was that statute-authorized Brexit referendum that was almost totally ignored and treated as of no legal consequence. That is worth noting because it strikes me that only by ignoring the referendum could the applicants run a case with any hope of winning in the courts,⁶⁸ just as

⁶³ See HART, *supra* note 10, at 123.

⁶⁴ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Bloomsbury Acad. 2013) (1977). The claim of there being one right answer is made explicitly by Dworkin in chapter thirteen as a whole and more particularly, the last page of that chapter. *Id.* at 335–48.

⁶⁵ See HART, *supra* note 10, at 153.

⁶⁶ *Policy Exchange's* Judicial Power Project invited leading academics on both sides of the issue to comment on the case and provides a good starting point to see the differing takes on the case. See *Miller Supreme Court Judgment: Expert Reactions*, POLICY EXCH. (Jan. 25, 2017), <http://judicialpowerproject.org.uk/miller-supreme-court-judgment-expert-reactions>.

⁶⁷ See European Union Referendum Act 2015, 2015 O.J. (C 36).

⁶⁸ The goal of the applicants was to turn the issue of "where is the boundary between parliament and the executive" from a political issue into a legal issue where unelected judges

only by ignoring the referendum could the majority judges decide against the Government in this case.⁶⁹

Hence, recall that the Referendum Act 2015 had been passed unanimously by Parliament. Remember too, these pertinent facts about that referendum spelled out by Jon Holbrook:

Parliament and the executive never doubted the political significance of the referendum as a way of empowering the people to resolve the issue that parliament had not and could not resolve. So, in 2013, the prime minister, David Cameron, said: ‘I say to the British people: this will be your decision . . . So we will have time for a proper, reasoned debate. At the end of that debate you, the British people, will decide.’”

Two years later, the Tory Party’s General Election manifesto stated that a Conservative government would legislate ‘for an in-out referendum’, which ‘we will honour . . . whatever the outcome’. When the Referendum Bill was presented to the House of Commons, the foreign secretary, Philip Hammond, said the bill had ‘one clear purpose: to deliver on our promise to give the British people the final say on our EU membership in an in-out referendum’. Supporting the Bill for the opposition, Hilary Benn, said, ‘it will be for the British people to decide’[.]. The entire legislative process, which culminated in the Referendum Act 2015, was informed by the view that the British people would bypass parliament and decide the issue of the EU membership directly.

Furthermore, the government delivered a leaflet to every household during the campaign that told them the referendum was ‘your chance to decide if we should remain in or leave the European Union’, and that ‘[t]his is your decision. The Government will implement what you decide.’ Anyone who now claims that the referendum did not transfer power from parliament to the people is rewriting history.⁷⁰

Yet that is precisely what the applicants in the *Brexit Case* did claim; it is what the Government lawyers who ran the case implicitly accepted and explicitly conceded⁷¹; and it was that Government

have the last word. To make that plausible you need to ignore the massive political fact of the referendum. Lord Reed, in dissent, made this same general point in blunt terms:

For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions. It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary.

Brexit Case [2017] UKSC 5, [240].

⁶⁹ I leave it to others to explain why the government lawyers ran the case in the way they did. It would not have been my choice.

⁷⁰ Holbrook, *supra* note 6.

⁷¹ In the first instance court below the UKSC, the High Court of England and Wales, the judgment of the court stated:

concession about the irrelevance of the Brexit referendum that the top judges also accepted⁷² and did so in a majority decision that put parliamentary sovereignty at the heart of why the Government lost. To my mind any understanding of parliamentary sovereignty that flies directly in the face of the facts surrounding this Brexit referendum set out by Holbrook above is an understanding that needs updating. It is one that smacks far too much of adopting an understanding of parliamentary sovereignty that is divorced from what the majority of voters actually want, and so whose value and reason for wanting to embrace it is far from obvious: it is one more nineteenth century in its enervated appreciation of democracy, than twenty-first century. Of course, there is something other-worldly or too insouciant about the legitimate demands of thin democracy in the way the *Brexit Case* airbrushes the referendum out of the picture.

David Wingfield in his analysis of the *Brexit Case* agrees and concludes this way:

The result of the EU referendum is an unambiguous expression of the will of the British people to leave the EU. The British people were asked to answer a clearly stated question of fundamental constitutional importance and they did so definitively. That result confers political legitimacy on the process of leaving the EU. That result also removes political legitimacy from efforts to cause the UK to remain in the EU. Leaving the EU means that the people of the UK will no longer be subject to the government of the EU and the laws that that government creates, even if they will lose the rights and privileges they have under those laws. This is what the people have said they want. For this reason, the rationale for removing from the executive the power to invoke Article 50 under international law,

The Secretary of State's case regarding his ability to give notice under Article 50 was based squarely on the Crown's prerogative power. His counsel made it clear that he does not contend that the 2015 Referendum Act supplied a statutory power for the Crown to give notice under Article 50. He is right not to do so. Any argument to that effect would have been untenable as a matter of statutory interpretation of the 2015 Referendum Act.

Brexit Case [2017] UKSC 5, [105].

⁷² Meanwhile in the UKSC, the appeal from the High Court decision, there was only the slightest of attempts to take back the government concession about the relevance of the 2015 referendum and it was dismissed by the majority judges. See *Brexit Case* [2017] UKSC 5, [38]:

Mr. Eadie [in his submissions on behalf of the Secretary of State] also suggested that the 2015 [Referendum] Act was enacted on the assumption that the result of the referendum would be decisive. . . . Also, in answer to a question from the Court, he adopted a suggestion that, even if Parliamentary authority would otherwise have been required, the 2015 ACT and the subsequent referendum dispensed with that requirement, but he did not develop that argument, in our view realistically.

Id. Cf. id. at [272] (Lord Carnwath dissenting) (“[I]t is difficult to talk of the Executive ‘foisting’ on Parliament a chain of events which flows directly from the result of the referendum which it authorised in the 2015 Act.”).

because doing this will affect the rights and privileges of people under EU law, as incorporated into UK law, disappears.⁷³

Yet the top U.K. judges in both the High Court and the Supreme Court did not consider that unambiguous expression of the will of the British people to be relevant to the outcome of the case,⁷⁴ nor to have any bearing on the proper understanding of parliamentary sovereignty and why an elected parliament has legitimacy to resolve big ticket social policy disputes. With elite opinion generally leaning towards Remain and non-elite leaning towards Leave, the very fact that non-elite opinion unambiguously wanted out of the E.U. was considered beside the point by the Government's lawyers and more or less irrelevant by most of the judges. There is at least a hint here of the tension I foreshadowed at the start of this Article between liberalism and democracy—in the thin, majoritarian sense.

Yes, in the end the Government got its bill through Parliament and received the statutory warrant the courts said was required before it could invoke Article 50.⁷⁵ Nevertheless, the delays that were sanctioned by the top judges were not in keeping with the notions of British democratic life laid out fifty years earlier by one of the great judges of that time:

It is a commonplace that in our sort of society matters of great moment are settled in accordance with the opinion of the ordinary citizen who acts no more and no less rationally in matters of policy than in matters of morals. Such is the consequence of democracy and universal suffrage. Those who have had the benefit of a higher education and feel themselves better equipped to solve the nation's problems than the average may find it distasteful to submit to herd opinion. History tells them that democracies are far from perfect and have in the past done many foolish and even wicked things. But they do not dispute that in the end the will of the people must prevail nor do they seek appeal from it to the throne of reason.⁷⁶

In the final Part of this Article I go back to the first principles and consider what should happen when the tension between democracy and liberal non-democratic institutions becomes too great.

⁷³ David R. Wingfield, *The Brexit Case: Does the Constitution Have a Place for Democracy?*, 35 U. QUEENSLAND L.J. 343, 348 (2016).

⁷⁴ As a result of which they were vociferously criticized in many newspapers and tabloids. See, e.g., James Slack, *Enemies of the People: Fury over "out of Touch" Judges Who Have "Declared War on Democracy" By Defying 17.4m Brexit Voters and Who Could Trigger Constitutional Crisis*, DAILY MAIL (Nov. 4, 2016, 11:26 AM), <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>.

⁷⁵ European Union (Notification of Withdrawal) Act 2017, 2017 O.J. (C 9).

⁷⁶ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 91–92 (reprt. ed. 1975).

V. DEMOCRACY SHOULD TRUMP LIBERALISM

One goal of this Article has been to set out a democratic argument for why the Brexit result was a good thing. In making that case, it is not difficult also to think that the whole Brexit saga exposed some of the built-in tensions in a liberal democracy between the majoritarian democratic elements of the U.K. constitutional order and the various institutions that see themselves as upholding the liberal order, or at least that might plausibly be seen as such by some outside observers. Thus far the democratic elements are prevailing in the U.K., though as the last Part showed, there is now a precedent for future appeals to the courts to ask them to oversee aspects of the U.K.'s unravelling from the E.U. and likewise a precedent for thinking those courts will not shy away from obliging such requests.

I finish this Article with a brief outline of why I side with democracy in the vast preponderance of such situations in which, for an established liberal democracy like the U.K., the liberal non-democratic institutions and elements come into noticeable conflict with the democratic elements. When the tension between the two becomes too great, then in my view, democracy should prevail in the vast preponderance of situations. This was the book-length position I set out three years ago.⁷⁷ This was the recent argument I made against libertarian attacks on majoritarian democracy with their concomitant defenses of strong judicial review and implicit reliance on a caste of well-informed experts.⁷⁸

To start, my case on behalf of democracy shuns natural law-type thinking⁷⁹ and rests wholly on consequentialist grounds. It is, I think, the least-bad decision-making option going for developed economies with tens and hundreds of millions of citizens. Hence, my claims on behalf of democracy are admittedly Churchillian, and the fact we can all

⁷⁷ See generally ALLAN, *supra* note 50.

⁷⁸ See James Allan, *Do Judges Know Best?* 32 CONST. COMMENT. 479 (2017) (reviewing ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2d ed. 2016)):

Thirdly, and no less importantly, most libertarians do not seem to share my views about democracy, by which I mean majoritarian “let the numbers count” democracy. I see it as the least-bad decision-making option available, and certainly a good deal better than the sort of strong judicial review that exists in my native Canada or in the United States, where nearly all (Canada) or probably most (the United States) top judges adopt some version of a “living tree” or “living Constitution” interpretive approach under which these same unelected judges end up deciding a whole host of social policy issues.

Id. at 480 (internal citations omitted).

⁷⁹ See generally James Allan, *Human Rights, Doubts and Democracy*, in *POLITICAL AND LEGAL APPROACHES TO HUMAN RIGHTS* (Tom Campbell & Kylie Bourne eds., 2018), for a full account of why I find such thinking and natural law foundations to be unconvincing.

point to various flaws in the outcomes produced by any democratic jurisdiction does not in itself refute the claim that “democracy is the worst form of Government *except* all those other forms that have been tried from time to time.”⁸⁰ The test is whether any other non-democratic decision-making process would have a better record or hit-rate over the medium to long-term—including one that handed most big ticket decisions over to an E.U.-style, democratically-deficient supranational body, or one that handed them to a committee of unelected ex-lawyers on the top court. So, I do not see myself as starry-eyed about the lack of failings of democratic decision-making, I just believe that in countries like the U.K., the United States, Canada, and Australia, it outperforms all other available options. And in large part that is because democracy makes decision-makers accountable to all of the country’s voters; it delivers or includes a Popperian⁸¹ capacity to “throw the bums out” that is lacking in all aristocratic, expert-driven, or bureaucratic decision-making set-ups. That sort of accountability—the direct link between your being able to continue in your job as a top politician and your being able to win regularly spaced elections in which all of your fellow citizens count the same and all who choose to vote have a more-or-less equal say in whether you get to continue—is a pretty blunt tool. Yes, but it has very good effects, at least if you believe that external incentives can shape behavior and that those with power may not be the best judges of whether they themselves are acting in the wider interest.

Or such was Jeremy Bentham’s understanding of the benefits of democracy.⁸² Bentham saw democracy as yet another system of sticks and carrots to motivate those with power to look out for the happiness or the welfare—in Bentham’s eighteenth century terminology, the pleasure⁸³—of as many other people in the society as possible. Of course, in a democracy there will not be incentives to deliver for everyone (however much there might be rhetorical advantages in claiming as much). But there will be incentives to look out for, to care about, and to try to deliver for more people than exist in any non-

⁸⁰ 444 Parl Deb HC (5th ser.) (1947) col. 207 (UK) (emphasis added).

⁸¹ See, e.g., KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 226–30 (Routledge Classics 2011) (1945); see also Karl Popper, *From the Archives: The Open Society and Its Enemies Revisited*, *ECONOMIST* (Jan. 31, 2016), <https://www.economist.com/blogs/democracyinamerica/2016/01/karl-popper-democracy> (republishing Karl Popper’s 1988 article on democracy).

⁸² This is clear from Jeremy Bentham’s early work. See, e.g., PHILIP SCHOFIELD, *UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM* 78–220 (2006); R. Cranford Pratt, *The Benthamite Theory of Democracy*, 21 *CAN. J. ECON. & POL. SCI.* 20 (1955). See generally JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Henry Frowde ed., Oxford Clarendon Press 1823) (1789).

⁸³ Throughout chapter one of his *Introduction to the Principles of Morals and Legislation*, Jeremy Bentham uses the term “pleasure.” Indeed, he uses it throughout the book. See BENTHAM, *supra* note 82, at 1.

democratic set-up. If you want to stay in the political job, you need to win more votes than anyone else who wants the job. Moreover, if you assume, as the anti-paternalist Bentham did,⁸⁴ that each individual knows what is best for himself better than anyone else does—including government agencies or social workers or, yes, E.U. Commissioners or the CJEU—then all the millions of individual voters using a majoritarian “letting the numbers count” method will be the ones who decide if decision-makers are performing.

The case for democracy is not that this is perfect; it is not that errors and even egregious outcomes will not transpire. It is that the medium and long-term hit rates of democratic decision-making will be better. I think that is correct. On top of that there is also the related issue of legitimacy. If in the year 2017 a vast preponderance of voters in the U.K. believed that they ought to have some sort of say over big-ticket issues that affect their country, then it follows that some methods of making those decisions will strike them as more legitimate than others. Indeed, they may care sufficiently about having that say that they would be prepared sometimes to accept worse results than what some caste of experts could potentially deliver as a cost worth bearing in order to be able to have that say and in order to hold those with power accountable. This would amount to an insurance-type argument that sits atop a more general psychological claim that most people do not much like paternalistic decisions imposed on them, even when what is imposed is right.⁸⁵ Put bluntly, there are ancillary costs to paternalism that can be factored in on the side of democratic decision-making too.

That is my thumbnail defense of democracy. One obvious question that it raises is whether the sort of democracy I am defending can take place in any robust form above the level of the nation-state. I personally suspect not. I suspect that the thin sort of procedural democracy that I am defending does not travel well when it moves above the level of the nation-state. But I am prepared to be convinced otherwise on that issue.

Here is a second thing to take from the Brexit decision. It has exposed more than a few people on the losing side of this referendum as quite skeptical of democratic decision-making.⁸⁶ Having lost, they

⁸⁴ For a comparison of Jeremy Bentham’s and John Stuart Mill’s utilitarianism, including their respective embraces of paternalism, see Robin West, *The Other Utilitarians*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 197 (Brian Bix ed., 1998).

⁸⁵ See generally JAMES ALLAN, *SYMPATHY AND ANTIPATHY: ESSAYS LEGAL AND PHILOSOPHICAL* 135 (2002).

⁸⁶ Here are just a few of many examples of those on the Remain side of the Brexit debate indicating their skepticism of democratic decision-making. See, e.g., Tony Blair, *Tony Blair’s Brexit Speech in Full: “They Will Say Leaving Is Inevitable. It Isn’t,”* TELEGRAPH (Feb. 17, 2017, 11:03 AM), <http://www.telegraph.co.uk/news/2017/02/17/will-say-leaving-inevitable-isnt-tony-blairs-brexit-speech-full/>; Hugo Dixon, *It’s Not a Fool’s Errand to Try and Keep Britain in the EU*, GUARDIAN (Sept. 5, 2016, 3:01 PM), <https://www.theguardian.com/commentisfree/2016/sep/05/keep-britain-in-eu-legal-challenges-european-concessions-vote>; A.C. Grayling, *A C*

dislike the majoritarian procedural decision-making system that delivered that loss. In other contexts this same attitude is known as “sore loser syndrome,” and it is one that cannot be generalized to other issues without undermining democracy.

Lastly, let me emphasize that my defense of democracy against the non-accountable liberal decision-making institutions was explicitly situated in those contexts in which the democratic elements and the liberal elements had come into noticeable conflict with one another—where the tension between the two had become too great. It is obvious and uncontentious to claim that different bargains can be struck between the democratic element and the liberal element in a modern liberal democracy. In fact, at the start of this Article I briefly outlined the different such bargains that have been struck in New Zealand and in the United States. The problem arises when non-accountable liberal institutions grow too ambitious and move from occasionally restraining the majority to a situation where they regularly dictate outcomes.

That, in my view, is what happened in the case of the U.K.’s membership in the E.U. Given the chance to have their say on that state of affairs, the majority of Britain’s voters preferred democracy to economic advantages claimed to flow from continued membership in that larger group. They wanted out. In a sense, they opted to side with Benjamin Franklin rather than his son. In circumstances such as the Brexit issue, I am wholly with the Leavers and on the side of democracy and democratic decision-making; and, if my above suspicions are correct, then also on the side of the nation-state.

Grayling Has 6 Reasons To Prove Why Brexit Will Be Stopped, NEW EUROPEAN (Aug. 30, 2017, 10:54 AM), <http://www.theneweuropean.co.uk/top-stories/a-c-grayling-has-6-reasons-to-prove-why-brexit-will-be-stopped-1-5098052>; Kenneth Rogoff, *Britain’s Democratic Failure*, PROJECT SYNDICATE (June 24, 2016) <https://www.project-syndicate.org/commentary/brexit-democratic-failure-for-uk-by-kenneth-rogoff-2016-06> (“The real lunacy of the United Kingdom’s vote to leave the European Union . . . was the absurdly low bar for exit, requiring only a simple majority. . . . Did the UK’s population really know what they were voting on? Absolutely not.”); Alastair Campbell (@campbellclaret) TWITTER (June 25, 2016, 1:08 AM) <https://twitter.com/campbellclaret/status/746615939647541248> (“EU law allows customers to withdraw from contract if contract based on lies. LEAVE agenda riddled with them. Lawyers on the case[.]”) (Mr. Campbell is a former Tony Blair advisor and campaign manager); Peter Sutherland (@PDSutherlandUN), TWITTER (June 25, 2016, 5:51 AM), <https://twitter.com/PDSutherlandUN/status/746687362902728704> (“The younger generation in UK has been sacrificed all because of distortion of facts & consequences. Somehow this result must be overturned.”) (Mr. Sutherland is the United Nations Special Representative for International Migration.).