

RESTORING PARLIAMENTARY DEMOCRACY

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I.

Any good constitution is a framework for reasoned self-government, making it possible for citizens jointly to reason and act to secure their common good. The Westminster constitution makes provision for such reason and action by way of a scheme for representative, parliamentary democracy, the two pillars of which are the doctrine of parliamentary sovereignty and the principle of responsible government. The United Kingdom (U.K.) entered into and is now exiting from the European Union (E.U.) in accordance with this scheme. Membership of the E.U. could formally be squared with—accommodated by—the Westminster constitution but there was a fundamental discordance between the European project and parliamentary democracy. The discordance increased over time and the U.K.'s choice to withdraw from the E.U. is a rational decision to restore robust self-government. This Article considers the constitutional dimensions of the U.K.'s fraught membership of, and now departure from, the E.U., contending that the U.K. reached and is implementing that decision in a way that was and is faithful to its constitutional order. Withdrawal from the E.U. has involved neither substitution of popular sovereignty for parliamentary sovereignty nor surrender to executive tyranny—and it was not the ill-judged intervention by the courts that saved the country from such. On the contrary, the process by which the U.K. has come to withdraw from the E.U. confirms the underlying strength and continuing promise of the U.K.'s parliamentary democracy.

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II.

In the early 1970s, having been rebuffed by the French in the previous decade, the U.K. joined the European Economic Community (EEC), which became the European Community (EC) and then the E.U. The decision to join the EEC was the subject of intense political controversy—there were divisions within each main political party, with the decision in the end being supported by the majority Conservative Party and resisted by the Labour opposition. The decision was driven by a crisis of confidence on the part of the U.K.’s governing elite, which believed that the continental European economies were outperforming the U.K. and that membership of the EEC, an important trading and regulatory bloc, was becoming economically imperative. Robert Tombs suggests that in hindsight this may have been a miscalculation: the U.K. joined the EEC too soon.¹ But importantly it was a *calculation*. For most, the point of entering the EEC was to improve the U.K.’s economic performance, not to dissolve or bind in chains the unruly power of the nation state (a small minority of Members of Parliament (MPs) and others did adopt the latter perspective).² The loss of state sovereignty inherent in joining the EEC was thought to be compensated for by the gains, a calculus that is indeed required whenever one exercises one’s sovereignty to commit to some international arrangement.

Even in the early 1970s, the EEC was clearly a *sui generis* international arrangement, one with institutional complexity and depth, and with a sense of unifying mission. The U.K. never shared the central presuppositions of the European project, and while this may be true of many member states, the extent of British distance from that project may have been unmatched. Put simply, the U.K. experienced the Second World War not primarily as an occasion of national disgrace or humiliation, in which parliamentary democracy failed or proved incapable, but as a triumph, albeit at massive cost in terms of blood and treasure. The abjuration of nationality, and of parliamentary democracy, that lies at the heart of the European project was always foreign to Britain.

None of this is to say it was unreasonable for the U.K. to join the EEC. It was a rational calculation and while it involved the costly breach of deep ties with Commonwealth nations, including the former Dominions with whom the U.K. shared overwhelmingly strong ties of culture, language, and law, it was not obviously wrong for Britain to think its future lay in ever closer cooperation with its democratizing

¹ ROBERT TOMBS, *THE ENGLISH AND THEIR HISTORY* 800 (2014).

² DANNY NICOL, *EC MEMBERSHIP AND THE JUDICIALIZATION OF BRITISH POLITICS* 61–63 (2001).

neighbors in continental Europe.

The EEC was, and the E.U. still is, the creature of treaties. It is brought into being by the treaties agreed by the member states. The organs of the E.U. (the European Commission, the European Court of Justice (ECJ), the European Parliament) understand this to be a treaty-based order like no other, to constitute a new legal order of which the member states are constituent parts, much as California forms part of the United States. In joining the EEC the U.K. did not accept this self-understanding, but plainly in committing itself to the treaties it was doing something remarkable, adopting international obligations that were far more extensive, institutionally complex, economically and politically significant, reflexive, and dynamic than any other.

The U.K. joined the EEC by ratifying the Treaty of Accession on October 17, 1972, a treaty which came into force on January 2, 1973. Her Majesty's Government had signed the Treaty on January 22, 1972, in exercise of the royal prerogative to make treaties, but held back from ratifying it until Parliament had enacted the European Communities Act 1972 (ECA). The Government only signed the Treaty after the Houses of Parliament had indicated their support in principle for such action in resolutions of each House in October 1971, and only ratified it after Parliament had enacted the ECA.³ Though nothing in the ECA required or even purported to authorize the ratification and accession, it would have been premature for the Government to have ratified the Treaty before the ECA was enacted because without that Act, which made provision for European law to come into force in domestic law, the U.K. would have been in breach of the Treaties as soon as they came into force in international law. But for the Act, the changed international legal position (the U.K. being subject to the Treaties) would not have changed domestic law, for the U.K. is, broadly speaking, a dualist legal order.⁴

The resolutions supporting government action, and the ECA itself, were supported by narrow partisan majorities. Membership of the EEC was not initially accepted by the opposition. When the Labour Party secured a majority in the Commons and formed a government, it held a referendum on continuing membership of the EEC.⁵ By this time, sentiment had shifted somewhat and the Labour Government supported remaining within the EEC. So did an overwhelming coalition of business and other elite groups and a decisive majority voted to remain.

³ R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union [2017] UKSC 5, [13]–[15], [2017] 2 WLR 583 (appeal taken from Eng. and N. Ir.); see also John Finnis, *Brexit and the Balance of the Constitution*, in JUDICIAL POWER AND THE BALANCE OF OUR CONSTITUTION (Richard Ekins ed., 2017) [hereinafter Finnis, *Brexit*].

⁴ *Miller* [2017] 2 UKSC 5, [55]–[57] (majority opinion); *id.* at [167], [182] (Lord Reed SCJ, dissenting).

⁵ On June 5, 1975, authorized by the Referendum Act 1975.

One sees in the U.K.'s entry into the EEC, the complexity of parliamentary democracy in action, with the Government representing the U.K. internationally and concluding treaties that can commit it to a treaty-based legal order, with Parliament holding the Government to account for its actions in the international realm, choosing to enact legislation to change domestic law accordingly, and making provision for the British people to give or withhold their consent to continuing membership.⁶ In this way, the U.K. chose to become a member state and to introduce into its legal order and public life the institutional structures and strictures of the EEC and thence E.U.

III.

The domestic law of the U.K. makes provision for European law, including rulings of the ECJ, to have effect. The ECA achieves all this in a few sparse sections: Section 2(1) says that without further enactment rights arising under the Treaties are to be given effect in U.K. courts; Section 2(4) says that enactments, including enactments yet to be enacted, "shall be construed and have effect subject to the foregoing provisions"; and § 3 says that the ECJ's rulings settle the meaning and effect of European law. Thus, European law has effect in the U.K. only because and to the extent that Parliament says it has effect. This was always clear, despite astonishingly having been doubted by some senior counsel,⁷ and has been reiterated in successive judgments and in legislation.⁸

The U.K. would be in breach of its international legal obligations if its domestic law did not give effect to European law. However, as a matter of domestic constitutional law, Parliament remains free to legislate as it chooses. Section 2(4) of the ECA does not impose any limits on the validity of successive legislation—if it purported so to do then the provision would itself fall afoul of the doctrine of parliamentary sovereignty which disables one Parliament from binding another. Rather, the section introduces a rule of priority in the event of inconsistency between statute and European law, providing that the former is to give way to the latter. The (apparent) puzzle is whether one can square the continuing force of this rule of priority with parliamentary sovereignty.

⁶ Finnis, *Brexit*, *supra* note 3.

⁷ See *Thoburn v. Sunderland City Council* [2002] EWHC 195, [2003] QB 151, [161] (reciting and rejecting argument of counsel, Eleanor Sharpston QC, who went on to serve as an Advocate General at the Court of Justice of the E.U. (from January 2006)).

⁸ *Id.*; European Union Act 2011, c. 12, § 18 (UK); *Pham v. Sec'y of State for the Home Dep't* [2015] UKSC 19, [2015] 1 WLR 1591; *R (HS2 Action All. Ltd.) v. Sec'y of State for Transp.* [2014] UKSC 3, [2014] 1 WLR 324.

For many scholars and judges the answer is that Parliament has bound its successors,⁹ either (a) to legislate consistently with European law for so long as the U.K. remains a member of the E.U., or (b) to require Parliament expressly to repeal the ECA if and when it wishes to legislate inconsistently with European law. Neither line of analysis is sound. Parliament is and has been always free to legislate inconsistently with European law and Section 2(4) does not at all make out a curb on this freedom. Parliament need not even repeal § 2(4) to exercise this freedom (in any case, repeal could be by implication). For the section works by framing the context in which successive legislatures act, justifying presupposition or presumption of an implied limitation in each new Act, to the effect that Parliament intends this particular statute to be read together with the rule of priority introduced in 1972, such that each new Act is to be set aside in the event of inconsistency with European law.¹⁰ It is always open to Parliament to negate or override this presupposition (defeat the presumption), and it may even do so by implication, as was arguably the case in the European Union Act 2011 or the European Union Referendum Act 2015.¹¹

While the U.K.'s international obligations do not limit the legal scope of Parliament's law-making authority, they do sharply limit its effective or practical freedom to legislate. Strictly this is no affront to the doctrine, which is consistent with non-legal constitutional (or practical) limits on lawmaking. Parliament freely chose to give European law effect in the U.K. and remained (and remains) free to modify the terms on or extent to which European law takes effect. Still, it is true also that the U.K.'s close entanglement in another legal order, which makes legislating freely the occasion for diplomatic and economic crisis, undercuts Parliament's centrality as the font of law and the decisive agent in the polity's public deliberation and action.

In short, the U.K.'s membership of the E.U. did not compromise the legal doctrine of parliamentary sovereignty but did compromise the principle of legislative freedom, which that doctrine gives legal form. This was not the only way in which membership sat awkwardly with fundamentals of the Westminster constitutional order. Consider the relationship between Government and Parliament for which that order provides.

The U.K.'s entry to the EEC was realized by Government and Parliament working together. In entering into treaties and in

⁹ N. W. Barber, *The Afterlife of Parliamentary Sovereignty*, 9 INT'L J. CONST. L. 144 (2011); H.W.R. Wade, *Sovereignty—Revolution or Evolution?*, 112 L.Q. REV. 568 (1996).

¹⁰ Richard Ekins, *Legislative Freedom in the United Kingdom*, 133 L.Q. REV. 582 (2017) [hereinafter Ekins, *Legislative Freedom*].

¹¹ See *Shindler v. Chancellor of the Duchy of Lancaster* [2016] EWCA (Civ) 469, [2017] QB 226.

participating in the international realm, including in relation to other member states of the E.U. and the organs thereof, the Government is the decisive agent. Parliament in 1972 made provision for further legal changes, which it would not enact, by giving effect to rights that arise “from time to time” under the Treaties.¹² It also limited the legal impact of successive European treaties by requiring they be specified either in the text of the ECA itself (*viz.* requiring amendment of the Act to introduce major new Treaties) or in an order of the Crown, supported by affirmative resolutions of each House of Parliament.¹³ Whether or not adequate to the task, this limitation recognized the risk that the locus of lawmaking might increasingly shift to the executive in its capacity of representing the U.K. internationally.

The risk was real and was realized. The origin of the E.U. as a creature of treaties has inevitably given it a certain cast, dominated by governments not parliaments. Various faltering attempts have been made to give national parliaments more say in the life of the E.U., but this has not advanced far, not least because it is only governments that have the right kind of capacity to deal with what remain—the depth of cooperation and entanglement notwithstanding—foreign states. Membership of the E.U. has predictably unsettled the balance of power between Government and Parliament, for it is Government that has the standing and capacity to act within the institutional machinery of the E.U. and which can present deliberation and decisions therein as a *fait accompli*.¹⁴

The slippage towards executive empowerment is not the only salient constitutional feature of the European project. The treaties create and empower central institutions, the organs of the E.U., which have a robust commitment to political unification, viewing the identity and independence of member states as at best temporary. These institutions have often misinterpreted or misapplied European law in order to promote this agenda.¹⁵ The difficulty of controlling those institutions—the absence of effective opposition—is pronounced.

These features of the European project have long been recognized to give rise to a “democratic deficit.”¹⁶ The effective transfer of lawmaking and executive responsibilities to transnational governing arrangements, overseen by a political and unaccountable court and

¹² European Communities Act 1972, c. 68, § 2.

¹³ *Id.* § 1(2)–(3).

¹⁴ *Cf.* Fergal Davis, *Brexit, the Statute of Westminster 1931 and Zombie Parliamentary Sovereignty*, 27 KING’S L.J. 344, 345–46 (2016) (arguing that E.U. membership is a check on executive power).

¹⁵ GUNNAR BECK, *THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU* (2012).

¹⁶ The term “democratic deficit” was first coined by a British political scientist, David Marquand. DAVID MARQUAND, *PARLIAMENT FOR EUROPE* 88 (1979).

other central(izing) institutions, has hollowed out national democracy.¹⁷ The remedy that European elites have attempted to apply has been to adopt the trappings of democracy, increasingly to empower the European Parliament and to adopt the panoply of a nation-state (while often abjuring as barbaric the language of nationality), introducing European citizenship, a Charter of Fundamental Rights, and so forth. Whatever the adequacy of this institutional arrangement, which at best is a constitutional work in progress with an ungainly separation of powers, this remedy does not address the central problem which is that there is no European public, no people as such, to animate these institutions. Without a dense common political culture, there is little transnational politics; elections to the European Parliament are more often an expression of national political discontent than an act of participation in competitive European politics.

Democratic reform in the E.U. has thus been a kind of constitutional cargo cult. The costs for national democracy have been real. The perception that citizens acting jointly cannot determine how they shall be governed is largely accurate. The loss of standing for Parliament, its formally unlimited authority notwithstanding, is important. On many important questions, the locus for effective decision-making authority is the European level, in which the U.K. Government has one vote (sometimes, but in fewer and fewer cases, a veto) and in which the commitment of one government (sometimes, but not always, with the support of Parliament) may effectively bind successors. European treaty making has become, for the U.K., a novel kind of constitution-making, but one with few effective restraints on executive freedom and next to no effective citizen participation.¹⁸

In one sense, the U.K. has been a member of the E.U. in good standing (conforming to European law and so forth) without abandoning central tenets of parliamentary democracy. Or at least, the entry into and maintenance of this set of commitments and their domestic reception was a set of choices made by way of the Westminster constitutional order, which membership has not changed so as to rule out the continuing capacity (freedom) on the part of the U.K. to modify or abandon those choices. However, in another sense, there has clearly been a fundamental discordance between the constitutional character of the European project and the U.K.'s constitutional order and membership of the former has compromised the coherence of the latter.

¹⁷ PETER MAIR, *RULING THE VOID: THE HOLLOWING-OUT OF WESTERN DEMOCRACY* 99–142 (2013).

¹⁸ Richard Tuck, *The Left Case for Brexit*, *DISSENT MAG.* (June 6, 2016), https://www.dissentmagazine.org/online_articles/left-case-brexit.

IV.

The intersection of the European legal order with the U.K.'s constitutional arrangements has long been a cause for concern. In 1978, Parliament enacted a rule that the Crown was not to ratify any treaty empowering the European Parliament unless and until it had been approved by Act of Parliament.¹⁹ This was the first of a series of legislative restrictions on the Government's freedom to enter into new international commitments or to participate in the decision-making infrastructure of the E.U.²⁰

Restrictions are spelled out extensively in the European Union (Amendment) Act 2008. This was an Act to give effect to the Lisbon Treaty, itself a form of the ill-fated European Constitution, which had been recast so as to circumvent its rejection by French and Dutch voters. This circumvention was well noted in the U.K. The Lisbon Treaty itself was adopted and introduced into domestic law in breach of the spirit—if not the letter—of the Labour Government's undertaking that a referendum would be held on the European Constitution. The Labour Government committed the U.K. to the Lisbon Treaty, in which the Article 50 path to exit was first set out, but also decided, earlier in its term in office, not to commit the U.K. to join the Euro. This was a fateful decision.²¹ But it was consistent with the history of the U.K.'s semidetached involvement in the European project, in which it remained aloof from various common endeavors, most notably (with Ireland) from the Schengen Area, in which internal border controls are more or less entirely set aside.

The Lisbon Treaty includes the Charter of Fundamental Rights, a charter which echoes the text of the European Convention on Human Rights plus a series of vague socioeconomic rights. Thus, the Treaty introduces into European law a further set of open-ended grounds for courts to quash legislative or executive decisions. The policy of the U.K. Government had initially been to oppose the introduction of any such charter, at least if it was justiciable, partly because it introduced or extended a form of rights adjudication that was hostile to the British constitutional tradition. But in the process of negotiating the Treaty, a set of nonjusticiable policy aims became actionable legal rights.²² The Government negotiated Protocol 30, which was presented, misleadingly,

¹⁹ European Assembly Elections Act 1978, c. 10.

²⁰ Some of which are traced in *R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union* [2017] UKSC 5, [206]–[213], [2017] 2 WLR 583 (appeal taken from Eng. & N. Ir.) (Lord Reed SCJ, dissenting).

²¹ Helen Thompson, *Inevitability and Contingency: The Political Economy of Brexit*, 19 BRIT. J. POL. & INT'L REL. 434 (2017).

²² EUROPEAN SCRUTINY COMMITTEE, *THE APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS IN THE UK: A STATE OF CONFUSION*, 2013-14, HC 979, at 21–52.

to Parliament as an opt-out from the Charter, but, as the ECJ made clear soon enough, has no such effect. The U.K. was and is vulnerable to Charter litigation, with a risk that the limits on the reach of the Charter (nominally it only governs actions implementing E.U. law) would be exploded by ECJ jurisprudence, as so often in the past.²³

One sees here, in vivid form, the radical deficiency of European treaty-making as constitution-making, not only in the alienation of the people from their own rule but also in the haphazard mode of lawmaking and in the content of the law made, which sharpens the discordance with the Westminster tradition and further empowers European and domestic courts. Again, it bears noting that the Government that ratified the Lisbon Treaty had the confidence of the Commons, and Parliament introduced that Treaty into the ECA itself.²⁴ The forms of the constitution were observed but the choice made by way of them hollowed out that order. This is hardly a way to govern—or to decide how the U.K. is to be governed—that follows from public deliberation, that aims to cultivate popular consent, or which is capable of joining citizens in the reasoned action that characterizes genuine self-government.

The coalition government that took office in 2010 was divided on the question of Europe. But it agreed to propose, and Parliament agreed to enact, the European Union Act 2011, which imposes strict limits on the Government in relation to the E.U. Most notably, the Act imposes a so-called referendum lock, requiring an Act of Parliament *and* support in a referendum before the Government is able to support, and commit the U.K. to agree to, further expansion of E.U. competences. This will not bind a sovereign Parliament but is a strong political commitment.²⁵ It may or may not have been good policy but it does confirm the concern that European integration is a ratchet and that limits on such were required. The previous Government's breach of its undertaking to hold a referendum on the Lisbon Treaty, the circumvention of unruly European electorates in general, and the insecurity of various opt-outs all loomed large.

Interestingly, shortly after Parliament sought to limit further integration, the British courts entertained arguments to similar effect. In two cases, the Supreme Court suggested that the ECA 1972 might not always give domestic legal effect to the Treaties, or to the decisions of the ECJ or actions of other E.U. institutions. The argument in *HS2* was that the ECA would not necessarily extend to propositions of European

²³ Paul Yowell, *The Justiciability of the Charter of Fundamental Rights in the Domestic Law of Member States*, in *THE EU AND NATIONAL CONSTITUTIONAL LAW* 107 (P.M. Huber & K. Ziegler eds., 2012).

²⁴ European Union (Amendment) Act 2008, c. 7.

²⁵ Ekins, *Legislative Freedom*, *supra* note 10.

law that were inconsistent with fundamentals of British constitutional law or practice.²⁶ For Parliament in 1972 might not have intended, the Court said, to modify the British constitution in this way. The argument in *Pham* was that the ECA would not necessarily extend to decisions of E.U. institutions that were *ultra vires* the empowering treaties, *viz.* the domestic courts would not accept that the ECJ had an unlimited jurisdiction and would resist flagrant misinterpretation of the treaties.²⁷

These dicta were transparent attempts to follow the lead of the German Constitutional Court, which had in the past managed to force the ECJ to take its constitutional concerns seriously. Whether the British judicial brinkmanship would have worked is an open question. What is striking is that the court was willing to publicly signal that it might defy E.U. law and articulated a principled case for such.

V.

These attempts to limit further integration and to discipline (deter) the ECJ were likely intended in part as ways to shore up the status quo. For further integration or E.U. overreach risked domestic political reaction. The risk was sharpened by the direction of travel in the E.U. itself, which was and is clearly in crisis. The Eurozone is trapped in stasis, with wealthier states resisting change, fearing open-ended fiscal exposure to what they perceive to be the liabilities of others, while poorer states in Southern Europe suffer under an ill-fitting economic model that seems to doom them to recession and mass unemployment.²⁸ The spectacle of governments in Southern Europe being toppled, or sharply overseen, by overt political and economic pressure from Brussels and Berlin has not assuaged concern about the E.U.'s political ambitions or temperament.²⁹

The travails of the Eurozone also highlighted and deepened the dissatisfaction of the British public with freedom of movement for E.U. nationals, which since at least the Maastricht Treaty in 1992 has been a fundamental part of the European project. The U.K. did not adopt restrictive transitional measures in 2004 when the E.U. was enlarged to include various Eastern European states. Mass migration to the U.K. duly followed, a trend that accelerated when the Eurozone crisis unfolded. The U.K., as the largest non-Eurozone economy within the

²⁶ *R v. Sec'y of State for Transp.* [2014] UKSC 3, [2014] 1 WLR 324, [207]–[208] (appeal taken from Eng.).

²⁷ *Pham v. Sec'y of State for the Home Dep't* [2015] UKSC 19, [2015] 1 WLR 1591, [90] (Lord Mance SCJ) (appeal taken from Eng.).

²⁸ JOSEPH E. STIGLITZ, *THE EURO: HOW A COMMON CURRENCY THREATENS THE FUTURE OF EUROPE* (2016).

²⁹ PAUL LEVER, *BERLIN RULES: EUROPE AND THE GERMAN WAY* (2017).

E.U. (with a widely spoken language), served as an employer of last resort for the Eurozone.³⁰ Successive governments undertook to address the problem of mass migration yet, predictably, were prevented by E.U. law from seriously addressing the problem, especially in relation to low-skilled migration. This lack of capacity brought into sharp focus the significance of loss of national sovereignty: domestic authorities were unable to address the public concern about who would be permitted to live and work in Britain.

The other main blow to the E.U.'s reputation concerned the security of the E.U.'s southern borders and the migration-refugee crisis that accelerated vividly in 2015. This was driven of course in large part by events well beyond Europe's shores, including the Syrian civil war. However, the intersection of E.U. asylum law and the structure of the Schengen Area was not a happy one.³¹ The former body of law made the first state of entry responsible for handling the asylum application. Border states, especially Greece and Italy, became ports of entry for large numbers of irregular migrants, drawn in large part by the promise of moving further northward to more prosperous states. The Schengen Area's absence of border checks *within* the Area made this ambition realistic. It also encouraged Greece and Italy not to police the regime strictly and to permit migrants to move freely north. The unilateral German repudiation (arguably a lawful temporary override) of the E.U. scheme for allocating responsibilities compounded the problem.

Being outside the Eurozone and the Schengen Area, these were not problems that directly and immediately afflicted the U.K. But they did frame the (perception of the) shape and character of the European project, implying that the E.U. lacks a common good, or an understanding of itself as a community capable of securing that common good together. It may well be that the E.U. requires close political integration to address its economic problems and yet this integration is out of reach, in which case the E.U. is a failing technocracy, unable to develop the capacities necessary to address the problems to which its flagship initiative has given rise. Further, the incapacity of the E.U. to secure its external or internal borders (and the relevance of both to the risk of terrorism) accentuated British concerns that membership of the E.U. requires an unacceptable surrender in control of the prerogatives of a self-governing nation-state.

³⁰ Helen Thompson, *Between Scylla and Charybdis: Brexit as Fate and Trap*, 23 JUNCTURE 111, 111, 113, 115 (2016).

³¹ Richard Ekins, *The Bounds of Compassion and the Dissolution of Nations*, 2 POL. & POETICS 2, 15–17 (2017).

VI.

The crises of the E.U. did not make it at all inevitable either that the British people would be invited to decide whether the U.K. should remain in the E.U. or that they would decide to leave. Indeed, in view of the overwhelming elite support for membership, it is astonishing that the people were invited to decide at all. Parliament was invited to enact the European Union Referendum Bill 2015 because the Conservative Party won a majority in the 2015 General Election, which it contested on the basis of a manifesto commitment to hold an in-out referendum.³² This commitment was made by the party leadership for a number of reasons: first, as a compromise that could be adopted by a party riven by division over the question of Europe; second, in order to see off the United Kingdom Independence Party (UKIP) insurgency, which threatened to undercut the party's prospects in marginal seats and risked sitting Tory MPs defecting to UKIP; and third, to put the opposition on the back-foot.

Elite consensus in a parliamentary democracy can keep certain questions off the political agenda. But, intraparty division, political pressure on the margins, and tactical politicking can break this open. The division of opinion within the Conservative Party, and the Party's concern for maintaining unity and avoiding electoral defeat, was critical to enabling responsiveness to the concerns of the wider public. This is how parliamentary democracy works. Guy Verhofstadt, the European Parliament's Brexit negotiator, spectacularly misses the point when he dismisses the U.K.'s decision to leave the E.U. as "a catfight in the Conservative Party that got out of hand, a loss of time, a waste of energy, stupidity."³³ In the same breath he speculates that perhaps the U.K.'s unification with continental Europe was never meant to be. But if it was never meant to be, then the "catfight" was the working out of the problem.³⁴

The 2015 Bill was enacted by overwhelming majorities. It proved difficult for parliamentarians to say that membership of the E.U. was not a question on which the British people ought to have a say. The powerful case against referendums in general holds with much less force in relation to questions about the long-term identity of the state or membership of the political community.³⁵ Here, the risk of elite capture

³² THE CONSERVATIVE PARTY MANIFESTO 2015, <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>.

³³ Joe Watts, *EU Parliament's Chief Negotiator Brands Brexit as a 'Catfight in Conservative Party That Got out of Hand'*, INDEPENDENT (Apr. 5, 2017, 9:07 AM), <http://www.independent.co.uk/news/uk/politics/eu-parliament-guy-verhofstadt-brexit-catfight-conservative-party-tory-a7667476.html>.

³⁴ I thank Helen Thompson for this point.

³⁵ Richard Ekins, *The Legitimacy of the Brexit Referendum*, UK CONST. L. ASS'N (June 29,

is very real and likewise the difficulty of revising the decision in the next term of Parliament undercuts the virtues of representative decision-making.

Parliament was right to authorize the referendum. Many citizens, especially those relatively lacking in political power or wealth, had long been dissatisfied with membership of the E.U. Whether to leave or remain was not a marginal question in public life, nor was it one to which there was only one obviously reasonable answer. The nature of the European project—its scope and its prospects—had changed sharply in the forty years since the previous referendum. The U.K.'s relationship with that project has been tense and contested for much of that period (and ever more so), and it was right to determine whether there was continuing consent to remain in the project.

The 2015 Act thus made provision for a referendum to be held. The franchise was to mirror that of a general election. This disabled non-U.K. E.U. nationals (Irish and Maltese aside) from voting, but enabled Commonwealth and Irish citizens resident in the U.K. to vote. The terms of the franchise were challenged in court, with U.K. citizens who had lived outside the U.K. (in the E.U.) for more than fifteen years contending that their disability from voting was a violation of E.U. law. The court dismissed the challenge.³⁶ Proposals to enfranchise sixteen to seventeen-year-olds were rejected. In the wake of the referendum, the limitation in the franchise was said to impugn its legitimacy.³⁷ It is hard to see why. Adopting the same franchise as a general election was the salient option, securing a fair contest without risking the inevitable (and justified) charge that, say, enfranchising E.U. nationals to vote had been cheating. As for Commonwealth and Irish participation, the law and practice of the U.K., long predating the E.U. or its forebears, has been to recognize citizens of these nations as cousins, not foreigners (pace E.U. nationals), who should be invited to share in the self-government of the U.K. while dwelling here.

The decision to hold the referendum was not an abdication of parliamentary democracy. It was a responsible exercise of parliamentary democracy. Parliament reasonably enacted legislation, proposed by the Government to honor a manifesto commitment, in order to put an important, contested question to the public for decision. This was a

2016) [hereinafter Ekins, *Brexit Referendum*], <https://ukconstitutionallaw.org/2016/06/29/richard-ekins-the-legitimacy-of-the-brexit-referendum>; Richard Ekins, *The Value of Representative Democracy*, in *WE THE PEOPLE(S): PARTICIPATION IN GOVERNANCE* 29, 48 (Claire Charters & Dean R. Knight eds., 2011).

³⁶ See *Shindler v. Chancellor of the Duchy of Lancaster* [2016] EWCA (Civ) 469, [2017] QB 226.

³⁷ Jo Shaw, *The Quintessentially Democratic Act? Democracy, Political Community and Citizenship in and After the UK's EU Referendum of June 2016*, 39 *J. EUR. INTEGRATION* 559 (2017).

question peculiarly apt for decision by referendum. Parliament made provision for a fair process and a reasonable franchise. That the Government and most MPs, not to mention President Obama and the Governor of the Bank of England (among countless other dignitaries and international bodies), campaigned actively for a vote to remain makes the outcome of the referendum astonishing. This mismatch between popular and elite preference gave rise to various complications. One I mention now: in anticipation of victory, and in order to avoid precipitating defeat, the Government faintly pretended but comprehensively failed to prepare for defeat. This was an abdication of duty.

VII.

The outcome of the referendum was a shock, especially to political and social elites. Its legitimacy was immediately challenged. Some MPs argued that they were Burkean representatives and would not support action they thought unreasonable. Others argued that they represented their constituents, who had voted Remain (in about a third of constituencies nationwide; if the referendum had been a general election a Leave party would have won by a landslide), and so would oppose withdrawal. Various scholars articulated a host of objections to the referendum.³⁸ The fairness of the franchise was contested—it was unjust, the argument ran, for E.U. nationals to have their lives upended without a vote, while Commonwealth citizens were enfranchised. Not so, as I noted above. Also, the time for raising this objection was *before* the referendum was held, not afterwards. The same holds for the objections made to the lack of a threshold for majorities in each of the U.K.'s four nations, for an elevated threshold, or for support by an absolute majority of voters, and so forth.³⁹ These are in any case unimpressive objections. Insisting on majorities in each nation would have been novel and inconsistent with the equality of each voter. Insisting on an elevated threshold or similar would have unfairly begged the question in favor of the status quo. This was all transparently special pleading.⁴⁰

A more promising line of argument was to say that the referendum did not settle the shape of the U.K.'s post-Brexit relationship with the E.U.⁴¹ Thus, the referendum did not provide a mandate for any

³⁸ Albert Weale, *The Democratic Duty to Oppose Brexit*, 88 POL. Q. 170 (2017).

³⁹ Jo Murkens, *Brexit: The Devolution Dimension*, U.K. CONST. L. ASS'N (June 28, 2016), <https://ukconstitutionallaw.org/2016/06/28/jo-murkens-brexit-the-devolution-dimension>.

⁴⁰ PUBLIC ADMINISTRATION & CONSTITUTIONAL AFFAIRS COMMITTEE, LESSONS LEARNED FROM THE EU REFERENDUM, 2016-17, HC 496 (UK); Ekins, *Brexit Referendum*, *supra* note 35.

⁴¹ Pavlos Eleftheriadis, *Constitutional Illegitimacy over Brexit*, 88 POL. Q. 182 (2017).

particular option. If or when some option was worked up by the Government, in negotiation with the E.U., it should then be put to the people in a second referendum for choice against the status quo of continuing membership. Providing for two referendums would not necessarily have been unreasonable *if* that provision were made in advance, rather than adopted post hoc to disarm an unwelcome surprise. If such provision had been made, the majority for leave might well have increased. Be that as it may, the referendum was instituted and fought on the basis that *it* would settle the question of membership. The Government expressly promised to implement the people's decision: it would destroy political trust to betray this promise.

The referendum was the joint act of millions of voters, reaching a decision in relation to the question posed. Indeed, quite apart from the merits or demerits of lawmaking by plebiscite, it bears noting that a referendum is more evidently a *joint act* of (self) government than is even a general election. The question of what to make of this referendum is in one sense open, in that one might propose this or that course of action as an intelligible and honorable response to the political interaction that culminated in the majority vote to leave. Like a general election, or other mass political moment or movement, statesmen should aim to understand the complex political action—and the context in which it was taken—with which they are confronted and determine how best to respond to it to secure the common good.

Proposing that the referendum was meaningless is obtuse. Anyone who followed the campaign, and the context (history) which framed it, should conclude that the referendum was settled by concerns about the erosion of sovereignty and self-government in general and loss of control over migration and borders in particular, with the fiscal cost of participation in the E.U. an important secondary consideration. The referendum was a decision to leave, taken for reasons. It did not change the law but it was not *advisory*—not a glorified opinion poll. Rather, it was the polity's chosen means to settle this question. The political authorities had no honorable choice save to implement the decision made. Defiance would have been dishonorable and reckless.

VIII.

The elite cry of rage seemed largely beside the point when the new Prime Minister, Theresa May, undertook faithfully to implement the referendum result. Throughout the campaign, her predecessor, David Cameron, had threatened to trigger Article 50 on the 24th of June if the British people were foolish enough to vote to leave. This might have been constitutionally legitimate but would have been imprudent, compounding market chaos and the lack of preparation for a leave vote.

In the event, he rightly left to his successor the decision about when it was best to trigger Article 50 and begin negotiations in relation to the U.K.'s exit from the E.U. Within a few days of the referendum result, three legal scholars set out an argument that the Government lacked the legal authority to trigger Article 50 without first securing specific empowering legislation.⁴² This argument was very widely reported, was endorsed by Lord Pannick in *The Times*, and culminated in legal action (led by one Lord Pannick), seeking declarations from the High Court that the Government lacked legal authority to trigger Article 50.

The point of this litigation was ostensibly to affirm parliamentary sovereignty and to avoid the executive acting in excess of its lawful powers. The litigation was said not to be an attempt to flout the referendum but rather a vindication of Parliament's authority against an imperious and overbearing executive. There are reasons for skepticism about this presentation: the argument was taken up by many precisely because it seemed a clever legal stratagem to frustrate the referendum, not directly—the courts had no authority to rule that the result could not be implemented—but indirectly, by delaying the process and by requiring the consent of MPs and peers, who overwhelmingly supported continuing E.U. membership. Still, litigation is often politically motivated and the responsibility of the courts is nonetheless to consider the application on its legal merits. And this litigation made out an arguable case—weak, but arguable. The claim was that triggering Article 50 would in due course lead the E.U. Treaties to cease to apply to the U.K., which would be tantamount to the executive destroying E.U. legal rights by fiat. The Crown has no authority to change the law of the land by proclamation or to undercut a statute, and triggering Article 50 would undercut the ECA, the argument ran, for that Act committed the U.K. to E.U. membership.

The legal challenge should have failed. In triggering Article 50—exercising a right under a treaty to which the U.K. is party—the Crown would have been deploying the long-standing royal prerogative to make and unmake treaties. This exercise would not itself have changed the law of the land. The resulting change in rights and duties in U.K. law would have been entirely in accordance with the terms of the ECA, which brings into U.K. law international obligations as they are from time to time. In addition, the ECA was simply not an Act *requiring* the U.K. to join the EEC/E.U. or to remain a member thereof. The sequencing of prerogative and legislative action in relation to the U.K.'s entry, outlined at the start of this Article, makes this clear, and the Act's drafting is

⁴² Nick Barber, Tom Hickman & Jeff King, *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, U.K. CONST. L. ASS'N (June 27, 2016), <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role>.

Careful to conform to this constitutional division of authority.⁴³

The Divisional Court and the majority of the Supreme Court wrongly attributed to Parliament in 1972 an intention to bind the U.K. to membership and to abrogate the royal prerogative. Oddly, the premise for the majority judgment in the Supreme Court was that the ECA had constituted European law as a direct, independent, and overriding source of law,⁴⁴ such that its effective removal was a constitutional change that could not be brought about without an Act of Parliament. Yet this was a flat misunderstanding of how E.U. law comes to bear in U.K. law, as the minority pointed out and as *Pham* and *HS2* (and the European Union Act 2011) confirm.⁴⁵ Further, the premise that major constitutional change requires legislation has no foundation in British law or practice. The majority ran together its prescription for ideal constitutional practice with conclusions about settled constitutional law. That is, the majority improperly imposed a novel limit on the Government, all the while asserting that it was Parliament in 1972 that had imposed the limit, to bring about its own sense of best constitutional practice.⁴⁶

The Supreme Court is not the guardian of the U.K. constitution. It is the highest appellate court and like all courts is responsible for adjudicating disputes in accordance with law. It has a particular responsibility to uphold the law of the constitution. But the question of how the Houses of Parliament address the Government's exercise of the prerogative to unmake treaties is, bluntly, not for the courts to determine. In any case, it was quite wrong to suggest that the Government was acting tyrannically or highhandedly by proposing to trigger Article 50 without either the support of affirmative resolutions in the Houses or an Act of Parliament. The referendum itself provided sufficient warrant for triggering Article 50, although per the principle of responsible government the Government was right to give advance notice of its intention so to do, leaving it open to the Commons to unseat it if it will. And it was good constitutional practice for the Government to invite the Commons positively to signify its support for the proposed exercise of the prerogative, as indeed the Government in the end did on December 7, 2016. The Government was always accountable for its policy in relation to the prerogative and for its exercise thereof and the Commons (and Lords) could hold it to account. The Government's intention to honor the referendum by beginning the

⁴³ Richard Ekins, *Constitutional Practice and Principle in the Article 50 Litigation*, 133 L.Q. REV. 347 (2017) [hereinafter Ekins, *Constitutional Practice*].

⁴⁴ R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union [2017] UKSC 5 [65], 2 WLR 583 (appeal taken from Eng. & N. Ir.).

⁴⁵ *Id.* at [224]–[230] (Lord Reed SCJ, dissenting).

⁴⁶ Ekins, *Constitutional Practice*, *supra* note 43, at 351–53.

Article 50 process was entirely consistent with constitutional orthodoxy.

IX.

The mishandling of legal and constitutional materials in the Supreme Court was less important than it might have been. The Government promptly introduced a narrowly cast bill to the Commons, a bill that effectively reinstated the legal status quo ante, empowering the Prime Minister to give notice to the European Council under Article 50.⁴⁷ The Commons adopted the bill by an overwhelming majority, rejecting various amendments to impose conditions on the Government's negotiating strategy. The Lords amended the bill to impose two important—and problematic—conditions, returning the amended bill to the Commons. The Commons stood firm and restored the bill to its original, narrow formulation, at which point the Lords yielded. The majority of peers were unwilling to defy the settled will of the Commons, concerning implementation of the referendum result, and the Parliament Acts 1911 and 1949 did not need to be invoked. Had the Acts been invoked, this would have forced a year's delay and might have prompted extraordinary measures in the interim, including perhaps the appointment of hundreds of new peers willing to vote for the bill.

Did MPs squander an opportunity the Supreme Court secured for them? No. The Government enjoyed the confidence of the Commons and intended to use its lawful powers to honor the result of the referendum for which Parliament had made provision. It was right to invite the Commons formally to signify their support by way of an affirmative resolution. The support of the Lords was not necessary. It was entirely open to MPs to conclude that legislation ought not to bind the hands of the Government in initiating negotiations and that any such limitation would be inimical to the national interest and indeed might prove self-defeating. Parliamentary accountability does not require legislative limitation in advance. Quite rightly, Parliament is considering the implications of Brexit in a host of different policy areas, outlining ideas for transitional arrangements, noting problems that require an answer, and critiquing the proposals made thus far by Government.

In the end, the main significance of the Supreme Court judgment was to empower the House of Lords, some members of which set out to oppose and to wreck the legislation. This was a legally unjustified, constitutionally improper intervention into the political process by the Court, but one that the Government and the Houses of Parliament were

⁴⁷ The bill became the European Union (Notification of Withdrawal) Act 2017.

able to contain. For the Government did enjoy the confidence of the Commons and MPs rightly resisted the temptation to frustrate the referendum.

The *Miller* litigation notwithstanding, the U.K.'s decision to withdraw from the E.U. was made and is being carried out by a mature parliamentary democracy. The aftermath of the referendum does not establish a new constitutional principle of popular sovereignty,⁴⁸ in which the people themselves are a master chamber of the legislature, giving orders to the other chambers. The British exercise reasoned self-rule over time by way of their representative institutions. Those institutions, in response to political pressure and situated at the sharp end of a public conversation about what should be done, chose to authorize the people themselves to settle the question of membership by way of a referendum. This was a reasonable choice, recognizing the limitations of the ordinary lawmaking process and perceiving the need for a fair, public, stable decision on a question of lasting significance. The choice having been made, and relied on (that is, the referendum having been held), should be honored not betrayed. It does not establish a precedent or entail any displacement of parliamentary authority in the future. Neither does it entail that the Westminster constitution now centers on popular sovereignty. Rather, the ongoing consent of the people to their governing arrangements and their active participation in those arrangements is a good which representatives ought to cultivate and maintain, not at all cost but as part of the complex common good of their community, which it is their responsibility (and ours) to secure.

X.

The political competition that resulted in Parliament enacting the 2015 Act was the working out of parliamentary democracy, *viz.* the introduction to, and adoption by, Parliament of intelligent proposals responding to questions of public concern. Having authorized the referendum, MPs were rightly willing to support the Government's use of the prerogative to implement its outcome and then willing to legislate in response to *Miller* to enable the Government to trigger Article 50. There is no rupture with the constitutional order here, just the working out of the relationships between Government, Commons, and public for which the constitution makes provision.

Much the same can be said in relation to the latest controversy, which concerns the Great Repeal Bill (it will almost certainly have a different short title when introduced). This will repeal the 1972 Act but is intended to maintain legal continuity, transposing into U.K. law the

⁴⁸ Cf. Vernon Bogdanor, *Europe and the Sovereignty of the People*, 87 POL. Q. 348 (2016).

body of E.U. law that would otherwise expire on the termination of the Treaties.⁴⁹ The point of withdrawal from the E.U. is not legal chaos but effective freedom to change the law thereafter. Transposition of E.U. law will not be altogether straightforward, for some E.U. rules will be redundant or unworkable without modification to maintain their meaning and effect, say if they include reference to E.U. institutions or depend on reciprocal arrangements. The plan is for the Bill to empower the Government to make incidental changes to E.U. rules as necessary in order to maintain legal continuity. Major policy changes will be realized by way of primary legislation and the Government will be accountable to Parliament for its exercise of these powers, either in the same way as it is now for secondary legislation or by way of a special procedure.

This proposal is rightly the subject of intense parliamentary scrutiny. But the outline of the proposal is in one sense unremarkable and does not warrant the charge that leaving the E.U. will restore power to Whitehall (Government) rather than Westminster (Parliament). There is no other practicable way to maintain legal continuity apart from by empowering much secondary legislation. But the powers can be framed, and their exercise scrutinized, to keep the focus on continuity, on incidental and minimal change, rather than radical revision. More importantly, the rules in question will, after withdrawal from the E.U., be for U.K. political authorities to change as and when they see fit, in accordance with the constitutional distribution of authority. The Bill will not disable Parliament from using the legislative freedom that withdrawal will restore; nor will it prevent Parliament from jealously guarding against misuse or excess of delegated authority. Leaving the E.U. may be unwise but it is not constitutionally self-defeating; it will not undermine rather than restore parliamentary democracy.

XI.

The constitutional lesson of the E.U. is that a constitution is only an effective frame for joint action if it is adopted by a people willing and able to act together, who share a common good—and know they do—and intend jointly to pursue it as one. The British have long had such a constitution and like other free peoples have exercised self-government by way of their representative institutions, which lead and respond to public deliberation with reasoned action. The U.K. joined the EEC in accordance with this constitutional order, but membership was always difficult to square with the principles of parliamentary democracy and

⁴⁹ DEPARTMENT FOR EXITING THE EUROPEAN UNION, LEGISLATING FOR THE UNITED KINGDOM'S WITHDRAWAL FROM THE EUROPEAN UNION (2017) Cm 9446 (UK).

the difficulty increased over time. The decision to leave the E.U. is a choice to disengage from the European legal order and thus to restore self-government. The rational appeal, and continuing capacity, of the U.K.'s scheme for parliamentary democracy is illustrated in how the U.K. decided to withdraw from the E.U. and is now implementing that decision.