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## Cover Page Footnote

Professor of Law and Constitutional Government, University of Oxford and Head of Policy Exchange's Judicial Power Project. I thank Erin Delaney and Stephen Tierney for helpful conversation about the latter's Global Spotlight lecture, delivered on Nov. 2, 2020. I am also grateful to Robert Craig, Stephen Laws and participants in the workshop "Constitutions, Peoples and Sovereignty", held at Notre Dame Law School's London campus on Feb. 21, 2020, for helpful comments on an earlier draft of this article; the usual disclaimer applies.

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## INTRODUCTION

This article reflects on the constitutional dynamics of the United Kingdom's (U.K.) departure from the European Union (EU). In section II, I outline the nature of the U.K.'s political constitution and its tension with European integration. In section III, I consider the decision to hold a referendum on the question of EU membership, arguing that its legitimacy should not have been, but was, questioned. Section IV considers the needless constitutional panic of late 2016, in which courts wrongly intervened to rule that the government was not entitled to trigger Article 50, and thus set in motion the process of terminating the EU treaties, unless and until Parliament enacted new legislation to this effect. This "crisis that was not" wrongly encouraged many in high places to think that withdrawal from the EU had exposed flaws in, or was undermining, the U.K. constitution. In section V, I outline how Parliament legislated about the legal consequences of Brexit, including making provision for continuing parliamentary involvement in relation to approval of, and in the event of failure to conclude, a withdrawal agreement. Section VI begins to outline the long crisis of 2019, in which some parliamentarians breached established norms of parliamentary government. Sections VII and VIII continue the analysis, considering in turn the prorogation crisis, in which the Supreme Court abandoned law to intervene in high politics, and its aftermath, in which the government was maintained in office but not in power. The long crisis constituted a major test for the U.K.'s political constitution and almost ended in disaster. Still, while some constitutional vulnerabilities were exposed, the article shows how the political constitution in the end made provision for orderly, politically legitimate withdrawal from the EU.

## I. EUROPEAN INTEGRATION AND THE POLITICAL CONSTITUTION

The two pillars of the U.K. constitution, I say, are the principle of responsible government and the doctrine of parliamentary sovereignty.[1] This

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Westminster model of constitutional government is a political constitution insofar as it makes central the law-making power of the Queen-in-Parliament, disciplined by politics not law, and makes the formation and direction of government turn on the confidence of the House of Commons and, in due course, the electorate. While the government is subject to the law, and the jurisdiction of the courts, it is held to account more generally by Parliament. The relationship between the government and the Houses of Parliament is a matter of constitutional convention and political dynamics, to which accountability to the country at large is vital. The courts are not responsible for safeguarding the constitution as such or for upholding rights against Parliament itself. The courts vindicate settled legal rights, including against government, but responsibility for choosing how best to protect rights lies with Parliament.

The government enjoys control over the business of the House of Commons. This control is realised by Standing Order 14 (SO14),[2] which has been central to parliamentary government since the early nineteenth century and before that had been an informal feature secured by the power of patronage rather than formal rules. Parliamentary government relies on government to provide initiative, with Parliament free to react, reject, or cajole and, in extremis, to remove the government from office by withdrawing its confidence. The Crown enjoys certain prerogative powers, which are exercised on the advice of ministers who are accountable to Parliament. The Fixed-term Parliaments Act 2011[3] (FtPA) swept away the prerogative of dissolution (that is, power to dissolve Parliament and to bring about an election), but expressly preserved the prerogative of prorogation (that is, power to control the timing of sessions of Parliament, which frame parliamentary business). The FtPA prevents an election being held before the full five-year term of Parliament has run its course unless either: (1) two-thirds of the Commons support a motion for an early election; or (2) the government is defeated on a vote of confidence and there is no vote of confidence in Her Majesty's Government within fourteen days of the first vote. This was a major constitutional change.

The Westminster constitution makes it possible for the people to participate in reasonable self-government by way of electoral and parliamentary institutions. The constitution makes radical political and legal change possible, but the law-making freedom of each successive Parliament introduces a kind of self-tempering equilibrium. While Parliament has legally unlimited law-making capacity, it has at times undertaken to forbear to act in order to facilitate self-government within the British Empire and, more recently, devolution within the U.K.

The U.K.'s membership in the EU did not change the fundamentals of the U.K. constitution. However, membership was hard to square with the constitution's animating logic and spirit. The U.K. entered into the EU (as it came to be known) by way of the government's decision, with parliamentary support, to commit the U.K. to the EU treaties, with Parliament making provision by statute for those treaties to have domestic legal effect. As a matter of domestic law, Parliament remained free to legislate,[4] but in

Sovereignty", held at Notre Dame Law School's London campus on Feb. 21, 2020, for helpful comments on an earlier draft of this article; the usual disclaimer applies.

[1] Richard Ekins, *Restoring Parliamentary Democracy*, 39 CARDOZO L. REV. 997 (2018).

[2] Standing Orders of the House of Commons, (2018) §14, https://publications.parliament.uk/pa/cm201719/cmstords/1020/body.html.

[3] Fixed-term Parliaments Act 2011, c. 14 (UK).

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

practice this freedom was heavily curtailed, with EU treaties forming, in effect, a supra-national constitution, making provision for judicial review of domestic law. Predictably, European integration compounded political alienation and encouraged political opposition within the U.K. and European law more generally.

The question of whether to enter the European Economic Community (EEC), as it then was, in 1972 was a matter of party-political controversy. In 1975, in view of divisions within the Labour Party about the merits of European integration, a referendum was held, which by a large majority of votes assented to continuing membership. In the years that followed, the reach of European law and EU institutions continued to expand, with successive governments committing the U.K. to new treaties (sometimes with opt-outs to avoid full integration, including to the EU's two flagship projects, the single currency and the Schengen Area of substantially free movement of all EU citizens). The government undertook to hold a referendum on the proposed new European Constitution, but did not hold a referendum in relation to the Lisbon Treaty, which largely replicated the Constitution after it failed to win approval in referendums in several states including France.[5] In 2011, Parliament legislated to forbid ratification of any new EU treaties expanding the powers of EU institutions, without support in a national referendum.[6]

Setting the European question aside, the U.K. constitution makes provision for strong, effective government, and for robust self-government by way of parliamentary democracy. A government that enjoys the confidence of the House of Commons is able to act boldly, but continuing dependence on parliamentary opinion and electoral accountability is a powerful restraint. Many scholars take a different view, arguing that the Westminster constitution encourages, or is predicated on, unjustified executive dominance and/or risks majoritarian tyranny. Others argue (or argue also) that the U.K.'s constitutional arrangements are ad hoc, and that the much-vaunted flexibility of the political constitution is simply an absence of principle. These perspectives framed much of the response to the 2016 referendum; I consider each in turn.

The fear that the constitution fails to adequately restrain the executive is not new. English (and thence British) government begins with royal power, exercised over time by and through parliaments. The struggle between King and Parliament in the seventeenth century helped shape the modern constitution, with the Glorious Revolution in 1688–689 authoritatively ending any royal capacity to rule without the support of Parliament. The efficient secret of the constitution, Bagehot wrote in the mid-nineteenth century,[7] was the near complete fusion of executive and legislative power in the office of the cabinet. This was an overstatement, but the coordination of executive and legislative power is a defining feature of parliamentary government, about which many U.K. lawyers have been sceptical, often contrasting it, enviously, with the American separation of powers.

In the twentieth century, the fear was of electoral despotism,[8] with the rise of mass political parties encouraging the worry that party discipline

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[5] THE RISE AND FALL OF THE EUROPEAN CONSTITUTION (NW Barber et al. eds., Hart Publishing 2019).
[6] European Union Act 2011 c.12.
[7] WALTER BAGEHOT, THE ENGLISH CONSTITUTION (Chapman & Hall 1867).
[8] LORD HEWART, THE NEW DESPOTISM (Ernest Benn Ltd. 1929); *see also* Editorial, *The Guardian view on the reshuffle: Johnson's cabinet of courtiers*, THE GUARDIAN, (Feb. 13, 2020),

enabled party leadership to do as it pleased. In the same vein, some lawyers and judges still often take for granted that a government with a stable majority is largely free to do as it pleases and that the legislative process makes little difference in practice to legislation that ministers propose. While overly strict party discipline might distort parliamentary deliberation, this analysis is again overstated: a government has to *work* to maintain a stable majority and governments are well aware of the political limits within which they operate. Likewise, study of the legislative process in the U.K. confirms that legislation introduced by the government is routinely amended and anticipation of parliamentary resistance, or popular disquiet, weighs heavily in setting the agenda.[9] Still, the narrative that executive power is rising, and that Parliament is supine and ineffective, has significant traction.[10] Ironically, the context in which this narrative might have most force is in relation to EU membership, which does tend to empower executives in relation to national parliaments precisely because the EU is a treaty-based organisation.

The fear that the constitution risks majoritarian tyranny is not hard to understand. Parliamentary sovereignty enables radical law-making action. There are no legal restraints on Parliament and thus on the people acting by way of their elected representatives. True, there are two Houses of Parliament, but the elected House of Commons holds the whip hand and may invoke the Parliament Acts of 1911 and 1949 to enable enactment notwithstanding the resistance of the House of Lords. Parliament recognises and honours constitutional conventions, but these are, by definition, not legally binding and may not restrain a determined parliamentary or popular majority. The U.K. is a signatory to the European Convention on Human Rights (ECHR), and the Human Rights Act 1998 gives it some domestic force, but U.K. courts very clearly have no authority to invalidate an Act of Parliament. For some lawyers and judges, this is an embarrassment and a problem. Much influenced by (some) continental European and North American approaches to constitutionalism, they reason that a good constitution would impose legal limits on Parliament and that the people are less a source of authority or legitimacy than a standing danger to minority rights and constitutional (limited) government.[11] The appeal of EU membership, on this view, is that it squares a circle, subjecting both the Parliament and the government of the U.K. to hard-edged (if nonetheless often vague) legal limits, removing in practice the capacity of the people by way of their representatives to freely to legislate.

Rather different is the perspective of those who argue that the U.K.'s constitution is characterised by a lack of clarity and a lack of principle. This is the flipside, it might be said, of the flexibility of the political constitution, in which parliamentarians are free to act pragmatically without the constraints of (justiciable) constitutional principle. Like other

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https://www.theguardian.com/commentisfree/2020/feb/13/the-guardian-view-on-the-reshuffle-johnsons-cabinet-of-courtiers.

[9] MEG RUSSELL AND DANIEL GOVER, LEGISLATION AT WESTMINSTER: PARLIAMENTARY ACTORS AND INFLUENCE IN THE MAKING OF BRITISH LAW (Oxford University Press 2017).

[10] *Cf.* Timothy Endicott's outstanding lecture, Parliament and the Prerogative: From the *Case of Proclamations* to *Miller* (Nov. 30, 2016) (Policy Exchange, London), published (in revised and updated form) as *The Stubborn Stain Theory of Executive Power: From Magna Carta to Miller*, POL'Y EXCHANGE (Sep. 7, 2017), https://policyexchange.org.uk/wp-content/uploads/2017/09/The-Stubborn-Stain-Theory-of-Executive-Power.pdf.

[11] *See, e.g.*, Lord Hope, *Is the Rule of Law now the Sovereign Principle?*, in RICHARD RAWLINGS ET. AL., SOVEREIGNTY AND THE LAW 89 (Oxford University Press 2013).

commentators,[12] I take the view that the U.K. constitution has proved remarkably capable of organic development without major rupture, with the U.K. adapting peacefully and pragmatically to the gain and loss of empire, industrialisation, mass democracy, devolution, and, perhaps European integration. For some, the worry is that this approach stores up troubles of its own or has reached its limits, including in relation to Europe and devolution, where the asymmetries of the territorial constitution risk political tension.[13] European membership interacted in important ways with devolution insofar as the U.K. was able to rely on European law to help delimit the authority of the devolved institutions. If the U.K. before 1973 had an "uncontrolled constitution,"[14] centring on parliamentary government and making possible pragmatic political change, European integration provided a kind of external constitution, unified by the idea of ever closer union and serving to address supposed problems in the U.K.'s arrangements.[15]

These different perspectives on the constitution before 2016 help explain why the electorate's decision to withdraw from the EU was received by some as an unravelling of vital restraints, returning to the fore long-standing problems of executive dominance and parliamentary absolutism, and by others as further evidence of the U.K.'s pragmatic, but unprincipled approach to constitutional change. For my part, I saw the decision to withdraw from the EU as a constitutional restoration, rejecting integration in a political order that frustrated self-government.[16] In making this decision, the British people rejected the ratchet of European integration, in which changes only move in one direction and in which withdrawing from an ever-closer union is not an option. This difference in perspective was to inform reaction, not only to the referendum outcome itself, but to the subsequent contest about how, and in the end, whether it should be implemented.

## II. THE REFERENDUM AND ITS CONSTITUTIONAL SIGNIFICANCE

For many members of the legal and political elite, the referendum result was confirmation that the people had either been misled into making a very bad decision or had simply made a very bad decision, motivated by selfishness, ignorance, racism, or nostalgia for empire. Either way, the result showed that the people had wrongly been permitted directly to make a decision that should not have been put to them, in which the risk of making the wrong decision was too high. Unsurprisingly, but still strikingly, many of those who abhorred the referendum result went on to argue that the referendum was illegitimate and should not be implemented.

This argument took several forms. One form was to maintain that the use of a referendum to settle the question of whether the U.K. should leave the EU was inconsistent with parliamentary democracy. That is, the

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[12] Lord Sumption, *Law and the Decline of Politics*, BBC REITH LECTURES (May 25, 2019), https://www.bbc.co.uk/programmes/m00057m8.

[13] Aileen McHarg, *Navigating without maps: Constitutional silence and the management of the Brexit crisis*, 16 INT'L J. OF CONST. L. 952 (2018).

[14] An "uncontrolled constitution" is a term of art intended to convey that the legislature has authority to change the constitution by ordinary legislative action rather than by way of some special procedure. *McCawley v. The King* [1920] A.C. 691. *See also* Ekins, *supra* note 4.

[15] Vernon Bogdanor, *Brexit and our Unprotected Constitution*, THE CONST. SOC'Y (Feb. 21, 2018), https://consoc.org.uk/wp-content/uploads/2018/02/Brexit-and-our-unprotected-constitution-web.pdf.

[16] Ekins, *supra* note 1.

referendum was a technique foreign to the U.K. constitution and it had been wrong to invite the people directly to answer this question.[17] Further, that the question had been put to the people in the first place confirmed the extent to which the Westminster constitution failed to limit executive power, with responsibility for calling the referendum attributed to the whim of Prime Minister Cameron. This line of argument was not persuasive. Cameron's support for calling a referendum had of course been very important, not because as Prime Minister it lay within his gift, but because some years earlier he had chosen to lead the Conservative Party in campaigning on a manifesto commitment to hold a referendum on the European question. He could perhaps have decided otherwise, but he chose to do so in a context of party-political competition, in which the U.K. Independence Party, an insurgent Euro-sceptic party, was clearly eroding support for the Conservative Party and in which offering a referendum was a policy on which to differentiate oneself from the Labour Party. Both the other major political parties had campaigned to offer referendums on European questions in the recent past and legislation enacted in 2011 made referendums a partial lock on further European integration. The party-political pressure to which the Conservative Party leadership responded, including the imperative of crafting a policy which Eurosceptic and Europhile wings of the party alike could both support, resulted in the decision to campaign for a referendum.

The Prime Minister was able to propose a referendum in government only because he had secured a parliamentary majority in the 2015 election. And when legislation was introduced to enable the referendum, it was striking that it passed by overwhelming majorities in both Houses of Parliament: very few in public life felt able to oppose putting the question to the people. The case for so doing was obvious. Whether to continue with EU membership was a question that went to constitutional identity and which cut across political lines, save that there was a widespread and accurate view that many more of the general public were keen on withdrawal than were their elected representatives. In fairness then, an obvious way to determine whether the U.K. should continue to consent to remain in the EU was to hold a referendum. Pace the feverish arguments in 2016, the constitutional referendum was an established technique of parliamentary democracy, which had been used in the U.K. across recent decades and even more often in the Commonwealth. There are very good reasons to avoid regular recourse to referendums, especially in the context of "ordinary" law-making, but these reasons subside in the constitutional context.

Still, the thought lingered that it was Prime Ministerial fiat, which had unleashed a populist insurrection, somehow substituting popular sovereignty for parliamentary sovereignty. And it was on parliamentary sovereignty that opponents of Brexit immediately relied, asserting that the referendum could only be "advisory" and that it was for Parliament to decide what, if anything, to do next. The case for Parliament to do nothing—that is, to reject the referendum result—was that parliamentarians had a duty to use their judgement and to act for the common good. That is, they would betray their constituents if they simply executed their will.[18] The referendum was clearly not legally binding, I say, but it scarcely follows that it was merely advisory. Introducing the Referendum Bill to Parliament, the government made clear

[17] Lord Sumption, *supra* note 12.
[18] Edmund Burke, *Speech to the Electors of Bristol* (Nov. 3, 1774) (available at https://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html).

that the point was to put the decision about whether to leave or remain in the hands of the British people and *not* in the hands of Parliament or the government. The government (campaigning for Remain) wrote to every household in the country during the campaign to confirm that the vote would be authoritative. Its force was political, as might be expected in a country with a political constitution. In invoking parliamentary sovereignty, opponents of the referendum attempted to deny this political force, asserting that parliamentarians should decide for themselves whether the U.K. should remain. They misunderstood parliamentary sovereignty—not for the first or last time—wrongly confusing Parliament's legally unlimited law-making authority with the political morality of representative democracy.[19]

In bolstering the argument for Parliament to defy the referendum, some argued that it had been unfairly framed and carried out. That is, they challenged the justice of the franchise, of who was entitled to vote and how their votes had been counted.[20] The 2015 legislation adopted the same franchise as a general election, which meant that EU nationals (other than the Irish and Maltese) and those aged under 18 years old were unable to vote. Across the U.K., a majority of voters living in England and Wales had voted to leave, whereas the opposite was true in Northern Ireland and Scotland. Finally, the referendum did not require a minimum turnout or a super-majority in favour of leaving.

This franchise was unfair, the argument ran, because the referendum affected EU nationals and those under 18 years old, because the integrity of the U.K. should have required majorities in each part of the U.K., and because a major constitutional change should not turn on majority vote alone. This was a very weak argument.[21] Adopting the general election franchise was the only salient, fair option. No nation-state should let the decision on whether to exercise its treaty right to withdraw from a treaty-based organisation, including a partial state like the EU, turn on the choices of non-citizens who have an interest in the U.K.'s continuing membership of that organisation. The argument that it was unfair to exclude under 18-year-olds (particularly 16 to 18-year-olds) from the vote simply begged the question that voting to leave the EU prejudiced their interests. For those who voted to leave, the calculus was that leaving the EU *was* good for the country, the young included. The referendum was a U.K.-wide decision in which each voter's vote was counted equally and any suggestion that the votes of the elderly, or the English, should count for less was risible. Likewise, the turnout had been comparable to or higher than recent general elections and no super-majority requirement had been imposed or perhaps could fairly have been imposed.

The idea that the referendum had been intended only to be advisory was hopeless. The more measured argument was not that the referendum was not a popular decision to leave the EU, but that the decision was incomplete, precisely because it did not settle the mode of exit. Therefore, the argument ran, one could not rely on the referendum to support any particular form of withdrawal from the EU, and it would be reasonable to put the question of exit to the people again, once a form of exit had been clarified, which is to say negotiated. Some on the Leave side had floated the idea, in advance of

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[19] Ekins, *supra* note 4.

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

[21] Richard Ekins, *The Legitimacy of the Brexit Referendum*, UK CONST. L. ASS'N (June 29, 2016),https://ukconstitutionallaw.org/2016/06/29/richard-ekins-the-legitimacy-of-the-brexit-referendum/.

the referendum, that one might have two referendums, one on the principle of leaving and a second on the detail. But this had not been taken up and the whole premise, on both sides, of the campaign was that it settled the question of whether the U.K. would leave the EU. Holding a second referendum would have broken faith with the electorate.

It is true that the referendum did not specify the future relationship between the U.K. and the EU after exit—the various ideas floated by those who led the campaign to leave were not the commitments of a party of government and quite what lay ahead remained uncertain. So, the argument that the referendum settled less than some claimed had some merit. But the argument that it settled very little was a gross overstatement. Rather, it was a decision of the people, per a referendum held by way of Act of Parliament, that the U.K. should leave the EU. How best to leave was for others to decide, but of course there was an obvious political imperative to do so in a way that addressed widespread popular concerns about membership of the EU. It did not follow, as some maintained, that the reasoning of the 52% had been made inviolate, such that the 48% were excluded from involvement in further public deliberation. On the contrary, the imperative for parliamentarians was obviously to implement the decision to leave in whatever way would best secure the common good and maximise popular consent for the decision, including across the country at large. In reasoning to this end, the question arose how important it was for the U.K.'s withdrawal from the EU to involve ending free movement, severing the continuing jurisdiction of the Court of Justice of the European Union (CJEU) and subjection to EU law more generally, and ending payments. Each of these points had loomed very large in the campaign.

David Cameron was succeeded by Theresa May. She had campaigned, very half-heartedly,[22] for Remain but took up office on the premise (and promise) that the government she would lead would be wholly committed to honouring the referendum result. The frequency and tone of attempts to delegitimate the referendum, including on the part of some parliamentarians (although most were more measured, or at least stunned and relatively silent), made it rational for the government to defend the legitimacy of the referendum and to pledge firmly to implement the will of the people. This was rational *and* honourable, even if it was certainly true that much had yet to be decided. The ferocity of the post-referendum discussion, in which the legitimacy of the referendum was expressly called into question, distorted public deliberation. Instead of the question being how should the U.K. leave, the question continued to be should it leave at all. Relatedly, for many commentators, including, in particular, many lawyers and (former) civil servants, in view of the extent of European integration, there was no good way in which to leave, such that the U.K. should not leave at all or the people should be invited to vote again when the difficulty of leaving became clear to them. In sharp contrast, for many who voted to leave, the difficulty of withdrawing from the EU confirmed the need to withdraw and the argument that withdrawal was unfeasible sounded awfully similar to the argument, during the referendum campaign, that withdrawal would be too costly. Remain never articulated a slogan with anything like the force of "take back

[22] She gave only one speech during the campaign, which was memorable mostly for its argument that while EU membership might be justified, barely and on balance, the UK should instead withdraw from the European Convention on Human Rights. *See* Theresa May, The United Kingdom, the European Union and our place in the world (Apr. 25, 2016) (Institute of Mechanical Engineers, London), https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world.

control," but its tacit slogan had been "resistance is futile." Its echo was to be heard years after the referendum.

In the months and years that followed the June 2016 referendum, questions continued to be asked about how far Parliament *should* take itself to be bound by the result. The unsound assertion that calling the referendum had been improper, and that it had been unfairly framed and fought, informed the views of many well-placed persons in the subsequent crisis. This concern bled into objections to the merits of withdrawal, which continued often to be depicted as an ill-informed, morally dubious decision. For Dominic Grieve MP QC, former Attorney General and central player in the long crisis, the decision to leave the EU was a revolution, but a revolution initiated without a revolutionary government.[23] His understanding of the constitutional significance of the U.K. leaving the EU was rather overstated, and certainly it ran hand in hand with a confidence that leaving the EU was a dreadful idea, but what is striking is his assumption, which became clearer as time passed, that implementing the referendum required and involved departing from the norms of constitutional government. This assumption framed how resistance to withdrawal was later understood (viz., to resist the government's attempts to honour the referendum was to prevent implementation of a foolish decision and to vindicate the historic constitution).

Vernon Bogdanor has argued that the significance of the referendum was to substitute the principle of popular sovereignty for parliamentary sovereignty, reasoning that parliamentarians were for the first time being forced by the people to carry out a policy with which they disagreed.[24] This analysis overlooks the long-standing significance of popular pressure on Parliament, with the doctrine of parliamentary sovereignty not entailing that parliamentarians are free to ignore the public. However, it is true that difficulties arise when political institutions invite the electorate to make a decision without being willing to carry out that decision once made, especially when many further decisions are required in consequence. The risk, which did partly manifest itself over time, was that no one in high office would be willing to take responsibility for the decision to leave the EU, instead blaming the people for the decision. In the wake of the referendum, the (new) government did take responsibility, but this commitment waned over time, as did the willingness of a stable parliamentary majority to take responsibility and to act responsibly.

## III. TRIGGERING ARTICLE 50

The referendum result clearly did not itself remove the U.K. from the EU. The 2015 Act made provision for the referendum but did not attach to the outcome of the referendum any particular legal consequences (viz., it did not change any person's legal powers or duties). For the U.K. to leave the EU, some further action would be required. Whereas it was doubtless always possible for the U.K., as a sovereign state, to withdraw from the EU treaties and thus cease to be an EU member state, Article 50 of the Lisbon Treaty had since 2009 provided a procedure for withdrawal. Article 50 is brief and was not expected ever to be invoked. It provides in relevant part:

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[23] Dominic Grieve, Revolution Without End?: A Politician's View of Brexit, (June 28, 2018) (unpublished lecture) (presented at The 20th Burrell Competition Lecture and Reception).
[24] Vernon Bogdanor, *Europe and the Sovereignty of the People*, 87 POL. Q. 348 (2016).

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.[25]

During the referendum campaign, the Prime Minister had said that if the country voted to leave, he would trigger Article 50 on June 24 by writing to notify the European Council that the U.K. had decided to withdraw from the EU. Was this a solemn promise to the electorate or a threat that a vote to leave would immediately plunge the U.K. into political chaos? I am not entirely sure. The point was certainly to emphasise that the vote was final. Perhaps triggering Article 50 on June 24 would have been irresponsible, especially taken in combination with his June 24 resignation and the (unconscionable) failure of the government to have prepared to leave, for it would have left the U.K. without an effective government ready to engage in negotiations under Article 50(2). On this view, the Prime Minister was right to leave to a new government the decision when exactly to trigger Article 50, a decision ideally made once it had clarified its negotiating aims and so forth. Alternatively, triggering Article 50 immediately may have minimised much of the political difficulty that followed, including difficulty in the conduct of the negotiations themselves.

In late June 2016, I published a defence of the legitimacy of the referendum, taking issue with some of the early, and extraordinary, attacks on the referendum and on the electorate.[26] My initial draft asserted that it would have been constitutionally legitimate, whether prudent or not, for the Prime Minister on June 24 to have notified the European Council that the U.K. had decided to leave the EU, precisely because the referendum vote was a mandate so to do. There was no need, in other words, to await a further debate in Parliament about whether or when to leave. I excised this assertion from the final published article on the grounds that it may have been more contestable than I at first anticipated, and thus a distraction from my main

[25] The Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306); the Lisbon Treaty came into force on Dec. 1, 2009.
[26] Ekins, *supra* note 21.

line of argument (which was controversial enough), and because the publication of an article by three colleagues gave me pause.

The article argued that it was not lawful for the Prime Minister to trigger Article 50 unless and until Parliament enacted legislation authorising this course of action.[27] That is, the government could not rely on the prerogative to conduct foreign policy to justify triggering Article 50, notwithstanding that Article 50 was a U.K. treaty right (viz., a right to begin a process to withdraw from other treaty commitments). The authors reasoned that the European Communities Act 1972—the long title of which they misquoted and therefore wholly misunderstood—had required the U.K. to be a member of the EU, that triggering Article 50 would end the application of EU law in the U.K. and thus change domestic law, and that there was no prerogative power to change domestic law by fiat.

This article was very widely read and its argument taken up by Lord Pannick QC in The Times. Litigation was initiated seeking an order that Article 50 could not be triggered without legislation. This litigation was extremely important to those who hoped to discredit the referendum and to persuade Parliament either to ignore it or, more plausibly, to require a second referendum before the U.K. were to leave the EU. The government had made clear that it intended to trigger Article 50 and that it understood itself to have lawful power so to do, without the need for fresh legislation. Litigation was necessary if the government was to be forced, or at least forced by those outside Parliament and especially the House of Commons, to put the question of whether to leave to Parliament. Requiring parliamentary approval by way of legislation had two apparent advantages: first, it made it possible for a parliamentary majority, including even a majority in the unelected upper house, to block withdrawal, and second, at a minimum it introduced considerable delay. The importance of delay is that it was widely believed, by an articulate minority, that simply the prospect of leaving the EU would cause the economy to founder and the British people to come to their senses. In other words, delay was a means to frustrate withdrawal.

Why did the government maintain that it had lawful authority to trigger Article 50 *without* needing to seek fresh legislation? Perhaps because the government is—and government lawyers are—predisposed to maintain the scope of the prerogative and to look askance at arguments that it has been swept away. Perhaps also because the prerogative clearly did extend to triggering Article 50, with the arguments raised in the article in question, and taken up in the litigation, appearing barely arguable and strained. There had been no suggestion *before* June 24 that the government lacked legal power to trigger Article 50, despite the Prime Minister's public declaration that he would do exactly this immediately after a vote to leave. But more than this, the likely reason is that the government, under the leadership of the new Prime Minister Theresa May, had committed itself forcefully to honouring the referendum, to leaving the EU, and was not willing to run the risk of a cross-party coalition in Parliament rejecting this. It must have seemed to the government—it did to me at the time—a real risk that a parliamentary majority would be mobilised to reject the referendum's outcome. The government would reasonably have wanted to avoid this outcome, not only because this would make its position untenable but also

[27] Nick Barber et al., *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, UK 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/.

because Parliament would be acting wrongly in so doing and trust in democracy would have been put in doubt.

Still, there was a good constitutional case to be made for the government to seek express approval from the Houses of Parliament, or at least the Commons, to the course of action it intended to undertake. Putting the point at a minimum, Article 50 not having been triggered immediately after the referendum vote, it was reasonable for the government to make clear that it intended in the future to trigger Article 50 and to provide an opportunity for the Commons to withdraw its confidence in the government accordingly. This was and is the constitutionally proper route for Parliament to maintain control over the government's use of the prerogative (viz., only sustaining in office a government in which it continues to have confidence). The Constitution Committee of the House of Lords declined to comment on the pending *Miller* litigation, as it came to be known, but recommended that the government consider seeking express support of both Houses of Parliament, either by resolutions in each House or by way of a short Act of Parliament.[28] The Committee reasoned, plausibly, that this would help to reinforce the legitimacy of the decision to trigger Article 50 and might even strengthen the U.K.'s position in relation to the EU, on the premise that domestic uncertainty and division would weaken that position. This was a reasonable analysis and indeed in due course, on the third day of the Supreme Court hearing in December 2016, the government did move a resolution in the Commons, which was approved by overwhelming majority, supporting its intention to trigger Article 50 by March 31, 2017, at latest.

By this point in time, the Divisional Court had already ruled that the prerogative did not extend to triggering Article 50.[29] The Divisional Court's judgment was a source of immense public controversy, as well as endless academic commentary and debate. Many scholars and lawyers took issue with the Court's reasoning and the division was not reducible to the question of pro- or anti-Brexit sentiment. Still, it was clear that most lawyers, or at a minimum most high-profile and publicly (politically) active lawyers, opposed withdrawal from the EU and supported the litigation. This was made very clear in the letter from more than a thousand barristers, made public on 11 July 2016, which asserted that the government had no lawful power to trigger Article 50 and called for a royal commission to investigate mistruths and to determine how best to respond to the "advisory" referendum.[30] The letter was political action, not legal analysis. It was special pleading and a misuse of professional authority. It helped inflame the fears of millions of voters, and many in government and Parliament, that a concerted effort was underway to frustrate the outcome of the vote. (So too, in a smaller way, did various absurd proposals to invite courts (a) to forbid the Prime Minister from taking the referendum to be morally binding; (b) to declare implementation of the referendum irrational and thence unlawful; or (c) to quash the referendum, and the 2015 Act itself, as motivated by an improper political purpose.)[31]

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[28] HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION, THE INVOKING OF ARTICLE 50, HL Paper 44 (2016).

[29] *R (Miller and Dos Santos) v Sec'y of State for Exiting the European Union* [2016] EWHC (Admin) 2768.

[30] Richard Ekins & Graham Gee, *Miller, Constitutional Realism, and the Politics of Brexit*, in THE UK CONSTITUTION AFTER: BREXIT AND BEYOND 249 (2018).

[31] For criticism, *see* Richard Ekins, *Brexit and Judicial Power*, POL'Y EXCHANGE (Jul. 21, 2016),https://policyexchange.org.uk/wp-content/uploads/2016/09/r-ekins-brexit-and-judicial-power-21-july-2016.pdf.

The Divisional Court's November 2016 judgment clearly did not itself prevent (block) withdrawal from the EU. The litigation was never capable of realising this end, even if this is also clearly why the litigation attracted such enormous interest and support and why it moved markets. Still, it is no surprise that it generated high feelings and much overheated political criticism. The low-point was the infamous *Daily Mail* headline "Enemies of the People." The headline was much criticised, although the Lord Chancellor, Liz Truss, was slow to criticise it and was herself heavily criticised in turn. The *Daily Mail*'s criticism was unfair. The Divisional Court made a mistake; it had not joined a conspiracy. The main significance of the *Daily Mail*'s criticism was to encourage a siege mentality on the part of many lawyers and judges. It is impossible to know if this made it more likely that a majority of Supreme Court judges would uphold the Divisional Court's judgment, bravely defying the mob or at least defending their embattled colleagues. It certainly reinforced the narrative that withdrawal from the EU either was, or had unleashed, a kind of populist revolution which would devour the institutions that Leavers (and Conservatives?) otherwise claimed to respect. This was to be a major part of the (self-serving) constitutional narrative that followed.

The *Miller* litigation was arguable, but only barely. One of my colleagues, an eminent public law scholar (who did not vote for withdrawal from the EU), reasoned that it was so weak that it should have been denied permission to proceed to a full hearing. I think the claim was strong enough to warrant a hearing, but that it should then have been roundly rejected. The reason it succeeded, unanimously in the Divisional Court and by a majority of eight to three in the Supreme Court, was not because the judges voted their politics (I expect it would have been unanimous in the Supreme Court if that had been the case), but because too many of them accepted a mistaken narrative. The litigation was framed, cannily, as a defence of parliamentary sovereignty against an over-mighty executive, resonant with the long parliamentary struggle against royal power. Hence, the prerogative power to conduct foreign policy, a central executive power in any constitution, was discussed as an ancient, royal prerogative, complete with invocation of clanking chains. Theresa May was routinely compared with Charles I or Henry VIII, and the political and constitutional significance of the referendum and the confidence of the House of Commons was ignored.

The decision of the House of Commons in December expressly to support triggering Article 50 took much of the political tension out of the Supreme Court litigation. It perhaps emboldened members of the Court to think that their ruling would not be pivotal if, as seemed likely by this stage, the government would be able to secure legislation and Article 50 would be duly triggered. Tempers had cooled somewhat by late January 2017, certainly in comparison with early November 2016, and the Supreme Court's judgment attracted much less public ire.[32] On the merits, the majority wrongly conflated its perception of good constitutional practice with requirements of constitutional law, despite only having authority to uphold the latter.[33] The central premise of the majority judgment, aside from its bad misreading of the way in which EU law comes to force in domestic U.K. law, was the assertion that constitutionally important decisions require an Act of Parliament. This was not and never had been the law. Neither was

[32] *R (Miller and Dos Santos) v Sec'y of State for Exiting the European Union* [2017] UKSC 5.
[33] Richard Ekins, *Constitutional Practice and Principle in the Article 50 Litigation*, 133 L. Q. REV. 347 (2017).

it a requirement of convention. The minority argued forcefully that it was not for the courts to turn questions about good constitutional practice into justiciable law. The eloquence and force of the minority dissent contributed to the generally calm public reception of the judgment, for it made clear that the arguments had been aired. The *Daily Mail* ran a self-mocking headline entitled "Champions of the People," profiling the three dissenting judges, whom it had otherwise (understandably) suspected of being Europhiles.

The upshot of the Supreme Court's judgment was that a short Bill was introduced to authorise the Prime Minister to trigger Article 50. The House of Commons assented by an overwhelming majority; some in the House of Lords were minded to amend the Bill in far-reaching ways, or even to refuse passage of the Bill, but in the end cooler heads prevailed and it was enacted without amendment.[34] Strictly, the main consequence of the Supreme Court's judgment, requiring legislation be enacted before Article 50 was triggered, was that the House of Lords was empowered to frustrate withdrawal or at least to delay it for up to one year if the Parliament Acts 1911 and 1949 had to be invoked. But in reality, Parliament acted promptly and rightly to empower the government to act. The legislation was a formality. Many commentators lamented Parliament's failure to take up the opportunity *Miller* had won for them, an opportunity to stipulate by legislation the government's negotiating strategy or to impose conditions. This was always an unreal hope. Parliament lacked the capacity to manage the government's negotiating strategy in advance, even if it of course retained capacity to scrutinise the government's actions as time went by. It may well have been a mistake to trigger Article 50 in March, before the government had formed or agreed to a strategy for negotiations. However, it was a mistake forced by the political reality that the government needed to bring a halt to the question of whether the U.K. should withdraw by beginning the process that meant it would withdraw. The frenzied response to the referendum explains the decision to trigger relatively quickly.

In one sense, the dispute about the authority to trigger Article 50 was a damp squib signifying nothing. *Miller* may have been a pyrrhic victory insofar as commencing withdrawal by way of an Act of Parliament helped to cement its legitimacy, complicating the prospect of its cancellation by a later government. The judgment insisted on an empty formality, which would have been disastrous if the House of Lords had delayed matters by a year. Almost three years later, in September 2019, Helen Mountfield QC, one of the successful counsel in *Miller*, wrongly recalled the *Miller* judgment as having secured for Parliament important controls over the subsequent Brexit process, controls that were pivotal in avoiding a no-deal exit in early 2019.[35] It was not so; Mountfield confused the 2017 Act, which was as brief as can be, with the 2018 legislation, which is rather more extensive. The significance of the *Miller* judgment was not that it won for Parliament an opportunity for participation it otherwise lacked, but that it gave an outlet to frustrated political energy and marked out a strategy pursued in the subsequent years, one centring on tactical recourse to courts, injured protestations about institutions (especially courts) under attack from shameless populists, and strategic defences of the rights and "sovereignty" of Parliament against a heavy-handed executive. This narrative dampened

[34] European Union (Notification of Withdrawal) Act 2017 c. 9.
[35] BBC Radio 5 Live Interview with Richard Ekins and Helen Mountfield QC (Sep. 25, 2019); we were seated opposite one another in the BBC Oxford radio booth at the time (unpublished interview).

down across the remainder of 2017, but returned in 2018 and, with a vengeance, in 2019.

## IV. LEGISLATING ABOUT BREXIT

The main political event of 2017 was not the triggering of Article 50, which followed from the referendum and from resolution of the Commons, but the June general election. The Conservative Party lost its small majority in the Commons and the government remained in office only with the support of the Democratic Unionist Party (DUP). The government had attempted to frame the election, and had probably persuaded itself to propose it, as necessary to return a substantial parliamentary majority that would make possible the U.K.'s smooth withdrawal from the EU. The irony is twofold. First, the election's outcome made this much more difficult, returning a Parliament in which divisions about whether, after all, to withdraw from the EU would loom large. Second, many voters seem to have reasoned that this was not, after all, a Brexit election but was instead the first post-Brexit election, with voting patterns turning on other matters. Why might voters (wrongly, but understandably) have reasoned in this way? The enactment of the 2017 legislation and the triggering of Article 50 suggested that the question of whether the U.K. would withdraw from the EU had been decisively settled. And both the main political parties, who secured 85% of the vote between them (the highest figure for many general elections), campaigned on commitments to deliver withdrawal, to end free movement of persons, and so on.

Theresa May's government was badly crippled by the 2017 election result. The Opposition had been shown to be much more electorally dangerous (popular) than expected and the government's working majority, with DUP support, was thin indeed. Nonetheless, the government went on to secure enactment of the European Union (Withdrawal) Act 2018, which made legislative provision for domestic law after Brexit, largely by retaining EU law as a special kind of domestic law. The Act was hard fought in the Houses of Parliament with some parliamentarians arguing that it conferred unconstitutional powers on ministers to change the law in far-reaching ways. The criticism was overstated and failed to address the technical complexity of adjusting retained EU law, especially in view of uncertainty about what, if any, deal the U.K. would conclude with the EU.

More important than the ministerial powers to make secondary legislation in preparation for withdrawal were the procedures introduced into the Act in the event of a failure to conclude a deal with the EU. The government saw off, narrowly, an attempt, led by Dominic Grieve MP, to empower the House of Commons itself to take over negotiations if the government failed to reach a deal. However, the legislation was amended to require the government, if a deal could not be reached by a certain date or if the Commons refused to support the deal, to come forward with further proposals, which the House should have the opportunity to debate. The debate was to be framed by the government tabling a motion in neutral terms, which is an unamendable motion. This was to prove pivotal in relations between government and Parliament in early 2019. Also important was the Act's provision that a *new* Act of Parliament would be required to implement any deal between the U.K. and the EU: this made clear that the legal default was exit without a deal, which encouraged many MPs to think, reasonably enough, that this could be achieved by inaction.

Article 50 having been triggered on March 29, 2017, the U.K. was on track to leave the EU by March 29, 2019 at latest, either with a withdrawal agreement, if such could be concluded, or without one. Withdrawal was the legal default. Again, Parliament had made legal provision, in the 2018 Act, for withdrawal without a deal; if there was to be a deal, it would require further legislation.

The premise of the *Miller* litigation had been that once Article 50 was triggered, the U.K.'s exit from the EU, and the termination of rights and duties under the EU Treaties, would follow inexorably. It suited the government and the claimants to accept the premise in this litigation, but doubt remained as to whether the U.K. had the freedom in EU law unilaterally to revoke its Article 50 notice. The government's position remained that it was committed to honouring the referendum's outcome and that the U.K. would leave the EU on March 29, 2019 at latest, preferably with a deal but without a deal if need be. This position was to be challenged, and reversed, by way of unconstitutional parliamentary action.

In late 2018, the Scottish courts referred to the Court of Justice of the EU ("CJEU") the question of whether a member state may unilaterally revoke an Article 50 notice. Litigation to secure this reference had not been straightforward. The Scottish litigation was the final stop in an extended forum-shopping exercise, taking in London, Dublin, and the Netherlands.[36] Failing at first instance, the challenge for the claimants was to establish that there was a dispute which required a reference to be made to the CJEU. The Inner House of the Court of Session (effectively the Scottish court of appeal) accepted the argument that it had a constitutional responsibility to advise the Houses of Parliament about the law, including the law about unilateral revocation of the EU, precisely because this advice might prove pivotal in parliamentary deliberation and action.[37] The court at first instance had concluded that it had no jurisdiction because there was no dispute requiring determination of any question of law and the courts had no general declaratory jurisdiction, still less one to advise Parliament about matters pertaining to its deliberations. Indeed, parliamentary privilege (and Article 9 of the Bill of Rights 1689) provided a reason to dismiss any application that sought to inform or interfere with possible or contemplated parliamentary proceedings.

The government appealed to the Supreme Court, attempting to block the reference to the CJEU, but the appeal was dismissed on the grounds that the Court had no appellate jurisdiction from decisions of the Inner House in relation to interim proceedings. Formally, the reference to the CJEU was a step in the Scottish litigation, after which it would be for the Inner House to make a final ruling, which would then be subject to appeal. But of course, the whole point of the litigation was to secure the reference: once the reference had been made the litigation was effectively at an end. The Supreme Court should have recognised this reality and heard the appeal.

The CJEU ruled that unilateral revocation was lawful, provided the member state really meant it (viz., it was unequivocal and unconditional). The CJEU did not impose further conditions, thus in effect lowering the perceived cost of remaining in the EU after all. It would always have been possible to cancel the Article 50 notice by mutual agreement, but, absent the

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[36] Stephen Laws, *Judicial Intervention in Parliamentary Proceedings: The question of the unilateral revocability of the UK's Article 50 notification*, POL'Y EXCHANGE (Nov. 6, 2018), https://policyexchange.org.uk/wp-content/uploads/2018/11/Judicial-Intervention-in-Parliamentary-Proceedings.pdf.

[37] *Wightman v. Sec'y of State for Exiting the European Union* [2018] CSIH 62.

CJEU's ruling on unilateral revocation, this would in practice have empowered the EU27 to demand concessions, including surrender of the U.K.'s rebate and opt-outs from the Schengen Area and common currency. Even after the CJEU judgment, the political reality remained that the U.K. would have had difficulty cancelling its Article 50 notice without some assurances that its political position within the EU would not be compromised, but it is certainly true that the judgment, as intended, encouraged parliamentarians to contemplate revocation. In other words, the judgment helped undermine the perception that Parliament's options were either to approve a withdrawal agreement or to see the U.K. leave without an agreement. But these were still the only honourable options; Parliament should not have considered revocation a live option. In practice, it was never supported as an option in the House of Commons by anything approaching a majority.

In late 2018, the government announced that a withdrawal agreement had been negotiated. However, the agreement could not be finalised, in accordance with the 2018 Act, unless and until it was approved by a majority of the House of Commons in a so-called "meaningful vote." In addition, a further Act of Parliament would be required to give the withdrawal agreement force in U.K. domestic law before ratification was possible. The agreement was opposed not only by the Opposition but also by many Conservative MPs, some on the grounds that the agreement was inadequate and should be renegotiated, or that the U.K. should simply leave without a deal, or that the agreement should be put to the people in a referendum, with the alternative being to remain in the EU. The Opposition had no grounds on which to reject the agreement save to assert that a Labour government would (somehow, in ways unspecified) negotiate a better deal. The government failed to secure a majority in the first meaningful vote. More were to follow, with the government increasing its vote in the Commons and yet failing to reach a majority.

One major ground of parliamentary concern, which lead the DUP and many Tory MPs to oppose the deal, was the fear that the agreement's Protocol for Northern Ireland, the so-called "backstop," risked locking the U.K. into permanent subjection to EU law. Minimising this risk, and the perception of such risk, was the focus of considerable activity between the U.K. and EU in early 2019.[38] The risk was indeed reduced and the government came closer to securing a majority. However, a combination of Conservative MPs, some intent on a second referendum and revocation and others intent on a no-deal exit, voted with (most of) the Opposition to defeat the motion. For the latter (larger) group of Conservative MPs, the continuing failure to approve the withdrawal agreement meant that the March 29 deadline approached, with the legal default of no-deal exit. This would either encourage the EU to bend or would result in exit without subjection to Theresa May's unacceptable deal. For the former group of Conservative MPs, no-deal exit was considerably worse than the deal and the question they faced was how to prevent exit at all.

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[38] *See generally* Guglielmo Verdirame, et al., *How to Exit the Backstop*, POL'Y EXCHANGE (Dec. 7, 2018), https://policyexchange.org.uk/wp-content/uploads/2018/12/How-to-Exit-the-Backstop.pdf; Guglielmo Verdirame & Richard Ekins, *Strengthening the UK's Position on the Backstop*, POL'Y EXCHANGE (Jan. 29, 2019), https://policyexchange.org.uk/wp-content/uploads/2019/01/Strengthening-the-UKs-position-on-the-Backstop.pdf; Guglielmo Verdirame, et al., *A Second Look: The UK's legal position in relation to the backstop*, POL'Y EXCHANGE (Mar. 15, 2019), https://policyexchange.org.uk/wp-content/uploads/2019/03/A-Second-Look.pdf.

The withdrawal agreement was unloved, but it provided a means for orderly exit. It should have been approved, even if only reluctantly, by all those MPs (an overwhelming majority) who insisted that they intended to honour the referendum and who feared a no-deal exit. As for the minority of MPs who were enthusiasts for a no-deal exit, their refusal to support the withdrawal agreement was in one way rational and principled, and in another way reckless in the extreme. For it was obvious that a parliamentary majority opposed a no-deal exit and that a majority might take radical action to prevent it; relatedly, it was not obvious that the government's resolve to leave without a deal if need be would endure. In failing to support the agreement this minority (the ERG, and later the members of the ERG most committed to a no deal exit: the so-called Spartans) risked ending up with no Brexit at all. The post-2017 parliamentary arithmetic thus made it very difficult for the government to secure majority support for the agreement, despite the nominal willingness of most MPs not to frustrate withdrawal. Parliament's refusal to accept the agreement had a predictable radicalising effect, contributing to the constitutional crises that followed.

## V. THE HOUSE OF COMMONS TAKES CONTROL

If the choice before Parliament had been to approve the withdrawal agreement or to see the U.K. leave without a deal on March 29, 2019, which was after all the legal default, the agreement would have been approved. The government attempted to frame this as the choice before Parliament, partly by stressing that it would not apply for an extension to the Article 50 process (and that there was no guarantee the EU27 would agree to an extension). On March 22, the government *did* apply for a short extension to April 12, hoping that MPs would in the end support the withdrawal agreement rather than risk a no-deal exit. However, what followed was an unconstitutional takeover of government by a cross-party coalition of MPs aiming to avoid a no-deal exit, or it was to prevent withdrawal with a deal and instead to play for time and for a second referendum. The takeover involved backbench MPs taking control of the order paper, which is to say the agenda of the House of Commons, removing the initiative from the government.

On December 4, 2018, the first debate under the 2018 Act to approve the withdrawal agreement began, in accordance with a business motion approved by the House of Commons. The Speaker allowed Dominic Grieve MP to successfully move an amendment disapplying Standing Orders of the House so that any motion on proposals from the government if the deal was rejected would be amendable, contrary to the intention of the 2018 Act. This was surprising, not only because the amendment would normally have been disallowed as outside the scope of the motion, but also because it re-opened a question already decided in the same Session during proceedings on the Bill for the 2018 Act and because it sought to use a motion of the House of Commons effectively to amend an Act passed by both Houses. The debate on the deal was abandoned before reaching a conclusion and was resumed in January. On the resumption of the debate, the Speaker again allowed Mr. Grieve successfully to move another amendment changing the timings for the stages of the 2018 Act proceedings. This was open to all the same objections as his previous amendment and also, on the normally understood wording of the House's earlier resolution, was expressly forbidden by it. Against official advice, the Speaker refused to apply that prohibition.

What was to follow were various attempts to "take control" using the amendability of the approval motion or, as a result of the Grieve amendments, of the motion relating to the Government's proposal in response to the votes rejecting the deal. These attempts consisted in amendments proposing the disapplication of SO14 to certain business, together with the introduction of Bills which could have formed the subject-matter of that business. On March 25, the agenda was seized and was used to hold a series of indicative votes about what should be done, including seeking a customs union with the EU, holding a second referendum, revoking the Article 50 notice, and so on. The options were underspecified and there were majorities against them all. Insofar as the attempts to take control were intended to culminate in proposals for legislation to require a second referendum they faced another objection, namely that Standing Orders require the consent of the government to legislation that has financial implications—a standing order that even the current Erskine May describes as of the highest constitutional importance. The same objection could be made to legislation requiring the government to apply for an Article 50 extension. However, there were reasons to fear that the rogue Speaker would fail to uphold these procedural rules.

On March 31, anticipating introduction of the Cooper-Letwin Bill to force the government to apply for an Article 50 extension, Sir Stephen Laws and I published an article arguing that the parliamentary manoeuvres in question were endangering constitutional government.[39] That is, the various departures from parliamentary procedure, and from the 2018 Act itself, were unjustified and were being used to displace the government from its rightful place in the constitution. It was improper for a cross-party coalition of MPs to attempt to form a government without removing from office the government, and thus hiding from political and electoral accountability. Further, unless and until the Commons withdrew its confidence from the government, the government was entitled to insist on its constitutional position, to lead the agenda of the House and not to be forced to take responsibility for initiatives that the rules of the House entitled it to block. We argued further that the government was not powerless in this exchange and that the subversion of constitutional government might well provoke the government, rationally enough, to respond by proroguing Parliament or even to advise Her Majesty to withhold assent to legislation. Avoiding such conflict was a further reason for MPs to refrain from unconstitutional takeover of government.

The point of our intervention was certainly not to seek a no-deal exit. Both Sir Stephen and I had argued extensively that the apparent reasons to refuse to support the withdrawal agreement, namely the risk of the backstop being permanent by default, were misconceived.[40] I had argued separately that Parliament should not contemplate remaining in the EU. Parliamentary sovereignty was a rule about law-making competence and did not justify parliamentarians in failing to honour their promises and breaking faith with the electorate.[41] If MPs were opposed to a no-deal exit, they should support the withdrawal agreement that had been reached between the U.K. and the

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[39] Richard Ekins & Stephen Laws, *Endangering Constitutional Government*, POL'Y EXCHANGE (2019), https://policyexchange.org.uk/wp-content/uploads/2019/03/Endangering-Constitutional-Government.pdf.

[40] Verdirame, et al., *supra* note 38.

[41] Richard Ekins, *Forget specious arguments about sovereignty, Parliament is honour-bound to deliver Brexit*, THE TELEGRAPH (Jan. 16, 2019), https://www.telegraph.co.uk/politics/2019/01/16/forget-specious-arguments-sovereignty-parliament-honour-bound/.

EU. However, our argument did entail that MPs were not constitutionally entitled to block exit by taking over government. They might reasonably withdraw confidence in the government, but they might simply have left this too late in order to prevent a no-deal exit, if the government refused, notwithstanding political pressure, to apply for an Article 50 extension.

Many academics and lawyers responded to our intervention with forceful denunciation, including dark invocations of the example of Schmitt and the last days of Weimar.[42] The denunciations misunderstood our claims about royal assent, which had relied on the long-standing and pre-existing scholarly disagreements on point, and which did not constitute an argument for assent to be withheld. On the contrary, our point was that departure from constitutional norms, of the kind evident in the ongoing parliamentary manoeuvres, risked provoking others either to use the tools at their disposal or to respond in kind with unconstitutional action or both. Few academics and lawyers, or at least those active in the public realm, seemed to express any concern about those manoeuvres, and indeed they were greeted with much sympathy and enthusiasm. This asymmetry is explicable, I suggest, partly on grounds of ignorance about the history and principled foundations of our political constitution and the parliamentary government for which it provides. It was also explicable partly on the grounds of simple political bias, for many of the academics and lawyers in question were partisans for Remain. Relevant also was the force of the wider narrative about Brexit (viz., that it had brought to light pre-existing failings of the U.K. constitution or that it was bringing about the collapse of parliamentary democracy into populism or worse).

The day after Sir Stephen and my intervention, John Finnis published an article,[43] relying in part on our analysis, in which he argued that the government should head off the unfolding crisis in Parliament by proroguing Parliament for two weeks. This would bring to an end one of the longest sessions of Parliament in many years and would mean Parliament would return to session only after the EU treaties had expired. That is, the U.K. would leave the EU without a deal and the cross-party coalition would not succeed in legislating to force the government to apply for an extension. If a bill to this effect did pass both Houses, as seemed entirely possible, the government might well advise Her Majesty to withhold assent, but better that she not be put in this position. The government should spend the two weeks in question focusing on preparations for a no-deal exit, making use of their extensive secondary law-making powers. I am not entirely sure how ready the U.K. was at this point, in legal terms, to leave the EU without a deal or how far secondary law-making powers would have been open to exercise without Parliament in session to approve regulations.

This was a bold proposal and attracted considerable negative attention.[44] In one sense it went wholly with the grain of the government's own stated policy, the undoing of which (by applying for a lengthy extension) threatened to do grave damage to public trust. Likewise, parliamentary

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[42] *See* Richard Ekins, *Constitutional government, parliamentary democracy and judicial power*, POL'Y EXCHANGE (Apr. 5, 2019), https://policyexchange.org.uk/constitutional-government-parliamentary-democracy-and-judicial-power/.

[43] John Finnis, *Only one option remains with Brexit—prorogue Parliament and allow us out of the EU with no-deal*, THE TELEGRAPH (Apr. 1, 2019), https://www.telegraph.co.uk/politics/2019/04/01/one-option-remains-brexit-prorogue-parliament-allow-us-eu/.

[44] As a search of posts on the UK Constitutional Law Association Blog will readily reveal, s*ee* UK CONSTITUTIONAL LAW ASSOCIATION, https://ukconstitutionallaw.org/blog/ (last visited Dec. 31, 2021).

government does not entail that government must provide parliamentarians with maximal opportunity to violate constitutional norms and to subvert government and the public trust. The idea that Parliament ought to have been free, up until 10:59 P.M. on April 12, to call halt was simply misconceived. But Finnis's proposal was too bold to be taken up by a government at war with itself and politically and emotionally unprepared to take the U.K. out of the EU without a deal. It would have been (and was) caricatured as a coup and, in view of the possible complexity and difficulty of a no-deal exit, would likely have been immensely politically controversial and tumultuous. On balance, I think that it would not have been a prudent course of action for the government to have taken, although the alternative course of action was likewise most unappealing. Proroguing to kill a bill requiring an application for an extension would have been less momentous.

The reaction to our intervention and to Finnis's proposal was memorable. The case for prorogation at this stage or even for advising royal assent to be withheld from a bill requiring the government to seek extension beyond April 12 would have been stronger still if Parliament had looked set to legislate for a second referendum or to revoke the Article 50 notice. This becomes especially evident since a bill to achieve either of those ends could only have been procured by violating fundamental procedural norms about government control of legislation with financial implications. The reaction misunderstood the fact that decisions, by Act of Parliament, about whether and on what terms the U.K. should leave the EU had been made in 2015, 2017, and 2018, such that there was no requirement for a further parliamentary decision to approve leaving the EU without a deal. This was the legal default, made so by unequivocal past choices of Parliament itself. It was no part of parliamentary sovereignty that a cross-party coalition should be able to displace the role of government within Parliament and execute its will up until the 11th hour without supporting a government that would take initiative and responsibility.

The refusal to accept the referendum result—the premise that whether the U.K. should leave remained an open question—continued to be significant. Equally significant was the sophomoric understanding of parliamentary government and democracy adopted by so many otherwise eminent persons, persons who showed no awareness that their unconstitutional actions might provoke a reaction in kind and no concern about public trust and keeping faith with the people. On the contrary, they rushed to parody such concerns as proto-fascist and unconstitutional in turn. They were in the grip of self-serving narrative that was to have (further) consequences.

The government yielded under pressure, accepting the Cooper-Letwin Bill,[45] which set a clear precedent for further parliamentary seizure of the initiative. It was a known fact that the Speaker had gone rogue and that a cross-party coalition was ready to postpone (prevent) exit. Having breached its commitment to the public, that the U.K. would leave the EU by March 29 (and then April 12, the date at which the short two-week extension came to an end), political support for the Conservative Party began to collapse. The collapse was made vivid in the European Parliament elections, which the government had promised would never happen and in which the newly created Brexit Party triumphed. The Conservative Party came neither second nor third, but fourth, with fewer than 10% of the votes. With her party facing an existential crisis, Theresa May resigned as leader.

[45] European Union (Withdrawal) Act 2019 c. 16 (UK).

## VI. THE PROROGATION CRISIS

The challenge facing whoever succeeded Theresa May as Prime Minister was how to secure the U.K.'s withdrawal from the EU in the face of hostile parliamentary arithmetic and in view of the Cooper-Letwin precedent. In the course of the Conservative Party leadership contest, Dominic Raab MP contemplated prorogation as a means to this end. Other candidates decried this proposal, and it was never entirely clear what Raab had in mind (viz., prorogation from September 3 through November 1 or something much more limited?). If Parliament was prorogued, this might prevent parliamentary efforts to force, especially by legislation, the government to apply for an Article 50 extension. But it would also prevent Parliament approving any new withdrawal agreement. That said, Parliament could always be reconvened to consider and approve a new agreement.

Fearing that prorogation might derail a rerun of Cooper-Letwin, backbench MPs set out to legislate about prorogation in the autumn. Their vehicle for so doing was the Northern Ireland (Executive Formation) Bill, which concerned progress towards restoration of devolution in Northern Ireland and which imposed a duty on the Secretary of State to make a report about progress. Taking over the Bill, a cross-party coalition made it a vehicle to change abortion and same-sex marriage law in Northern Ireland *and* to make prorogation much more difficult or much less effective. This was an unconstitutional move, putting a bipartisan measure in relation to devolution and the peace process to use to manage the government on an entirely unrelated matter. The legislation was not straightforward to craft because any measure that changed the royal prerogative, including limiting the power to prorogue Parliament, would require Queen's Consent (importantly different to royal assent), which meant in practice that the government had a procedural veto.[46] This restriction was duly evaded, partly by reliance on the rogue Speaker and partly by framing the legislation not as a limit on the power to prorogue but as making provision for recall if Parliament was prorogued, so that Parliament would be in session for much of autumn, and especially October, nominally to debate a report on Northern Ireland but in reality to prevent a no-deal exit.

More precisely, the legislation required the Secretary of State to make a report in early September and then another in early October and every fortnight thereafter. If Parliament were prorogued on the relevant date, then the government was obliged to exercise its statutory power, under the Meeting of Parliaments Act 1797, to recall Parliament within five days of what was otherwise the reporting date, with Parliament to remain in session for five more working days. The legislation did not strictly prevent prorogation, but it did make lengthy prorogation trickier. Strictly, it left open exactly the kind of two-week prorogation that John Finnis had mooted in April (viz., prorogation in mid-October until after the U.K. had left the EU at 11pm on October 31).[47] It also left open a prorogation for much of

[46] Richard Ekins & Stephen Laws, *Grieve's plan to prevent prorogation is too clever by half*, CONSERVATIVE HOME, (Jul. 8, 2019), https://www.conservativehome.com/platform/2019/07/richard-ekins-and-stephen-laws-grieves-plan-to-prevent-prorogation-is-too-clever-by-half-and-puts-the-courts-in-an-awkward-spot.html.
[47] Richard Ekins, *Prorogation After the Northern Ireland (Executive Formation etc) Act 2019*, POL'Y EXCHANGE (Aug. 29, 2019), https://policyexchange.org.uk/publication/prorogation-after-the-northern-ireland-executive-formation-etc-act-2019/.

September. This legislation was procured immediately before the new Prime Minister was appointed, and one might question whether the outgoing government was as active as it ought to have been, including by asserting its procedural rights. At the same time as the legislation was enacted, Gina Miller and John Major (former Conservative Prime Minister) threatened to bring legal proceedings against the government if Parliament were prorogued. Joanna Cherry QC MP went one step further, initiating proceedings in Scotland.

The Prime Minister disavowed prorogation as a means to secure the U.K.'s withdrawal from the EU. But in late August he advised the Queen to prorogue Parliament from the second week of September until mid-October. The prorogation was compliant with the Northern Ireland (Executive Formation etc.) Act 2019, but litigation immediately flared into action. The public rationale for the prorogation was that the current session of Parliament had been absurdly long and that it was time to start a new session, which would open with a Queen's Speech setting out an ambitious new legislative agenda. The proposed prorogation would cost only a few days of sitting time (because of the recess for party conference season), September sittings were a novelty in any case, and reconvening before mid-October was impractical. Plus, this would leave plenty of time in October for MPs to scrutinise progress towards withdrawal. There were reasons to suspect this was not the full explanation. Proroguing might help minimise the risk of Cooper-Letwin II, although this prorogation would not make that impossible and indeed might make it more likely. But prorogation would signal resolve, might provoke political opponents to misstep or overreach, and would strengthen the U.K.'s negotiating position vis-à-vis the EU. The decision provoked immense political controversy, with much talk of the prorogation being a "coup" or the death of democracy. The overheated rhetoric betrayed a fear that the gambit might work.

The decision exposed the Queen to criticism. Some argued that she should have refused the advice to prorogue Parliament. This criticism was deeply unfair; the prorogation in question did not come close to the length or circumstances in which Her Majesty might have a reserve power to refuse the advice. Others argued that the prorogation was unconstitutional because the Prime Minister did not really, or clearly, enjoy the confidence of the Commons. The criticism was misplaced, not only because the vital point is that confidence had not been withdrawn, but also because this prorogation was not intended to avoid a loss of confidence and indeed made room for a vote of no confidence to be called and lost. That is, the prorogation did not proceed until after MPs and peers had just over a week of parliamentary time. Strikingly, there was no move to withdraw confidence in the government, likely because this would not have prevented a no-deal exit, but also because there is no guarantee that the government would lose. Instead, parliamentary time was mobilised, with help from the Speaker and in departure from Standing Orders, to legislate to force the government to apply for an extension if no deal was approved by October 19. The legislation was fiercely opposed by the government, but various procedural objections, including Queen's Consent and financial responsibility, were dismissed by the Speaker. The government maintained that the legislation broke faith with the British people, would hamstring the U.K. in its negotiations, and was an unconstitutional attempt by the House of Commons to manage the conduct of foreign policy. Tory peers stood ready to filibuster the bill but were stood down, apparently on the premise that the government would abandon resistance in exchange for an early election, on October 14

or 15. If this was the exchange, which is unclear, the Opposition did not honour its part of the bargain, refusing to support a motion under the Fixed-term Parliaments Act to hold an early election.

Prorogation took place in the early hours of September 10. Courts at first instance dismissed the litigation challenging the advice to prorogue and the prorogation itself on the grounds that these were non-justiciable matters, the constitutionality of which was not for courts to judge. Whether and for how long to prorogue was a matter of high policy and the principle of parliamentary sovereignty did not permit judges to review the decision to prorogue. These orthodox judgments at first instance were reversed, first by the Inner House in Scotland (by two of the judges who ruled in *Wightman*, on referring Article 50's revocability to the CJEU) and then in the Supreme Court. The Inner House judgment moves from grand principle, otherwise non-justiciable, to particular conclusions about the veracity of the Prime Minister's dealings with the Queen.[48] It is an unimpressive judgment, made all the more so by its failure to specify whether the effect of its judgment is that prorogation never happened or that Parliament should be recalled. The Supreme Court judgment, handed down five days after a televised three-day hearing, was astonishing.[49] It is intellectually threadbare, collapsing the distinction between the scope of the prerogative and the manner of its exercise, ignoring the relevant legal and constitutional history and precedent, turning parliamentary accountability into an actionable legal principle and transmuting parliamentary sovereignty into a ground to interfere in high politics. The judgment is marred by overheated rhetoric, by its irrational dismissal of tried and true political and practical constraints on the power to prorogue, and the non sequitur of its argument that there should be some legal restraint on prorogation, its recitation of some such statutory restraints, and then its conclusion that because those restraints had not been breached the court must invent another. It also evades (flouts) the 1689 Bill of Rights' prohibition on judicial interference in parliamentary proceedings.[50]

The Supreme Court's judgment brings together in a perfect storm the series of misconceptions about the U.K. constitution in which social and political elites have indulged since the process of withdrawal began. The Court remade the law of the constitution, which forbad its intervention, in order better to guard the (political) constitution, which it misunderstood. It did so without attending to its unanimous ruling in *Miller (No 1)* that courts are neither the guardians nor parents of convention.[51] Its reasoning is transparently that of a court that is making new law, while aiming to obscure to the general public that it is so doing. The quashing of the prorogation was greeted by many enthusiasts for Remain as saving the constitution from dictatorship. Many academic lawyers and parliamentarians have taken it to be justified by fundamental principle.[52] It is not so. The Prime Minister and Attorney General were quite right to resist the charge that they had acted

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[48] *See also* Richard Ekins, *Parliamentary Sovereignty and the Politics of Prorogation*, POL'Y EXCHANGE (Sept. 16, 2019), https://policyexchange.org.uk/publication/parliamentary-sovereignty-and-the-politics-of-prorogation/.

[49] *R (Miller) v Prime Minister/Cherry v Advocate General* [2019] UKSC 41.

[50] John Finnis, *The Unconstitutionality of the Supreme Court's prorogation judgment*, POL'Y EXCHANGE (Sept. 28, 2019), https://policyexchange.org.uk/publication/parliamentary-sovereignty-and-the-politics-of-prorogation/; Martin Loughlin, *The Case of Prorogation*, POL'Y EXCHANGE (Oct. 15, 2019), https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf.

[51] *R (Miller) v. Sec'y of State for Exiting the European Union,* [2017] UKSC 5.

[52] Paul Craig, *The Supreme Court, Prorogation and Constitutional Principle*, PUB. L. 248-77 (2020).

unlawfully and to maintain that the Supreme Court had misapplied the law. The judgment gave victory in a political contest to the opponents of the government but did not enable Parliament to do anything it had not done in the days before prorogation. On its return, Parliament simply (and disgracefully) refused to hold an election, despite manifestly not having confidence in the government, and refused also to allow a recess to allow the Conservative Party conference to go ahead. The apparent rationale for this undemocratic action was that one could not waste the Supreme Court judgment. The listlessness of Parliament on return confirms the emptiness of the judgment.

The judgment follows from many of the lines noted earlier. It is the capstone to the wider judicial-constitutional panic that has characterised much of the last few years. It disabled the government from using one of its tools to govern and it wrongly lent the authority of the courts to the unconstitutional project of stage-managing the foreign policy of the government by legislation. The judgment tightened the vice on the government, making it harder either to govern or to force the issue (viz., to persuade the Commons to withdraw confidence if it had no confidence).

The judgment was not well-received by the government or the wider public, partly because the lack of dissenting voices, and the mismatch with the judgments at first instance, made it clear that the judgment was scarcely an application of settled law. It was perceived instead, rightly, as another move, and a vital one, in the continuing recourse to the courts (and continued subversion of constitutional government) that one political group was making. The obvious pleasure with which Lady Hale crushed the government was widely noted, as were her subsequent ill-judged comments. For the Court's apologists, the judgment was the Supreme Court's finest hour, a defence of parliamentary democracy against a populist government, in which the parallels with the late Weimar period are overwhelming and in which courts are the last bastions. This self-flattering narrative is absurd. In truth, the courts abandoned law and made a political intervention, not to prevent withdrawal from the EU but to give courage and comfort to the parliamentary coalition which it (wrongly) identified as standing for the constitution. This analysis was badly mistaken.

## VII. IRRESPONSIBLE GOVERNMENT AND ELECTORAL ACCOUNTABILITY

The European Union (Withdrawal) (No 2) Act 2019, also known as the Benn Act, was enacted in the days before prorogation. It was a constitutional monstrosity,[53] stage-managing the government's foreign policy. It might even have been reasonable for the government to have advised Her Majesty to refuse to assent to the Bill, although obviously that would have created a new and different crisis. Having enacted this measure, the predicted (intended) consequence of which was to delay Brexit still further, Parliament's refusal to hold an election was a disgrace. The country was clearly ungovernable, with the Commons having no confidence in government but unwilling to withdraw confidence. The refusal to allow an early election was a stratagem to force the Prime Minister to apply for an extension and thus to break his word, which, the calculation went, would

[53] Richard Ekins & Stephen Laws, *Securing Electoral Accountability*, POL'Y EXCHANGE (Sept. 9, 2019), https://policyexchange.org.uk/wp-content/uploads/2019/09/Securing-Electoral-Accountability.pdf.

damage public trust in him. Only at this point would the Opposition consider pulling the plug, and perhaps not even then; alternatively, some MPs aimed to extract a second referendum as the price for an election. (It is a sign of changing feeling within Parliament that at around this time the Liberal Democrats, under new leadership, adopted a policy of revoking Article 50 without a referendum.)

A majority in the Commons refused to vote for an early election nominally because of fear about when the Prime Ministers would schedule it (viz., that he would schedule it for *after* 31 October). But this was an illusory fear: a one-line bill would have answered the worry by specifying the date on which the election was to be held.[54] The Fixed-term Parliaments Act imposed on the whole House responsibility for dissolving Parliament if need be. But in light of the Speaker's abandonment of procedure, such that a handful of backbench MPs could frame the parliamentary agenda without responsibility, and the House's (justified) fear of the electorate, the Commons refused to exercise its responsibility and to call the election that was so obviously needed. In quashing prorogation, the Supreme Court robbed the government of its capacity to prevent unconstitutional action and to force (provoke) the Commons to withdraw confidence. The Court changed the law of the constitution, sanctifying the breakdown of constitutional government and making the bad worse.

It is not easy to stage-manage foreign policy by legislation and the government did cavil against the Benn Act's imposition. It was reasonable for the government to look for ways to minimise the damage the legislation did. Hence the government might reasonably have made clear to the EU that applying for an extension was not its policy and sent two letters to this end. Or the government might have explained the reasons why it was obliged to apply for an extension, reasons that were either incoherent or unappealing. This was perhaps never a winning strategy—the EU was always likely to agree to an extension—but it was reasonable, not least since the law does not forbid one from complying grudgingly only so far as the law strictly extends. Some argued that attempts to persuade the EU to decline the Article 50 application constituted frustration of the Act or, worse, misconduct in public office, a common law offence subject to a maximum punishment of life imprisonment.[55] Threatening government advisors with criminal proceedings for aiming to minimise the Act's damage to constitutional government was ill-advised at best. However, it is true that the Prime Minister wrongly flirted with the idea of not obeying the statute,[56] or at least strongly implied that he would somehow resist the Act's dictates, forcing MPs to remove him from office in some way or defying the courts if and when they ordered him to comply. This was never serious talk and the Lord Chancellor and others walked firmly away from it. Still, it was not a good way for the Prime Minister to engage with the law, even bad law. His excuse, which is no justification, is that the Act was designed to foist on him responsibility for the decisions of a cross-party coalition, and it was politically imperative that he make clear to the public that he had done everything possible to resist being forced to delay U.K. withdrawal.

The Benn Act was procured with the help of the votes of some twenty or so Tory MPs, including some who had been senior cabinet ministers until the change of Prime Ministers. The government warned them that, if they

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[54] *Id.*

[55] Jeff King, *The Prime Minister's Constitutional Options after the Benn Act: Part I*, UK CONST. L. ASS'N (Oct. 9, 2019).

[56] A point made clearly in Ekins & Laws, *supra* note 53 at 11.

supported efforts to remove the government's control of the agenda of the House, the party whip would be withheld. The threat was carried out. Some of these MPs subsequently returned to the fold but not all, and clearly in one sense the move complicated the government's position, by reducing its nominal majority in the Commons. The move was derided as savage, unreasonable, and shocking in its ruthlessness. On the contrary, it was decisive and rational. The government had to make clear to the public that it was intent on delivering its commitments and needed also to purge the party of those who refused to support it in so doing. In any case, those who were purged were mostly not willing to support the Labour opposition.

Upsetting all expectations, a new deal between EU and the U.K. was reached, a deal with much better odds of being approved by the House of Commons. The deal was put to the Commons for approval, just in time to satisfy the Benn Act's requirements and thereby prevent the coming into force of the duty to apply for an Article 50 extension. A majority refused to support the deal, reasoning that there remained a risk that the Prime Minister would abandon his deal and attempt to take the U.K. out of the EU without a deal. Hence, the majority, personified by Oliver Letwin MP who moved the relevant amendments, would offer only conditional approval (which was no approval at all in terms of the Act) unless and until legislation to implement the deal had been enacted. This was almost to amend the Benn Act by parliamentary motion. It added in a new obstacle to be cleared and required the Prime Minister, reluctantly but immediately, to apply for an extension. Legislation to implement the agreement was introduced, passing a second reading but with obvious signs that it would be amended out of all recognition by the House. That is, there was no firm majority support for the Bill as introduced and the government withdrew it accordingly, demanding instead that an early election be held (the EU by this time having agreed to an extension until January 31, 2020).

The Opposition refused to allow an early election until the Liberal Democrat Party and Scottish National Party, spying possible electoral advantage, broke ranks and agreed to support a bill for an early election. Amendments were moved to this one-line bill, with a view to expanding the franchise for the general election to allow 16- and 17-year-olds and EU nationals to vote. This was shockingly unconstitutional. Mercifully the Acting Speaker refused the amendment on the grounds that it was out of scope. This attempt to subvert the rules for the election passed by in haste but warrants much greater condemnation than it received at the time.

The election that was to follow was in one sense a rerun of 2017, but one in which it was clear that without a change in the parliamentary arithmetic Brexit would not be delivered. The "revoke Article 50 now" policy did not survive its encounter with voters, being met with much derision, including by many who had voted Remain but who thought that votes matter. Having equivocated for years, the Labour Party chose to campaign for a second referendum, with its parliamentary caucus overwhelming in favour of Remain, and fearing otherwise the defection of its young, metropolitan voters to the Liberal Democrats. The Conservative Party was able to campaign with unity, having purged some members from its ranks and because an apparently palatable agreement with the EU had been reached, such that there was no need to campaign for a no-deal exit. The party was able also to invite public support to "get Brexit done" and thus to defy the lawyers and others. This was a highly effective stratagem, not least because the failings of Jeremy Corbyn MP, Leader of the Opposition, had been widely exposed. The government secured a decisive

majority ready to deliver on the commitments in question. Irresponsible government thus ended, electoral accountability was restored, and the dead Parliament of 2017–2019, to quote then Attorney General Geoffrey Cox MP, put to rest.

## CONCLUSION

The dynamics of parliamentary democracy led, remarkably, to the question of whether the U.K. should remain an EU member being put on the political agenda. This was a question that needed to be asked. The electorate's answer—that the U.K. should leave the EU—was always going to be difficult to implement but was made much more difficult by the refusal of so many to accept the legitimacy of the decision. Political litigation, trading on misunderstandings about parliamentary sovereignty, prerogative, and the political constitution, was important, delaying the triggering of Article 50 and providing a more general strategy to attempt to frustrate withdrawal. While parliamentary politics in early 2017 was non-destructive, the reaction to the referendum and the framing of the *Miller* litigation sowed the seeds for later trouble. Many members of the political and legal elite seem wrongly to have persuaded themselves that they should obstruct withdrawal from the EU and that in so doing they would somehow be vindicating the constitution.

The new parliamentary arithmetic that followed from the 2017 election made it much harder to implement the referendum's outcome, but nonetheless Parliament in 2018 did enact legislation that made provision for exit, including a default of no-deal exit. Having made authoritative provision for withdrawal, Parliament refused to accept a deal that would have avoided the no-deal exit MPs said they feared. The refusal of MPs to support the government's deal resulted in delay, public distrust, and political radicalisation. It was in 2019 that constitutional crisis unfolded, with parliamentarians upending the political constitution by displacing the government. The Supreme Court's decision to quash prorogation helped to shore up unconstitutional parliamentary action. This was a serious crisis, with the FtPA enabling a majority to prevent an election, and with the Speaker (and the Supreme Court) enabling a majority to govern without responsibility.

However, the politics of the impasse proved unstable, and the government managed to frame the crisis as an unconstitutional refusal of the House of Commons to support withdrawal. Party political competition (and miscalculation) resulted in an election, which returned a decisive parliamentary majority in support of the U.K.'s orderly withdrawal from the EU. It is entirely possible that the unconstitutional actions of parliamentarians and judges in 2019 helped deliver the government's decisive majority by making the problem clear to the electorate. In this way, the crisis may have begat its own solution. That said, no responsible government or Parliament would risk a repeat of recent events, and it is imperative now that the Supreme Court be brought to order, the Fixed-term Parliaments Act be repealed,[57] and the traditional relationship between government and the Houses of Parliament be restored. These reforms

[57] When enacted, the Dissolution and Calling of Parliament Bill 2021-22, introduced as the Fixed-term Parliaments Act 2011 (Repeal) Bill, will repeal the FtPA and restore the prerogative of dissolution.

involve legislation, of course, but also require a reckoning with recent events, to speak truthfully about what went wrong and why.