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LEGISLATIVE SOVEREIGNTY, EXECUTIVE POWER, AND JUDICIAL REVIEW: COMPARATIVE INSIGHTS FROM BREXIT

*René Reyes**

INTRODUCTION

In June 2016, participants in a United Kingdom referendum voted to leave the European Union (EU) by a margin of 52% to 48%.¹ The timing and terms of Britain's exit (commonly known as "Brexit") are the subject of ongoing public and parliamentary debate. But the mechanism by which Brexit is to be formally commenced was clarified by the U.K. Supreme Court at the end of January 2017 in the landmark case *R (Miller) v. Secretary of State for Exiting the European Union*.² The question presented was whether ministers of Theresa May's government could give notice of the U.K.'s withdrawal from the EU "without prior legislation passed in both Houses of Parliament and assented to by HM The Queen."³ The secretary of state argued that the power to withdraw was part of the royal prerogative exercisable by ministers without prior parliamentary action.⁴ However, in light of the far-reaching changes to domestic law that would result from terminating EU membership treaties, the court held that withdrawal "must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation."⁵

On the one hand, the *Miller* decision may be seen as a resounding reaffirmation of the principle of parliamentary sovereignty in British constitu-

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1. *EU Referendum Results*, ELECTORAL COMMISSION, <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/electorate-and-count-information> [<https://perma.cc/EB6F-FQ6D>].

2. [2017] UKSC 5 (appeal taken from N. Ir., Eng., and Wales), <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf> [<https://perma.cc/UT7E-2E2Z>].

3. *Id.* at [2].

4. *Id.* at [5].

5. *Id.* at [121].

tional law. Notwithstanding the facts that a majority of voters supported Brexit and that government ministers ordinarily have the power to terminate treaties without legislative approval or judicial review,⁶ formal notice of withdrawal under Article 50 of the EU Treaties could not be given unless and until Parliament so agreed.⁷ Yet on the other hand, a comparative analysis of *Miller* also reveals some significant limitations on parliamentary power in the United Kingdom relative to congressional power in the United States—even though Congress is constrained by the Constitution and enjoys no sovereignty over the other branches of government.⁸ This Essay explores these limitations on parliamentary power and argues that legislative sovereignty is best understood not as an immutable principle laid down in Britain’s constitutional history, but rather as an evolving ideal that continues to develop to this day.

I. PARLIAMENTARY SOVEREIGNTY AND EXECUTIVE POWER:
SCOPE AND LIMITATIONS

For those whose understandings of legislative power are primarily informed by the U.S. congressional model, the U.K. Supreme Court’s account of parliamentary sovereignty is likely to seem strikingly robust. The court noted that Parliament is one of the “three principal organs” of the U.K. government: the legislature, the executive (consisting of ministers rather than an independently elected president), and the judiciary.⁹ At first glance, Parliament would thus appear to occupy a similar role in constitutional structure to that held by Congress. But British constitutional history since the late 1600s has evolved in such a way as to make Parliament’s role in government far more expansive than that of the other branches.¹⁰ The three branches of the U.K. government are not coequal as they are in the United States.¹¹ To the contrary: “Parliamentary sovereignty is a fundamental principle of the UK constitution.”¹²

6. *EU Referendum Results*, *supra* note 1; *see Miller*, [2017] UKSC 5 at [55].

7. *See supra* note 5 and accompanying text.

8. *See generally* U.S. CONST. art. I.

9. *Miller*, [2017] UKSC 5 at [41].

10. The court identifies the Bill of Rights of 1688, the Claim of Right Act of 1689, the Act of Settlement of 1701, and the Acts of Union of 1706 and 1707 as particularly significant legal milestones. *Id.*

11. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison’s view of the appropriate relationship among the three coequal Branches.”).

12. *Miller*, [2017] UKSC 5 at [43].

How does this sovereignty operate in practice? With respect to domestic law, Parliament's powers appear to be practically absolute. The court quoted A.V. Dicey for the proposition that Parliament may "make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation."¹³ A necessary implication is that ministers of the government (who exercise executive powers and the administrative powers of the Crown) cannot exercise their own authority in a manner incompatible with parliamentary legislation.¹⁴ Nor can ministers seek to undermine legislation through more indirect means, such as "by emptying it of content or preventing its effectual operation."¹⁵ This plainly suggests that the equivalent of presidential "signing statements," in which the executive might declare that certain provisions of a newly enacted statute are unconstitutional and need not be enforced as written, would have no place in U.K. law.¹⁶

In the specific context of Brexit, the treaties by which the U.K. joined the European Union were implemented pursuant to an act of Parliament in 1972, rather than by ministerial action alone.¹⁷ Moreover, the 1972 act made certain rights and rules from the EU directly applicable in the U.K.: "[I]ts effect is to constitute EU law an independent and overriding source of domestic law."¹⁸ Withdrawal from the European Union would effectively sever the "conduit pipe" through which EU law is imported into the U.K. and would therefore result in changes to domestic rights and responsibilities—areas of law that have traditionally been in Parliament's purview.¹⁹ Given the principle of legislative sovereignty and the fact that the executive was merely the constitutional "junior partner" in the exercise of grafting EU law into U.K. law, the court concluded that ministers could not "subsequently remove the graft without formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament."²⁰

Despite this emphatic language about the scope of parliamentary sovereignty, *Miller* indicated that there are some important areas in which the executive retains a surprising degree of power relative to the legislature. For

13. *Id.* (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 38 (8th ed. 1915)).

14. *Id.* at [45].

15. *Id.* at [51].

16. For discussion and analysis of signing statements in U.S. law, see, for example, AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006); Symposium, *The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1 (2007).

17. *Miller*, [2017] UKSC 5 at [13]–[15].

18. *Id.* at [65].

19. For discussion of the "conduit pipe" metaphor, see *id.* at [65], [80].

20. *Id.* at [90].

example, the court suggested in several places that Brexit presents an exception to “the general rule . . . that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts.”²¹ One of the main explanations for this general rule is that the U.K. follows a dualist system of foreign relations in which the treaty power is understood to involve an exercise in international rather than domestic law.²² The court goes so far as to note that the power to make treaties that do not change domestic law has long been “unfettered” in principle, even if ministers have generally presented treaties to Parliament for review as a matter of convention since the late nineteenth century.²³

A similarly significant qualification to the idea of parliamentary sovereignty may be found in the power of ministers to declare war.²⁴ The court recognized that the exercise of this prerogative may have significant consequences in domestic law, but nonetheless describes the power to declare war as one “by [its] very nature at least normally best reserved to ministers.”²⁵ Parliament itself would seem to agree. The U.K. government published a consultation document in 2007 raising the question of whether the current constitutional arrangement should be modified to give Parliament a greater role in declaring war and deploying armed forces.²⁶ However, no such modification was included in the ensuing parliamentary legislation.²⁷

These exceptions to parliamentary power are all the more notable when compared to congressional power in corresponding areas. Unlike Parliament, which may pass law on almost any subject whatsoever,²⁸ Congress

21. *Id.* at [55], [92] (“[I]t has always been considered that . . . prerogative treaty-making powers are not subject to judicial review . . .”).

22. *Id.* at [55]–[56].

23. *Id.* at [58]. This practice has become known as the “Ponsonby Convention.” For further discussion of the convention and the extent to which it has been superseded by statute, see *infra* notes 35–37 and accompanying text.

24. *Miller*, [2017] UKSC 5 at [47] (citing H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW (1st ed. 1961)).

25. *Id.* at [49], [52]–[53].

26. See LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE, THE GOVERNANCE OF BRITAIN—ANALYSIS OF CONSULTATIONS, 2008, Cm. 7342-III (Gr. Brit.), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/250907/7342_iii.pdf [<https://perma.cc/UCT3-QXW3>] (discussing the various responses to questions about Parliament’s role in the deployment of armed forces); SECRETARY OF STATE FOR JUSTICE AND LORD CHANCELLOR, THE GOVERNANCE OF BRITAIN—WAR POWERS AND TREATIES: LIMITING EXECUTIVE POWERS, 2007, Cm. 7239 (Gr. Brit.), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243164/7239.pdf [<https://perma.cc/8K6F-K8DN>] [hereinafter LIMITING EXECUTIVE POWERS].

27. See Constitutional Reform and Governance Act 2010, c. 25 (UK).

28. See *Miller*, [2017] UKSC 5 at [43].

may legislate only pursuant to constitutionally enumerated powers and within constitutionally prescribed limits.²⁹ These constitutional limits are, of course, enforceable through judicial review.³⁰ But at the same time, Congress is also constitutionally empowered to exercise greater authority than Parliament presently does in key areas of law—in particular, with respect to treaties and declarations of war. Indeed, the U.S. Constitution explicitly provides that the president’s power to make treaties is to be exercised “by and with the Advice and Consent of the Senate,” and requires that treaties be ratified by the Senate as a matter of constitutional law rather than as a matter of historical convention.³¹ The Constitution also expressly vests the power to declare war and to raise and support armies with Congress.³² To be sure, the Constitution also names the president as commander in chief of the armed forces.³³ This division of authority with respect to military matters has led to occasional conflict between the legislative and executive branches about their respective powers,³⁴ but it remains clear that Congress plays an integral constitutional role in this arena.

Importantly, many of these comparative limitations on parliamentary power relative to congressional power could be modified or abolished if Parliament so decided. Government ministers invited discussion several years ago on whether the convention of presenting treaties to Parliament for review should be strengthened, and Parliament subsequently passed the Constitutional Reform and Governance Act of 2010.³⁵ U.K. law now provides that treaties will not be ratified before Parliament has had an opportunity to scrutinize them.³⁶ As noted above, Parliament declined to act on a similar proposal to amplify its constitutional role in declaring war—but it surely would have been within its power to include such a change in the same act.³⁷

29. See, e.g., *United States v. Lopez*, 514 U.S. 549, 567 (1995) (striking down federal Gun-Free School Zones Act as beyond Congress’s power under the Commerce Clause and noting that to accept the government’s position “would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated”).

30. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

31. U.S. CONST. art. II § 2.

32. U.S. CONST. art. I § 8.

33. U.S. CONST. art. II § 2.

34. See, e.g., War Powers Resolution, 50 U.S.C. § 1541 (2012).

35. Constitutional Reform and Governance Act 2010, c. 25 (UK).

36. *Id.*

37. See *R (Miller) v. Sec’y of State for Exiting the European Union*, [2017] UKSC 5, [48] (appeal taken from N. Ir., Eng., and Wales), <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf> [<https://perma.cc/UT7E-2E2Z>] (“[C]onsistently with Parliamentary sovereignty, a prerogative power however well-established may be curtailed or abrogated by statute.”).

This does not mean that the executive's treaty and war powers are bestowed by or derived from Parliament.³⁸ Rather, they are "the residue of powers which remain vested in the Crown" after hundreds of years of British history.³⁹ Nor does it mean that Parliament's decision not to abrogate the powers of the executive is a mere formalism. Ministers have exercised the treaty and war powers for many years, and this will remain an established feature of British constitutional law unless Parliament acts to change the dynamic. But it does suggest that the scope of parliamentary power is an evolving rather than a fixed concept. *Miller* is another step in that evolution. The next Part briefly considers the role played by the U.K. Supreme Court in this evolutionary process, and some of the ways in which parliamentary sovereignty may continue to manifest itself in the near future.

II. THE ROLE OF THE JUDICIARY

While the focus of *Miller* (and this Essay) is on the powers of the legislature, the U.K. Supreme Court's opinion also yields noteworthy comparative insights about the role of the courts and judicial review. As is the case in the United States, the judiciary in the United Kingdom is a constitutionally independent branch of government.⁴⁰ Yet an independent judicial branch is not the same thing as a constitutionally coequal branch. The *Miller* court did observe that "the role of the judiciary is to uphold and further the rule of law," and that there are even "areas where the law has long been laid down and developed by judges themselves: that is the common law."⁴¹ Like statutory law, common law cannot be changed or infringed by ministers.⁴² But the judiciary's lawmaking role is limited by principles of parliamentary sovereignty: "[I]t is not open to judges to apply or develop the common law in a way which is inconsistent with the law as laid down in or under statutes, i.e. by Acts of Parliament."⁴³ Whereas it has long been "emphatically the province and duty of the judicial department to say what the law is" in the United States, the same is not necessarily true for the judicial department in the U.K.—at least not when Parliament says otherwise.⁴⁴

38. LIMITING EXECUTIVE POWERS, *supra* note 26, at 7 (noting that treaty and war powers "which are exercised by Ministers are not conferred by Parliament," and that "there is no codified Parliamentary procedure which prescribes how Parliament should have a say in how they are exercised").

39. *Miller*, [2017] UKSC 5 at [47].

40. *Id.* at [42]. See generally U.S. CONST. art. III.

41. *Miller*, [2017] UKSC 5 at [42].

42. *Id.* at [45], [50].

43. *Id.* at [45].

44. *Id.*; cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The U.K. judiciary may thus be said to be comparatively weaker than the U.S. judiciary vis-à-vis the legislature. Nevertheless, the U.K. Supreme Court does play a significant role in developing and upholding constitutional principles. *Miller* itself is an important example. Britain's departure from the EU represents "a far-reaching change to the UK constitutional arrangements,"⁴⁵ and it was ultimately left to the Supreme Court to resolve the uncertainty surrounding the respective powers of ministers and Parliament to trigger Brexit. Despite the momentous and potentially polarizing nature of the case, the court emphasized that no one seriously questioned the appropriateness of a judicial determination of the issues presented.⁴⁶ Theresa May's government accepted the court's decision and promptly presented a bill before Parliament.⁴⁷

In addition, the U.K. Supreme Court arguably enjoys more independence and flexibility than the U.S. Supreme Court in some respects. U.K. justices are not subject to legislative confirmation,⁴⁸ and so are spared the highly politicized battles that characterize U.S. Supreme Court nominations.⁴⁹ An oft-asserted argument in these political battles is that U.S. judges should interpret the Constitution according to its original meaning to provide stability in the law and to guard against judicial lawmaking.⁵⁰ But U.K. justices are free to unabashedly acknowledge that they are not bound by originalism or any other fixed theories of constitutional interpretation, and to note the role played by the judiciary in the evolution of British constitutional law. As the

45. *Miller*, [2017] UKSC 5 at [81].

46. *Id.* at [3].

47. See European Union (Notification of Withdrawal) Bill 2017, HC Bill [132] (UK).

48. For an overview of the U.K. appointment process and statutory references, see *Appointments of Justices*, SUP. CT., <https://www.supremecourt.uk/about/appointments-of-justices.html> [<https://perma.cc/Y8WV-VZ2H>].

49. The situation in the United States has become so politicized that President Obama's final nominee to the Supreme Court was never even given a hearing by the Senate, and President Trump's nominee was confirmed only after the Senate invoked the so-called "nuclear option" that ended the filibuster for Supreme Court appointments. See Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/B7Nj-FFjB>].

50. For discussion of originalism and recently-confirmed Justice Neil Gorsuch, see, for example, Aaron Blake, *Neil Gorsuch, Antonin Scalia and Originalism, Explained*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/?utm_term=.29373bfa1bcc [<https://perma.cc/6MBH-4YCA>]; Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html> [<https://perma.cc/R4C2-KW9B>]; Ed Pilkington, *Originalism: Neil Gorsuch's Constitutional Philosophy Explained*, GUARDIAN (Feb. 2, 2017, 6:00 AM), <https://www.theguardian.com/law/2017/feb/02/originalism-constitution-supreme-court-neil-gorsuch> [<https://perma.cc/Y6MQ-592H>].

majority stated in *Miller*, “Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions.”⁵¹ This pragmatism allows even fundamental principles like parliamentary sovereignty to adapt and develop in light of changing circumstances in a more candid and transparent manner than might be the case under more rigid jurisprudential approaches.

CONCLUSION

Where might parliamentary sovereignty go from here? *Miller* and the larger Brexit debate suggest a few possibilities. The court noted that the form of legislation authorizing ministers to give formal notice of Britain’s departure “is entirely a matter for Parliament,” and that such legislation “could no doubt be very short indeed.”⁵² The government responded by bringing forth a bill consisting of a mere two clauses and less than 150 words.⁵³ This bill would largely leave the details of Brexit negotiations to ministers, which accords with the traditional U.K. constitutional practice of leaving the power to withdraw from treaties with the government. Although the proposed bill passed through the House of Commons in its original form, it was amended in the House of Lords to require parliamentary approval of the terms of Britain’s departure.⁵⁴ The House of Commons overrode these amendments and the Lords relented,⁵⁵ but some peers have continued to press for greater parliamentary involvement in the Brexit process.⁵⁶ Other voices have warned of potential further legal action to guarantee an opportunity for a final vote in Parliament on the details of Britain’s future relationship with the EU.⁵⁷

51. *Miller*, [2017] UKSC 5 at [40].

52. *Id.* at [122].

53. See European Union (Notification of Withdrawal) Bill 2017, HC Bill [132] (UK).

54. See Lords Amendments to the European Union (Notification of Withdrawal) Bill 2017, HL Bill [152] cl. 2 (UK). The amendments would also require ministers to produce plans to protect the rights of EU nationals currently living legally in the U.K. *Id.* at cl. 1.

55. Anushka Asthana et al., *Parliament Passes Brexit Bill and Opens Way to Triggering Article 50*, GUARDIAN (Mar. 13, 2017, 6:12 PM), <https://www.theguardian.com/politics/2017/mar/13/brexit-vote-article-50-eu-citizens-rights-lords-mps> [<https://perma.cc/P5C6-KYHX>].

56. See Joe Watts, *Theresa May Faces New Challenge from House of Lords Over Brexit*, INDEPENDENT (Mar. 16, 2017, 12:45 PM), <http://www.independent.co.uk/news/uk/politics/brexit-latest-theresa-may-article-50-a7633106.html> [<https://perma.cc/U5VX-JA4S>].

57. Rob Merrick, *Theresa May Warned That Brexit Is “Heading Back to the Courts” After She Refuses to Give MPs a “Meaningful Vote”*, INDEPENDENT (Mar. 13, 2017, 7:04 PM), <http://www.independent.co.uk/news/uk/politics/brexit-est-article-50-theresa-may-meaningful-vote-lords-eu-nationals-a7628206.html> [<https://perma.cc/V4GG-W5A4>]; Joe Watts, *Gina Miller Warns Theresa May of New Court Battle If Parliament Not Guaranteed Vote*

It thus appears likely that Parliament will come to play a more active role with respect to treaty powers and foreign affairs in the near future. This result is not compelled by constitutional text, precedent, or original meaning. Nor is it a necessary corollary of parliamentary sovereignty—for ministers have long been the dominant actors in foreign relations without posing a threat to the constitutional primacy of the legislature. It is rather a manifestation of the British system's capacity for growth and evolution in response to changing circumstances. Hence, while Parliament may exert its sovereignty in foreign affairs during the unique constitutional climate presented by Brexit, it will not necessarily do so with respect to other matters of international law. Particularly when compared with the more rigid and enduring structural elements of the U.S. Constitution, this adaptability suggests that the U.K. Constitution may indeed be "the most flexible polity in existence."⁵⁸

on Leaving EU, INDEPENDENT (Mar. 1, 2017, 6:15 PM), <http://www.independent.co.uk/news/uk/politics/brexit-latest-gina-miller-article-50-theresa-may-court-case-three-knights-opinion-a7606346.html> [<https://perma.cc/9D28-C44G>].

58. *R (Miller) v. Sec'y of State for Exiting the European Union*, [2017] UKSC 5, [40] (appeal taken from N. Ir., Eng., and Wales) (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 87 (8th ed., 1915)), <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf> [<https://perma.cc/UT7E-2E2Z>].