

Miller: Expert Reactions

Policy Exchange's Judicial Power Project invited a number of leading academics and practitioners to offer very short comments on the High Court's decision on the process for triggering Article 50 in [R\(Miller\) v Secretary of State for Exiting the European Union](#). We sought contributions from commentators with a range of views; some might be expected to be sympathetic to the Project's central concerns, and others less so. In the days and weeks ahead, the Project will offer further and more detailed critiques of Miller.

1. Critiquing the High Court's Decision

Parliamentary Sovereignty and the High Court's Mistake

Richard Ekins

The High Court made a bad mistake of law in its judgment yesterday. But it was a mistake not a conspiracy and one into which the Court was led by counsel. The Supreme Court should put it right.

The mistake was to take Parliament in enacting the European Communities Act 1972 to have intended to limit the prerogative. The foundations of the mistake were the Court's elevation of the status of the 1972 Act, by way of the new language of "constitutional statutes", and the Court's adoption of the claimants' misleading analysis of the

“statutory rights” to which the 1972 Act gave rise, an analysis never effectively challenged by the Government.

There has been talk in the last 24hrs about the judgment being effectively unassailable by virtue of the seniority of the judges and the force of their reasoning. This is wishful thinking. The weaknesses in the judgment are clear already and will likely become clearer still between now and the Supreme Court hearing. While it is entirely possible that the Supreme Court will double down on the High Court’s errors, if properly argued it may well fix a bad job.

A silver lining in the *Miller* judgment is that the Court is nothing but orthodox in its strong affirmation of parliamentary sovereignty. While the Court is wrong, to my mind, in its reasoning about what Parliament intended in 1972, the judgment is mercifully free from the sceptical asides about parliamentary sovereignty that sprout up from time to time.

But then it seems we are all true believers in parliamentary sovereignty now. For those of us whose defence of the doctrine predates June, this is a welcome development. Having said that there are reasons to fear some of this enthusiasm is strategic. And certainly it is misconceived to level charges of hypocrisy and incoherence at those who revere parliamentary sovereignty and yet also think the High Court yesterday was mistaken.

Withdrawing from a treaty may have consequences for domestic law – if Parliament has made provision to this effect, as it has in the 1972 Act – but this does not make withdrawal from the treaty itself remotely inconsistent with parliamentary sovereignty. That doctrine does not mean that every governmental power should be directly exercised by Parliament; it means rather that Parliament may make and change any law and that its laws cannot be invalidated by anyone.

The Government’s intention to trigger art. 50 by way of the royal prerogative, challenged in *Miller*, is entirely consistent with this rule. It is consistent also with responsible government and parliamentary democracy, for the Government is and always has been accountable to Parliament for its exercise of the prerogative.

Parliamentary sovereignty is rightly fundamental to our constitution. But the *Miller* judgment was not necessary to protect it and, welcome rhetoric notwithstanding, does nothing to uphold it.

Professor Richard Ekins, Associate-Professor, University of Oxford and Head of Judicial Power Project.

“Intent of Parliament” Unsoundly Constructed

John Finnis

The judgment’s basic thesis: the ECA’s requirement that no new EU treaty-based obligations and rights be introduced into UK law without “Parliamentary control” implies a “converse intent that the Crown should not be able, by exercise of its prerogative powers, to make far more profound changes in domestic law by unmaking all the EU rights” so introduced [93(8)]. The reasoning ignores the asymmetry between making treaty rights part of UK law and unmaking them by international action.

My JPP papers of [26 October](#) and [2 November](#) show that asymmetry’s significance. As I feared, the Government’s failed answers to the Court’s questions about unmaking treaty-based UK rights to relief from double taxation – rights that come into UK law by a single statutory provision combined with individuated Orders in Council (one for each of the UK’s 120+ double tax treaties) – have yielded a Judgment silent about that major category of UK treaty-based rights, uniquely analogous to ECA-based treaty rights.

The Judgment’s “clear and necessary implication” about Parliament’s 1972 intention is thus a highly improbable construct, a legal fiction. Six days before the introduction of the European Communities Bill on 26 January 1972, the Commons heard a lucid exposition – directed to the Bill’s imminent unveiling – of double tax treaties and the way they come with great impact into UK law with some but not much Parliamentary control. The exposition was by the leading public lawyer, Sir John Foster QC, MP.

In 1971, though he did not mention this, the UK Government had unilaterally terminated its double tax treaty with the Virgin Islands; in 1988 it unilaterally terminated the similar treaty, approved by the House of Commons in 1970, with the Dutch Antilles. In neither case does termination – fully authorized by a treaty provision, analogous to art. 50 TEU and like art. 50 given Parliamentary approval – seem to have needed or received any “Parliamentary control”. Yet, as Sir John pointed out to the House, 60 or 70 statutory rights come in if a tax treaty draft Order is (a) approved by the House (the Lords having no part at all) and then (b) takes effect internationally – when, while and for just as long as it does (he might have added, but the point is obvious).

Readers of my two papers will easily complete the analogy to Brexiting from the EU Treaties, and understand its bearing on Parliament’s really inferable intent.

John Finnis FBA is Professor Emeritus of Law & Legal Philosophy at the University of Oxford and Biolchini Family Professor of Law in the University of Notre Dame.

***Miller*: Statutory Interpretation and the Contestability of Constitutional Principles**

Mark Elliott

Some of today's [press coverage](#) of the judgment in *Miller*, accusing judges of acting undemocratically, is deplorable. It is entirely right and proper that the Court should determine the legal extent of executive authority. That is an axiomatic judicial function in a democracy founded on the rule of law. But what of the content of the decision?

The judgment is striking in its muscularity. The Court considered the Government case to be so weak that it judged it untenable before even considering the claimant's arguments in detail. The Government's case, said the Court, was 'flawed' at a 'basic level'. Reading the judgment, one might be forgiven for thinking that the Government had advanced a heterodox argument of outlandish proportions. In fact, it was simply asserting that it could use a prerogative power to begin negotiations on the international plane. None of this is to deny the subtlety of the issues to which that contention gives rise concerning the relationship between EU and domestic law, and the role played by the European Communities Act 1972 ('ECA') in mediating that relationship. But [as John Finnis has shown](#), the Government's position is far from unarguable.

Once the Divisional Court had accepted – contrary to Finnis's view – that EU law rights are to be considered domestic statutory rights enacted by Parliament, its focus inevitably shifted to the question whether the ECA was to be read as having displaced the Government's ability to use the prerogative to begin the art. 50 process. In concluding that the ECA had indeed produced such an effect, the Court engaged in a highly creative process of statutory interpretation that involved relying upon the ECA's status as a 'constitutional statute'; treating the Act's 'constitutional status' as evidence of Parliament's intention – a view that is in tension with Laws LJ's analysis in *Thoburn*; invoking certain 'background constitutional principles' that are relevant to statutory interpretation; and asserting that those principles are particularly relevant to the construction of constitutional statutes.

My point, in this short comment, is not to assess the correctness of the court's conclusion on this matter. Rather, it is to observe that that conclusion – and the reasoning on which it is based – is highly contestable. Perhaps, therefore, the most surprising aspect of *Miller* is that the confident certainty of the terms in which the judgment is framed obscures almost entirely the complexity and contestability of the questions to which it gives rise, concerning the selection, content and interaction of the

constitutional principles that form the prism through which the ECA falls to be examined.

Mark Elliott is Professor of Public Law at the University of Cambridge.

Miller: Pointless and Futile

Stanley Brodie QC

The decision of the Court, and the case itself, in *Miller v Secretary of State*, seems pointless and futile. It may be hailed as a great victory: but it is nothing of the sort. The Brexit process can, and will, continue uninterrupted.

All that the Court has decided is that the Government cannot trigger art. 50 by the use of the Royal Prerogative, and no more. It would need to have the approval of Parliament, by statute or other means, before it could validly give notice under the article. But it would have needed that anyway before this decision: because the progress of the Brexit negotiations would be repeatedly discussed in the House of Commons, as it already has been. That will continue. It would be unthinkable that the Government would utilise the Royal Prerogative without the approval of Parliament – which, of course, is sovereign. As the terms of any Brexit settlement become clearer, so Parliament will be able to judge whether it can approve them or not. These are all political issues: either the Government can get sufficient support for what it wants to do, or a sufficiency of MPs may block it. It has always been open to the Remainers to bring the Brexit issues to Parliament, and seek to overturn the Referendum vote.

The Government can, therefore, and should continue with its negotiations, always keeping Parliament, so far as may be reasonable, informed of their direction, to achieve the operation of art. 50 by March 2017. In the event of obstruction and criticism in Parliament, the Government will have to deal with that as and when it arises. Unless there is convincing political support for any change in the Government's policy towards Brexit, there is no reason to suppose that the Prime Minister will not get the outcome she is seeking. The majority will of 17.4m people would seem to be politically very persuasive.

In the end all that the *Miller Case* really determined is a matter of procedure: the Royal Prerogative cannot, on its own, be utilised to proceed with Brexit. But there are other constitutional means available to Parliament to enable Brexit to happen in accordance with Government policy.

Whichever way the appeal turns out, our sovereign Parliament will decide on the fate of Brexit and its implementation – not the Courts.

Stanley Brodie QC is the most senior barrister practising from Blackstone Chambers.

Miller and Constitutional Adjudication

Alison Young

I can understand the reaction that *Miller* is an example of 'judicial activism'. The High Court did not adopt a narrow interpretation of earlier case law on the relationship between prerogative powers and legislation. Instead it interpreted earlier cases as establishing the 'constitutional principle that unless Parliament legislates to the contrary, the Crown shall not have power to vary the law of the land by its exercise of prerogative powers.' It interpreted the intention of Parliament broadly; the European Communities Act 1972, a 'statute of special constitutional significance', demonstrating an intention of 'switching on the direct effect of EU law'. It deployed a more abstract analysis of the constitutional consequences; can the Crown use prerogative to trigger art. 50 given that this may lead to circumstances in which rights would be removed without future specific parliamentary authority. However, it is important to put the case in its constitutional context. This is not a judgment claiming power for the courts from the legislature. It does not overturn legislation. Nor is a judgment of such constitutional importance, where a declaratory order is sought and issues are raised in a preliminary, abstract manner, unsuited to an assessment of broad constitutional principles rather than a narrow interpretation of precedent. The judgment reinforces parliamentary sovereignty, recognises the constitutional reality of the UK's membership of the EU and maintains the balance of power between all three institutions of the constitution. It recognises the important role of Parliament in protecting rights, ensuring there is full democratic debate and not erosion by the executive acting alone. It is the judiciary performing its role in preserving the principles of the UK constitution; balancing the

ultimate sovereignty of Parliament with the rule of law. This is not ‘judicial activism’. It’s a judgment of constitutional principle written for a public audience.

Alison Young is Professor of Public Law at the University of Oxford and a Fellow of Hertford College.

2. Anticipating the Supreme Court’s Hearing

A Heady, Worrying Brew of Doctrines

Carl Gardner

Talk of this judgment creating a “constitutional crisis” are overdone. But I do think *Miller* is wrongly decided, and problematic. What’s gone wrong is that a heady mixture of two fashionable interpretative doctrines brewed at home by British judges – the idea that there are higher “constitutional” statutes and what’s called the “principle of legality” – on top of some confusion about the nature of EU rights created by the European Communities Act has led judges, in the end, to strain the Act’s meaning well beyond what Parliament can seriously have intended either in 1972, or at any time since.

The court’s reasoning seems to me much thinner, when re-read, than it appears on the impressively coherent surface. Paragraph 93, for instance, which enumerates the textual reasons the courts says support what ought actually to be (according to the principle of legality) a non-textual approach departing from natural statutory language, is a weak list and suspiciously overdetermined. But the consequences of the judgment are worrying. The judgment raises such alarming prospects as that all previous amendments of EU treaties, which have surely affected UK law in the same way the court says art. 50 notification would, have been unlawful.

I’d like to think the Supreme Court will reverse this, but based on its enthusiasm for the “principle of legality” as shown in the *Evans* case, I doubt it. I worry about where we’re headed. The principle of legality may today seem a useful sword against government; but tomorrow it can cut Parliament just as deep, and no doubt will. I already mourn the

relatively sensible framework of EU and human rights law our courts have been used to, and fear constitutional trouble ahead when it's gone and common law ideas develop further, to replace it.

Carl Gardner is a former government lawyer and current writer at [Head of Legal](#).

On Appearances and Disappearances

Simon Lee

If ever there is a case for interested 'third' parties to appear, or at least intervene through written submissions, now is the time for Professor John Finnis, the Judicial Power Project and other constitutional experts to present their views. It will then be for the 'first' and 'second' parties, as well as the Justices, to consider them in what promises to be a great constitutional law symposium of a case in the UK Supreme Court. For example, in the Conjoined Twins' case [2001] 2 WLR 480, discussed in *Uneasy Ethics* (2003), the then Archbishop of Westminster's *amicus curiae* brief set out the moral principles in a way which shaped the judgments in the Court of Appeal, even though the judges understandably disagreed with the intervener's application of those principles to the particular case. In *Miller*, now is the time to point out where the swift judgment in the High Court has left us in suspense. For instance, paragraph 68 of the *Miller* judgment spotted a statutory difference between *increasing* powers of EU institutions over the UK and *withdrawing* from those powers: 'Section 6 of the 2008 Act provided for parliamentary control of Ministers before they took action in relation to certain decisions to increase the powers of the EU institutions. It did not provide for any similar parliamentary control in relation to a decision to give notice under Article 50 of the TEU.' The second sentence is then left hanging. We are not told that s6 was repealed by s14 of the European Union Act 2011. Paragraph 71 concludes by explaining that the new version, s4 of the 2011 Act, 'sets out cases where a referendum would be required, focusing on cases where there would be an extension of the competences of powers of EU institutions' but omits the point in the second sentence of paragraph 68, ie that it also did not provide for any similar parliamentary control re art. 50. This difference between extending powers to the EU and withdrawing from the EU under the 2011 Act is point 5 of the Secretary of State's submission as recorded in paragraph 76. But then the 2011 Act disappears from the judgment of the High Court, save for a passing

dismissal of any need to address the *claimants'* arguments on this statute in paragraph 102. With a little more time, and regardless of which way they interpret the law, it would be good to see Supreme Court Justices' judgments solving all the mysteries of this case.

Simon Lee is Professor of Law at Open University and Emeritus Professor of Jurisprudence at Queen's University Belfast.

3. *Miller*: The Bigger Picture

Mixing the Old and the New in *Miller*

Graham Gee

Irrespective of whether you agree with the judgment – and, for many of the reasons detailed by other contributors, I regard it as [mistaken](#) – there is something slightly quizzical about how the High Court answered the question before it. As Aileen McHarg [noted](#), the judgment is 'a curious mixture of new and old constitutionalism'. (See also Paul Daly on [this](#)).

The 'old' embraces the Court's endorsement of constitutional orthodoxies, including parliamentary sovereignty. ('Parliament remains sovereign and supreme' and 'can, by enactment of primary legislation, change the law of the land in any way it chooses'). It is Bingham's dicta in *Jackson* that is cited, not Steyn, Hope or Hale. The traditional lens of representative democracy dominates, with the EU referendum largely absent (the referendum was a 'political event, the significance of which will have to be assessed and taken into account elsewhere').

The 'new' includes the stress on the EC Act 1972 as a 'constitutional statute' which attracts more flexible (less disciplined?) interpretative approaches informed by (a very incomplete set of?) 'background constitutional principles'. Formalistic interpretations are for the constitutional ash heap, replaced by new (strained and unconvincing?) legal fictions about what the 1972 Parliament intended. The multi-layered constitution is in

plain sight (but not the [powerful parallels](#) with terminating treaty-based rights in double-tax treaties).

What is disquieting (for me) is that parts of the 'old' are employed (twisted?) to justify parts of the 'new', whilst the effect of the 'new' is to undercut the 'old'. If invocations of the 'old' were intended to comfort and reassure, as well as to justify and persuade, they left me feeling cold.

Where does this leave us? Not for the first time of late I find myself recalling a character by the name of Mike Campbell in Hemingway's *The Sun Also Rises*. Someone asks Campbell 'How did you go bankrupt?' Campbell replies that he went bankrupt two ways: 'Gradually and then suddenly'. Yesterday's decision suggests that something similar might be said about the constitution and the judicial roles within it. If our constitution is changing (in part because of changing judicial roles), it has done so gradually and suddenly – and, in many respects, it is the cumulative consequences of gradual change that normally concern me more. But yesterday's decision is a sudden change of some significance. The Supreme Court should correct the High Court's mistake and reassert the tried and tested good sense of the old constitution.

Graham Gee is Professor of Public Law at the University of Sheffield and Editor of the Judicial Power Project website.

Parliament and the People: A Cautionary Tale

Fergal Davis

The decision in in [R \(Miller\) v Secretary of State for Exiting the European Union](#) rested on the Sovereignty of the Parliament at Westminster. But the referendum was an expression of the will of the People. It is not at all obvious how these competing claims can be reconciled.

A Sovereign Parliament is free to make or unmake any law. Arguments which rely on the Sovereignty of Parliament necessarily imply that Parliament is free to set aside the referendum result.

In 1835 King William IV dismissed a Whig government which had not yet lost the confidence of Parliament. He did so because he 'fancied that public opinion was leaving

the Whigs...'. [Bagehot](#) argues that although the King had the power to act he was unwise to do so: his actions 'looked inconsistent with the liberties of the People' (Bagehot, 183). The Tories failed to win the resulting election. The episode ultimately highlighted the waning influence of the monarchy over the people – that weakened the institution of the Crown.

The experience of King William is a cautionary tale for Parliament. Some might fancy that public opinion is leaving the Brexiteers. Some might fancy that Parliament could act to prevent Brexit. In light of the High Court judgment in *Miller* it could be argued that a Sovereign Parliament would be free to do just that: but it would be unwise.

As Prof Bogdanor put it in [The Telegraph](#), "Brexiteers wanted to re-establish the sovereignty of Parliament. But Parliament will now be constrained, not by Brussels, but by the British people".

Parliament should rely on *Miller* to cautiously assert its authority. It should seek assurances but ultimately, if and when it is asked, it should trigger art. 50. To do otherwise would be to risk appearing 'inconsistent with the liberties of the People' and that would be risky.

Fergal Davis is a Reader in Public Law at The Dickson Poon School of Law, King's College London, and a Senior Visiting Fellow.

Parliament Should Have Been Left to Look After Itself

Sir Stephen Laws

The notion that Parliament needs the courts' help to manage its relationship with Government actually undermines Parliamentary Sovereignty and wrongly puts unaccountable judges in overall control of the whole constitutional system. Most dispiriting is the extent to which this notion suggests, and so further incites, the mistaken assumption that the Parliamentary system and democratic accountability, on their own, lack the capacity to control politics.

A political process was in train in which some in Parliament were seeking closer Parliamentary supervision of the art. 50 process. This process should have been left to run its Parliamentary course. The courts abuse their proper function by taking sides to

choose the winner in an argument in Parliament that was otherwise likely to have ended in some form of accommodation on issues going way beyond the art. 50 notification.

It has always been impossible, in practice, to leave the EU without Parliament's approval in the form of legislation – what is now being called “the Great Repeal Bill”. This is why, in practical terms, the Government has always had to take account of Parliamentary opinion before giving the art. 50 notification. But, it is absurd to suggest that legal precedent or principle can determine, in a constantly developing political situation, the milestones for which Parliament’s prior approval is necessary, as opposed, say, to its retrospective ratification.

My view was that the constitutionally respectable course would have been to delay an art. 50 notification until the implementing Bill had received a second reading in the Commons. It would be prudent to start the process only after a clear signal from the elected House of its willingness to see the process completed. The second reading trigger would be consistent with established constitutional convention on using existing powers in an anticipatory way, while legislation is still before Parliament, to facilitate the legislation’s speedy implementation after the legislation passes.

It is self-delusional for anyone to believe that the courts can prescribe a process for resolving a political dispute without the choice of process having an influence – possibly a decisive one – on its outcome. It is impossible to prescribe the process in a politically impartial way; and to exercise influence without assessing or caring what political outcome is made more likely by doing so is highly irresponsible.

Sir Stephen Laws KCB, QC(Hon), LLD(Hon) is a former First Parliamentary Counsel (2006-2012). He is Senior Associate Research Fellow at the Institute of Advanced Legal Studies, an Honorary Senior Research Associate at University College London and an Honorary Fellow of the University of Kent Law School.

Questions Old and New: *Miller*, Representative Democracy and the Rule of Law?

Lisa Burton Crawford

Miller reorientates our attention: away from the relationship between judicial and legislative power towards the relationship between the legislature and the executive. It

reminds us of the importance of events preceding 1688, and the fact that many constitutional principles were forged in the contest between Parliament and the Crown. The most fundamental of these is, the Court confirms, the sovereignty of Parliament. The authority for this is Dicey. There is no hint (of the kind seen in *Jackson v Attorney-General*, and popular among academics) that legislative power is, in fact, constrained. The sovereign Parliament can make and unmake any law it wants, and so can empower the Crown to abrogate rights created by statute, or curtail the prerogative power. In order to determine whether Parliament has done so, we must ascertain its *intention*, which is portrayed as a real and useful thing (eg. [93]).

So stated, the judgment seems fairly orthodox. Yet, the decision (re)opens other fault-lines.

Some say that the High Court upheld the rule of law; others that it undermined it. This seems further proof of that concept's ability to be all things to all people. I tend to be sceptical of references to the rule of law – yet there does seem to be a real rule of law issue here. Judicial opinions ought to be scrutinised, frankly and fearlessly. If the judges got it wrong, we ought to say so (and I express no view as to whether they did). There are also many good reasons why judicial power ought to be constrained. However, judges should not be attacked for deciding a case that is properly justiciable in a way with which the “people” do not agree. Whatever it may entail, the rule of law constrains the people's will as well as that of government – as the Court suggests at [22].

Miller (and Brexit) raise important questions, of interest in many jurisdictions (including Australia). What are the merits of giving the people a direct say on matters of fundamental public importance? Is this compatible with traditional Anglo-Australian understandings of representative democracy? How can popular votes be accommodated within existing constitutional frameworks? How might they be designed to minimise uncertainty, and fall-out? Though the Court in *Miller* seems to endorse a series of foundational principles that flow from the British constitutional settlement, much else is far from settled.

Dr Lisa Burton Crawford is Lecturer at the Faculty of Law, Monash University.