

Abstract: An essay on Brexit and the British constitution, from an American appellate attorney's perspective. The argument is advanced that democratic legitimacy and territorial integrity are intertwined, comparable to the American experience, and may be beneficially considered as the new relationship between the United Kingdom and the European Union develops.

What Brexit tells us about the British constitution –  
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As an American appellate attorney, it is sometimes difficult to explain to subjects of the United Kingdom what constitutionalism means to us. The U.S. Constitution is truly the only thing that makes us Americans. For all our flaws, we remain the creators and beneficiaries of an intentional system of self-government that has been able to support and harmonize a large, heterogeneous nation through continental expansion, industrialization, Civil War, the end of slavery, urbanization, universal education and suffrage (incorporating class, race, ethnicity and gender over time in our understanding of “universal”), monopoly capitalism, economic instability and depression, two hot World Wars and one Cold War, and numerous other wars of varying degrees of nobility. This achievement is something that we are rightfully proud of.

After the American Revolution, the British constitution developed in parallel to ours, along lines that evolutionary biologists would call “convergence.” Adapting to the same societal dynamics, but without forming in a crucible similar to the American Constitutional Convention of 1787, the British constitution organically evolved, permitting the British people to adapt to Enlightenment, Empire, the end of the Slave Trade, industrialization, urbanization, universal education and suffrage, monopoly capitalism, economic instability and depression, numerous wars (again, of varying degrees of nobility), and loss of Empire. While the American and British constitutions are strikingly different in their actual

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operation, we each came to cherish democracy and the Rule of Law as the basis of our respective systems of government. Divided by a revolution, America and Britain, over time, became wedded to the same two political ideals. The “special relationship,” therefore, is not based on kinship, language, or even a partially shared history, but upon shared fundamental values.

As it evolved after 1688, the British constitution developed a number of assumptions, including:

- The United Kingdom is sovereign territory consisting primarily of England, Wales, Scotland and (at least part of) Ireland
- Parliament is the ultimate source of governmental power in the United Kingdom
- Democracy alone provides legitimacy to Parliamentary Sovereignty
- When the people of the United Kingdom are divided on an issue of major national importance, the electorate must decide the issue by electing a parliamentary majority to resolve the question at issue
- Judges are expected to apply & enforce the laws and treaties enacted by Parliament above all other sources of law

After World War II, and particularly after the loss of Empire, Britain’s relationship with Europe posed new challenges to the assumptions underlying the British constitution. At first, the Common Market posed no serious challenges for those assumptions; international trade agreements are inherently consistent with the exercise of sovereignty by nations. With the establishment of the European Union in 1992, however, the conflict between the underlying assumptions of the British constitution and those of the European Union became apparent. When the Treaty of Maastricht went into effect:

- The subjects of the United Kingdom also became citizens of a European Union including most of the territory between Spain and the countries bordering Russia
- The European Council of Ministers (in conjunction with the European Commission and the European Parliament, in a rather convoluted way) became the ultimate source of legislative power for numerous areas of British life

- Political legitimacy in the European Union flowed from national treaties; any political legitimacy at the Council was a function of diffuse and derivative democracy
- The role of British judges, subject to review by the European Court of Justice, was to apply and enforce laws (i.e., “regulations”) established by the Council

Each of the central assumptions of the British constitution were contravened by the Treaty of Maastricht (i.e., the “European Constitution”). Over time, a substantial percentage of the British people became frustrated with the tension between their assumptions about political life, as understood in the British constitution, and the strictures and limitations of Maastricht and its follow-on treaties. By contrast, in America, we were able to transition from our first constitution (the Articles of Confederation) to our second, current one, only because the framers of the second constitution created a path for explicit acceptance of it by the people of the United States. This was known as ratification, and Maastricht, as a treaty between nations, possessed no such founding popular legitimacy. Because Maastricht’s democratic legitimacy was, from the beginning, at best diffuse and derivative, it lacked the ability to adapt and respond to the will of the European people -- whether regarding the permissible curve of bananas, the immigration of people from North Africa to Europe, or tax policy (tax “harmonization” produced anything but harmony).

The result in Britain of the “Democratic Deficit” in the EU -- actually, the conflict between the British constitution and Maastricht -- was a combination of Nigel Farage in the European Parliament, election (at least to some extent) of the Conservative Party as majority party in Parliament, and pressure on the Conservative Party for a referendum regarding EU membership. That pressure ultimately resulted in the referendum of June 23, 2016.

To the shock of many, 51.9% of the people of the United Kingdom voted to leave the European Union. At that point, Maastricht lost political legitimacy in Britain. But the referendum, and the legal, political and diplomatic manoueverings that followed, have presented altogether new challenges to the assumptions underlying the British constitution.

The referendum itself was a challenge to the idea of Parliamentary Sovereignty. When the people, acting through a referendum, decide a political issue, how can Parliament prevent that decision from becoming law without undermining its democratic legitimacy? Furthermore, Parliamentary Sovereignty is premised on the notion that the majority that controls Parliament controls the executive power of government as well, through the Prime Minister and the Cabinet. Because no General Election coincided with the Brexit referendum, the same Conservative Party that was internally split over membership in the EU remained in power, tasked with execution of the separation required by the referendum. The Prime Minister (a Remainer) and her Cabinet dallied in providing notice to the EU of the decision to separate. Furthermore, in negotiating with the EU over the terms of separation, the Prime Minister and Cabinet took a no-deal exit off the table from the outset -- itself a contravention of the referendum (as well as a severe contravention of good negotiating tactics).

In constitutional terms, the executive power differed from the legislative power (as expressed in the referendum) regarding the possible options for delivering Brexit.

Then the then-recently-minted United Kingdom Supreme Court got involved. In constitutional terms, the judicial power had the opportunity to differ from the legislative power. In America, we have these types of confrontations all the time; it's part of the internal structure of the U.S. Constitution called Separation of Powers. Because of Parliamentary Sovereignty, however, the traditional assumption under the British constitution is that the executive power and the judicial power may not conflict with the legislative power.

In its first decision on Brexit, *R. ex rel. Miller v. Secretary of State for Exiting the European Union*, the U.K. Supreme Court was tasked with deciding whether, in the wake of the referendum, a vote of Parliament was necessary to authorize formal notice to the European Union of Britain's intention to leave the EU. By an 8-3 vote, the U.K. Supreme Court decided that an Act of Parliament would be required to trigger the notice.

The decision of the majority, along with the opinions of the three dissenters, is striking for its reaffirmation of the basic assumptions of the British constitution. Parliamentary Sovereignty is paramount throughout the decision. The majority decision also explicitly extolls the principles of democratic legitimacy and the Rule of Law. The disagreement among the judges concerned, simply, the interpretation of the 2015 Act that provided for the referendum -- if Parliament had written operative language in the 2015 Act along the lines of “the outcome of the referendum shall be binding, and the government shall withdraw from the Europe Union forthwith if a majority in the referendum decides to exit the EU”, then the judges would almost certainly have held that the government had the power to issue a notice to the EU of the United Kingdom’s intention to leave the EU without further action by Parliament.

The *Miller* decision also concerned the power of the Scottish, Welsh, and Northern Irish devolved assemblies to scuttle Brexit. The UKSC ruled that those assemblies did not possess that power, again reaffirming one of the basic assumptions in the British constitution regarding the territorial integrity of the kingdom.

After the *Miller* decision, the governing Conservative Party remained divided over the method (even, possibly, over the end) of Brexit. Theresa May sought a snap general election, intending to consolidate her majority in Parliament and garner further public support for Brexit. The results of the election were not as she had expected. The Conservative Party lost its majority in Parliament and had to rely on the support of unionist MPs from Northern Ireland to retain power. But no Remain party garnered a majority of MPs either. The outcome of the snap election again challenged a traditional assumption of the British constitution, that general elections, by empowering a majority, should resolve issues of national importance. The issue of Brexit -- so clear in a simple-majority referendum, had become muddied by a court ruling requiring further Parliamentary action, and a general election that produced no parliamentary majority.

Possibly worse, the question of the territorial integrity of the United Kingdom became part of the Brexit negotiations. While a premise of the Good Friday Accords was that the border between the Republic of Ireland and Northern Ireland should remain open, the EU refused to countenance a trade agreement that permits free trade between Northern Ireland and Britain upon a British exit. Coupled with the fact that the overwhelming majority of Scots voted Remain, while the then-still-recent referendum for Scottish independence had barely failed to secure a majority of Scots, the territorial integrity of the United Kingdom was again opened to serious discussion.

The Prime Minister tried to break the legislative impasse for Brexit, floating a number of possible solutions -- from "hard Brexit" to a customs union in which the majority of EU regulations would apply to the UK. No solution reached a majority. The Prime Minister even sought Labour Party votes to achieve a majority in Parliament. To many MPs, this effort by party leadership to work with the opposition to gain a Brexit deal, particularly one that tied the UK to the EU indefinitely, undermined the democratic legitimacy of Parliament itself.

The parliamentary impasse continued after March 31, 2019, the date under which Britain was to leave the EU. The Cabinet and the EU first agreed to a short extension, and then a longer one, for the parties to try to reach agreement. Ultimately, on December 13, 2019, the voters in Britain resolved the political impasse by electing a clear Conservative Party majority to Parliament. Britain then formally left the European Union on January 31, 2020, with much of the relationship between Britain and the EU to be worked out over the coming months and years.

Now that Britain has left the EU, it is important that, as a new relationship with the EU develops, the U.K. Supreme Court in *Miller* reaffirmed the fundamental importance of Parliamentary Sovereignty to the British constitution, while also maintaining the territorial integrity of the whole of Britain and Northern Ireland. The Democratic Deficit of the EU led to the original referendum, and its result. Recalling our own history, when democratic legitimacy is at stake, even the territorial integrity of the

nation is at risk. Facing secession, Abraham Lincoln emphasized, “A house divided against itself cannot stand.” He led the Union against our secessionists through our Civil War “so that government of the people, by the people, and for the people shall not perish from the face of the earth.”

As the debate about Brexit has shown, Britain is clearly divided, but hopefully not against itself. Because a majority voted for Brexit, and that majority prevailed through to formal separation, the democratic underpinnings of Britain were reaffirmed by the people, their political leaders, and the U.K. Supreme Court.

Admittedly, this is the opinion of an American who will not have to deal with any of the social, political, economic, or personal effects of Parliament’s decisions. But maybe our American experience with explicit constitutional governance -- and our fundamental shared values -- can be of assistance as the aftermath of formal separation ensues. Democratic legitimacy is simply too important to the British constitution to be thwarted. Rejecting the referendum result would have severely damaged the democratic underpinnings of the British constitution. Moreover, the territorial integrity of the United Kingdom, in the face of mere democratic disagreement, is also now at stake. Which, based on our American experience, means that, again, democratic legitimacy is also at stake.

As Britain establishes a new relationship with Europe, and as the United Kingdom grapples with devolution and separatism, our American constitutional experience -- of increasing democratic governance coupled with the necessity of territorial integrity for democracy’s sake -- may prove a beneficial model for the people of the United Kingdom to consider.