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Lessons for the government from Miller I and the Scottish Continuity Bill case

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Abstract *In the United Kingdom (UK), tensions between the executive and the judiciary reignited recently when the government launched a thinly veiled 'attack' on the courts in an 'Independent Review of Administrative Law' (IRAL).*[1] *Largely understood to have been triggered by the government's defeats in the Miller cases,*[2] *the IRAL seems intended to limit the availability of judicial review against the government.*[3] *This article revisits some (unpublished) arguments made by the author at the time of the Miller I judgment about its true driving force.*[4] *It also* considers *a similar impulse in the Scottish Continuity Bill case*[5] *that was* considered *around the same time.*[6] *It argues that the Supreme Court's procedural protections of EU-derived rights and the devolution settlement with Scotland in these cases represent a threat to the executive government. This is because these cases make it more difficult for the government to overcome the common law constitution without proper Parliamentary scrutiny.*

1. Introduction

In a country without a codified constitution, it can be difficult to answer questions about constitutional arrangements. Yet that is precisely what Brexit required the UK to achieve. Article 50(1) TEU prescribed that the UK should withdraw from the European Union 'in accordance with its own constitutional requirements.'[7] This raised some very practical questions. Which branch of government had the power to commit the UK to leaving the EU, for example, and must Scotland, Wales and Northern Ireland consent to the legislation regulating Britain's withdrawal? For better or worse, the UK Supreme Court was called upon

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[1] Ministry of Justice, 'Independent Review of Administrative Law' (*GOV.UK*) <https://www.gov.uk/government/publications/independent-review-of-administrative-law> accessed 16 November 2020.

[2] *R (on the application of Miller and another) (Respondents) v Secretary of State for exiting the European Union (Appellant)* [2017] UKSC 5 (*Miller I*);*R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)* [2019] UKSC 41 (*Miller II*).

[3] See also Melanie Carter and Sarah Court-Brown, 'Government Announces Independent Review of Judicial Review' (*Law Society Gazette*) <https://www.lawgazette.co.uk/legal-updates/government-announces-independent-review-of-judicial-review/5105287.article> accessed 16 November 2020.

[4] Sarah Court-Brown, 'Common Law Constitutionalism in the UKSC's Recent Brexit Adjudication: A Silver Lining for Devolution and Rights', QMUL PhD conference (2019), unpublished.

[5] *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*[2018] UKSC 64, [2019] 2 WLR 1. ("Scottish Continuity Bill case)

[6] *Miller I* (n 2).

[7] Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

to answer such constitutional questions and open that 'box filled with dark matter, the deeper reaches of the British Constitution'.[8] This was either because a judicial review claim was brought against a proposed course of action, with final appeal to the Supreme Court (as in *Miller I*), or because the Court had been appointed as adjudicator in a constitutional statute (as in the *Scottish Continuity Bill* case[9]).

This article revisits some (unpublished) arguments made by the author at the time[10] about the true force of the *Miller I* and *Scottish Continuity Bill* case judgments.[11] It argues that whilst the Supreme Court continues to recognise Parliamentary Sovereignty as the UK's rule of recognition, these cases also saw it offer protection to fundamental rights and the UK's devolution settlements in the common law. The Court's protections were procedural rather than substantive in nature, and they were subtle. However, they represent a threat to the current government, since they make it harder for the government to legislate to overcome the common law constitution (including fundamental rights) without proper Parliamentary scrutiny. This may be one factor that prompted the IRAL.

This article is structured as follows. Sections 1 and 2 map theories of Parliamentary Sovereignty and the common law constitution relevant to *Miller I* and the *Scottish Continuity Bill* case. Section 3 explores tensions between these two conceptions of the constitution. Section 4 considers how these tensions unfolded in *Miller I* in relation to the Article 50 question, and what this reveals about the attitude of the Supreme Court to the UK constitution. Section 5 completes the same exercise for the devolution questions in *Miller I* and the *Scottish Continuity Bill* case.

2. Parliamentary Sovereignty

It is well known that for Dicey, Parliamentary Sovereignty meant that Parliament had 'the right to make or unmake any law whatever' and 'that no person or body [was] recognised by the law of England as having a right to override or set aside [its] legislation'.[12] Parliamentary

[8] Sionaidh Douglas-Scott, 'What Will Happen next? Brexit and the Parliamentary Possibilities' <www.prospectmagazine.co.uk/politics/what-will-happen-next-brexit-and-the-parliamentary-possibilities> accessed 23 January 2019.
[9] *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* (n 5).
[10] Sarah Court-Brown, 'Common Law Constitutionalism in the UKSC's Recent Brexit Adjudication: A Silver Lining for Devolution and Rights', QMUL PhD conference (2019), unpublished.
[11] *Miller I* (n 2); *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (n 5).*
[12] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982) 3–4.

Sovereignty was the most important of Dicey's 'guiding principles' of the constitution, [13] since none of the others[14] could override it.

Dicey's orthodox theory of Parliamentary Sovereignty has been disputed over the years, although it has never entirely gone out of fashion. Many people disagree with Dicey's view that Parliament can make or unmake any law whatever, arguing that Parliament cannot make a law if it is unable to satisfy the manner and form requirements set by past Parliaments, for example, those in the Parliament Acts 1911 and 1949 prescribing the form Parliament must take for certain legislative acts.[15] Jennings, for example, argued that if Parliament set manner and form restrictions on future Parliaments in statute, the Courts would be bound to apply them.[16] Nonetheless, some consider that Parliament's ability to bind future Parliaments an *expression* of its unfettered sovereignty. Manner and form restrictions do not stop Parliament being sovereign in the sense that 'it still has no law-making superior', so the argument goes (the 'self-embracing' theory of Parliamentary Sovereignty).[17] Others do not agree that manner and form restrictions fetter Parliament at all. For Wade, the important point was that the Courts could not apply restrictions over and above Parliament's power to repeal such restrictions, therefore Parliament remained sovereign ('continuing' Parliamentary Sovereignty).[18]

This was also the debate around Britain's membership of the EU.[19] Some considered section 2(4) of the European Communities Act ('ECA 1972'), which made construction of Acts of Parliament subject to the incorporation of European Law, a direct challenge to Parliamentary Sovereignty. This argument was made because section 2(4) imposed substantive rather than procedural restrictions on how the UK Parliament could legislate during its EU membership,[20] as seen in action in the *Factortame* litigation when the House of Lords disapplied part of an Act of Parliament for incompatibility with EU law.[21] However, others argued that since

[13] ibid 25.
[14] The rule of law and constitutional conventions - ibid xxxvi; cxlv–cxlviii; 120–121; 279–299.
[15] See, for example, Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1958) 152–156; RFV Heuston, *Essays in Constitutional Law* (2nd edn, Clarendon 2012) 9–16.
[16] Jennings (n 15) 140–156.
[17] Peter C Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 KCLJ 137, 149–150.
[18] HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172, 175–176.
[19] Although interestingly Wade himself thought that Britain's EU membership *had* changed the country's rule of recognition – see HWR Wade, 'Sovereignty-Revolution or Evolution?' (1996) 112 LQR 568.
[20] NW Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 ICON 144, 149.
[21] *R v Secretary of State for Transport, Ex P Factortame Ltd (No 2)* [1991] 1 AC 603 (HL) [659].

Parliament retained the right to repeal the ECA 1972 and override the restrictions applied in *Factortame*, it remained sovereign.[22]

3. Common Law Constitutionalism

By contrast with Parliamentary Sovereignty, common law constitutionalism provides a different perspective on what is the most important guiding principle of the British constitution. Common law constitutionalism may be defined as the theory that the Courts, rather than Parliament, act as the guardians of the constitution, by developing fundamental rights and values in the common law.[23] Such fundamental rights and values are often seen as morally or logically *a priori* other constitutional principles, and therefore the argument is sometimes made (including by some in the judiciary)[24] that common law rights and values should, if the conflict ever arose, even override Acts of Parliament.[25]

Common law constitutionalism has many opponents, including amongst other members of the judiciary,[26] who dismiss the idea that common law rights and values override other constitutional principles, particularly Parliamentary Sovereignty.[27] Many prefer to see the mechanism of the common law (judicial review) as no more than the principled enforcement of the *ultra vires* doctrine (in keeping with Parliamentary Sovereignty) that all public bodies must act within the powers conferred on them in Acts of Parliament.[28] However, others have called the *ultra vires* argument a 'fig leaf' covering the fact that the Courts are slowly developing the common law as a higher order of law-making, and ask how the Courts could have a supervisory jurisdiction over powers with no basis in statute (for example, prerogative powers) if the only motivation for judicial review were Acts of Parliament.[29]

The rights and values of the common law are subject to debate between supporters of common law constitutionalism. Laws identifies the high-level values of 'reason, fairness and

[22] See the debate in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003).
[23] Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 OJLS 435, 439, 448.
[24] John Laws, *The Common Law Constitution* (Cambridge University Press 2014); *Jackson and others v Attorney General* [2005] UKHL 56 [102].
[25] See Poole (n 23) 439, 448; Laws (n 24).
[26] Jonathan Sumption, 'Judicial and Political Decision-Making: The Uncertain Boundary' (2011) 16 JR 301.
[27] See JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1.
[28] Paul Craig, 'Competing Models of Judicial Review' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000) .
[29] See Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review', in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000) .

the presumption of liberty' as the 'common law's insights'.[30] Oliver, by contrast, identifies the slightly different, but no less high-level, values of 'autonomy, dignity, respect, status, and security'.[31] However, many join Jowell in pointing to a series of cases in which the Courts have slowly protected a collection of 'individual democratic rights' using the principle of legality,[32] rather than attempting to create a finite list of high-level values.[33] The principle of legality means that 'fundamental rights cannot be overridden by general or ambiguous words' of Parliament and the Courts 'presume that even the most general words were intended to be subject to the basic rights of the individual'.[34] Jowell argues that the development of such individual democratic rights has been assisted by the Human Rights Act 1998 ('HRA 1998'), but such rights did not originate in statute, and nor were they created by judges. They emanated 'from the framework of modern democracy within which Parliament legislates'. They 'are not a consequence of the democratic process but logically prior to it''.[35]

Some argue that the common law constitution has been used by the Courts to protect more than individual democratic rights. For example, Anthony adds 'the nature of the UK's devolution settlement' to the values developed and protected in the common law.[36] He notes a series of cases in which the Courts have interpreted the devolution statutes as generously as possible to allow the devolved Parliaments and Assemblies the utmost ability to legislate in devolved areas. However, Anthony notes that this line of jurisprudence has yet to realise the potential of Lord Steyn's *obiter* comments in *Jackson* about divided sovereignty becoming the new reality of the UK constitution.[37]

4. Tensions between Parliamentary Sovereignty and the Common Law Constitution

There is a clear tension in British theory about whether Parliamentary Sovereignty, or the rights and values of the common law – or both – are the modern guiding principles of the UK constitution. This often leads to the question of whether there is anything Parliament cannot do because it is restrained by the common law (a substantive restriction on Parliament).[38]

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[30] Laws (n 24) 3.
[31] Dawn Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' (1997) 12 PL 360, 369.
[32] Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671, 672–673.
[33] Stephen Sedley, 'The Common Law and the Constitution' (1997) 19 London Review of Books 8, 8–11; see also the discussion in Martin Loughlin, *The British Constitution: A Very Short Introduction* (OUP Oxford 2013) 113–114.
[34] *R v Secretary of State for the Home Department Ex P Simms* [2000] 2 AC 115, 131.
[35] Jowell (n 32) 672-673.
[36] Gordon Anthony, 'Brexit and the Common Law Constitution' (2018) 24 EPL 673, 673.
[37] ibid 687-689.
[38] Most clearly expressed in *Jackson and others v Attorney General* (n 24).

However, it may also be posed as a question about whether there is anything Parliament must do in a certain way because it is restrained by the common law constitution (a procedural restriction on Parliament).[39] The Supreme Court was required to grapple with the roles played by these two competing conceptions of constitutionalism in *Miller I* and the *Scottish Continuity Bill* case, therefore these two judgments provided an interesting opportunity for the Court to re-evaluate them.

5. The Article 50 Question: *Miller I*

The tension between Parliamentary Sovereignty and common law constitutionalism played out most obviously in relation to the Article 50 question in *Miller I.* The Supreme Court commenced its judgement by setting out a fairly orthodox version of Parliamentary Sovereignty which it called 'a fundamental principle of the UK constitution'.[40] It defined Parliamentary Sovereignty, following Dicey, as 'the right to make or unmake any law whatsoever' and the principle that 'no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament'. It also emphasized, like Dicey, that the will of Parliament was to be divined from statute, and 'not in any other way'.[41]

It clarified that Britain's membership of the EU had not been the death of Parliamentary Sovereignty. Its view was that whilst Parliament had temporarily allowed EU law to take precedence over domestic statutes, this effect of the ECA 1972 would 'only last so long as Parliament wishe[d]' and the ECA 1972 could be 'repealed like any other statute'.[42] This accorded with continuing Parliamentary Sovereignty[43] since any subsequent Parliament could undo the actions of the 1972 Parliament, Parliamentary Sovereignty remained the main guiding principle of the UK constitution.[44] The ECA 1972 was no more than a 'conduit pipe'[45] by which EU law had been introduced into domestic law and it could be repealed at any time, thus undoing the restriction it placed on law-making.[46]

[39] See *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).
[40] *Miller I* (n 2) [43]; although not "the most fundamental rule" as in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) [20].
[41] *Miller I* (n 2) [43].
[42] ibid [60].
[43] Wade (n 18) 175–176.
[44] *Miller I* (n 2) [60].
[45] Citing John Finnis, 'Brexit and the Balance of Our Constitution' (*Judicial Power Project*) <http://judicialpowerproject.org.uk/wp-content/uploads/2016/12/Finnis-2016-Brexit-and-the-Balance-of-Our-Constitution2.pdf> accessed 3 April 2019.
[46] *Miller I* (n 2)[65].

Having made this 'powerful restatement' of Parliamentary Sovereignty,[47] the Court went on to decide what the principle meant in practice. The case turned on whether the Executive's treaty-making prerogative power (which the claimants accepted extended to the unmaking of treaties)[48] could be used to 'frustrate domestic law, in particular, rights or a scheme created by Parliament'. The UK government argued that it could use the prerogative to amend domestic law unless ***proscribed*** by statute;[49] the claimants argued amending domestic law was forbidden unless ***specifically permitted*** in statute. [50]

The Supreme Court noted a principle from the *Case of Proclamations*[51] / Bill of Rights 1688 which, it said, established a 'fundamental principle of the UK constitution' that 'unless primary legislation ***permits it***, the Royal prerogative does not enable ministers to change [domestic] statute law or common law'.[52] The Court concluded that withdrawing from the EU treaties *would* change domestic law and that triggering Article 50 TEU would ultimately cause the repeal of the ECA 1972.[53] Further, that once that had occurred, domestic rights would be lost. For example, the right of UK citizens to benefit from employment protections such as the Working Time Directive.[54] Therefore, Parliamentary approval was required for triggering Article 50 and withdrawing the UK from the EU. Thus, the executive government could not act on its own.

It is interesting that the Article 50 question in *Miller* turned on the loss of rights. It was because of this that the Court could be sure domestic law would be changed as a result of triggering Article 50 TEU;[55] and this brought the principle from the Case of Proclamations / Bill of Rights 1688 into play.[56] The rights that the Supreme Court focused upon in its judgment in *Miller* were 'rights capable of replication in UK law'. They included:

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[47] Anthony Bradley, Keith Ewing, and Christopher Knight, *Constitutional and Administrative Law* (Pearson Higher Ed 2018) 137.
[48] *Miller I* (n 2) [54].
[49] 'Miller Day 2 Transcript' (*The Supreme Court,* 6 December 2016) https://www.supremecourt.uk/docs/draft-transcript-tuesday-161206.pdf accessed 5 March 2019, 37-38.
[50] ibid 159–160.
[51] *Case of Proclamations* [1610] 1 WLUK 46 (HL), 77 ER 1352.
[52] *Miller I* (n 2)[50]; Paul P Craig, 'Miller, Structural Constitutional Review and the Limits of Prerogative Power' [2017] PL 48.
[53] *Miller I* (n 2)[92]–[94].
[54] ibid [69]–[73]. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time OJ L299/9.
[55] It is not clear whether the CJEU's later decision in *Wightman* would have changed the Supreme Court's certainty on this point - see *C-621/18 Wightman v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999.
[56] *Miller I* (n 2) [69]–[73].

"The rights of UK citizens to the benefit of employment protection such as the Working Time Directive, to equal treatment and to the protection of EU competition law, and the right of non-residents to the benefit of the "four freedoms" (free movement of people, goods and capital, and freedom to provide services)."[57]

Some of these rights, said the Court, had 'already been embodied in UK law by domestic legislation pursuant to section 2(2) of the 1972 Act'.[58] However, some rights had not. Thus, whilst an Act of Parliament (the ECA 1972) had allowed this second category of rights to have effect, no Act of the UK Parliament had created them.

Shortly after making clear that it was not only concerned with rights created by the UK Parliament, the Supreme Court expressly approved and applied the principle of legality,[59] which has been celebrated as a judicial mechanism amongst common law constitutionalists.[60] When applied to the facts, the principle of legality, which requires fundamental rights not to be overridden by general or ambiguous words, transpired to have important consequences. In particular, since the ECA 1972 did not mention the use of the prerogative to withdraw from the EU treaties, the Court could not accept that Parliament had '"squarely confront[ed]" the notion that it was clothing ministers with the […] right to use a treaty-making power to remove […] important domestic rights'.[61]

Arguably, by applying the principle of legality at this juncture, the Court highlighted that EU-derived rights, including some not recognised in statute by the UK Parliament, had gained 'fundamental'[62] status in the UK constitution. The Court did not expand upon this point (perhaps this would have been too controversial at such a fraught time), however, it is certainly possible that these rights were seen to be fundamental because they accorded with the values of the common law.

The effect of applying the principle of legality was that Parliament could not override the relevant EU-derived rights with general or ambiguous words; it had to squarely confront this action.[63] Poole argues that this holds the 'key' to the whole *Miller* judgment.[64] Since the

[57] ibid [70].
[58] ibid.
[59] *Miller I* (n 2)[87]; citing *R v Secretary of State for the Home Department Ex P Simms* [2000] 2 AC 115.
[60] See, for example, Jowell (n 32).
[61] *Miller I* (n 2)[87].
[62] The language used in the definition of the principle of legality adopted from *Ex P Simms.*
[63] *Miller I* (n 2)[87].
[64] Thomas Poole, 'Devotion to Legalism: On the Brexit Case' (2017) 80 MLR 696, 700.

ECA 1972 did not squarely confront the loss of rights "the Simms doctrine required clear statutory authorisation to trigger Article 50".[65] Therefore, Parliament had to effect the change.

This interpretation of the Court's judgment appears more logical than the Court's attempts to use Parliamentary Sovereignty to explain its judgment.[66] Triggering Article 50 TEU would amend fundamental rights in the UK, therefore Parliamentary action was required to squarely confront that decision. This is a procedural rather than a substantive limit on Parliament. Indeed, *Miller I* ultimately does not prevent the UK Parliament from enacting in legislation a policy it seeks to pursue, even one that overrides fundamental rights. It simply requires legislation to squarely confront that decision.[67] However, the procedural protection of EU-derived fundamental rights provided by the Supreme Court focused attention on the important constitutional decision and forced enhanced scrutiny by Parliament. This ensured Parliament properly considered the decision and made sure that it was not rushed through under the radar by the executive government. This is certainly what upset the executive about the *Miller I* judgment, and it may have prompted the attack on judicial review in the IRAL.

6. Devolution: *Miller I* and the *Scottish Continuity Bill* case

The Supreme Court's answer to the devolved competence question in *Miller I* and the *Scottish Continuity Bill* case initially appears, once again, to have been a 'reassertion of orthodoxy' on Parliamentary Sovereignty.[68] Like Dicey, the Court suggested that in both cases it believed that the UK system of government was unitary, with sovereignty concentrated in the UK Parliament rather than belonging to the devolved Parliaments and Assemblies.[69] Far from comments made by Lady Hale in 2012 suggesting that the UK had become a federal state,[70] and (minority) comments by Lord Thomas in the Supreme Court in 2015 that perhaps equated devolution with a 'nascent federalism in the UK',[71] the Supreme Court in *Miller I* and the *Scottish Continuity Bill* case emphasised that the UK Parliament had reserved its right to legislate on devolved matters, even without consent.[72] This was despite the Sewel convention that 'the UK Parliament would not normally legislate with regard to devolved matters except

[65] Ibid.
[66] For issues with the Parliamentary Sovereignty explanation of *Miller I* see M Elliott, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (2017) 76 CLJ 257.
[67] Anthony (n 36) 685-686.
[68] ibid 690.
[69] Dicey (n 12) 74; *Scottish Continuity Bill Case* (n 5) [12].
[70] Baroness Brenda Marjorie Hale, 'The Supreme Court in the UK Constitution' (*The Supreme Court,* 12 October 2012) <https://www.supremecourt.uk/docs/speech-121012.pdf> accessed 15 February 2019, 23.
[71] Anthony (n 36) 687-689; *Re Recovery of Medical Costs for Asbestos Disease (Wales) Bill* [2015] UKSC 3.
[72] *Miller I* (n 2) [136].

with the agreement of the devolved legislatures'. [73] As far as the Court was concerned, the Sewel convention was unenforceable.[74] For the Court to enforce it would be contrary to the nature of a political convention, which was "political in inception and [depended] on a consistent course of political recognition".[75] This was not changed by the recognition of the Sewel convention in some of the devolution legislation.[76]

In the context of *Miller I,* in which the key devolution argument considered relied upon the Sewel convention, this meant that the Supreme Court would not require the UK Parliament to obtain devolved consent before passing its Brexit legislation.[77] This implied that the UK Parliament was not constrained by any common law restrictions protecting the devolution settlements, but in reality, the Court barely considered the point, since it effectively found it had no jurisdiction to hear a case relying on the Sewel convention.

By contrast, the Court *did* have jurisdiction to consider the devolution questions raised in the *Scottish Continuity Bill* case about the lawfulness of what was effectively the Scottish Parliament's own EU Withdrawal Bill.[78] This was because the Supreme Court had a power under section 33 of the Scotland Act 1998 ("Scotland Act") to consider whether Scottish legislation was within the legislative competence of the Scottish Parliament.

The Court's starting point in the *Scottish Continuity Bill* case was that the Scottish Parliament had competence to pass its own legislation, provided that: (i) it was not incompatible with EU law; (ii) it did not relate to a matter reserved to the UK Parliament in Schedule 5 of the Scotland Act; and (iii) it did not amend an enactment protected from modification by Schedule 4 of the Scotland Act.[79] The Court quickly dismissed the UK government's claim that the whole of the Scottish continuity bill was outside competence, a small victory for Scotland. Instead, the Court chose to assess whether any of the provisions of the Scottish continuity bill would have the unlawful effects proscribed by the Scotland Act and/or whether its provisions were unlawful for some other reason (for example, conflict with Parliamentary Sovereignty).

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[73] ibid [138], [147].
[74] ibid [141].
[75] Citing *Re Resolution to Amend the Constitution* [1981] 1 SCR 753,774–775.
[76] *Miller I* (n 2)[148].
[77] ibid [148].
[78] SP Bill 28B UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill [as passed] Session 5 (2018).
[79] *Scottish Continuity Bill Case* (n 5) [15]. Applying section 29 of the Scotland Act.

Much of the bill was dispatched with at the very end of the Supreme Court's judgment. Having gone to much effort to set out why the bill was not entirely out of competence,[80] the Court went on to find that all the provisions of the Scottish bill that conflicted with the UK Withdrawal Act *were* outside competence. It made this finding because the UK Withdrawal Act had amended Schedule 4 of the Scotland Act to make itself a protected statute,[81] which meant that the Scottish Parliament could not modify it, and the Supreme Court found that much of the Scottish bill *did* modify the UK Withdrawal Act.[82] Thus, everything in the Scottish bill that amended the UK Withdrawal Act was outside competence, and was "not law".[83] This encompassed many of the important differences between the two enactments.[84]

Was this a recognition of the Sovereignty of the UK Parliament as the key guiding principle of the constitution? On the one hand, the Supreme Court emphasised the legitimacy of "legislation by the UK Parliament which amends the Scotland Act and thereby changes the legislative competence of the Scottish Parliament *after* the Scottish Parliament has passed a Bill".[85] This recognises the legitimacy of (even underhand) decisions by the UK Parliament to change the rules on competence after the Scottish Parliament has relied on them, which is consistent with a sovereign UK Parliament that has the right to make or unmake any law whatsoever. On the other hand, the Court focused on the ability of the UK Parliament to change the rules on competence as *an effect* of the Scotland Act,[86] rather than as an effect of Parliamentary Sovereignty. This could imply that it did not mean to emphasize Parliamentary Sovereignty over the status of the Scotland Act as a "constitutional settlement".[87] This was just the meaning of that constitutional settlement.

The latter interpretation seemed to be supported when the Court specifically considered the effects of Parliamentary Sovereignty on section 17 of the Scottish bill, requiring the consent

[80] ibid [28]-[35]. Note that the Scottish Parliament is competent to regulate the legal consequences in Scotland of the cessation of EU law relating to devolved matters, provided that it does it consistently with the Scotland Act 1998.
[81] Controversially, the Court considered the effect of UK Withdrawal Act at the date of the hearing, rather than at the time the Scottish bill was passed. When the Scottish bill was passed, the UK Withdrawal Act was not a protected statute. See Christopher McCorkindale and Aileen McHarg, 'Continuity and Confusion: Towards Clarity? – The Supreme Court and the Scottish Continuity Bill' (*UK Constitutional Law Association Blog*) <https://ukconstitutionallaw.org/2018/12/20/chris-mccorkindale-and-aileen-mcharg-continuity-and-confusion-towards-clarity-the-supreme-court-and-the-scottish-continuity-bill/> accessed 15 February 2019.
[82] *Scottish Continuity Bill Case* (n 5) [92]-[94].
[83] ibid [124].
[84] See ibid [101]–[124].
[85] ibid [97]. Emphasis added.
[86] ibid [93]–[94].
[87] ibid [12].

of the Scottish ministers to retained EU law affecting Scotland. The two relevant considerations for the Court when considering the lawfulness of this provision were the Sovereignty of the UK Parliament and section 28(7) of the Scotland Act, which provides that 'This section ["Acts of the Scottish Parliament"] does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'

The Court found that section 17 of the Scottish bill modified section 28(7) of the Scotland Act, which was protected from modification, therefore section 17 of the Scottish bill was outside competence. However, the Court found that section 17 of the Scottish bill did not separately impinge upon the Sovereignty of Parliament, *since Parliamentary Sovereignty was to be read in light of the rest of the Scotland Act,* and did not otherwise protect UK legislation from the effects of Scottish legislation. Thus the Court established that, as long as Scottish legislation is within competence pursuant to the Scotland Act, the Scottish Parliament can legislate differently from the UK Parliament. Parliamentary Sovereignty will not be compromised. The UK Parliament would eventually have to 'amend, disapply or repeal [Scottish legislation]' to proceed.[88]

This may suggest that the Court *does* place value on the Scotland Act as a permanent constitutional settlement to be protected in the common law, since it is willing to interpret Parliamentary Sovereignty *in light of* the Scotland Act. For Elliott, this part of the judgment also suggests that the Supreme Court's conception of Parliamentary Sovereignty allows for procedural restrictions. This is because it 'implies a preparedness to disaggregate the question of whether Parliament is sovereign" from the question of whether the exercise of Parliament's legislative authority is subject to any form of condition'. [89]

The effect of the *Scottish Continuity Bill* judgment is that whilst the UK Parliament will ultimately always be able to pass legislation for Scotland under section 28(7) of the Scotland Act, it will probably need to frame this as an expression of its power under the Scotland Act, rather than relying on Parliamentary Sovereignty as a standalone principle. This means acknowledging the ability of the Scottish Parliament to pass legislation on devolved matters and acknowledging that any such legislation will need to be amended, disapplied, or repealed specifically before Parliament enacts its own policy in Scotland. This is a procedural hurdle on

[88] ibid [63].
[89] Mark Elliott, 'The Supreme Court's Judgment in the Scottish Continuity Bill Case' (*Public Law for Everyone,* 14 December 2018) <https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/> accessed 15 February 2019, 7.

the UK Parliament's ability to legislate for Scotland in devolved areas and may be an attempt by the Supreme Court to protect the spirit of the devolution settlements as a value of the common law.

Like the Supreme Court's procedural protection of fundamental rights in *Miller I,* the Supreme Court's procedural protection of the devolution settlements in the *Scottish Continuity Bill* case was subtle. The Court did not specifically establish that it was holding Parliament to the terms of the Scotland Act, in the common law, over and above Parliamentary Sovereignty. Probably this would have been too controversial in the fraught political climate surrounding Brexit. Nonetheless, the effect of the *Scottish Continuity Bill* case was to protect, in a procedural manner, the ability of the Scottish Parliament to legislate for Scotland. The requirement for the UK Parliament to amend, disapply or repeal Scottish legislation before enacting its own policy in Scotland ensured enhanced consideration, and therefore scrutiny, of decisions to override the spirit of the devolution settlements.

Overall, whilst it is possible to see *Miller I* and the *Scottish Continuity Bill* cases as a powerful restatement of the sovereignty of the UK Parliament in the devolution context, this was not rigorously put to the test in *Miller I,* given the Court's findings on jurisdiction. In the *Scottish Continuity Bill* case*,* the Supreme Court's focus on the effects of the Scotland Act over Parliamentary Sovereignty and its willingness to see Scottish legislation as a procedural limitation on Parliament may suggest that it does place emphasis (in the common law) on the Scotland Act as a fundamental part of the UK's constitutional arrangements.

The Supreme Court's procedural protection of the Scotland Act in the *Scottish Continuity Bill* case again ensured enhanced Parliamentary scrutiny of an important constitutional decision, namely the UK Parliament's decision to proceed with the Brexit legislation without devolved consent.[90] This ensured that the decision was not rushed through under the radar by the executive government. This was likely another judgment that upset the government in advance of the IRAL.

7. Conclusion

In *Miller I* and the *Scottish Continuity Bill* cases, the Supreme Court grappled with two competing conceptions of the UK constitution: Parliamentary Sovereignty and the common

[90] Which is what eventually happened following the case.

law constitution. As a result, these judgments enhance our understanding of the modern guiding principle(s) of the UK constitution.

Whilst the Supreme Court said in *Miller I* that Parliamentary Sovereignty remained the UK's rule of recognition, its judgment on the Article 50 question makes more sense when viewed as an application of the common law constitution. Fundamental rights would be lost as a result of triggering Article 50, therefore Parliament not only had to permit the loss of those rights, but also to 'squarely confront' their loss by effecting the constitutional change in legislation.

The Supreme Court's recognition of the Scotland Act as a procedural restriction on the UK Parliament's ability to legislate for Scotland in the *Scottish Continuity Bill case* offered protection to the Scottish devolution settlement in the common law.[91]

The common law protections offered by these judgments focused attention on important constitutional decisions around Brexit and forced their enhanced scrutiny by Parliament. This ensured they could not be rushed through under the radar by the executive government. These are two judgments likely to have upset the executive government, which has now launched a counterattack in the IRAL. We wait with bated breath for the Courts to land the next blow if the IRAL is implemented as threatened.

Note that this article was finalised for publication before the government published its response to the Independent Review of Administrative Law.[92] Nonetheless, the arguments in it remain valid about the possible motivation behind the original Review.

[91] Anthony (n 36) 687–689.
[92] Ministry of Justice, 'Judicial Review Reform' (Consultation 2021) <https://www.gov.uk/government/consultations/judicial-review-reform> accessed on 18 August 2021.