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Schmitt, Dicey, and the Power and Limits of Referendums in the United Kingdom

By Matt Qvortrup and Leah Trueblood

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Abstract:

Carl Schmitt and A.V. Dicey are two of history's most influential constitutional theorists, and they offer two of history's most influential accounts of referendums. In most respects, their approaches to referendums are in direct opposition to each other. On Schmitt's view, the purpose of referendums is to acclaim executive actors. On Dicey's view, the role of referendums is to constrain them. Despite disagreeing about whether referendums should acclaim or constrain the executive, Schmitt and Dicey agree that an agenda-setting role for representatives in referendums is inevitable. This paper argues that, in the UK context, if Schmitt and Dicey are right about the necessary agenda-setting power of representatives in referendums, then the accounts of referendums they each offer must be two sides of the same coin. Given the dominance of the executive over the legislature in the UK and the uncodified nature of the constitution, referendums are processes that necessarily *both* acclaim and limit the executive.

Key Words:

Public law, Referendums, Jurisprudence, Democracy

1. INTRODUCTION

Carl Schmitt and A.V. Dicey are two of history's most influential constitutional theorists, and they offer two of history's most influential accounts of referendums.¹ In most respects, their

¹ There is no universally agreed definition of a referendum. A broad, familiar definition is 'a popular vote on a matter of policy' Maija Setälä, *Referendums and Democratic Government* (Macmillan 1999). 4. This broad definition does not, however, have universal support. Often, theorists distinguish between processes that are initiated by voters, labelling those initiatives. The term referendum is then reserved for processes initiated by representatives. The term plebiscite is also sometimes used to distinguish referendums based on their content or bindingness. Matt Qvortrup (ed), *Referendums Around the World: The Continued Growth of Direct Democracy* (Palgrave MacMillan 2014). 2 This paper adopts the broad definition of referendums as 'popular votes on a matter

approaches to referendums are in direct opposition to each other. On Schmitt's view, the purpose of referendums is to acclaim the executive. On Dicey's view, referendums constrain the executive. Despite disagreeing about whether referendums should acclaim or limit the executive, Schmitt and Dicey agree that an agenda-setting role for representatives in referendums is inevitable. This paper argues that, in the UK context, if Schmitt and Dicey are right about the necessary agenda-setting power of representatives in referendums, then the accounts of referendums they each offer must be two sides of the same coin. Given the dominance of the executive over the legislature in the UK, referendums are processes that necessarily *both* acclaim and limit the executive. The current state of referendums in the UK creates opportunities for referendums to constrain the executive; but also risks that even well-meaning governments may use them as tools of power consolidation.

This paper has four parts. It begins by explaining Dicey's negative account of referendums as limiting the executive. Second, it turns to Schmitt's positive account of referendums as processes of executive acclamation. The third part explains the surprising similarities between Schmitt and Dicey's accounts and why their theories each necessarily offer one side of the coin in thinking about referendums in the UK context, where (a) the executive dominates the legislature and (b) the use of referendums is (largely) uncodified. Suppose Schmitt and Dicey are right that representatives play an agenda-setting role in referendums, and the executive are the dominant representatives in the UK. In that case, referendums are necessarily processes that both acclaim and limit the executive. This dual relationship between

of policy,' without distinguishing between referendums and initiatives. The reason for not distinguishing between referendums and initiatives is that while it is undoubtedly correct to say, as a matter of *degree*, citizen-initiated referendums are driven by voters, the terms of those referendums remain constrained by representatives. These constraints come in the form of the agenda-setting role(s) identified by Schmitt and Dicey. However, it is certainly true that while a role for representatives is inescapable in setting the terms of referendums, the type and impact of that role will depend on the popular vote in question and whether voters trigger them. An excellent example of this is the recall of MPs Act 2015. This Act allows for removing MPs, so representatives are certainly on the backfoot in such processes. Still, the circumstances in which voters can remove MPs, and the procedures for their removal, remain tightly controlled by representatives.

acclamation and limitation holds for three further conception reasons, the nature of (i) voting, (ii) decision-making, and (iii) authority and power. The fourth part of the paper demonstrates the dangers of power consolidation through referendums and argues that the UK should codify the use of referendums. The aim of the codification proposals put forward here is to build on Dicey's approach. Their objective is to achieve a state where, so far as possible, referendums are constraining the executive. Codification also helps ensure that referendums capture broad public support for propositions. While codification cannot eliminate the abuses of referendums entirely, it can help ensure that referendums are used in a clear, consistent way. It is necessary to concede, though, that the circumstances Schmitt identifies are inescapable. There will always be a tactical element to the use of referendums, just as there are with other democratic processes such as elections. Political actors will inevitably use processes such as referendums to achieve their ends. Given that the executive already tends to dominate the legislature in the United Kingdom, and the propensity for referendums globally to be tools by which the executive circumvents legislatures, the challenges of codification must be confronted directly.

2. DICEY: REFERENDUMS AS LIMITATION

As the House of Lords' power, the traditional check on the House of Commons, was losing its force,² Dicey was concerned about the consolidation of power in the executive through political parties. Dicey argued that the UK should introduce the referendum to prevent the government from instructing a majority in Parliament to push through changes³ that '[did] not command

² With the rise of mass party democracy, the house of Lords was losing its legitimacy as a check on the House of Commons. This shift was institutionalised by the passing of the Parliament Acts 1911 and 1949 which limit the capacity of the House of Lords to block legislation from the House of Commons.

³ The constitutional issue that dominated Dicey's thinking about this was Home Rule for Ireland. Mads Qvortrup, 'A.V Dicey: The Referendum as the People's Veto' (1999) 20 *History of Political Thought* 531.

the sanction of electors.’⁴ Indeed, Dicey thought the referendum was the one available check on party leaders. The context in which Dicey was writing is, in many ways, recognisable today. He says that '[over] forty years parliamentary government has suffered an extraordinary decline or, as some would say, a temporary eclipse.'⁵ The consolidation of power in parties was happening in the United Kingdom, Dicey thought, and worldwide.⁶ Dicey attributed this global democratic crisis to the rise of party government.⁷ Dicey's concern, which persists today, is Lord Hailsham's idea of 'elective dictatorship.'⁸ Elective dictatorship means that the House of Commons ceases to check on an executive with a Parliamentary majority. Instead, the House of Commons has the purpose of giving effect to the prevailing party's policies. To address this problem, Dicey made a case for the referendum as a 'people's veto.'⁹ An 'alternative second chamber.'¹⁰

On Dicey's view, the strength of the referendum lies not only in the fact that it was a veto, and a veto of a certain kind. The referendum, for Dicey, is both a democratic and conservative institution.¹¹ 'He explains what it means for referendums to be both democratic and conservative, saying it is democratic because of its popular appeal, but conservative since 'it ensures the maintenance of any law or institutions which the majority of electors effectively wish to preserve.'¹² Furthermore, it is a majoritarian¹³ veto, but not a veto in the service of

⁴ Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Roger E Michener ed, 8th Revised edition, Liberty Fund Inc 1982). cix

⁵ *ibid.* cxv

⁶ *ibid.* cxv-cxvi

⁷ *ibid.* cxv

⁸ Lord Hailsham, 'Elective Dictatorship' *The Listener* 496-500, 21 October 1976

⁹ Albert V Dicey, 'Ought the Referendum to Be Introduced in England?' (1866) 57 *The Contemporary Review* 489.

¹⁰ Qvortrup, 'A.V. DICEY' (n 3). 542

¹¹ Dicey (n 4). cvx

¹² *ibid.*

¹³ Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press 1990). 15

homogenisation in the way that, as will be seen shortly, Schmitt's view requires. The aim of Dicey's use of majoritarianism is the control of party government and maintenance of the status quo; it is not the elimination of heterogeneity or difference as it is for Schmitt.¹⁴ For this, and a range of other reasons, it is best to read Dicey as the exemplar of offering a case for referendums in the liberal democratic tradition.¹⁵

That is all to say: on Dicey's view, the role of referendums is to protect the status quo from unbounded party majorities in Parliament. Dicey was not arguing for referendums' use on a participatory basis, and he was not arguing that voting in referendums is intrinsically educative or valuable.¹⁶ Nor was he arguing that referendums are epistemically better ways of making decisions; he accepts that voters will make mistakes.¹⁷ He concedes that the referendum has the weaknesses as well as the strengths of a veto.¹⁸ He is not arguing that referendums are perfect. What he does think, however, is that the referendum's 'strongest recommendation is that it may keep in check the inordinate power now bestowed on the party machine.'¹⁹ On Dicey's view, the referendum was a mechanism that could stop this and do so in a way that was consistent with the doctrine of popular sovereignty.

¹⁴ However, it is essential to recognise that in advocating for a referendum, Dicey was trying to make the process of Home Rule impossible through a different form of homogenisation. A referendum across the entire United Kingdom would leave the Irish as a minority vastly outvoted by the majority.

¹⁵ 'Dicey [deserves] a place among the great liberal thinkers.' Qvortrup, 'A.V. DICEY' (n 3). 546

¹⁶ 'This argument forms an important supplement to the argument for the referendum as a veto, an entrenching device. For, as we have seen, the case for the veto is broadly a conservative one, based upon a distrust of the efficacy of representative institutions and, in particular, of political parties. But the case for the referendum based upon its educative nature and the need to encourage participation relies upon arguments of an entirely different type.' Vernon Bogdanor, *The People and the Party System* (CUP 1981). 85

¹⁷ 'It must, in short, be admitted that a veto on legislation, whether placed in the hands of the King, or in the hands of the Lords, or of the House of Commons, or of the 8,000,000 electors, would necessarily work sometimes well and sometimes ill.' Dicey (n 4). cxiii

¹⁸ *ibid.*

¹⁹ *ibid.* cxiv

With the House of Lords' declining role, and the fusion of political parties with government, Dicey thought the UK required a change to maintain the integrity of Parliamentary democracy. Parliamentary democracy needed to be protected against the influence of political parties in a way that was consistent with the doctrine of popular sovereignty. For Dicey, that protective democratic process was the referendum. This paper will argue, though, that while Dicey is correct to say that referendums can play a role in constraining the executive, they also – necessarily – play a role in consolidating executive power. The use of referendums in the UK has exacerbated precisely the problems that Dicey sought to address.

3. SCHMITT: REFERENDUMS AS ACCLAMATION

Schmitt's theory of plebiscitary democracy follows from his critique of liberalism. Liberals, Schmitt thinks, are trying to have their cake and eat it.²⁰ They try to base their theory of democracy on principles, such as the rule of law, which are universal and neutral.²¹ Schmitt argues that these ideas are not neutral and that democracy is fundamentally about substance.²² Liberalism's lack of willingness to engage with substance means that it will always postpone addressing issues by setting up 'commissions of inquiry and avoiding conflicts.'²³ As a consequence of this absence of clarity, decisions, compromises, and majorities in parliamentary democracies will only ever be transitory, and political commitment will be absent. In a time of increasing bureaucratisation, what Schmitt thought was required is explicit, decisive action on behalf of the people. Only a system of plebiscitary democracy acclaiming an authority can

²⁰ Heiner Bielefeldt, 'Carl Schmitt's Critique of Liberalism' in David Dyzenhaus (ed), *Law as Politics* (Duke University Press 1998). 24

²¹ *ibid.* 25

²² *ibid.*

²³ *ibid.*

make this possible.²⁴ By contrast, Schmitt's system of plebiscitary democracy authorises 'the government or an authoritative organ'²⁵ to act clearly and authoritatively on the people's behalf. The contrast between parliamentary and plebiscitary democracy, Schmitt thinks, is between one that is 'anachronistic, transitory, dangerous and self-contradictory and one that is vibrant, democratic, efficient, and permanent.'²⁶

In addition to these structural failings, there is a more profound and irresolvable paradox between the legality required by parliamentary democracy and the legitimacy needed for democracy through expressions of popular sovereignty.²⁷ Schmitt argues that 'every democracy rests on the on the presupposition of the indivisibly similar, entire, unified people.'²⁸ Since this is so, Schmitt concludes, 'plebiscitary legitimacy is the single type of state justification that may be generally acknowledged as valid today...it is the last remaining accepted system of justification.'²⁹ Schmitt's theory of plebiscitary democracy follows logically from his understanding of the nation and constituent power.³⁰ For Schmitt, 'constitutional authority cannot escape its origins in constituent power.'³¹ This means that constituent power cannot be constrained or controlled by the law. The constitution is legally valid *because* it is a decision of the people.³² Schmitt's is a way of thinking that continues to

²⁴ 'The total state needs a stable authority in order to move ahead with the necessary depoliticisation and to establish free spheres and living spaces from within itself.' Carl Schmitt, *Legality and Legitimacy* (Duke University Press 2004). 90

²⁵ *ibid.*

²⁶ *ibid.* 61

²⁷ John McCormick, 'Identifying or Exploiting the Paradoxes of Constitutional Democracy? An Introduction to Carl Schmitt's Legality and Legitimacy, *Legality and Legitimacy* (Duke University Press 2004). xxvii

²⁸ Schmitt (n 24). 21

²⁹ *ibid.*

³⁰ David Dyzenhaus, 'The Politics of the Question of Constituent Power' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007).

³¹ Dyzenhaus (n 30). 129

³² Loughlin and Walker (n 30). 22

have enormous resonance in the rhetoric of referendums, particularly the idea of ‘*vox populi vox dei*,’ the voice of the people is the voice of God.³³

While Schmitt argues that referendums are expressions of legitimacy coming from the people, this does not mean that he thinks referendums are directly democratic. Schmitt does not believe that ‘the people’ themselves set the terms of referendums. He is clear that the people can only ever respond to questions asked of them. Schmitt says, ‘the question can only be posed from above; the answer only comes from below.’³⁴ This passage connects two essential features of Schmitt’s theory of plebiscitary democracy. First, the dependence of the people in a referendum on the prior actions of authorities. It is also related to the trust that Schmitt places in authorities to use that power judiciously. Schmitt’s view is based on the presupposition that executive organs will use this power properly. Schmitt says: ‘Plebiscitary legitimacy requires a government or some other authoritarian organ in which one can have confidence that it will pose the correct question in the proper way and not misuse the great power that lies in the posing of the question.’³⁵ The abuse of the idea of a unified people expressing their will through referendums to acclaim dictator has become ‘one of the chief hallmarks of fascism.’³⁶ and one of the ways that dictators of all stripes continue to abuse referendums today.³⁷ The relevance of Schmitt’s work remains clear. Schmitt’s theory of plebiscitary democracy helps make sense

³³ The question of who ‘the people’ are is, of course, a serious problem in legal and constitutional theory, not least because of the boundary problem Frederick Whelan, ‘Prologue: Democratic Theory and the Boundary Problem’ (1983) 25 *Nomos* 13. This paper is not advocating for the use of the term ‘people’ in its analysis. In its positive suggestions in section four, it explicitly uses the word ‘voters’ to recognise that the very definition of a, or *the*, people is contested.

³⁴ Schmitt (n 24). 90

³⁵ *ibid.*

³⁶ McCormick (n 27). xxxii

³⁷ Setälä says that referendums are ‘handy tools for dictators in boosting their legitimacy, and were used to consolidate the powers of the Nazis, and among former communist countries in Eastern Europe.’ Setälä (n 1). 1-2

of the many contemporary cases of abuse of referendums,³⁸ particularly by those executive actors seeking to use them to consolidate power.³⁹ It is not only despots who use referendums to consolidate power, however. The following two sections demonstrate how referendums may be sources of power for the executive, even in healthy constitutional democracies.

4. TWO DEFINING FEATURES OF REFERENDUMS IN THE UK

So far, this article has contrasted Schmitt and Dicey's theories of referendums. It has shown how the two accounts of referendums appear to be opposites of each other. Schmitt makes a positive case for referendums as acclaiming the executive, Dicey, that referendums are negative ways of constraining the executive through vetoes. This section argues that, specifically in the UK context, Schmitt and Dicey both offer inseparable insights into the uses of referendums. Indeed, in the UK, the two accounts offered by Schmitt and Dicey are *necessarily* two sides of the same coin. These shared insights have salience in the UK because (a) the use of referendums is (largely) uncodified and the (b) dominance of the executive relative to the legislature. This paper will explain first the salience of the UK context before outlining the three further conceptual reasons that acclamation and limitation must be two sides of the same coin: the nature of (a) decisions, (b) voting, and (c) the relationship between power and authority. The essential point is this: referendums will always provide a mandate to the executive in the UK. These mandates arise at once, both in the form of what the executive *can* do and what they *cannot* do.

³⁸ Schmitt's current influence, of course, extends well beyond democracies as demonstrated by Xie Libin and Haig Patapan, 'Schmitt Fever: The Use and Abuse of Carl Schmitt in Contemporary China' (2020) 18 *International Journal of Constitutional Law* 130. 130

³⁹ William Rasch, 'Carl Schmitt's Defense of Democracy' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (OUP 2016). 331

a. Referendums in the UK

There are two defining features of the use of referendums in the UK context: the absence of codification and the dominance of the executive relative to the legislature. Take the matter of codification first. The use of referendums in the United Kingdom is governed mainly by the Political Parties, Elections and Referendums Act 2000 (PPERA). The PERA is administrative, not substantive, legislation. The PERA says very little about the role of referendums in the United Kingdom, although some acts –specifically the devolution acts– stipulate circumstances in which referendums must be used. The Scotland Act 2016, Wales Act 2017, and the Northern Ireland Act 1998 all use referendums as methods of entrenchment for the devolution settlement. The existence of the Scottish and Welsh Parliaments is not to be abolished but for the consent of people voting in a referendum. However, the Acts provide no further procedural guidance about how these referendums are to work or how these referendums are to be initiated. The Northern Ireland Act is slightly different in that s 1(2) clarifies if there is a majority vote in a referendum to no longer be a part of the United Kingdom, then there is a duty on the Secretary of State to bring forward proposals for a change in the relationship. While there would be extreme political consequences if the Westminster Parliament were to change these acts unilaterally, it is very legally likely that they could lawfully do so. There was one other way it was clear by law that representatives must put a question to a referendum. The European Union Act 2011 previously required a referendum on any further European integration; however, this has now been repealed by the European Union Withdrawal Act 2018.

The PPERA is also-opened ended about the matters for which referendums must be used. While the House of Lords Constitution Committee concluded that referendums should be used for 'fundamental constitutional issues', the Committee itself was, understandably, reluctant to define a fundamental constitutional issue.⁴⁰ While it is doubtlessly right that the boundaries of a fundamental constitutional issue are contested, it does not follow that there are no clear-cut cases where referendums should be required. Additionally, the PPERA does not clarify how referendums are to be used, whether, for example, they are pre-or post-legislative. This was a core problem identified in the wake of the Brexit referendum.⁴¹ Even the question of whether referendums are binding or advisory is a question left to the government of the day. The bottom line is this: the way a referendum works in the United Kingdom depends enormously on the specifics of the enabling legislation. For instance, for the Alternative Vote referendum, s 8 of the Parliamentary Constituencies and Voting Act 2011 outlined two possible paths for the bill depending on the popular vote results.⁴² If there were a majority of votes in the referendum for the proposed changes, then the Secretary of State was to introduce an order bringing the changes in legislation into force. If there was a majority of votes against the

⁴⁰ The HLCC did put forward a list to provide examples of what could count as a fundamental constitutional issue while emphasising their qualification: 'This is not a definitive list of fundamental constitutional issues, nor is it intended to be.' The list included: 'to abolish the Monarchy; to leave the European Union; for any of the nations of the UK to secede from the Union; to abolish either House of Parliament; to change the electoral system for the House of Commons; To adopt a written constitution; and to change the UK's system of currency.' House of Lords' Constitution Committee, 'Referendums in the United Kingdom' (2009) 12th. 49

⁴¹ Recommendation 18 of the report holds that: 'Referendums should be held on proposals that are clear and immediately actionable. This means that, wherever possible, referendums should be held post-legislatively: the relevant Parliament or assembly should legislate in detail for the change, subject to the approval by voters in the referendum. Should the result favour the change, the provisions would then be implemented.' 'Independent Commission on Referendums' (Constitution Unit 2018) <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/182_-_Independent_Commission_on_Referendums>. 86

⁴² '(1) The Minister must make an order bringing into force section 9, Schedule 10 and Part 1 of Schedule 12 ("the alternative vote provisions") if—(a)more votes are cast in the referendum in favour of the answer "Yes" than in favour of the answer "No", and (b)the draft of an Order in Council laid before Parliament under subsection (5A) of section 3 of the Parliamentary Constituencies Act 1986 (substituted by section 10(6) below has been submitted to Her Majesty in Council under section 4 of that Act. (2) If more votes are not cast in the referendum in favour of the answer "Yes" than in favour of the answer "No", the Minister must make an order repealing the alternative vote provisions.' Parliamentary Constituencies and Voting Act 2011 s 8

changes, then the Secretary of State was to bring an order repealing it. The enabling legislation for the 2016 Brexit referendum, by contrast (the European Union Referendum Act 2015), made no such provisions for the outcome of the vote.⁴³

The absence of codification around referendums, particularly *how* and *when* they must be used, gives enormous power to the executive. The question of whether a referendum is required is essentially up to the government of the day. The government has enormous power over constitutional change processes in the United Kingdom, not just concerning referendums.⁴⁴ The question alone of what amounts to a fundamental constitutional issue gives enormous power to the government. This ambiguity alone would be risky, combined with the power that comes to dictate the process and outcome of referendums. This absence of codification runs directly into the risk of referendums as tools that the executive can manipulate. Indeed, the threat, or promise, to hold a referendum may be as politically useful as holding a referendum in the first place.⁴⁵ The threat to hold a referendum is by no means limited to the United Kingdom.⁴⁶ Nevertheless, the absence of much codification introduces an element of flexibility around referendums present in other constitutions. This changeability is not in

⁴³ The UKSC stressed this point in *Miller* where the majority holds that: 'Both sides of the argument proceed on the basis that the referendum on membership of the EU was held under the European Union Referendum Act 2015 ("the 2015 Act"), which resulted in a vote to leave the EU, does not provide the answer. The Secretary of State's argument proceeds on the basis that the Crown has taken the decision under Article 50(1), accepting the result of the referendum. The Miller claimants argue only that Parliament can take that decision. Both the Secretary of State and the Miller claimants proceed on the basis that the referendum result was not itself a decision by the UK to withdraw from the EU, in accordance with the UK's constitutional requirements, and that the 2015 Act did not itself authorise notification under Article 50(2). In these circumstances, there is no issue before the court as to the legal effect of the referendum result. Nor is this an appropriate occasion on which to consider the implications for our constitutional law of the developing practice of holding referendums before embarking on major constitutional changes: a matter on which this court has heard no argument. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [171]

⁴⁴ 'House of Lords - The Process of Constitutional Change - Constitution Committee' <<https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/177/17702.htm>> accessed 14 December 2018.

⁴⁵ Indeed, the absence of codification allows for referendums to be promised, for example, on the Lisbon Treaty, and then the promise retracted. This practice has given rise to legal challenges including *R (on the Application of Wheeler) v Office of the Prime Minister* (2008) [2008] EWHC 1409.

⁴⁶ Richard Albert, 'Trudeau's Threat: The Referendum at Patriation' <SSRN-id3665025> accessed 5 August 2020.

itself necessarily problematic; the reason it is problematic is the dominance of the executive relative to the legislature.

b. The Dominance of the Executive in the United Kingdom

One of the most common and compelling arguments against the use of referendums is that elites manipulate them.⁴⁷ Referendums may be abused by elites in all kinds of ways, for example: to bolster personal legitimacy,⁴⁸ for internal party management,⁴⁹ and to achieve political goals broadly speaking.⁵⁰ Social scientific literature also shows that referendums tend, as a baseline, to lend power to the executive.⁵¹ This is all to say: the worry about the elite-driven nature of referendums, and the potential for elite manipulation, are clear and well-understood. These risks are particularly acute in the absence of codification and where the executive is strong relative to the legislature.

In the United Kingdom, as explained above, the process for legislating on any issue is nearly identical to legislating on constitutional issues.⁵² The difficulty is that the executive dominates the legislative process in the United Kingdom. As Norton argues, the legislature is

⁴⁷ ‘Referendums are part of a bargaining process between elites...executives can better position themselves than legislatures along a policy spectrum when introducing referendums. M Walker, *The Strategic Use of Referendums: Power, Legitimacy, and Democracy* (Springer 2003). 3

⁴⁸ Setälä says that referendums were ‘handy tools for dictators in boosting their legitimacy, and were used to consolidate the powers of the Nazis, and among former communist countries in Eastern Europe.’ Setälä (n 1). 1-2.

⁴⁹ Hollander persuasively shows that, in calling referendums, ‘strategic motives are decisive’ Saskia Hollander, *The Politics of Referendum Use in European Democracies* (Palgrave Macmillan 2019). 5

⁵⁰ ‘Political actors use referendums to achieve their goals.’ Walker (n 48). 1

⁵¹ ‘Referendums are part of a bargaining process between elites...executives can better position themselves than legislatures along a policy spectrum when introducing referendums.’ *ibid.* 3

⁵² With the caveat that constitutional statutes cannot be impliedly repealed—*Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) (Court of Appeal).

fundamentally responsive.⁵³ This is not to overstate the case. Particularly in the first two decades of the twenty-first century, Norton argues, Parliament is ‘now stronger than at any time since the development of mass-membership organised political parties in the 1860s.’⁵⁴ Parliament performs many essential functions; it is perhaps more effective in its role as a scrutineer of legislation.⁵⁵ There are plenty of counterexamples of instances where private members bills have made an impact.⁵⁶ In *Legislation in Westminster*, Russell and Glover are effective in challenging the argument that Parliament is relatively weak. While the influence exercised by the different parts of Parliament are diffuse and piecemeal, they are nevertheless effective.⁵⁷ While Russell and Glover’s study is persuasive and important, Dicey’s core concern – the possibility of Lord Hailsham’s elective dictatorship – remains valid. If a government is legislating on an issue of constitutional significance, it is likely essential for the government. If an issue is vital to the government, it is very likely, albeit not certain, that the bill will be passed.⁵⁸ That is not to suggest that the chambers of Parliament and its select committees have no role whatsoever in shaping legislation with regard to referendums. The claim is only that the absence of codification gives governments a structural advantage in legislating for referendums on terms that suit them politically.

These two defining features of the use of referendums in the UK: the absence of codification, and the dominance of a government majority in the legislative process, mean that referendums are exacerbating rather than addressing power consolidation. It is correct to say,

⁵³ ‘The key characteristic is that it is a reactive legislature.’ Phillip Norton, ‘Parliament: The Best of Times, the Worst of Times?’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019). 158

⁵⁴ *ibid.* 185

⁵⁵ Norton argues that this has improved particularly with the strengthening of the select committee system *ibid.* 169-171

⁵⁶ Meg Russell and Philip Cowley, ‘The Policy Power of the Westminster Parliament: The “Parliamentary State” and Empirical Evidence’ (2016) 29 *Governance* 121. 133

⁵⁷ Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (OUP 2017). 1

⁵⁸ Legislatively, ‘what the executive [wants], the executive [gets.]’ Norton (n 54). 163

though, that even in these circumstances, referendums are still acting as limits on the executive's actions. As the next section demonstrates, Schmitt and Dicey's insights show that the processes of limitation and acclamation are inseparable from each other.

5. THE INTERCONNECTEDNESS OF ACCLAMATION AND LIMITATION

All referendums in the UK act as limits on the actions of the executive and as ways of acclaiming the executive. The duality of these two forces can be seen in Schmitt's discussion of Napoleon. Schmitt makes the compelling point that: 'For those seeking support, the appeal to the people will always lead to some loss of independence.'⁵⁹ This is the essential idea driving this article. Referendums provide support for the executive to execute propositions, but this direction always involves – as Schmitt rightly says – some loss of independence as well. Put differently: In instructing representatives in what to do through referendums, referendum outcomes also identify what the executive *cannot* do. In this way, each of Schmitt and Dicey's arguments is, at least in the UK context, one side of the coin. Referendums are both always, at least to some extent, both negative and positive.⁶⁰ There are three other conceptual reasons that these negative and positive processes cannot be separated from each other in the context of the United Kingdom: (a) referendums as decisions, (b) the nature of voting, and (c) the relationship between authority and power.

(a) Referendums as Decisions

⁵⁹ Schmitt (n 24). 91

⁶⁰ The degree to which referendums are negative and positive democratic processes depends on the context. Matt Qvortrup, *The Referendum & Other Essays on Constitutional Politics* (Hart 2019). 92

Whatever else referendums are, they are decisions. Referendums have outcomes. The purpose of holding a referendum is to conclude a particular debate (at least temporarily), even if the conclusion is to maintain the status quo. Further, decisions are not self-executing. Decisions require action by representatives, even – again – if the action is to maintain the status quo. The executory function of referendum outcomes may be directed to different actors. Referendums may task a legislature, executive, or *ad hoc* body with acting based on a particular outcome. Examples of such actions include instructing the legislature or executive to enter or leave a treaty or requiring a minister to bring a bill before a legislature. The bottom line is that for the outcome of a referendum to have meaning, voters require representatives to take that action on their behalf. That is not an action they can take themselves. This is true even when the outcome is an affirmation of a status quo. Inevitably, these referendum outcomes constrain and empower elites. They empower elites and representatives of various kinds to act, and in empowering elites to take specific actions referendums, by definition, these outcomes constrain what representatives can do. This happens in two ways, both directly and indirectly. First, referendums constrain and empower those tasked with undertaking particular functions resulting from a referendum. To return to the Parliamentary Constituencies and Voting Act 2011, the Act identified the referendum's consequences and automatically tasked a particular minister with bringing legislation into force. This both directly empowered the Secretary of State to take one of two actions and limited his options. In an indirect sense, the outcome also empowered and limited the executive in a political sense. The outcome offered support for those opposed to electoral reform, such as the Conservatives, and was a blow to the advocates for electoral reform, the Liberal Democrats.⁶¹ The bottom line is this: whatever else they are, referendums are decisions that cannot be self-executing. Referendums are, among other things,

⁶¹ Paul Whiteley and others, 'Britain Says NO: Voting in the AV Ballot Referendum' (2012) 65 Parliamentary Affairs 301. 301

instructions to representatives. In instructing representatives to take a particular action, they limit what representatives can do too.

A reader might worry that this paper's argument holds occasionally, but certainly not all the time. As was seen above, referendums are used in an enormous variety of ways. This variation occurs even in a single jurisdiction like the United Kingdom.⁶² Little if anything holds about their use in general, still less their relationship concerning representatives such as the government. This is an essential and helpful worry. Referendums are indeed democratic processes that vary. The specifics of their use, and whether they are advisory or compulsory, for instance, matters a great deal. Despite this plurality, however, this paper maintains that the same dynamic holds between representatives and voters, albeit to a greater or lesser degree. Whatever else referendums are, and they are and can be many different things in different contexts, they are always decisions. That they are decisions is key to understanding how they both limit and empower the executive. It is right to say this will vary depending on the referendum in question. Take the Parliamentary Constituencies and Voting Act, for example, as one end of the spectrum. The AV referendum was essentially a veto device in the Diceyan tradition; there was a proposal on the table that voters could choose to veto. If a majority of voters in the referendum supported the legislation, then the bill would become law. Nevertheless, it was still a positive source of legitimacy for the coalition government's Conservative members. It was both a way of limiting the government's actions and achieving the government's goals. The referendum outcome lent support to those who supported it and undermined those who supported the failed proposition.⁶³ It both limited the government's actions on a particular proposition and allowed them to pursue other political objectives. This

⁶² 'Referendums "fail to fit any clear universal pattern' Michael Gallagher and Pier Uleri (eds), *The Referendum Experience in Europe* (Macmillan 1996). 2 citing Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 1984). 206

⁶³ Whiteley and others (n 62).

is all to say: the degree to which each referendum constrains and acclaims the executive varies depending on the enabling legislation. Nevertheless, because referendums necessarily require decisions to be taken by executive actors, they will always both empower and constrain them. This dual relationship between empowerment and constraint can also be seen in the nature of voting in referendums.

(b) Voting

Voting is not one phenomenon, but many. A vote has many kinds of significance. Whatever else it does, however, voting demonstrates support for a proposition. This is called the contributory or mandate view of voting.⁶⁴ The mandate view is not an exhaustive theory of voting, and this is not to suggest that voting is only about contributory mandates. It may well be in certain circumstances that voting should count, for example, as an act of deliberation. On the minimalist, mandate view advocated here, however, votes are understood as contributing to a mandate for a proposition, whatever else they are. Guerro advances the mandate view of voting in the context of elections. He rightly argues that it does not only matter for purposes of legitimacy *who* gets elected but *how* they are elected.⁶⁵ To that end, he introduces the idea of elected representatives as having *manifest normative mandates*.⁶⁶ Guerro's account of manifest normative mandates is trying to solve a paradox. How can it be rational for voters to continue to cast their votes, even if their vote is not dispositive in putting their preferred candidate over the top? Voting remains rational in these circumstances, Guerro argues, because the greater the

⁶⁴ 'Survey research shows that voters do not believe they are pivotal but do believe their vote influences the (mandate) outcome. The contributory model of voting – contributing to advancing a greater public good – is also consistent with the fact that turnout is higher in more important elections. It is higher in countries whose constitutions are more responsive to voters' preferences.' Gerry Mackie, 'Deliberation and Voting Entwined' in Andre Bächtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (OUP 2018). 222

⁶⁵ Alexander Guerrero, 'The Paradox of Voting and the Ethics of Political Representation' (2010) 38 *Philosophy and Public Affairs* 272. 274

⁶⁶ *ibid.*

mandate the representative has, the better placed they are to achieve their goals. Guerro is right about this. This paper builds on his argument to distinguish between *primary* and *secondary* normative mandates.

A primary normative mandate, Guerro argues, is support for a representative. There is no reason why primary normative mandates cannot exist for propositions, too, in cases such as referendums—the greater support for a proposition, the greater the mandate. The importance of clear mandates is seen, for example, in the debates in Québec around the clarity act and the question of what amounts to a clear majority.⁶⁷ Referendums involve mandates in another interesting way, however, the idea that representatives might indirectly receive a mandate from an outcome. These secondary normative mandates may be for representatives or groups such as umbrella campaign organisations and political parties. These secondary normative mandates are mandates to execute or give effect to a particular outcome. They are not precisely support for a representative, but they are authorisation for a representative to Φ or to execute an outcome. Further, what a representative has a mandate for and against are inseparable from each other. If voters choose between two options: to Φ or not to Φ , and they elect to Φ , that outcome provides a primary normative mandate to Φ and not to not Φ , as well as secondary normative mandates to the same effect for representatives to execute those outcomes. Put more simply: if a government has a mandate to leave the European Union, they also have a mandate *not* to not leave the European Union, and the decision to leave the European Union provided indirect legitimacy to those who supported the winning proposition. This example captures Schmitt's point that referendums entail support for executive action and entail some loss of

⁶⁷ In its *Secession Reference*, ‘The Supreme Court [of Canada] did not define what would amount to a “substantial consensus.” And “It [was] unclear what a clear majority meant[t].’ Patrick Monahan, ‘Doing the Rules: An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference’ (2000) <<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1074&context=reports>>. (accessed 18 December 2018) 12-13.

independence. These types of independence take different forms depending on the degree of authority and power offered by a particular referendum.

(c) Authority and Power

The idea of secondary normative mandates is connected to the exercise of power and authority through referendums. Consider the ways first in which referendums can be powerful. They can be powerful insofar as they require representatives to act in a particular way as a political matter. Returning to the example of leaving the European Union, winning the 2016 Brexit referendum lent political power to those who led the campaign. Additionally, referendums can be authoritative. That is to say, they can be legitimate as a matter of domestic law, international law, or political morality. They can authoritatively trigger bills to become laws, as in the AV referendum in 2011. Referendums can also be a combination of powerful and authoritative. That is to say: they can provide clear mandates to representatives and unambiguous legal outcomes. However, power and authority can also come apart. Results can be powerful, even when referendum outcomes maintain the status quo. The referendum in Scotland in 2014 did not result in majority support for independence, but it did result in changes to the devolution settlement. This is all to say: referendums, by definition, provide primary normative mandates for political propositions and secondary normative mandates for representatives. These mandates may be powerful, and they may also be authoritative. The more point is this: referendums do not need to be abused by dictators to lend political power to political actors. The use of referendums, or at least the attempt to use referendums, to bolster a government's legitimacy, is a necessary feature of their use given (a) the (largely) uncodified state of referendums in the United Kingdom (b) the degree of dominance the executive has over the legislature.

Finally, it is not an *entirely* problematic feature of referendums that they provide legitimacy to authorities; it is part of the basis of their appeal. Schmitt is right to argue that it is part of referendums' purpose is to come to clear decisions and then for those decisions to be executed. Referendums must authorise what they want their representatives to do, and that clarity and finality can, in certain circumstances, be helpful in democracies.⁶⁸ However, Schmitt is only right about this in a democratic context when read alongside Dicey. Referendums must limit authorities' actions, too, constraining how and to what end they can use the power referendums necessarily provide. Reading Dicey and Schmitt together demonstrates that both of their approaches are correct, albeit only in part.

6. THE CASE FOR CODIFICATION

So far, this paper has argued that – at least in the UK context – Schmitt and Dicey each offer essential contributions to understanding referendums. Referendums limit what the executive can do, but they also acclaim the executive instructing the executive to execute a particular action. This final section argues that this duality in the use of referendums must be confronted directly in their use, particularly that the use of the referendums should be codified to limit the degree of power they can lend to the executive. This is not to say that legislating for referendums is a silver bullet that will address all of their failings or prevent the consolidation of power in the executive. Further, as noted above, it is not entirely undesirable that referendums instruct the executive to act in a particular way. There are also risks in legislating for referendums and the loss of constitutional flexibility that entails. The point here does not

⁶⁸ Although note the possibility that this finality can undermine deliberation, Chambers argues in Simone Chambers, 'Constitutional Referendums and Democratic Deliberation' in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum democracy: citizens, elites, and deliberation in referendum campaigns* (Palgrave 2001). 232

require new primary legislation to be perfect or address all the referendums' risks. Referendums have presented challenges in countries with clear legislative frameworks.⁶⁹ The claim only this: legislation will do more good than harm in preventing referendums from consolidating power in the executive in the United Kingdom.⁷⁰ Currently, the executive has far too much control over the process, outcome, and content of referendums, giving rise to Lord Hailsham and Dicey's concerns about elective dictatorship. This new referendum Act should clarify three matters. First, what issues must be put to a referendum? This would codify existing conventions, but the debates around these conventions have become increasingly fraught, and it is essential to clarify what a fundamental constitutional issue is. Second, the timing and process of referendums should be clarified. It should be agreed in the abstract when referendums will be held, for example, on the same dates as elections or distinct from elections, to prevent the manipulation of referendum processes to benefit various constituencies who are more and less likely to vote. Third, a new act should clarify that referendums must be used post-legislatively. This is because it allows Parliament to play the role that, as was argued above, it is more effective at than as a legislator: the role of scrutineer. Using referendums post-legislatively, that is to say: to approve legislation rather than to initiate processes of constitutional change, clarifies the content of referendums rather than leaving the content inchoate and subject to manipulation. In this way, the vision of codification offered here attempts to build on Dicey's approach. The aim is to get to a place where, so far as is possible, referendums are constraining the executive and making sure that referendums are used in a clear, consistent way and capture broad public support for propositions. It is essential to concede, though, that the circumstances Schmitt identifies are inescapable. There will always

⁶⁹ The challenges and debates around the Australian postal vote on same-sex marriage show that no framework on its own can guarantee the clear and consistent use of referendums.

⁷⁰ This is not to overstate how distinctive the abuses of referendums are to the United Kingdom. Referendums have been used poorly in Canada, where there is little legislative guidance on their use either. The referendum question on Quebec's secession in 1995 created confusion and nearly constitutional chaos.

be a tactical element of referendums, just as there are with other democratic processes such as elections. Political actors will inevitably use these processes to achieve their goals. Given that the executive is already dominating the legislative process in the United Kingdom, the challenge is that referendums tend to privilege the executive's aims of the executive vis-à-vis the legislature, how to prevent referendums from being manipulated. Some tactical use of referendums are inevitable, but the aim should be to prevent, so far as is possible, referendums being used to consolidate power in the executive, especially when that one of their natural tendencies already.

7. CONCLUSION

At first glance, it seems that Schmitt and Dicey's account of referendums are opposites of each other. Schmitt is offering a plebiscitary theory of democracy whereby referendums acclaim authorities. At the other end of the spectrum, Dicey argues that referendums are negative expressions of popular sovereignty. On Dicey's view, referendums are limit majorities in Parliament from making constitutional changes that do not have broad public support. Despite these differences, there are striking similarities between these two accounts. The most striking similarity is that both agree that role of authorities as agenda-setters in referendums is essential. This paper has argued that Schmitt and Dicey capture essential features of the use of referendums in the United Kingdom. Namely, they both emphasise the role of agenda-setting required of representatives in referendums. Schmitt is correct to say that referendums lend legitimacy to authorities, particularly the executive, and Dicey is correct to say that referendums can and should limit authorities too. These processes are inseparable from each other. Acclamations are limits; they tell authorities what they cannot do and what they can. Limits are also acclamations; they are instructions to authorities to take – or not take – actions. If referendums are instructing authorities on what steps to undertake, which Schmitt and Dicey

show they necessarily do, they will always empower and constrain authorities. There is always the potential that referendums can constrain authorities and – even in democratic cultures such as the United Kingdom– the possibility that they can be abused and manipulated. Although codification cannot prevent acclamation altogether, legislating for referendums will help constrain the executive. Reading Schmitt and Dicey together helps address the distinct challenges presented by referendums in the United Kingdom and the opportunities to improve their use.