

*MARBURY V MADISON* IN THE UK:  
BREXIT AND THE CREATION OF JUDICIAL SUPREMACY

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[T]he most honest judges are after all only honest men, and when set to determine matters of policy and statesmanship will necessarily be swayed by political feeling and by reasons of state. But the moment that this bias becomes obvious a Court loses its moral authority, and decisions which might be justified on grounds of policy excite

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Since 14-15 April when the Symposium was held, events have, of course, moved on, indeed, incredibly so. But I have not attempted to take such events into account, save in a few, specially indicated footnotes when not doing so seemed outright absurd.

natural indignation and suspicion when they are seen to be not fully justified on grounds of law.

Dicey, *The Law of the Constitution*, 1885<sup>1</sup>

## INTRODUCTION

Though the implementation of the United Kingdom's (UK) decision to leave the European Union (EU) of course involves enormous difficulties, in the period immediately after the decision was taken the unwritten British constitution appeared to have handled the specifically political difficulties with some facility. The exception to this is one that proves the rule, for that exception is the Scottish National Party's policy of using the decision to leave to further its argument for Scottish independence, and this is a policy which seeks to break with that constitution. By far the principal obstacle to the implementation of the decision to leave has been, not directly political, but legal, for judicial review was obtained of the way the UK Government proposed to carry out that implementation. The UK Supreme Court's (UKSC) decision in *R. (Miller and another) v The Secretary of State for Exiting the European Union*,<sup>2</sup> popularly known as "the Brexit case" but which, together with the judgment from which this was an appeal, shall here be referred to as *Miller*, was handed down on 24 January 2017. If this case was brought with the political purpose of ultimately preventing Brexit, then it has been a complete failure, for it was immediately clear that the UKSC judgment would not serve this purpose, and indeed the UK gave notice to the President of the European Council of its intention to leave the EU on 29 March 2017,<sup>3</sup> entirely in line with the timetable for the implementation of the referendum result which the

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<sup>1</sup> A.V. DICEY, *The Law of the Constitution*, in 1 THE OXFORD EDITION OF DICEY 92-93 (2013).

<sup>2</sup> [2017] UKSC 5; [2017] 2 W.L.R. 583, 621; [2017] 1 All E.R. 593. Hereinafter references to this judgment will be given as, e.g., (S.C. [28]), i.e. para. 28 of the UKSC judgment.

<sup>3</sup> H.C. Deb. vol. 624 col. 251 (March 29, 2017) (Mrs. Theresa May, Prime Minister).

Prime Minister announced at the Conservative Party Conference held some seven months after that result was known but before *Miller* had been heard.<sup>4</sup>

Nevertheless, *Miller* was unprecedented and represents a constitutional coup in which the UKSC has created itself as a constitutional court.<sup>5</sup> That the case was heard at all, the way it was heard, and the UKSC's decision to instruct the UK Government, and therefore the UK Parliament, to pass an Act of primary legislation overturns sovereignty of Parliament and establishes judicial supremacy in the UK. This is the culmination of a process which hindsight makes clear has inexorably been gathering pace since the passage of the Human Rights Act 1998.<sup>6</sup> One reason that that process has been able to gather pace is that there are, of course, good reasons for the creation of a constitutional court, reasons which certainly have resonance amongst the overlapping UK legal and political elites which have supported and in many cases still support continued membership of the EU. But, as if to give a profound example of why the mode of rule of these elites received such a rebuff from the electorate's decision to leave, the major constitutional change involved in creating such a court has not been a matter of democratic persuasion<sup>7</sup> but has indefensibly been done in a "legal" way which is tantamount to incomprehensible to almost every citizen of the UK, as the dispiritingly uncomprehending public debate about *Miller* more than sufficiently demonstrates. Though Brexit will now proceed to the point where the UK leaves the EU on 29 March 2019, the restoration of the sovereignty of Parliament which was the main impulse behind the referendum decision will be frustrated, not in a political, but in a legal way which

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<sup>4</sup> Josh May, *Read in Full: Theresa May's Conservative Party Speech on Brexit*, POLITICSHOME, OCTOBER 2, 2016, [HTTPS://WWW.POLITICSHOME.COM/NEWS/UK/POLITICAL-PARTIES/CONSERVATIVE-PARTY/NEWS/79517/READ-FULL-THERESA-MAYS-CONSERVATIVE](https://www.politicshome.com/news/uk/political-parties/conservative-party/news/79517/read-full-theresa-mays-conservative).

<sup>5</sup> See the Addendum to this article.

<sup>6</sup> (c. 42) (U.K.). Though the issue is legally separate from leaving the EU, *Miller* now makes it clear that the effective reversal of this process requires the repeal of this Act and concomitant withdrawal from the European Convention on Human Rights.

<sup>7</sup> JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT* 279 (1999).

has so avoided public debate as to be almost surreptitious. In *Miller*, the UK has had its *Marbury v Madison*.<sup>8</sup>

The point which I wish to make is not, however, about the formal legal, if I may put it this way, constitutional position of judicial supremacy created by *Miller*, but rather is about the civil procedural arrangements which were made to allow *Miller* to be heard and so create that position. It is, however, obviously necessary to describe at least the main legal points in order to proceed at all, and, disavowing any intention to explore the arguments in *Miller* more than is necessary for this limited purpose, I will now do so.

#### I. *MILLER* AND THE SOVEREIGNTY OF PARLIAMENT

On 23 June 2016, a majority of the citizens of the UK who participated in a referendum which asked the question “Should the United Kingdom remain a member of the European Union or leave the European Union?”<sup>9</sup> voted to leave.<sup>10</sup> The procedure for a Member State to withdraw from the EU is governed by Art. 50 of the Treaty on European Union (TEU),<sup>11</sup> and in public debate over Brexit the UK’s giving notice under this procedure has become widely known as “triggering” Art. 50. On 29 July 2016, Mrs. Gina Miller, a UK citizen, served claim to bring judicial review proceedings against the newly created Secretary of State for Exiting the European Union (SSEEU) which were intended to “clarify the procedural steps necessary for the UK to trigger Article 50 in line with the UK constitution,” and to this was joined a

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<sup>8</sup> 5 U.S. 137 (1803).

<sup>9</sup> U.K. GOVERNMENT, E.U. REFERENDUM, <https://www.gov.uk/government/topical-events/eu-referendum/about>.

<sup>10</sup> On a turnout of 72.2% (33,551,983 valid votes returned from a total electorate of 46,500,001), 51.9% (17,410,742) voted to leave and 48.1% (16,141,241) voted to remain: U.K. ELECTORAL COMMISSION, E.U. REFERENDUM RESULTS, <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>.

<sup>11</sup> O.J. 2012/C. 326/1.

claim to similar effect previously served by Mr. Deir Tozetti Dos Santos, also a UK citizen.<sup>12</sup> The proceedings were heard before what I shall pro tem call the High Court on 13, 17 and 18 October 2016, which handed down its single judgment ruling against the SSEEU on 3 November 2016.<sup>13</sup> An appeal by the SSEEU to the UKSC was heard on 5, 6, 7 and 8 December 2016 and a judgment, dismissing the appeal, was handed down on 24 January 2017. A single majority judgment stated the views of eight of the eleven Justices who heard the appeal, including the President of the UKSC, Lord Neuberger, and the Deputy President, Lady Hale (S.C. [1]-[152]). There were three dissenting judgments, by Lord Reed JSC (S.C. [153]-[242]), Lord Carnwath JSC, agreeing with Lord Reed and making some additional arguments (S.C. [243]-[274]), and Lord Hughes JSC (S.C. [275]-[283]).

Adamantly maintaining that the political merits of the decision to leave were irrelevant, the High Court insisted that “[t]he legal question is whether the executive government can use the Crown’s prerogative powers to give notice of withdrawal” (H.C. [5]), and, equally insistently disavowing a political intent (S.C. [3]), the UKSC saw the “main issue” in the same way (S.C. [5]). This was a peculiarly English way of addressing things which calls for some explanation. The British constitution carries many marks of England’s long constitutional history, some of which are still of great legal and political significance. Perhaps now the most significant is that the Government’s power to conduct foreign policy is fundamentally derived from the Royal prerogative of English Monarchs in the days of their political sovereignty. The continuance of the prerogative in any area of domestic or foreign policy has, of course, long been entirely subject to Parliamentary sufferance, and the precise

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<sup>12</sup> Mishcon de Raya LLP, *Article 50 Q and As*, <https://www.mishcon.com/qanda>. Mishcon de Raya are the firm of solicitors which advised the applicants.

<sup>13</sup> *R. (Miller and another) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2017] 2 W.L.R. 583; [2017] 1 All E.R. 158; [2017] 1 C.M.L.R. 34; [2016] H.R.L.R. 23; [2016] A.C.D. 134. Hereinafter references to this judgment will be given as, e.g., (H.C. [28]), i.e. para. 28 of the High Court judgment.

extent of the foreign policy prerogative is now much shaped by constitutional convention and statute; indeed a statute purporting to enlarge the role Parliament previously enjoyed under constitutional convention in the ratification of treaties has but recently been passed.<sup>14</sup> The fundamental power of the UK Government to conduct foreign policy nevertheless remains a matter of prerogative, and it was as an exercise of this prerogative that the UK Government proposed to give notice under Art. 50 TEU.

Despite the extent of the discussion of prerogative powers in both judgments *passim*, it does not sufficiently emerge anywhere save from the dissent of Lord Reed how much of a red herring these powers were. That the UK Government's power to conduct foreign policy is indeed derived from ancient Royal prerogative is just a matter of constitutional history. Every state has similar executive powers, though they are, of course, elsewhere almost always derived from a relatively recently written constitution. And, to focus just on the making or unmaking of treaty or other international commitments, the reason for this is that it is neither desirable nor even possible that the legislature should be intimately involved in the discussion of prospective changes to those commitments. As Lord Reed pointed out, this compelling reasoning may be found in Blackstone, and it applies just as much in the twenty first century as in the eighteenth, and just as much to all modern states as to the UK:

The compelling practical reasons for recognising this prerogative power to manage international relations were identified by Blackstone: "This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford" (S.C. [160]).<sup>15</sup>

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<sup>14</sup> Constitutional Reform and Governance Act 2010 Pt. 2 (c. 25) (U.K.). This provision was briefly discussed by the High Court (H.C. [13]) and the majority in the UKSC (S.C. [58]), and more substantially by Lord Reed, dissenting (S.C. [161]-[163], [211]). Lord Carnwath, dissenting, also briefly discussed it (S.C. [249]).

<sup>15</sup> Quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*250. Dicey radically restated this for Parliamentary rule. DICEY, *supra* note 1, 12-13.

Whilst rendering the executive properly accountable to the legislature might even be described as the intractable main issue of constitutional law, and whilst *Miller* touches on an area in which some policy having to be conducted in secrecy creates particular problems, there is nothing specific to the prerogative foreign policy powers that precludes Parliamentary scrutiny. Under the U.K.'s Westminster system, there is always the possibility at any time of Parliament calling the Government to account over any issue, including foreign policy, if there is the political will in Parliament to do so, recognising that, of course, the Government is the Government only because it normally can command a majority in the House of Commons. I shall later expand upon the relevance of this point in the context of *Miller*.<sup>16</sup>

Let us assume that a Government alters the UK's international legal position by entering into or withdrawing from a treaty commitment. In many cases this will require a concomitant alteration in the UK's domestic law.<sup>17</sup> Under the UK's still strongly dualist approach,<sup>18</sup> this requires the UK Government to secure the passage of the necessary domestic legislation, without which the alteration has no domestic effect.<sup>19</sup> Such is the degree of penetration into UK domestic law of EU law – this penetration of non-national law into the national legal systems of its Member States is what makes the EU historically unique<sup>20</sup> - it was a fortiori the case that leaving the EU would require domestic legislation; to suppose otherwise is absurd. The UK Government has never denied this, and at the Conservative Party Conference following the referendum result the Prime Minister announced that implementation of the decision to leave would require a "Great Repeal Bill" to come into

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<sup>16</sup> See *supra* text accompanying notes 80-92.

<sup>17</sup> In *Miller* what would seem to have been a problematic authority for the applicant was distinguished precisely on the ground that ratifying a Protocol to the TEU from which the UK had opted out would not have had any domestic effect (S.C. [90]-91]).

<sup>18</sup> JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 63 (8th ed. 2012).

<sup>19</sup> ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 167-73 (3d ed. 2013).

<sup>20</sup> JOHN A. USHER, *EUROPEAN UNION LAW AND NATIONAL LAW: THE IRREVERSIBLE TRANSFER?* (1981).

force instantly the UK left.<sup>21</sup> This was, as, in fairness, a closer reading of the Prime Minister's speech than it generally has received would have shown the Government to have always realised,<sup>22</sup> a misleading way to describe the legislation to be passed, for a vital purpose of that legislation will be initially to preserve in UK law the overwhelming proportion of EU law. This will be essential to avoid legal chaos, leaving aside the substantial desirability of much of this legislation, in the passage of which the UK played a full part. But nevertheless the centrepiece of the legislation<sup>23</sup> will be the repeal of the European Communities Act 1972,<sup>24</sup> the domestic legislation by which Parliament subordinated the legal sovereignty of the UK to the law of what is now the EU.

At all times, then, giving Art. 50 notification was subject to the will of Parliament according to the previously settled UK constitutional position. This being so, a particular difficulty potentially arising from *Miller* would be to limit its implications, for it would seem that, just to take a first step, it could apply to all acts of state altering treaty commitments. The difficulty would not arise if membership of the EU was in some way legally distinguishable from other international positions, as of course is the case, indeed that membership is *sui generis*. However, the way the point found expression in *Miller* was, not to stress that The European Communities Act 1972 was unique,<sup>25</sup> but to conclude that it was one member of a special category of UK "constitutional statutes."

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<sup>21</sup> May, *supra* note 4.

<sup>22</sup> The Government's position about this is now, it is submitted, as clear as the subject permits. DEPARTMENT FOR EXITING THE EUROPEAN UNION, LEGISLATING FOR THE UNITED KINGDOM'S WITHDRAWAL FROM THE EUROPEAN UNION (Cm 9946 2017) paras. 2.4-2.25.

<sup>23</sup> *Id.*, paras. 2.1-2.3.

<sup>24</sup> c. 68 (U.K.). See also *R. (Factortame) v Secretary of State for Transport (No. 2)*, Case C 213/89 [1991] 1 A.C. 603 (H.L., E.C.J.) (U.K.).

<sup>25</sup> Though it is irrelevant here, I myself believe that the 1972 Act (and subsequent related legislation) is of a unique constitutional form and that the Government's decision to give notice by an exercise of the prerogative, whilst perfectly lawful, has been a political mistake, for full Parliamentary debate, unaffected by the issues bought up in *Miller* but exposing the extent of the mistake that was made by passing the 1972 Act in the first place,

One of the ways in which the doctrine of sovereignty of Parliament recognises that the rule of law ultimately rests, not on law itself, but on the political choices of the members of a political society, is to deny that Parliament can bind itself.<sup>26</sup> No legal, moral, political or whatever position is so settled that it cannot be altered. Parliamentary sovereignty is perfectly compatible with belief in the existence of a “higher law” in accord with which Acts of Parliament may be interpreted or even outright evaluated, and with attempts to constitutionally entrench such law, all of which Dicey acknowledged could have value,<sup>27</sup> but it denies that such steps either should or possibly could be given a positive legal status that could ultimately defeat a political choice to ignore them: “[t]here is no difficulty, and there often is very little gain, in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement.”<sup>28</sup> By in this way making the necessity of self-legislation actual in the Hegelian sense,<sup>29</sup> Parliamentary sovereignty charges the members of a political society with responsibility for the existence, or non-existence,<sup>30</sup> of the rule of law:

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would have been welcome. On the nature of this unique legal form as it has now led to *Miller* see David Campbell, *Dicey in the Age of Globalisation*, 17 EUROPEAN PUBLIC LAW 571 (2011) (reviewing DANNY NICOL, *THE CONSTITUTIONAL PROTECTION OF CAPITALISM* (2010)). I fully acknowledge that in saying this I expose the academic nature of my way of looking at the issues, which I fear would be dismissed as such by admirably successful practising politicians such as Mrs. May, who has so far managed to stick to her timetable for leaving against very powerful opposition.

[June 11, 2017: See now *infra* note 144].

<sup>26</sup> DICEY, *supra* note 1, 27, 42, 51.

<sup>27</sup> In regard of the point of greatest importance to us here, interpretation, see *infra* note 40.

<sup>28</sup> DICEY, *supra* note 1, 129.

<sup>29</sup> G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 19-22 (Cambridge University Press 1991); G.W.F. HEGEL, *THE ENCYCLOPAEDIA LOGIC* sec. 6 (Hackett Publishing 1991).

<sup>30</sup> By far the predominant motif of Dicey’s later political views was that the nineteenth century growth of radicalism and collectivism was eroding the rule of law and, supported by public opinion favouring this growth, reformers would find in Parliamentary sovereignty “an instrument well adapted for the establishment of democratic despotism.” A.V. DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND IN THE NINETEENTH CENTURY* 217 (Liberty Fund 2008).

“the freedom from legal interference which Englishmen actually enjoy results from the prevailing tone of public sentiment rather than from the nature of our laws.”<sup>31</sup>

The obvious implication of this, that there can be “no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional,”<sup>32</sup> is precisely what is disputed by those who have influentially argued that the UK should substitute for sovereignty of Parliament a “constitutionalism” which purports to legally embed higher level law. The member of the senior judiciary who has made this argument in terms most conversant with constitutional history and theory arguably has been Sir John Laws, a Lord Justice of Appeal,<sup>33</sup> and in 2002 in *Thoburn v Sunderland City Council*, a case which we will see became central to *Miller*, Laws L.J. claimed that the UK constitution recognised that there were certain constitutional statutes, of which the European Communities Act 1972 was one.<sup>34</sup> The specific significance of this in *Thoburn* was that the 1972 Act’s special status prevented its implied repeal by subsequent legislation. Clear words in primary legislation (or absolutely necessary implication)<sup>35</sup> would be needed to amend or repeal such an Act. In *Miller*,<sup>36</sup> what nevertheless remains essentially this argument<sup>37</sup> was

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<sup>31</sup> A.V. Dicey, *The Legal Boundaries of Liberty*, 13 FORTNIGHTLY REVIEW (n.s.) 1, 13 (1868).

<sup>32</sup> DICEY, *supra* note 1, 52.

<sup>33</sup> John Laws, *Is the High Court the Guardian of Fundamental Constitutional Rights?*, 1993 PUBLIC LAW 59; John Laws, *Law and Democracy*, 1995 PUBLIC LAW 72; John Laws, *The Constitution: Morals And Rights*, 1996 PUBLIC LAW 622.

<sup>34</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151, [60]-[64] (D.C.) (U.K.).

<sup>35</sup> *R. (Morgan Grenfell and Co. Ltd.) v Special Commissioner of Income Tax* [2003] 1 AC 563, [45] (Lord Hobhouse) (H.L.) (U.K.).

<sup>36</sup> Under the influence of Laws L.J., the UKSC had, prior to *Miller*, found that the 1972 Act was a constitutional statute. *R. (Buckinghamshire County Council and others) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324, [207], [209]. This specifically was a finding of Lords Neuberger and Mance, with whom four other Justices, including Lord Reed, agreed. This authority is cited unproblematically by the UKSC majority in *Miller* (S.C. [67]), but more substantially discussed by Lord Reed, dissenting (S.C. [228]-[229]).

<sup>37</sup> See *infra* note 53.

considerably stretched in the course of finding that the 1972 Act's constitutional status shielded it from an exercise of the prerogative power which, it was argued,<sup>38</sup> would inevitably lead to its repeal, notification leading to withdrawal and withdrawal necessitating repeal (S.C. [45]-[67]). In the absence of clear words in the 1972 Act allowing its implied repeal, the UKSC found that Parliament had not intended to allow such implied repeal, a fortiori not by the exercise of prerogative power, and so the Government would have to secure the passage of the requisite primary legislation before giving Art. 50 notice. In essence, in *Miller* the UKSC instructed the Government to secure the passage of what became the European Union (Notification of Withdrawal) Act 2017<sup>39</sup> as a condition of giving notice.

It is perfectly settled, for it follows from an inevitable and valuable aspect of all judicial reasoning which Dicey did not dispute,<sup>40</sup> that judicial interpretation of Parliamentary intention will reflect a background understanding of constitutional and general public values and so in a sense one can always say that those values enjoy a special status even under the UK constitution. *Miller* is no exception to this (S.C. [82]), and indeed it must apply a fortiori to *Miller* because two most important examples of it are the interpretive conventions that, not

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<sup>38</sup> See *infra* text accompanying notes 61-62.

<sup>39</sup> c. 9 (U.K.).

<sup>40</sup> DICEY, *supra* note 1, 38:

There is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament. Language which might seem to imply this in reality amounts to nothing more than the assertion that the judges when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the ordinary rules of morality, or violate the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and international morality.

I refer a principally U.S. audience to *R. v Secretary of State for Social Security ex p. JCWI* [1997] 1 W.L.R. 275, 292-293 (C.A.) (U.K.) as an example of this thinking in modern employment. Finding The Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996 (S.I. 1996/30) (U.K.) to “necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it,” and so to be *ultra vires*, Simon Brown L.J., in the majority in the Court of Appeal, maintained that “[p]rimary legislation alone could in my judgement achieve that sorry state of affairs.”

only will an Act of Parliament extinguish a prerogative power which it supersedes, but the courts will try to interpret an exercise of a prerogative power in a way which does not conflict with a statutory provision, both of which follow from the long constitutional history of the subjection of the prerogative to sovereignty of Parliament (H.C. [86]).

But it is a quite different thing to claim that when a constitutional statute is silent as to its implied repeal, then it must have been the intention of the Parliament that passed it that it should not be open to such repeal.<sup>41</sup> As with the reasoning of Laws L.J. in *Thoburn*,<sup>42</sup> though the term “implied repeal” is so embedded, and was so prior to Laws’ L.J.’s use of it,<sup>43</sup> that avoiding its use would be a mere affectation, that term can be unhelpful; we are merely dealing with what should be a simple recognition of what is inevitable when a statute is superseded by a later, inconsistent statute. Even if care is taken, as of course it should be, expressly to specify the relationship between the two, unspecified issues will always be latent, and when they arise they will call for interpretation. There is an absurd paradox, more apposite to the science fiction of Philip K. Dick<sup>44</sup> than to practical legal reasoning, involved in speculating about the 1972 intention of Parliament regarding constitutional statutes when no Minister, draftsman, member of either Houses of Parliament, or judge can at that time have possibly conceived of such statutes.<sup>45</sup> Even endeavouring to put this to one side, the

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<sup>41</sup> I am grateful to Jim Allan and Maimon Schwarzschild, in correspondence with whom the argument I am about to make was much clarified.

<sup>42</sup> David Campbell & James Young, *The Metric Martyrs and the Entrenchment Jurisprudence of Lord Justice Laws*, 2002 PUBLIC LAW 399, 402.

<sup>43</sup> A famous example of pre-war use is *Ellen Street Estates v Minister of Health* [1934] 1 K.B. 590, 597 (Maugham L.J.) (C.A.) (U.K.).

<sup>44</sup> PHILIP K. DICK, *The Minority Report*, in 4 COLLECTED STORIES 71 (2000). Dick’s plotline, as with all such science fiction plotlines, is, of course, ultimately derived from *Oedipus Rex*.

<sup>45</sup> It is claimed that there is a long, if minor, theme of constitutionalism running through English legal history, but, however this is, I think it fair to say that the most generous view of when constitutionalism was given (at the time not very) significant post-war expression, not in the UK but anywhere in the Commonwealth, could put it no earlier than some 1980s New Zealand decisions and extrajudicial utterances by Sir Robin Cooke, as he then was. *Fraser v*

reason the European Communities Act 1972 made no express provision about its implied repeal pursuant to an act of state undertaken as an exercise of prerogative power is that it was so perfectly obvious that this would be the way that ever leaving the then European Economic Community would be done that no-one would have thought of providing for it expressly.<sup>46</sup>

One has the uncomfortable feeling that one must have missed something terribly important when one says that the 1972 Act was passed some nine months *after* the UK Government had by prerogative power signed The Treaty of Accession<sup>47</sup> - a position famously described during the interim by Lord Denning M.R. as one in which UK courts took “no notice”<sup>48</sup> of The Treaty of Rome - and that the UK’s instrument of ratification was deposited the day *after* the 1972 Act was passed.<sup>49</sup> Had the Act failed to pass, it is inconceivable that the Treaty would have been ratified, and the UK would then have had to disentangle itself from its international commitments. The same sort of procedure would no doubt have been followed had the UK’s decision at the 1975 referendum on membership been to leave.<sup>50</sup>

The *Miller* position can, with great respect, be found at all plausible only if one accepts the mere *petitio principii* on which it rests. If one assumes that there are such things as constitutional statutes and if – this easily, indeed inevitably, follows if there are constitutional

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*State Services Commission* [1984] 1 N.Z.L.R. 116, 121 (C.A.) (N.Z.); Sir Robin Cooke, *Fundamentals*, 1988 NEW ZEALAND LAW JOURNAL 158.

<sup>46</sup> On subsequent legislation argued to be relevant, I have nothing to add to the dissent of Lord Reed (S.C. [198]-[214]).

<sup>47</sup> Treaty Concerning the Accession of ... the United Kingdom ... to the European Economic Community etc., February 2, 1972, U.K.T.S. 18 (1979).

<sup>48</sup> *McWhirter v Attorney General* [1972] C.M.L.R. 882, 886 (C.A.) (U.K.). Lord Denning’s views were examined in both hearings of *Miller* only by Lord Reed, dissenting (S.C. [174], [183], [225]).

<sup>49</sup> European Communities Act 1972, *supra* note 24, date of Royal Assent.

<sup>50</sup> Referendum Act 1975 (c. 33) (U.K.).

statutes – the European Communities Act 1972 was one, then *Miller* is fundamentally right.<sup>51</sup> But only if. It is, with respect, highly regrettable that the entire handling of *Miller* obscures the way that it is courts since the passage of the Human Rights Act 1998 that have supplied the necessary assumption.<sup>52</sup> To be perfectly frank, that the UK constitution contains such things as constitutional statutes and that the 1972 Act is one of them can barely be said to be argued in *Miller*. Such argument as there is occupies but two paragraphs of both the High Court (H.C. [43]-[44]) and the majority UKSC judgments (S.C. [66]-[67]), though it should be said that there is disparate, potentially relevant material to be found elsewhere throughout both judgments. The length of the judgments overall, but particularly the time spent on constructing Parliament's intention,<sup>53</sup> constitutes a filigree of elaborate construction upon a barely laid foundation. If one accepts that there are constitutional statutes, then one may go on to ask whether the decision in the case follows. But the very great deal of sophisticated reasoning that is involved in doing so does not alter the *petitio principii* on which the entire edifice rests. If, and only if, one thinks there should be constitutional statutes, one may find *Miller* persuasive, and one will certainly find it enormously welcome. In what really is a thoroughgoing justification of Dicey's views, the legal result will be heavily influenced by the prevailing tone of legal sentiment. It is unarguable that a belief in constitutionalism and against Parliamentary sovereignty has exerted very considerable influence on the

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<sup>51</sup> Though I would, in fact, submit that the quality of much of the reasoning about interpretation in *Miller* is itself evidence of the fallaciousness of that reasoning's premise.

<sup>52</sup> David Feldman, *The Nature and Significance of Constitutional Legislation*, 129 LAW QUARTERLY REVIEW 343 (2013); David Feldman, *Statutory Interpretation and Constitutional Legislation*, 130 LAW QUARTERLY REVIEW 473 (2014).

<sup>53</sup> What will prove to be for constitutional law in general the most important difference between Laws L.J.'s argument and the arguments of the High Court and the UKSC majority in *Miller* is the basis in which the 1972 Act, or any Act, may be found to be constitutional, for the former's argument is not based on the intention of Parliament for on the "force of the common law." *Thoburn*, *supra* note 34, [63].

development of UK public law since the passage of the Human Rights Act 1998,<sup>54</sup> and *Miller*, which now outright creates judicial supremacy, is the latest and most important product of that influence.

## II. A HYPOTHETICAL BARGAIN?

Though the very finding in *Miller* was unarguably the most extraordinary feature of the case, that finding was made possible only because of two other features in themselves extraordinary. The first of these is the manner in which the SSEEU argued the case.

Putting aside the correctness or otherwise of the outcome of *Miller*, on the basis of what had been regarded as constitutionally settled it was certainly possible to raise the prior issue of whether the question posed in the case was even justiciable. In one sense, of course, Mrs. Miller having served her claim, the court of first instance had to decide whether the claim was admissible, and in that sense the High Court was obliged to make the ultimate ruling. But by deciding to hear the case, the High Court made its ultimate ruling in a very different, indeed completely opposed, constitutional sense, for by accepting it could and should “clarify the procedural steps necessary for the UK to trigger Article 50 in line with the UK constitution,”<sup>55</sup> the High Court was asserting supremacy over Parliament. The SSEEU did not oppose this.

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<sup>54</sup> I have tried to show this in respect of the three very different cases which have come to the greatest public attention as assertions of growing judicial power: on *A and others v Secretary of State for the Home Department*, [2004] UKHL 56; [2005] 2 A.C. 68 (U.K.), see David Campbell, *The Threat of Terror and the Plausibility of Positivism*, 2009 PUBLIC LAW 501; on *Thoburn*, *supra* note 34, see Campbell & Young, *supra* note 42; and on *[Soria] v Secretary of State for the Home Department*, Asylum and Immigration Tribunal, IA/14578/2008, September 24, 2008 (Immigration Judge Devittie), see David Campbell, “Catgate” and the Challenge to Parliamentary Sovereignty in Immigration Law, 2015 PUBLIC LAW 426.

<sup>55</sup> *Supra* note 12.

Nor did the SSEEU challenge that Mrs. Miller and Mr. Dos Santos had standing to bring their action. As, acknowledging that I remain rooted in an earlier way of viewing the issues derived from Dicey, I cannot see how they did have standing, and as the SSEU's absence of argument means the issue was never canvassed, I am afraid I am unable completely to enlighten the readers of this article on this point. The applicants of course argued that Brexit would cause them to lose at least some important rights derived from membership of the EU, as was so incontrovertibly the case that the time spent on the point throughout the *Miller* judgments seems, with respect, merely a distraction. This loss of rights seems to be the basis on which they were thought to have standing: "[i]t is not difficult to identify people with standing to bring the challenge since virtually everyone in the UK or with British citizenship will ... have their legal rights affected if notice is given" (H.C. [7]). But the obverse of this argument is that the claimants were indeed no different to any other UK citizen, and that, by passing the European Referendum Act 2015,<sup>56</sup> Parliament had decided that the procedure by which all such rights of all UK citizens would be determined would be by referendum. There have been very many public expressions of concern about the wisdom of this referendum, and about the wisdom of referendums in general. But all this should be irrelevant to judicial review of irrationality, and there was no argument that the vote had been improperly conducted. Mrs. Miller and Mr. Dos Santos suffered no prejudice and, really, all one can say is that the ground on which their application was heard seems to be that it would be a jolly good thing to hear it.

Nevertheless, that the SSEEU did not challenge Mrs. Miller's standing is, in a most important adversarial sense, not at all difficult to understand. A process of, it can fairly be said, very extensive liberalisation of the standing requirement, to the point where it is all but

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<sup>56</sup> c. 36 (U.K.).

extinguished in reported cases,<sup>57</sup> which began in the 1970s but has been much accelerated by the passage of the Human Rights Act, has been a principal feature of modern British judicial review. To attempt to row against this tide could easily be imagined to be not merely fruitless but frivolous.<sup>58</sup> Nevertheless, the question whether “the applicant has no interest whatsoever and is, in truth, no more than a meddling busybody”<sup>59</sup> was one of great public interest in *Miller*, and it would merely show where we now are if raising it was, as it may very understandably have been, unthinkable or thought definitely unwise.

The SSEEU did not even challenge the argument that, once the UK had given notice to leave, then leaving was irreversible (S.C. [10]). I am unsure whether maintaining this was essential to the applicants’ case, but it incontrovertibly greatly strengthened it, for if Parliament’s effective scrutiny, if I may put it this way, of the notification was to lie in a subsequent refusal to pass requisite domestic legislation, then irreversibility would nullify such scrutiny.<sup>60</sup> I am anxious not to use inflammatory language so I am denied the words really appropriate to describe this argument, but I am obliged to say I can give no credence whatsoever to the idea that it would ever be possible to impose by operation of law a

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<sup>57</sup> CAROL HARLOW AND RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 699 note 121 (3rd ed. 2009): “A single decision, *R v Secretary of State for the Environment, ex p. Rose Theatre Trust Co.* [1990] 1 Q.B. 504 [(Q.B.D.) (U.K.)], exhibited a different judicial attitude.”

<sup>58</sup> Earlier attempts to review the UK’s possible decision to accede to, as opposed to *Miller*’s challenge to a decision to withdraw from, what is now the EU had been heard but failed largely because the issues raised were not held to be justiciable. *Blackburn v Attorney General* [1971] 1 W.L.R. 1037 (C.A.) (U.K.); *McWhirter v Attorney General* [1972] C.M.L.R. 882 (C.A.) (U.K.); *R. v Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees-Mogg* [1994] Q.B. 552 (D.C.) (U.K.). *Blackburn* and *McWhirter* were indeed important cases in the liberalisation of standing heard by the leading early proponent of that liberation, Lord Denning M.R.

<sup>59</sup> *R v Monopolies and Mergers Commission, ex p. Argyll Group plc.* [1986] 1 W.L.R. 763, 773H (Sir John Donaldson M.R.) (C.A.) (U.K.).

<sup>60</sup> This argument was accepted by the High Court (H.C. [11], [17]) and, somewhat obliquely, the majority in the UKSC (S.C. [94]-[100]), but was subjected to, in my opinion, a stinging criticism by Lord Carnwath, dissenting (S.C. [261]-[264]), on which I have drawn heavily.

(perpetual) situation in which the UK would be both internationally outside and domestically inside the EU (H.C. [14]).

Putting this aside, it is not only that Art. 50(5) TEU specifically provides that a state which has withdrawn may subsequently apply to rejoin; nor that Art. 50 is silent on the possibility of revoking a notice to leave and so does not expressly forbid it, when irreversibility surely requires the latter as a necessary (if not sufficient) condition; nor even that this silence requires that Art. 50 be interpreted in light of Art. 68 of the Vienna Convention,<sup>61</sup> which expressly provides for revocation.<sup>62</sup> It is that it cannot be seriously maintained that if the UK wished to revoke, say by the current Government being obliged to hold a General Election which led to the formation of a new Government which wished to remain,<sup>63</sup> the new Government could not revoke. No doubt the EU would, perfectly legitimately, raise political difficulty about this, and one can even allow for the purposes of

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<sup>61</sup> Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331.

<sup>62</sup> Mr Although one is hardly now sure what it is and is not appropriate to be taken up in legal argument, I confine two points to a footnote. First, even the drafter of Art. 50 has made it plain that it was intended to allow of revocation. Glenn Campbell, *Article 50 Author Lord Kerr Says Brexit Not Inevitable*, BBC NEWS (Edinburgh), November 3, 2016, <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37852628>. Secondly, between the High Court and Supreme Court hearings of *Miller*, one Mr. Jolyon (Jo) Maugham, an English Q.C., made an application to review the operation of Art. 50 TEU, apparently particularly focusing on reversibility, to the High Court of the Republic of Ireland: *Maugham and others v Ireland*, Record Number 2017 781 P, January 27, 2017. No judgment has been reached as the case awaits a ruling on jurisdiction. As I have no idea why Mr. Maugham was allowed to make this application, I have no idea what the outcome will be. The case nevertheless holds out the delightful prospect that the Irish Supreme Court and the Court of Justice of the European Union could find that giving notice to leave is, as a matter of law, reversible. One can afford to take this delight because one is sure that, other than the role it played in *Miller*, the whole issue matters not a jot.

[April 21, 2017: Hoping to influence the UK electorate to treat the General Election called by Mrs. May (*see infra* note 143) as a second Brexit referendum, S. Antonio Tajani, the President of the European Parliament, said that if a new Parliament wished to reverse the Art. 50 notification, it would face no difficulty in doing so. Dan Roberts and Lisa O'Carroll, *EU leader: UK Would Be Welcomed Back If Voters Overturn Brexit*, THE GUARDIAN (London), April 20, 2017, <https://www.theguardian.com/politics/2017/apr/20/european-parliament-will-welcome-britain-back-if-voters-veto-brexit>.]

<sup>63</sup> [June 11, 2017: *See now infra* note 143].

argument that it might politically prevent it, but this is an entirely different matter from it being legally impossible to revoke.

I do not mention these points as a preliminary to now discussing all the legal issues but to indicate how strange was the SSEU's manner of argument, simply relinquishing as it did these points, some of which undeniably could have been strong.<sup>64</sup> But, conscious of writing principally for a U.S. legal academic audience, I have wondered whether the "hypothetical bargain" analysis, which I believe is ultimately traceable to the early work of Judge Posner<sup>65</sup> and which has since enjoyed wide currency, might cast light on what has happened. For, really, if it were to lose the case, things could not have gone much better for the Government than they did. Though the decision obliged the Government to secure the passage of an Act of Parliament before giving Art. 50 notice, *Miller* explicitly concluded that "[w]hat form such legislation should take is entirely a matter for Parliament ... Parliament may decide to content itself with a very brief statute" (S.C. [122]). Whether the Government could secure the passage at all of what became the European Union (Notification of Withdrawal) Act 2017 was, of course, a political matter. But if *Miller* was brought with the intention of preventing withdrawal by applicants cognisant that a very substantial minority of the members of the House of Commons and a very considerable majority of the members of the House of Lords would have personally wished to oppose this Act, then it was bound to be fruitless because there was no practical political possibility that the Act would not pass.

Failure of the Act to pass through the Commons would have obliged the Government to call a General Election, and that election would have returned a Commons overwhelmingly in

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<sup>64</sup> So weak is the SSEU's discussion of the significance of the referendum itself that I perhaps should have included it amongst the points I have taken up. It is discussed in James Allan's presentation to the symposium. On the remedy granted *see infra* note 143

<sup>65</sup> RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* chs. 3-4 (1983). The most concise statement of this method of analysis of which I am aware is, however, JULES L. COLEMAN, *RISKS AND WRONGS* 165 (1992).

favour of leaving. Privately, if not publicly, acknowledging this, members of the House of Commons who opposed Brexit but who believed they would lose their seats if they were obliged to fight a General Election on the basis of such opposition, were always going to support the Act. The appalling situation in which Mr. Corbyn, the Leader of the Labour Party, found himself was pitiable. He was elected to his position by members of the Labour Party who are overwhelmingly in favour of remaining and he represents one of the 30% of Labour constituencies which voted to remain. His supporters therefore regarded with horror and contempt his attempt to marshal his forces in the Commons to support the Act.<sup>66</sup> But he was obliged to do so because the alternative would have seen a great proportion of the 70% of his Parliamentary Party whose constituents, typically unlike their representatives, wished to leave, lose their seats at either the General Election which failure to pass the Act would have necessitated or at the General Election which must take place by 2020.<sup>67</sup>

The constitutional position of the Lords means that it ultimately must accede to the will of the Commons, and so the Lords' position was, to put it in the interest of brevity far too bluntly,<sup>68</sup> irrelevant. Much more than this, however, the House of Lords as currently constituted, with its majority for remain being a (one assumes not directly intended) result of gross political patronage, is held in such public contempt that any serious attempt to frustrate the referendum or substantially delay its implementation would have been more likely to lead to the abolition of the Lords than the prevention of leaving.<sup>69</sup> It is not inconceivable that, in

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<sup>66</sup> Anoosh Chakelian, *Is Jeremy Corbyn Losing His Supporters After Voting for Brexit?*, NEW STATESMAN (London), February 16, 2017, <http://www.newstatesman.com/politics/uk/2017/02/jeremy-corbyn-losing-his-supporters-after-voting-brexit>.

<sup>67</sup> [See now *infra* note 142].

<sup>68</sup> Dicey's suspicion of democracy was a reason for his opposition to the legislation which created this position, and he interpreted that legislation conservatively when giving an account of the resultant power of the House of Lords. DICEY, *supra* note 1, 421-24.

<sup>69</sup> Jon Stone, *Consider Abolishing the House of Lords If It Delays Brexit*, *Former Tory Brexit Chief Says*, THE INDEPENDENT (London), February 9, 2017,

some stronger or weaker form, this point may be tested over the course of the next two years. To those, like myself, whose general suspicion of an unelected second chamber has turned to disgust as the possibilities of patronage created by the “reform” of the House of Lords by the Government of Mr. Tony Blair<sup>70</sup> have enthusiastically been seized upon by Mr. Blair and succeeding Prime Ministers (though not, so far, Mrs. May), this would be a very valuable incidental benefit of Brexit.

However, by allowing the Government to draft the shortest possible Act,<sup>71</sup> the operative part of which was of only forty two words, the UKSC allowed the Government to take advantage of rules of Parliamentary procedure which seek to ensure that even oppositional debate is confined to the amendment of legislation introduced by the Government rather than the rehearing of the principle behind the legislation, and the European Union (Notification of Withdrawal) Bill enjoyed what those able to understand the procedure could see immediately *Miller* was decided would be an essentially untroubled passage through Parliament.<sup>72</sup> Two days of heated debate in the Lords were of far more therapeutic value to their Lordships than of significance to the UK electorate.<sup>73</sup>

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<http://www.independent.co.uk/news/uk/politics/oliver-letwin-brexite-house-of-lords-article-50-delay-march-a7571406.html>. Mr. Stone is reporting the views of Sir Oliver Letwin, a former Conservative Cabinet Minister and still highly influential Conservative Member of the House of Commons.

<sup>70</sup> House of Lords Act 1999 (c. 34) (U.K.).

<sup>71</sup> Though not directly relevant here, the Government’s expeditious conduct of its business also greatly befitted from the UKSC’s unanimous severe limitation of the possible role of the UK’s devolved administrations (S.C. [129]-[130], [133]-[135], [150], [152], [242], [243], [282]), which was greeted with disgust by the Scottish National Party: *Nicola Sturgeon Rallies Towards Second Scottish Indyref after Supreme Court’s Brexit Ruling*, ITV NEWS (London), January 24, 2017, <http://www.itv.com/news/2017-01-24/nicola-sturgeon-hints-at-second-scottish-indyref-after-surpeme-courts-brexite-ruling/>.

<sup>72</sup> U.K. PARLIAMENT, BILL STAGES: EUROPEAN UNION (NOTIFICATION OF WITHDRAWAL) ACT 2017, <http://services.parliament.uk/bills/2016-17/europeanunionnotificationofwithdrawal/stages.html>.

<sup>73</sup> H.L. Deb. vol. 779 col. 12 (February 20, 2017) to col. 324 (February 21, 2017).

The views of Mrs. Miller’s leading counsel, Lord Pannick Q.C., are of particular interest in this connection. David Pannick unarguably is the most important figure in the *Miller* episode outside of the senior judiciary and the Cabinet. In addition to his role as Mrs.

In our hypothetical bargain, the Government's consideration for this benefit conferred by the UKSC was, of course, conceding, as we have seen, all the points which would have denied that the UKSC could create itself as a constitutional court. If, in our hypothetical bargain, the Government's interest in giving notice to leave in line with its timetable for leaving took priority over concern about domestic constitutional changes; and if, as it insisted and as undoubtedly was the case, the UKSC was not interested in the politics of Brexit but wished to establish judicial supremacy, then that bargain happily conforms to the criterion of being mutually advantageous which we use to evaluate bargains of any sort.

### *An Embarrassing Incident*

That the bargain about which I have speculated is purely hypothetical is certainly confirmed by an incident which occurred shortly after the High Court judgment in *Miller* was handed down which showed that Lady Hale, who it will be recalled is the Deputy President of the UKSC, could be no party to any such bargain. On 9 November 2016, six days after the High Court judgment, Lady Hale discussed the constitutional implications of the EU referendum at some length when giving the most recent of a distinguished series of annual lectures on legal

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Miller's counsel (he is a partner in one of the most important Barristers' Chambers in the UK), he has been, as a Fellow of All Souls College, a Member of the House of Lords, including its Constitution Committee, and a legal columnist for *The Times* of London, exceptionally well placed to exert influence on the issue, as he has on the entire development of modern UK human rights law. He strongly, if, he told us, "unenthusiastically," advocated remaining, but as soon as the UKSC had handed down its *Miller* judgment, he made it publicly clear he would support the passage of the legislation it made necessary and, having been at the heart of the debate on that legislation, actually became impatient with other Lordships who wished to prolong the debate in the forlorn hope of seriously delaying the giving of notice to leave. The terms in which he did so show him to have found in *Miller* considerable consolation for a decision to leave which he continued to deplore. Bryan Appleyard, *He Outgunned May in the Supreme Court But Now He's Backing Brexit*, THE TIMES (London), January 29, 2017, at 29; H.C. Deb. vol. 779 col. 1727 (March 13, 2017) (Lord Pannick).

topics held in Kuala Lumpur, Malaysia.<sup>74</sup> Having discussed the possibility of the courts requiring the Government to pass an Act in order to proceed to give notice, she went on to say:

Another question is whether it would be enough for a simple Act of Parliament to authorise the government to give notice, or whether it would have to be a comprehensive replacement for the 1972 Act.<sup>75</sup>

This lecture gave rise to strong public demands that Lady Hale should recuse herself from the hearing of *Miller*,<sup>76</sup> and a very strong argument for this unarguably may be based on the relevant body<sup>77</sup> of the senior judiciary's own *Guide to Judicial Conduct*.<sup>78</sup> This, it is submitted, wise course of action would, however, have meant that Lady Hale would have to relinquish any ambition she may entertain to succeed Lord Neuberger, whose retirement is imminent, as President of the UKSC, and thereby add to the distinction of being the only ever woman so far appointed to the UK's domestic court of final appeal by becoming the first woman to become that court's senior judge.<sup>79</sup> She did not recuse herself, nor did the UKSC

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<sup>74</sup> Lady Hale, Sultan Azlan Shah Lecture 2016, *The Supreme Court: Guardian of the Constitution?* (November 6, 2016), 12-13, <https://www.supremecourt.uk/docs/speech-161109.pdf>.

<sup>75</sup> *Id.*, 12.

<sup>76</sup> Charles Moore, *Lady Hale and Her Supreme Court Colleagues Seem To Have No Idea Why So Many Britons Mistrust Our Judges*, THE DAILY TELEGRAPH (London), November 18, 2016, <http://www.telegraph.co.uk/news/2016/11/18/lady-hale-and-her-supreme-court-colleagues-seem-to-have-no-idea/>. Mr. Moore is one of the UK's most influential journalistic commentators.

<sup>77</sup> H.M. COURTS AND TRIBUNALS SERVICE, THE JUDGES' COUNCIL, <https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/how-the-judiciary-is-governed/judges-council/>.

<sup>78</sup> JUDICIARY OF ENGLAND AND WALES, *GUIDE TO JUDICIAL CONDUCT* (2016), n.b. para. 8.1, <https://www.judiciary.gov.uk/wp-content/uploads/2010/02/guidance-judicial-conduct-v2016-update.pdf>. See also U.K. SUPREME COURT, *GUIDE TO JUDICIAL CONDUCT* (2009), n.b. para. 2.5, <https://www.supremecourt.uk/docs/guide-to-judicial-conduct.pdf>. The point seemed to be acknowledged, without, of course, any reference to the specific case, by Lord Neuberger himself: Joshua Rosenberg, *Brexit on Trial*, THE SPECTATOR (London), December 3, 2016, <https://www.spectator.co.uk/2016/12/brexit-in-the-balance-exactly-what-is-at-stake-in-the-supreme-court/>.

<sup>79</sup> [June 21, 2017: Lady Hale's appointment to the Presidency has since been announced: SUPREME COURT, *LADY HALE APPOINTED NEXT PRESIDENT OF SUPREME COURT*,

acquit itself well when it issued an anodyne defence of her which implausibly evaded the issues.<sup>80</sup>

The point which it is sought to make here is, however, that Lady Hale’s possibly “more comprehensive replacement” would have made impossible the hypothetical bargain about which I have speculated. A comprehensive replacement would have necessitated Parliamentary debate on, not the minimal Bill which was introduced, but something which invited detailed and lengthy debate which could have wrecked the Government’s timetable for leaving, perhaps to the point— it is a matter of political judgment – of requiring a General Election. This would have destroyed any hypothetical incentive the Government could have had to enter into the hypothetical bargain.

The constitutional crisis latent in Lady Hale’s speculation was averted by the precise conclusion reached by the UKSC that the form the necessary legislation should take was entirely a matter for Parliament. The passage of the majority judgment in full is:

What form such legislation should take is entirely a matter for Parliament. But, in the light of a point made in oral argument, it is right to add that the fact that Parliament may decide to content itself with a very brief statute is nothing to the point. There is no equivalence between the constitutional importance of a statute, or any other document, and its length or complexity. A notice under article 50(2) could no doubt be very short indeed, but that would not undermine its momentous significance (S.C. [122]).

A, one assumes chastened, Lady Hale was, of course, one of those who contributed to the majority judgment.

#### *Some Guidance for the Perplexed*

Appearing outside the UKSC immediately after receiving judgment in her case, Mrs. Miller understandably cut a proud figure, proclaiming that she had affirmed that “Parliament Alone

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ALONGSIDE THREE NEW JUSTICES, June 21 2017, <https://www.supremecourt.uk/news/lady-hale-appointed-next-president-of-supreme-court-alongside-three-new-justices.html>.]

<sup>80</sup> U.K. SUPREME COURT, LADY HALE’S LECTURE, THE SUPREME COURT: GUARDIAN OF THE CONSTITUTION?, November 15, 2016, <https://www.supremecourt.uk/news/lady-hales-lecture-the-supreme-court-guardian-of-the-constitution.html>.

is Sovereign.”<sup>81</sup> Aware of her having said many, many things to the effect that the referendum result made her “physically sick,”<sup>82</sup> I simply discount Mrs. Miller’s profession, in light of the limits of her legal success as she understood it, not to have initially wished to actually prevent the Government giving notice to leave, in order to examine her claim that she had bolstered sovereignty of Parliament.

It would appear that Mrs. Miller was of the belief that Parliament is the political sovereign of the UK. She was by no means alone in this. Mr. David Lammy, a prominent Labour Member of Parliament, was amongst the first after the result of the referendum became known to say that that result was not binding on the “sovereign Parliament,” which should vote to reverse it.<sup>83</sup> The utter fatuity of *Miller* as a political tactic follows from this foolish belief. The result of *Miller* has been that the Government, if it chose to respect the decision of the UKSC, has had to secure the passage of a particular piece of legislation through Parliament. But, under the U.K.’s Westminster system, a Parliament which had the political will to do so could at any time require the Government to pass something like the European Union (Notification of Withdrawal) Act 2017 without *Miller* being necessary. And if Parliament did not have the will to do this, then *Miller* would be fruitless because the necessary Act would be passed (though perhaps not, and only with extreme difficulty had the UKSC acted on Lady Hale’s speculation about “a comprehensive replacement”). In the end, this was the case because it was perceived by most members of both Houses of Parliament, Mr. Lammy it seems being one of the exceptions, that the UK’s political sovereign is, not

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<sup>81</sup> *Gina Miller on Brexit Ruling: “Parliament Alone is Sovereign,”* BBC NEWS (London), January 24, 2017, <http://www.bbc.co.uk/news/uk-politics-38729021>.

<sup>82</sup> *Gina’s Joy at Victory over Odds ... and Trolls,* DAILY MIRROR (London), January 25, 2017, 6.

<sup>83</sup> Will Worley, *David Lammy MP Urges Parliament to Reject EU Referendum Result: “We Can Stop This Madness,”* THE INDEPENDENT (London), June 25, 2016, <http://www.independent.co.uk/news/uk/home-news/brexit-result-latest-david-lammy-mp-eu-referendum-result-parliament-twitter-statement-stop-this-a7102931.html>.

Parliament, but the UK electorate, and that to defy the electorate's will expressed in the decision to leave would, as we have seen, have had grave consequences for the members of Parliament who did so. That the members of both Houses of Parliament, a majority of whom, we have noted, were personally opposed to the European Union (Notification of Withdrawal) Act 2017, overwhelmingly passed it out of fear of the electorate is very welcome evidence of the UK constitution's ability to identify where political sovereignty lies. It was not requiring the Act to be passed but that it was all but inevitable (putting aside Lady Hale's speculation) that it would pass that confirmed the UK to be a functioning democracy.

Sovereignty of Parliament is the rule of recognition<sup>84</sup> of the will of the politically sovereign UK electorate, though use of Hart's term in this connection is misleading in that direct recognition of that will is not normally how the UK Parliament, nor indeed the electorate, conceives of Parliament's role in a representative democracy. The EU referendum was an exceedingly rare occasion<sup>85</sup> on which, by passing the European Union Referendum Act 2015, Parliament did conceive of its role as one of direct recognition.<sup>86</sup> The politics of

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<sup>84</sup> H.L.A. HART, *THE CONCEPT OF LAW* 94-95 (3d ed. 2012). This concept received some attention in *Miller* (S.C. [60], [173], [177], [223]-[227]).

<sup>85</sup> There have only ever been three referendums held on issues affecting the entire UK, two on membership of what is now the EU and one on electoral procedure. As the last was held only because of party politics in the worst sense rather than as a response to undeniable general public concern, it is most accurate to say that the UK has only ever held two referendums, both on membership of what is now the EU.

<sup>86</sup> It is incidental to the argument of this article, but Parliament conceived of its role in this way because, such was the disparity of the personal views of the members of Parliament (i.e. Commons and Lords) and the electorate, that Parliament had failed in its representative function, a repetition of the situation acutely analysed by Mr. Enoch Powell M.P. in a politically important speech during what proved to be the run-up to the 1975 referendum. J. Enoch Powell, *Speech at an Election Meeting at the Tamworth College of Further Education* (June 15, 1970), <http://enochpowell.info/Resources/May-June%201970.pdf>:

[M]any electors ... find, in a way that perhaps has never happened before, that they cannot use their vote to express their wishes on what seem to them the most important political questions ... the electors find themselves confronted with a virtual unanimity between the official parties ... The party system seems no longer to do its work of offering a choice between policies, and it is not surprising to hear so many demanding

this, and in particular that Mr. Cameron, the Prime Minister behind the 2015 Act, thought that the referendum would never have to be held and that, even if held, it certainly would result in a decision to remain,<sup>87</sup> and the indisputable intention of a number of the then members of the House of Commons and a large number of the then members of the House of Lords to do what they could to obstruct the passage of the necessary legislation,<sup>88</sup> whilst it may tell one something about the way the UK's political elite thinks it fit to conduct itself, is irrelevant to the specific problems posed by *Miller*. The ultimate reason why Mr. Cameron took the fateful line he did was that he believed that Parliament, operating in its normal representative democratic fashion, was unable to determine whether the will of the electorate was or was not that the UK should continue to be a member of the EU, and so he sought to determine that will by recourse to direct recognition. Though wholly unaware of this, in so doing he was giving effect to the reasoning of A.V. Dicey, whose putting our understanding of Parliamentary sovereignty on an adequate basis did not prevent him from arguing that referendums could have a positive role in a constitution of Parliamentary sovereignty<sup>89</sup> because:

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that the Parliamentary system itself should be short-circuited, and the people offered the direct opportunity to say Yes or No by referendum.

Mr. Powell was the most influential post-war British politician not to hold high Government office and the most controversial major politician of any sort. Claiming, in my opinion justifiably, to express widely held concerns about large scale immigration and the inevitable loss of British sovereignty consequent upon joining what is now the EU, he was anathematised as a racist by the British political elite.

<sup>87</sup> Martin Kettle, *The Downfall of David Cameron: A European Tragedy*, THE GUARDIAN (London), June 24, 2016, <https://www.theguardian.com/politics/2016/jun/24/david-cameron-downfall-european-tragedy>; Tom McTague et al., *How David Cameron Blew It*, December 9, 2016, POLITICO (Europe edition), <http://www.politico.eu/article/how-david-cameron-lost-brexiteu-referendum-prime-minister-campaign-remain-boris-craig-oliver-jim-messina-obama/>.

<sup>88</sup> Dan Hodges, *Remainers and Brexiteers are Determined to Sabotage the EU Deal, So this Could Be Theresa's Last Stand*, SUNDAY MIRROR (London), April 2, 2017, <http://www.dailymail.co.uk/debate/article-4372058/DAN-HODGES-Theresa-s-stand.html>. Mr. Hodges is a Lobby correspondent whose strength is his particular access to "inside" information about Westminster. See *infra* note 144.

<sup>89</sup> DICEY, *supra* note 1, 474-80.

the institution of a Referendum would simply mean the formal acknowledgment of the doctrine which lies at the basis of English democracy – that a law depends at bottom for its enactment on the assent of the nation as represented by the electors.<sup>90</sup>

Mrs. Miller did not achieve her aim, and has been spared the disappointment flowing from this only because she has no idea what that aim actually involved or even meant. Her belief that she affirmed that Parliament is sovereign has been realised in litigation by which the courts have instructed Parliament what to do, for she does not seem to realise that under the Westminster system it is impossible for a court to instruct Government what primary legislation it has to pass without that instruction being an instruction to Parliament, on the sufferance of which a Government's continued existence is wholly dependent. After *Miller*, the Government was obliged to introduce the European Union (Notification of Withdrawal) Bill, which is precisely what Parliament had decided that the Government should not be required to do, and precisely why Mrs. Miller brought her action. The result of Mrs. Miller's case has been that Parliamentary sovereignty has been replaced by judicial supremacy.

What advice can one offer to Mrs. Miller in her perplexity? More importantly, what guidance can one offer to public opinion which is perplexed in a similar way, though not to a similar degree and indeed, having some perception of what has happened, has begun to criticise the senior judiciary for what it has done in *Miller*. To the extent that this criticism has been disgracefully expressed and to the extent that it unworthily attributes to the senior judiciary the crude political motive of seeking to prevent Brexit,<sup>91</sup> it has entirely merited the

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<sup>90</sup> A.V. DICEY, *A LEAP IN THE DARK* 189 (2d ed. 1911).

<sup>91</sup> James Slack, *Enemies of the People: Fury Over "Out of Touch" Judges Who Have Declared War on Democracy" by Defying 17.4m Brexit Voters and Who Could Trigger Constitutional Crisis*, *The Daily Mail* (London), November 3, 2016, <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>. Mr. Slack is the Political Editor of *The Daily Mail*, which has the largest combined print and online circulation of any UK newspaper.

vehement condemnation it has received from that judiciary.<sup>92</sup> But, exceedingly unfortunately, such criticism is the future, because the creation of judicial supremacy will inevitably ultimately expose the political views of the judiciary to scrutiny of a type which it is a great achievement of the UK constitution to have hitherto managed to deny legitimacy. The astounding and commendable – it is a great constitutional achievement – degree of public confidence which the UK judiciary enjoys has come under considerable attack since the passage of the Human Rights Act 1998, and the process of its erosion will be accelerated by *Miller's* establishment of judicial supremacy.<sup>93</sup> This, it is respectfully and regrettably submitted, will be the more likely as it emerges in public debate that what has been done in

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<sup>92</sup> The senior judiciary has, in fact, couched its criticism of the media in terms intended to show an appreciation of the necessity of a free press, and has reserved its most forcefully expressed criticism for those politicians who it believes have responded badly to the media coverage, especially the current Lord Chancellor, Ms. Liz Truss, who they believe has failed in her constitutional, indeed statutory, duty to protect the independence of the judiciary. This judicial criticism would seem to have placed the Lord Chancellor's continued tenure in her post into jeopardy. SELECT COMMITTEE ON THE CONSTITUTION, UNCORRECTED ORAL EVIDENCE WITH THE LORD CHIEF JUSTICE (March 22, 2017), Q4, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/lord-chief-justice/oral/49312.pdf>; SELECT COMMITTEE ON THE CONSTITUTION, UNCORRECTED ORAL EVIDENCE WITH THE PRESIDENT AND DEPUTY PRESIDENT OF THE SUPREME COURT (March 29, 2017), Q7, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/president-and-deputy-president-of-the-supreme-court/oral/49543.html>; Francis Elliott et al., *Clashes with Judges Leave Truss at Risk of Losing Job*, THE TIMES (London), April 7, 2017, at 6.

[June 12, 2017: In the Cabinet reshuffle following the General Election (*see infra* note 144), Ms. Truss was removed from her post having held it for less than a year].

<sup>93</sup> It is highly significant and worrying that even so responsible a figure as Mr. Iain Duncan Smith, a former Leader of the Conservative Party, and so then potentially Prime Minister, and still extremely influential member of the House of Commons, has already called for the vetting by politicians of senior judicial appointments in light of what has been done in *Miller*. Iain Duncan Smith, *Why It's Crucial That the Judges Who Could Decide the Fate of Brexit Are Scrutinised*, THE DAILY MAIL (London), December 7, 2016, <http://www.dailymail.co.uk/debate/article-4007894/IAIN-DUNCAN-SMITH-s-crucial-judges-decide-fate-Brexit-scrutinised.html>. Mr. Duncan Smith's position is that the UK courts' active involvement of themselves in political issues is irreversible, and, if so, then such vetting is also inevitable. Jonathan Morgan, *Law, Politics and the Independence of the Judiciary in the United Kingdom: Reflections on the "Brexit Litigation."* 25 THE COMMONWEALTH LAWYER: JOURNAL OF THE COMMONWEALTH LAWYERS' ASSOCIATION 7 (2016).

*Miller* has been done, as Mrs. Miller’s own sad state evidences, in a way bound to perplex the general public. To the procedural aspect of this I now turn.

### III. THE LEGAL PROCEDURE THAT MADE *MILLER* POSSIBLE

I have claimed that the extraordinary finding in *Miller* was made possible by two features of the case in themselves extraordinary, the first being the SSEEU’s manner of argument. The second is the civil procedure of the case, at first glance a feature most unlikely to ever be described as extraordinary, but in this instance the description is more than justified.

The basic structure of the most senior domestic courts of England and Wales, and thus for our purposes the UK, remains as it was established by the immense reform of the fusion of the common law and equity jurisdictions under the nineteenth century Judicature Acts,<sup>94</sup> with the creation of the Supreme Court in 2009<sup>95</sup> not changing this in a way of relevance to us. That basic structure encompasses three levels of court. The High Court, which also is a court of appeal from inferior courts and tribunals, is the court of first instance for more “complex and difficult” matters. From the High Court there is appeal to the Court of Appeal, from which there is final domestic appeal to the Supreme Court. The general jurisdiction of the High Court has three Divisions: the Chancery Division, the Queen’s Bench Division and the Family Division.<sup>96</sup> There are specialist courts within these Divisions, and the

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<sup>94</sup> Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66) (U.K.), Supreme Court of Judicature Act 1975 (38 & 39 Vict. c. 77) (U.K.) and the Appellate Jurisdiction Act 1879 (39 & 40 Vict. c. 59) (U.K.).

<sup>95</sup> Constitutional Reform Act 2005 Pt. 3 (c. 4) (U.K.) and Constitutional Reform Act 2005 (Commencement No. 11) Order 2009 (S.I. 1604/2009) (U.K.).

<sup>96</sup> Senior Courts Act 1981 s. 5(1) (c. 54) (U.K.). *See also* H.M. COURTS AND TRIBUNALS SERVICE, THE STRUCTURE OF THE COURTS, <https://www.judiciary.gov.uk/wp-content/uploads/2012/08/courts-structure-0715.pdf>

Administrative Court, which hears most judicial review applications, is a specialist court of the Queen’s Bench Division.<sup>97</sup>

The first instance hearing of *Miller* did indeed take place in the London seat of the Administrative Court in the Royal Courts of Justice, and the official transcript of this judgment, which indeed tells us that it was a matter “In the High Court of Justice, Queen’s Bench Division,” bears the Neutral Citation Number [2016] EWHC 2768 (Admin). Public debate about *Miller* has been based on the belief that it began as a “High Court” case. This belief is mistaken in a very important way.

The High Court judiciary is mainly composed of up to eighty *puisne* Justices of the High Court, plus some Deputy High Court judges who sit in inferior courts as well as the High Court in process of being elevated to the High Court.<sup>98</sup> In normal High Court proceedings, one of these sits alone.<sup>99</sup> These judges are highly distinguished, almost always having had considerable experience of judging in the inferior courts and tribunals from which they are recruited, as well, of course, as having experience of distinguished legal practice, academic entry to the senior judiciary being vestigial. Six even more senior judges are also members of the High Court, the most important of whom is the Lord Chief Justice, the Head of the Judiciary of England and Wales.<sup>100</sup> The Lord Chief Justice’s duties are predominantly administrative, as is to be expected when being responsible for the judicial function in higher

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<sup>97</sup> H.M. COURTS AND TRIBUNALS SERVICE, THE ADMINISTRATIVE COURT, <https://www.gov.uk/courts-tribunals/administrative-court>

<sup>98</sup> Senior Courts Act 1981, *supra* note 96, s. 4(1)(e). *See also* H.M. COURTS AND TRIBUNALS SERVICE, HIGH COURT JUDGES, <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/high-court-judges/> and H.M. COURTS AND TRIBUNALS SERVICE, SENIOR JUDICIARY, <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/senior-judiciary-list/>

<sup>99</sup> Senior Courts Act 1981, *supra* note 96, s. 19(3).

<sup>100</sup> Constitutional Reform Act 2005, *supra* note 95, s. 7(4) (c.4) (U.K.). *See also* H.M. COURTS AND TRIBUNALS SERVICE, THE LORD CHIEF JUSTICE, <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/lord-chief-justice/>

proceedings other than in the UKSC is but one of a large number of such duties, but in regard of his<sup>101</sup> own duties as a judge, and putting to one side the exceptional occasions when the Lord Chief Justice has sat as an “acting” judge of the Supreme Court, he sits in the Court of Appeal or the High Court.<sup>102</sup> His time is of course focused upon matters of particular gravity, and he therefore principally sits in the Court of Appeal and his role in the High Court is to sit as a member of the Divisional Court, which will be described below. I speak only on the basis of the experience of forty years of study rather relying on the result of any research focused on the issue when I say I am aware of only three reported cases in which the Lord Chief Justice sat as sole judge in the High Court,<sup>103</sup> all of which were cases of particular public importance. The Lord Chief Justice is not only a member of the Court of Appeal but is President of its Criminal Division. The President of the Civil Division is the Master of the Rolls,<sup>104</sup> second only to the Lord Chief Justice in importance amongst the judiciary of England and Wales.<sup>105</sup>

When some criminal or judicial review matters which are required to be heard by the High Court but are of a particular complexity or gravity, the bench may be of two or more judges,<sup>106</sup> and this specially constituted bench is called a Divisional Court.<sup>107</sup> A three member bench is, however, rare,<sup>108</sup> and a Divisional Court is usually composed of a High Court judge

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<sup>101</sup> There has never been a female Lord Chief Justice.

<sup>102</sup> Senior Courts Act 1981, *supra* note 96, ss. 2(2)(d), 4(1)(b)

<sup>103</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd.* [1952] 2 Q.B. 795 (Lord Goddard C.J.) (Q.B.D.) (U.K.); *Smith v Leech Brain and Co. Ltd.* [1962] 2 Q.B. 405 (Lord Parker C.J.) (Q.B.D.) (U.K.); *Attorney General v Jonathan Cape Ltd.* [1976] Q.B. 752 (Lord Widgery C.J.) (Q.B.D.) (U.K.).

<sup>104</sup> Senior Courts Act 1981, *supra* note 96, s. 3(2).

<sup>105</sup> H.M. COURTS AND TRIBUNALS SERVICE, MASTER OF THE ROLLS, <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/profile-mor/>

<sup>106</sup> Senior Courts Act 1981, *supra* note 96, s. 19(3)(a).

<sup>107</sup> *Id.*, s. 66.

<sup>108</sup> *See infra* note 110.

and a more senior judge drawn from the Court of Appeal. *Thoburn*<sup>109</sup> was a paradigm instance of the Administrative Court sitting as a Divisional Court, being a judicial review matter in which Crane J., a High Court judge, simply agreed with the senior Laws L.J., who was no doubt asked to sit because of his particular interest in constitutional matters.

The official transcript of the first instance judgment in *Miller* tells us that the court was a Divisional Court, and more legally sophisticated comment has referred to the case, not as a matter before the High Court, but as a matter before the Divisional Court. The bench that heard *Miller* at first instance was, however, composed of Lord Thomas of Cwmgeidd C.J., the Lord Chief Justice, Sir Terence Etherington M.R., the Master of the Rolls, and Sir Philip Sales L.J., a Lord Justice of Appeal. No *puisne* justice of the High Court was involved. Not merely would it be very misleading to describe this bench as a High Court bench, but I am unaware of any Divisional Court ever previously being of such a composition.<sup>110</sup> This was, in fact, a first instance hearing by the Court of Appeal, and indeed by a bench of that court which was as distinguished as one can really conceive, not only because of the eminence of the Lord Chief Justice and the Master of the Rolls, but because Sales L.J., whose previous career included distinguished service as the senior legal representative of the Crown,<sup>111</sup> was particularly fit to hear this case. I believe this way of handling an application for judicial review, indeed of any civil matter, is unique in post-war English legal history, differences with earlier legal procedure making any wider ranging claim impossible.

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<sup>109</sup> *Supra* note 34.

<sup>110</sup> One of the earlier attempts to review issues arising from membership of the EU was heard by an extremely distinguished Divisional Court composed of, in addition to a High Court Judge, two Lords Justice of Appeal. *R. v Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees-Mogg*, *supra* note 58.

<sup>111</sup> H.M COURTS AND TRIBUNALS SERVICE, BIOGRAPHIES OF THE COURT OF APPEAL JUDGES, <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/coa-biogs/>

Any decision of this court would be bound to be regarded as extremely authoritative, but the power of this decision was increased by it being, still unusually, handed down as a single judgment. Nevertheless, from the outset there was never any doubt on the part of any legally informed commentator that that judgment, whatever it was, would be appealed to the Supreme Court.<sup>112</sup> (An ultimate outcome that the extreme distinction of the so-called High Court made really quite inconceivable was that the UKSC would find that the High Court was wrong to take the matter in the first place.) The reader will immediately see that the normal three level court system was thereby reduced to two levels. In the very first Practice Direction it issued, the UKSC retained the longstanding practice of “exceptionally” allowing “leapfrog” appeals in civil matters from the High Court direct to itself,<sup>113</sup> the statutory power enabling this specifying that the appeal may be from either “proceedings before a single judge of the High Court ... or ... a Divisional Court.”<sup>114</sup> The nature of the bench which heard *Miller* at first instance surely strains this conception of a leapfrog appeal. The leapfrog is, of course, intended to be over the Court of Appeal, as is emphasised by a later practice direction stipulating that when leave to make such an appeal is sought because “the proceedings entail a decision relating to a matter of national importance or consideration of such a matter,”<sup>115</sup> then leave should be granted “only ... where ... it does not appear likely that any additional assistance could be derived from a judgment of the Court of Appeal.”<sup>116</sup> This would not, of

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<sup>112</sup> I am at a loss to explain Mrs. Miller’s widely reported comments that she was “baffled” by the Government’s decision to appeal. Sara Spary, *Gina Miller Says She Is “Baffled” By Government Brexit Appeal*, BUZZFEED NEWS, November 8, 2016, [https://www.buzzfeed.com/sarasparry/gina-miller-says-she-is-baffled-by-government-brexit-appeal?utm\\_term=.td3l2Vem6#.qvwjz9r03](https://www.buzzfeed.com/sarasparry/gina-miller-says-she-is-baffled-by-government-brexit-appeal?utm_term=.td3l2Vem6#.qvwjz9r03).

<sup>113</sup> SUPREME COURT, PRACTICE DIRECTION 1, para. 1.2.17, <https://www.supremecourt.uk/procedures/practice-direction-01.html>.

<sup>114</sup> Administration of Justice Act 1969 s. 12(2) (c. 58) (U.K.).

<sup>115</sup> SUPREME COURT, PRACTICE DIRECTION 3, para. 3.6.12, <https://www.supremecourt.uk/procedures/practice-direction-03.html#06>; Administration of Justice Act 1969, *id.*, s. 12(3A)(a).

<sup>116</sup> SUPREME COURT, PRACTICE DIRECTION 3, *id.*, para. 3.6.12.c.

course, be likely in *Miller*, as an effective Court of Appeal which was, as we have seen, as distinguished as one can really conceive, had already heard the case. Any other Court of Appeal would be of less standing. It was, in fact, impossible for the Court of Appeal as such to hear *Miller*.

Further extraordinary procedural features were added to *Miller* at the Supreme Court hearing. The UKSC may have twelve Justices<sup>117</sup> and currently there are eleven.<sup>118</sup> The UKSC normally sits as a bench of five, though seven is by no means unknown. *Miller* was heard by all eleven Justices. This was not only the sole occasion so far on which the Court has sat *en banc* but it was the largest bench ever assembled in the UK's domestic court of final appeal in modern times.<sup>119</sup> The but recently entirely refurbished premises of the UKSC could not comfortably accommodate, not merely the public,<sup>120</sup> but those participating in the hearing,<sup>121</sup> for, judged conservatively and leaving aside those concerned with a specifically Northern Irish issue, the Appellant, two Respondents, one interested party and five interveners had the benefit of over fifty legal representatives, including twenty two Q.C.s! Over 20,000 pages of documents supported the arguments of this multitude (S.C. [275]), with additional academic arguments also playing a part (S.C. [11]). What is more, the physical bench itself had to be

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<sup>117</sup> Constitutional Reform Act 2005, *supra* note 95, s. 23(2).

<sup>118</sup> U.K. SUPREME COURT, BIOGRAPHIES OF THE JUSTICES, <https://www.supremecourt.uk/about/biographies-of-the-justices.html>.

<sup>119</sup> Lord Neuberger P.S.C., Bar Council Law Reform Lecture, The Role of the Supreme Court Seven Years On: Lessons Learnt (November 21, 2016), para. 23, <https://www.supremecourt.uk/docs/speech-161121.pdf>.

<sup>120</sup> Press Release, U.K. Supreme Court, Access to the Supreme Court Building, <https://www.supremecourt.uk/news/access-to-supreme-court-building-article-50-brex-it-case.html>.

<sup>121</sup> Lord Neuberger, Opening Statement by the President [of the UKSC in *Miller*] (December 5, 2016), p. 2, <https://www.supremecourt.uk/docs/draft-transcript-monday-161205.pdf>.

modified to allow even all the Justices themselves a comfortable seat!<sup>122</sup> The proceedings were in various ways televised, but it should be said that, though the extent of coverage was unprecedented, television has become a quite common feature of UKSC proceedings. That the entire matter was just gone through again emerges even more clearly from the written arguments of the parties and the full transcript of the hearing which have been made publicly available.<sup>123</sup>

What these spectacles in the High Court and the UKSC amount to is, it is submitted, the creation of a UK constitutional court. Though, as we have seen, the point was not argued, taking *Miller* at all, regardless of what was decided, asserted judicial supremacy in the UK, and the court arrangements that made this possible were absolutely unprecedented in modern English legal history. It is unarguable that doing this strained the statutory authority for making any such arrangements, but this is not really the right way to approach the criticism that must be made of what was done. The arrangements for the conduct of the business of the senior courts are rightly left very flexible, and indeed I do not think I can have sufficiently conveyed the flexibility that lies behind the arrangements for the specialist Administrative Court, despite the length at which I have tried to do so. But this flexibility imposes a grave duty – it amounts to a constitutional convention - on the senior judiciary to manage the business of the courts in the public interest. By arranging the hearings of *Miller* in such a way as to create the forum of a constitutional court which made possible, and indeed was appropriate to the magnificence of, those hearings, without any public discussion whatsoever of whether a constitutional court should be created, is, with great respect, a momentous failure to perform that duty. The public ignorance of what has been done is nowhere better

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<sup>122</sup> Press Release, U.K. Supreme Court, Supreme Court Prepares for Article 50 Appeal (December 2, 2016), <https://www.supremecourt.uk/news/supreme-court-prepares-for-article-50-appeal.html>.

<sup>123</sup> U.K. SUPREME COURT, ARTICLE 50 ‘BREXIT’ APPEAL, <https://www.supremecourt.uk/news/article-50-brexite-appeal.html>.

evidenced than in the way that the first hearing of *Miller* continues to be understood to have been a hearing in the High Court when it really was nothing of the sort.

But all good things must come to an end, and if and when this ignorance is dissipated, the senior judiciary will find it has eroded the very public confidence in the judiciary's conduct of the business of the courts which allowed the packing of the *Miller* benches with judges of the highest rank and distinction as a peculiarly self-absorbed way of legitimating the decisions taken, and this way of proceeding will no longer be allowed to be good enough. This act of acute self-harm by an independent senior judiciary is entirely consistent with the post-war abandonment of the most successful political culture of modern history by the U.K.'s ruling elites, in the process of which the now failed attempt to cede British sovereignty to the E.U. had seemed to be the ultimate self-abasement. Surely the most important passage of Lord Reed's dissent, the wisdom of which stands out even amongst those words, is that: "[i]t is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary" (S.C. [240]).

#### *Similar Fact Evidence*

One imagines it will never become publicly known what in any detail was the procedural reasoning behind setting up the *Miller* hearings in this way. One can nevertheless be sure that, in addition to the Lord Chief Justice and the Master of the Rolls, David Neuberger, Baron Neuberger of Abbotsbury, The President of the UKSC, will have played a major part. If so, this would not have been the first time Lord Neuberger had taken an innovative line with judicial procedure in order to bring about a change to the law he thought desirable which one doubts would have survived public debate. I have discussed this other episode elsewhere

and I will give but the briefest account of it here, referring the reader to that discussion for further detail and authority.<sup>124</sup>

Fundamental reform to civil procedure at the turn of the twentieth century allowed civil litigation to be funded by variants of contingency fee previously unknown or prohibited in the UK. This led to an explosion in personal injury claims and litigation which even those in favour of the personal injury system and of funding this litigation, including the author of the reforms himself, found to be of great concern. The conduct of the legal profession which lost, and still has not begun to regain, any defensible balance between pursuit of the public interest and pursuit of fee income drew particular criticism. A most authoritative review of the situation which the Government commissioned an eminent member of the senior judiciary to undertake led to the proposals that the fee arrangements which had been brought into disrepute be abolished or radically modified but, so as to ensure that the funding for litigation was not overall reduced, damages for personal injury be increased. The first, reducing, proposal, was brought about by statute. No legislative provision was made for the second, increasing, proposal. But, following an, I think it fair to say, at the time astonishing 2001 Court of Appeal decision, which the Law Commissioner who played a major role in bringing the decision about has since defended as a way of using the courts to effectively pass legislation which it is likely that Parliament would not, this proposal was given effect by the 2012 Court of Appeal decision in *Simmons v Castle*.<sup>125</sup>

In *Simmons v Castle*, Court of Appeal approval of a personal injury damages settlement of a sort which would normally be dealt with a single Lord Justice of Appeal on papers was used as the occasion to uplift the relevant damages in every case across England and Wales by 10%. Unlike the 2001 case, the hearing of which had some of the C.B. de Mille quality of

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<sup>124</sup> David Campbell, *The Heil v Rankin Approach to Law-making: Who Needs a Legislature?*, 46 COMMON LAW WORLD REVIEW 340 (2016).

<sup>125</sup> [2012] EWCA Civ 1039, [2012] EWCA Civ 1288; [2013] 1 W.L.R. 1239 (U.K.).

*Miller, Simmons v Castle* was a most austere affair reminiscent of Samuel Beckett. The case was not in a most important sense even actually heard because the interests of the nominal parties played no part and there was no argument whatsoever before the court. A most impressive bench nevertheless was assembled, not to hear this case, but to use the pretext of doing so to engage in this act of judicial legislation, comprising of the Lord Chief Justice, the Master of the Rolls and a distinguished Lord Justice of Appeal. The Master of the Rolls at that time, who as President of the Civil Division of the Court of Appeal was primarily responsible for these arrangements, was Baron Neuberger of Abbotsbury. After *Miller*, Lord Neuberger, who must now be regarded as the U.K.'s John Marshall, will look upon *Simmons v Castle* as a very ordinary achievement indeed.

#### CONCLUSION: *MILLER* AND *MARBURY V MADISON*

At the moment, the power of the UK senior judiciary is far greater than it has ever been in modern English legal history. The passage of the Human Rights Act 1998 has given the courts an express power to strike down secondary legislation, declare primary legislation incompatible with binding human rights laws, and, it has been authoritatively and in my opinion persuasively argued, an effective power to alter by interpretation the legal position created by primary legislation that in very important ways exceeds even the power to strike down of the US Supreme Court.<sup>126</sup> All this has been, however, ultimately dependent on the acquiescence of the Government and Parliament, for, leaving aside other issues, in the end Parliament could repeal the 1998 Act (and pass domestic legislation necessary to deal with

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<sup>126</sup> J.D. Heydon, *Are Bills of Rights Necessary in Common Law Systems?*, 130 *LAW QUARTERLY REVIEW* 392, 401-402 (2014). Similarly, the analogy to *Marbury v Madison* drawn here breaks down to the extent that the US Supreme Court has never told Congress to pass a particular piece of legislation.

the UK's withdrawal from the Charter of Fundamental Rights of the European Union<sup>127</sup> and the European Convention of Human Rights). But, with *Miller*, outright judicial supremacy has been asserted. This is, of course, as yet a merely nascent development. However, no-one who has witnessed the growth in human rights jurisprudence in the UK over the merely twenty years since the passage of the 1998 Act can doubt that *Miller* will grow.

I will conclude by going so far as to predict the line the next and further assertion of judicial supremacy will take. Restoring legal sovereignty to the UK Parliament will, of course, be an enormous, as distinct from complex, undertaking, quite impossible if Parliament has to actively debate all the legislative changes, which, therefore, will in large part have to be made by just the sort of secondary legislation which was the focus of Laws L.J.'s judgment in *Thoburn*. This has been obvious to anyone competent to understand the issues from the moment the EU referendum was canvassed, and in Parliamentary debate following the publication, the day after the UK gave notice of its intention to leave, of the Command Paper<sup>128</sup> intended to stimulate consultation over the legislation necessary to give effect to that notice, the SSEEU acknowledged this to be the case.<sup>129</sup> The publication of this Command Paper nevertheless instantly gave rise to the criticism by politicians<sup>130</sup> and media commentators<sup>131</sup> that the Government proposed to make improper use of secondary legislation. The debate has been handicapped from the outset because the precise legislative device at the heart of the matter, the Henry VIII clause, enjoys a similarly long pedigree in

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<sup>127</sup> O.J. 2012/C. 326/02.

<sup>128</sup> DEPARTMENT FOR EXITING THE EUROPEAN UNION, *supra* note 22, para. 1.15.

<sup>129</sup> H.C. Deb. vol. 624 col. 433 (March 30, 2017) (Mr. David Davis, Secretary of State for Exiting the European Union).

<sup>130</sup> Clive Lewis, *Article 50 is Going to give Theresa May the Powers of a Monarch Under "Henry VIII clauses,"* INDEPENDENT (London), March 30, 2017, <http://www.independent.co.uk/voices/article-50-great-repeal-bill-eu-law-henry-viii-powers-what-happens-next-a7655331.html>. Mr. Lewis is the Labour Party Member of Parliament for Norwich South.

<sup>131</sup> Lucy Fisher et al., *Davis Accused of Power Grab as He Seeks Free Hand Over EU Law*, TIMES (London), March 31, 2017, at 12.

English constitutional law to the Royal prerogative, and the way this pedigree has been seized upon by the uncomprehending as an ipso facto objectionable feature of the Government's legislative programme is a dispiriting example of *déjà vu* all over again.<sup>132</sup>

It cannot reasonably be denied that Henry VIII clauses, and secondary legislation in general, are open to abuse, and have been abused, by UK governments of all political hues, in order to shield controversial proposals from Parliamentary and public debate. *Thoburn*<sup>133</sup> itself concerned a deplorable example of this, though this aspect of the case seemed to escape the attention of a Divisional Court's preoccupied with constitutional innovation.<sup>134</sup> Nor can it be denied that, so long as government is conducted at anything remotely like the scale it is now is in the UK, the widespread use of such clauses and such legislation is inevitable and in this sense normal. Apart from the size of the legislative task of leaving the EU, there is nothing about any of this specific to Brexit, nothing that is not a part of the passage of legislation in the course of the modern conduct of government.<sup>135</sup> But nor, of course, was there anything specific to giving notice under Art. 50 that was not part of the modern conduct of foreign policy, and that did not stop the senior judiciary doing what it did in *Miller*.

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<sup>132</sup> H.C. Deb. vol. 624 col. 433-34 (March 30, 2017) (Mr. Stephen Gethins). Mr. Gethins is a Scottish Nationalist member of the House of Commons whose contribution to the debate on the Government's proposed legislation wittily invoked the rhetoric of perceived historical grievance so beloved of those who share his views. A reader who wishes to understand that rhetoric should consult MARCUS MERRIMAN, *THE ROUGH WOOLINGS: MARY QUEEN OF SCOTS 1542-1551* (2000).

<sup>133</sup> *Supra* note 38.

<sup>134</sup> Campbell & Young, *supra* note 42.

<sup>135</sup> In fact, whilst I am anxious to avoid complacency about this, the intense focus of the public and Parliament on Brexit will mean that the potential for abuse of secondary legislation will be less likely over this issue than is commonly the case. This will be a marked change to the generally low level of scrutiny of the most extensive use, pursuant to the European Communities Act 1972, *supra* note 24, s. 2(2), of secondary legislation in order to join what is now the EU. s.2(2), which was "as inevitable as it was notorious", has been authoritatively described as a "significant example" of modern laxity in legislative drafting and scrutiny. Daniel Greenberg, *Dangerous Trends in Modern Legislation*, 2015 PUBLIC LAW 96, 109.

Showing an awareness of recondite elements of UK constitutional and administrative law most surprising and admirable in one who did not complete her LL.B. studies at what is now the University of East London and who, prior to coming to legal eminence through Brexit, does not seem to have had any particular interest in constitutional matters,<sup>136</sup> Mrs. Miller also instantly declared herself to be “profoundly worried” by the possible use of Henry VIII clauses, which she saw raising the same threat of the Government using ancient powers to try “to bypass Parliament”<sup>137</sup> as she had detected in the use of the Royal prerogative to carry out acts of state.<sup>138</sup> Having already spent between £200,000 and £300,000 on her case<sup>139</sup> and having said she “can’t think of anything better” to do with her great wealth than to continue the good legal fight, Mrs. Miller, who is also in other regards a philanthropist, is

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<sup>136</sup> *Shining The Spotlight On Gina Miller*, THE GUYANA PREMIER, February 2, 2017, <http://www.guyanapremier.com/single-post/2017/01/31/SHINING-THE-SPOTLIGHT-ON-GINA-MILLER>. This interest in Mrs. Miller arises because, though a British citizen, she was born in what was then British Guyana and spent her childhood in the newly independent Guyana.

<sup>137</sup> Gina Miller, *Triggering Article 50 Without Parliament Getting a Say Would Set a Precedent for Autocracy*, New Statesman (London), January 9, 2017, <http://www.newstatesman.com/politics/staggers/2017/01/triggering-article-50-without-parliament-getting-say-would-set-precedent>.

<sup>138</sup> I hope the reader will excuse my entering something of a personal note. In debate on the Government’s Command Paper, Mrs. Helen Goodman claimed that “The public are extremely worried about these Henry VIII clauses.” H.C. Deb. vol. 624 col. 441, March 30, 2017. Mrs. Goodman’s is the Labour Member of the House of Commons for Bishop Auckland in the North East of England, where my wife and I live. I have written columns for a local newspaper seeking, without noticeable success, to alert the public to the Government’s abuse of secondary legislation in order to bring about by undemocratic means the major programme of changes to local government on which it is currently embarked, changes which will effect the entire North of England. Nevertheless, despite the profound depth of my engagement with such issues, I myself have not detected this public concern about Henry VIII clauses.

<sup>139</sup> Michael Savage, *Scourge of Brexiteers Promises to Fight On*, THE TIMES (London), March 3, 2017, at 10. This expense appears to have been incurred despite, one imagines, Mrs. Miller being awarded her legal costs under the usual rule in England and Wales. The Government has not so far made public the expense it has incurred arguing *Miller*, and though it has said it will do so, it has also said it has kept no full record of these costs. Ben Kentish, *Government Does Not Know Full Cost of Its Article 50 Legal Challenge Due To “Electricity and Printing Charges,”* THE INDEPENDENT (London), February 6, 2017, <http://www.independent.co.uk/news/uk/politics/uk-government-article-50-legal-challenge-supreme-court-gina-miller-electricity-printing-charges-a7565461.html>.

now contemplating again “going to court to get a ruling” over the legislation outlined in the Command Paper.<sup>140</sup>

Were the Government to secure the passage through Parliament of competently drafted enabling legislation granting the necessary powers, Mrs. Miller would face different and, one would have said, but who now really knows, harder legal obstacles. It is evident, however, that she believes that what she has achieved is a power of the courts to regulate Parliamentary procedure, telling Parliament what it needs to do in line with sovereignty of Parliament as determined by the courts, and so these obstacles will hardly appear insuperable to her. I write this article because there is a very strong possibility that, in the legal realist sense,<sup>141</sup> she has grasped the legal *zeitgeist* and she is right. She may have drawn succour, if her remarkable legal acuity encompasses keeping abreast of the scrutiny of constitutional matters by Parliamentary Select Committee, from Lord Neuberger’s evidence to the Lords Committee on the Constitution given on the day the UK gave notice to leave, that the future use of secondary legislation to alter, rather than merely receive, the EU *acquis* gives rise to “a possibility of increased litigation.”<sup>142</sup>

Lord Neuberger saw all this as a prospect remote in time, and as it will be two years before the UK can alter any part of the *acquis*, one can understand how he was able to say so. But the relief granted in *Miller* was, as it had to be, declaratory (H.C. [109]),<sup>143</sup> and, having succeeded in one application for declaratory relief, perhaps Mrs. Miller now sees no need to bide her time before embarking on her next act of constitutional philanthropy. A good time to

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<sup>140</sup> Fisher et al., *supra* note 131.

<sup>141</sup> O.W. Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457, 460-61 (1897).

<sup>142</sup> SELECT COMMITTEE ON THE CONSTITUTION, UNCORRECTED ORAL EVIDENCE WITH THE PRESIDENT AND DEPUTY PRESIDENT OF THE SUPREME COURT, *supra* note 92, Q1. Lord Neuberger’s views rest on a point arising from the Human Rights Act 1999 which is not directly relevant to us.

<sup>143</sup> The SSEEU did not object to this relief, always unusually granted and in this case *sui generis*. I myself would accept, however, that, as the High Court maintained, if *Miller* was to be heard at all, the nature of the relief follows.

do so from her perspective will be when the Great Repeal Bill is introduced in Parliament, which must be well within the next two years.<sup>144</sup> It was not until over more than a decade had passed after *Marbury v Madison* that the US Supreme Court first reversed a decision of a state court,<sup>145</sup> and it was more than half a century before it again struck down a Federal statute.<sup>146</sup> I predict that the new UK constitutional court will not take nearly so long to tell the UK Government, Parliament and electorate how it should go about using Henry VIII clauses in the course of leaving the EU. The process of doing so may well have been initiated before this article appears in print.

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<sup>144</sup> [June 11, 2017. On April 19, four days after the Symposium was held, Mrs. May called in Parliament for a General Election. H.C. Deb. vol. 624 col. 681 (April 19, 2017). As nothing seemed to have changed, unless it was that her position had by then grown stronger, since the earliest days of her Government, during which she maintained that she would not call an Election, the political commentariat was at a loss to explain her decision. Joe Watts, *Theresa May Shocks Brexit Britain with Snap Election She Said She'd Never Call For*, THE INDEPENDENT (London), April 18, 2017, <http://www.independent.co.uk/news/uk/politics/theresa-may-election-2017-uk-pm-shocks-nation-with-promise-breaking-vote-a7689911.html>. At the time I formed the belief, or should say, in the complete absence of actual information, the speculation, that she had received advice about just how much real trouble a Parliament composed as it was could cause given the opportunity to do so by a UKSC judgment about the Great Repeal Bill, and was looking to obtain an overwhelming Commons majority which supported Brexit.

The Election, held on June 8, 2017, was a disaster for Mrs. May. Colin Rallings and Michael Thrasher, *The New Political Map of the U.K.*, THE SUNDAY TIMES (London), June 11, 2017, at 16. Far from increasing her majority, much less inflicting a huge defeat on the Labour Party as at one time seemed likely, she lost her majority in the Commons, and the Conservatives remaining largest party by far was no consolation as she has had to enter into negotiations to form a coalition government. The electorate would appear to have believed Mr. Corbyn's pledge that the Labour Party will support Brexit, which in my opinion it will do only in such a way that support will be indistinguishable from opposition.

Mrs. May remains Prime Minister only because there is no alternative in the short term and her resignation in humiliation is but a matter of time. There can be no doubt that managing the Parliamentary business of Brexit will now become immensely difficult and, in my opinion, were it not impossible anyway, the further Supreme Court case contemplated by Mrs. Miller or her ilk will make it impossible. I am afraid I cannot tell a US, or indeed any, audience where this will go. Anyone who purports to do so at the moment is either a liar or a fool.]

<sup>145</sup> *Martin v Hunter's Lessee*, 14 U.S. 304 (1816).

<sup>146</sup> *Dred Scott v Sandford*, 60 U.S. 393 (1857).

## ADDENDUM

I have left the sentence associated with note 5 and related passages of this article as I drafted them in November 2016 as the arrangements for the UKSC hearing of *Miller* became public. At that time I believed the point about the constitutional court to be original to myself. Between that time and the submission of the paper to the Symposium organisers in early April 2017, I have become aware that the same language has been publicly employed, though not, to my knowledge, in any sustained argument, by a number who enthusiastically support the development. The most significant of these occurred on the day the UK gave notice of its intention to leave, 29 March 2017.

The House of Lords Select Committee on the Constitution has annual discussions, called “evidence sessions,” with the Cabinet Ministers of Government responsible for the legal system and with the senior judiciary, and in 2017 these included the sessions with the Lord Chief Justice and the President and Deputy President of the UKSC which have already been mentioned. At the session with the latter two held, I assume by coincidence, on 29 May 2017, one of the members of the Committee, Lord Morgan, fulsomely congratulated the President and Deputy President on having, in *Miller*, “effectively” created a “constitutional court,” an arrangement which, Lord Morgan proposed, might be put on a “more formal” basis. Addressing the President, he asked:

We had a series of very significant statements by the Supreme Court about the question of legal certainty in the case of Mrs. Miller, in which my colleague Lord Pannick was involved, which in a way was fortuitous. Mrs. Miller was a lone protester who won her point in the courts. It is fortunate that this was done, because we benefited from it hugely, and I hope the Government benefited from the wisdom of the Supreme Court. Would you think there was any merit in having a more formal arrangement on that? In effect, the Supreme Court, by pronouncing the eternal verities on the sovereignty of Parliament, acted as a constitutional court, as they have in France and other countries. Would you feel that a more formal structural relationship for that could be created?<sup>147</sup>

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<sup>147</sup> SELECT COMMITTEE ON THE CONSTITUTION, UNCORRECTED ORAL EVIDENCE WITH THE PRESIDENT AND DEPUTY PRESIDENT OF THE SUPREME COURT, *supra* note 92, Q3.

Kenneth Morgan is a retired academic historian of distinction who has held important administrative posts in British higher education, including the Vice-chancellorship of the University of Aberystwyth. He was appointed to the Labour benches of the House of Lords by Mr. Blair in 2000, shortly after Mr. Blair's Government had passed its reform of that House. Lord Morgan's views may be regarded as representative of informed and influential left-liberal, lay opinion on constitutional matters. I fear, nevertheless, that his intendedly helpful question was something of a *faux pas*. The President's reply, far from seizing the opportunity the question obviously offered, was most equivocal, eschewing anything concrete about what should be done in the UK and instead vaguely reviewing the various constitutional systems of the world.<sup>148</sup> Nor did the Deputy President, or Lord Pannick, also a member, it will be recalled, of the Committee, take up this opportunity.

In this they were, in a sense, very wise. Putting what *Miller* has done on the more formal basis envisaged by the naïve Lord Morgan would involve public debate about the wisdom of establishing a constitutional court, and avoiding this inconvenience whilst establishing such a court is what *Miller* is all about. I understand that *Marbury v Madison* shared some of this quality akin to duplicity.<sup>149</sup>

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<sup>148</sup> In other public statements about *Miller*, Lord Neuberger has scrupulously sought to affirm Parliamentary sovereignty as he understands it. Lord Neuberger, Personal Support Unit Fundraising Breakfast, Reflections on Significant Moments in the Role of the Judiciary, March 16, 2017, <https://www.supremecourt.uk/docs/speech-170316.pdf>.

<sup>149</sup> ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* ch. 3 (6th ed. 2016).