

MARBURY V. MADISON IN THE U.K.: BREXIT AND THE CREATION OF JUDICIAL SUPREMACY

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INTRODUCTION

Though the United Kingdom's (U.K.) decision to leave the European Union (E.U.) unarguably gave rise to 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. By far the principal obstacle to the implementation of the decision to leave has been not directly political, but legal, for judicial review was successfully obtained of the way the U.K. Government proposed to carry out that implementation. The

[†] Professor of Law, Lancaster University Law School, U.K. I am grateful to the Symposium participants for their comments, and in particular to Professor Weiler for the graciousness of his criticism of a position at such variance to his own. I am also grateful to Mark Conway, Richard Cullen, Barbara Mauthe, Chris McNall, James Summers, and Tom Webb for comments given separately. I have left this Article largely as it was when finalized in the days immediately after the Symposium, making no attempt to incorporate developments since then, even though they call into question whether Brexit will take place on the anticipated date, or, indeed, ever. As I now correct the proofs, on November 30, 2017, the Article's topic, constitutional supremacy, has so far been unaffected by these developments. I do not expect this situation to continue.

U.K. Supreme Court's (UKSC) decision in *R (Miller) v. Secretary of State for Exiting the European Union*,¹ 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 January 24, 2017. If this case was brought with the political purpose of ultimately preventing Brexit, then it has been a failure, for it was immediately clear that the UKSC judgment would not serve this purpose, and indeed the U.K. gave notice to the E.U. of its intention to leave on March 29, 2017, entirely in line with the timetable for the implementation of the referendum result which the Prime Minister had announced before *Miller* had been heard.

Nevertheless, *Miller* was unprecedented and represents a constitutional coup in which the UKSC has created itself as a constitutional court. That the case was heard at all, the way it was heard, and the UKSC's decision to instruct the U.K. Government, and therefore the U.K. Parliament to pass an Act of primary legislation overturns sovereignty of Parliament and establishes judicial supremacy in the U.K. This is the culmination of a process which hindsight makes clear has inexorably been gathering pace since the passage of the Human Rights Act 1998.² One reason that that process has been able to gather pace is that it is, of course, entirely possible to mount a strong case for the creation of a constitutional court, a case which certainly has resonance for the U.K. legal and political elites which supported and largely still support continued membership of the E.U. But, as if to give a profound example of why the 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, but has indefensibly been done in a "legal" way tantamount to incomprehensible to almost every citizen of the U.K., as the dispiritingly uncomprehending public debate about *Miller* demonstrates. Though Brexit will now proceed to the point where the U.K. leaves the E.U. on March 29, 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

¹ *R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583, [2017] 1 All ER 593.

² 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. v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, see David Campbell, *The Threat of Terror and the Plausibility of Positivism*, 2009 PUB. L. 501; on *Thoburn v. Sunderland City Council* [2001] EWHC 195, [2003] QB 151, see David Campbell & James Young, *The Metric Martyrs and the Entrenchment Jurisprudence of Lord Justice Laws*, 2002 PUB. L. 399; and on *Soria v. Secretary of State for the Home Department, Asylum & Immigration Trib.*, IA/14578/2008, Sept. 24, 2008 (Immigr. Judge Devittie), see David Campbell, *"Catgate" and the Challenge to Parliamentary Sovereignty in Immigration Law*, 2015 PUB. L. 426.

way, which has so avoided public debate as to be almost surreptitious. In *Miller*, the U.K. has had its *Marbury v. Madison*.³

The principal 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 June 23, 2016, a majority of the citizens of the U.K. 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?” voted to leave.⁴ The procedure for a Member State to withdraw from the E.U. is governed by Article 50 of the Treaty on European Union (TEU),⁵ and in public debate over Brexit the U.K.’s giving notice under this procedure has become widely known as “triggering” Article 50. On July 29, 2016, Mrs. Gina Miller, a U.K. 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 “ensure that the correct legal process is followed when the Government triggers Article 50,”⁶ and to this was joined a claim to similar effect previously served by Mr. Deir Tozetti Dos Santos, also a U.K. citizen. The proceedings were heard before what I shall *pro tem* call the High Court on October 13, 17, and 18, 2016, which handed down its single judgment ruling against the SSEEU on November 3, 2016.⁷ An appeal by the SSEEU to the UKSC was heard on December 5, 6, 7, and 8, 2016, and a judgment, dismissing the appeal, was handed down on January 24, 2017. A single majority judgment stated the views of eight of the eleven justices who heard the appeal,

³ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁴ 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.

⁵ Consolidated Version of the Treaty on European Union art. 50, Oct. 26, 2012, 2012 O.J. (C 326) 1.

⁶ *Article 50 Legal Challenge: Q&A November 2016*, MISHCON DE REYA LLP, https://www.mishcon.com/news/firm_news/article_50_legal_challenge_qanda_november_2016_11_2016 (last visited Nov. 30, 2017) (Mishcon de Reya is the firm of solicitors which advised the applicants).

⁷ *R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union* [2016] EWHC (Admin) 2768, [2017] 2 WLR 583, [2017] 1 All ER 158, [2017] 1 CMLR 34, [2016] HRLR 23, [2016] ACD 134.

including the President of the UKSC, Lord Neuberger, and the Deputy President, Lady Hale.⁸ There were three dissenting judgments: by Lord Reed SCJ,⁹ Lord Carnwath SCJ, agreeing with Lord Reed and making some additional arguments,¹⁰ and Lord Hughes SCJ.¹¹

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,”¹² and, equally insistently disavowing a political intent,¹³ the UKSC saw the “main issue” in the same way.¹⁴ This was a peculiarly English way of addressing things, which calls for explanation. The British Constitution carries many marks of England’s long constitutional history, perhaps now the most significant of which 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 extent of the foreign policy prerogative is now much shaped by constitutional convention and statute. The fundamental power of the U.K. Government to conduct foreign policy nevertheless remains a matter of prerogative, and it was as an exercise of this prerogative that the U.K. Government proposed to give notice under Article 50 of the TEU.

Despite the extent of the discussion of prerogative powers in both judgments *passim*, how much of a red herring these powers were does not sufficiently emerge, save from the dissent of Lord Reed. That the U.K. 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:

This is wisely placed in a single hand by the British constitution, for

⁸ *Miller* [2017] UKSC 5, [1]–[152].

⁹ *Id.* at [153]–[242].

¹⁰ *Id.* at [243]–[274].

¹¹ *Id.* at [275]–[283].

¹² *Miller* [2016] EWHC (Admin) 2768, [5].

¹³ *Miller* [2017] UKSC 5, [3].

¹⁴ *Id.* at [5].

the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: 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.¹⁵

This reasoning applies just as much in the twenty-first century as in the eighteenth, and just as much to all modern States as to the U.K.

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; recognizing that, of course, the Government is the Government only because it normally can command a majority in the House of Commons.

Let us assume that a Government alters the U.K.'s international legal position by entering into or withdrawing from a treaty commitment. In many cases this will require a concomitant alteration in the U.K.'s domestic law. Under the U.K.'s still strongly dualist approach, this requires the Government to secure the passage through Parliament of the necessary domestic legislation, without which the alteration has no domestic effect. Such is the degree of penetration into U.K. domestic law of E.U. law—this penetration of non-national law into the national legal systems of its Member States is what makes the E.U. historically unique—it was *a fortiori* the case that leaving the E.U. would require domestic legislation. The U.K. Government has never denied this, and indeed has always been clear that implementation of the decision to leave would require a “Great Repeal Bill” to come into force the instant the U.K. left. This was a not wholly accurate way to describe the legislation to be passed, for a vital purpose of that legislation will be initially to preserve in U.K. law the overwhelming proportion of E.U. law in order to avoid legal chaos, leaving aside the substantial desirability of much of this legislation, in the passage of which the U.K. played a full part. Nevertheless, the centerpiece of the Bill will be the repeal of the European Communities Act 1972,¹⁶ the domestic legislation by which Parliament subordinated the legal sovereignty of the U.K. to the law of, what is now, the E.U.

¹⁵ *Id.* at [160] (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 242–43 (1765)). Dicey radically restated this for Parliamentary rule. See A.V. DICEY, THE LAW OF THE CONSTITUTION 12–13 (J.W.F. Allison ed., 1st ed. 2013).

¹⁶ European Communities Act 1972, c. 68 (UK).

At all times, then, giving Article 50 notification was subject to the will of Parliament according to the previously settled U.K. 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 many acts of state-altering treaty commitments. The difficulty would not arise if membership of the E.U. 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, but to conclude that it was one member of a special category of U.K. "constitutional statutes."

One of the ways in which the doctrine of sovereignty of Parliament recognizes 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.¹⁷ 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. But Parliamentary sovereignty 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 is often very little gain in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement."¹⁸ By, in this way, making the necessity of self-legislation actual in the Hegelian sense, Parliamentary sovereignty charges the members of a political society with responsibility for the existence, or nonexistence, of the rule of law: "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."¹⁹

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,"²⁰ is precisely what is disputed by those who have influentially argued that the U.K. 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

¹⁷ DICEY, *supra* note 15, at 27, 42, 51.

¹⁸ *Id.* at 129.

¹⁹ Albert V. Dicey, *The Legal Boundaries of Liberty*, 3 FORTNIGHTLY REV. 1, 1 (1868).

²⁰ DICEY, *supra* note 15, at 52.

has been Sir John Laws, a Lord Justice of Appeal, and in 2002 in *Thoburn v. Sunderland City Council*, a case which we will see became central to *Miller*, Laws LJ claimed that the U.K. Constitution recognized that there were certain constitutional statutes, of which the European Communities Act 1972 was one.²¹ 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) would be needed to amend or repeal such an Act. In *Miller*,²² what nevertheless remains essentially this argument was 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, would inevitably lead to its repeal, notification leading to withdrawal, and withdrawal necessitating repeal.²³ 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 Article 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 2017²⁴ 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,²⁵ 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 U.K. Constitution. *Miller* is no exception to this,²⁶ and indeed it must apply *a fortiori* to *Miller* because two most important examples of it are the interpretive conventions that, not 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.²⁷

But it is a quite different thing to claim that when a constitutional

²¹ *Thoburn v. Sunderland City Council* [2002] EWHC 195, [2003] QB 151 [60]–[64] (UK).

²² Under the influence of Laws LJ, the UKSC had, prior to *Miller*, found that the 1972 Act was a constitutional statute. *Buckinghamshire Cty. Council v. Sec'y of State for Transp.* [2014] UKSC 3, [2014] 1 WLR 324 [207], [209]. This authority is cited unproblematically by the UKSC majority in *Miller* [2017] UKSC 5, [67], but more substantially discussed by Lord Reed, dissenting. *Id.* at [227]–[229].

²³ *Id.* at [45]–[67].

²⁴ European Union (Notification of Withdrawal) Act 2017, c. 9 (UK).

²⁵ DICEY, *supra* note 15, at 38.

²⁶ *Miller* [2017] UKSC 5, [82].

²⁷ *Miller* [2016] EWHC (Admin) 2768, [86].

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. As was the case with the reasoning of Laws LJ in *Thoburn*,²⁸ though the term “implied repeal” is so embedded, and was so prior to Laws LJ’s use of it, that avoiding its use would be a mere affectation, that term was not entirely helpful in *Miller*. It clouds the recognition that we are merely dealing with 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 time travel than to practical legal reasoning, involved in speculating about the 1972 intention of Parliament regarding constitutional statutes when no minister, draftsman, member of either of the Houses of Parliament, or judge could possibly at that time, prior to *Thoburn*, have conceived of such statutes as anything other than the remotest theorizing. Even endeavoring to put this to one side, the 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 at the time 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 dreamed of providing for it expressly.

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 U.K. Government had by prerogative power signed the Treaty of Accession²⁹—a position famously described during the interim by Lord Denning MR as one in which U.K. courts took “no notice”³⁰ of the Treaty of Rome—and that the U.K.’s instrument of ratification was deposited the day *after* the 1972 Act was passed.³¹ Had the Act failed to pass, it is inconceivable that the Treaty would have been ratified, and the U.K. would then have had to disentangle itself from its international commitments. The same sort of procedure would no doubt have been followed if the U.K.’s decision in the 1975 referendum on continued membership had been to leave.

The *Miller* position is, with great respect, 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

²⁸ Campbell & Young, *supra* note 2, at 402.

²⁹ Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community, Jan. 22, 1972, 1972 O.J. (L 73).

³⁰ *McWhirter v. Attorney-General* [1972] CMLR 882 (CA) 886.

³¹ European Communities Act 1972, c. 68 (UK) (date of Royal Assent).

inevitably, follows if there are constitutional statutes—the European Communities Act 1972 was one, then *Miller* is fundamentally right. But only if. It is highly regrettable that the entire handling of *Miller* obscures the way that it is courts since the passage of the Human Rights Act 1998 have supplied the necessary assumption. To be perfectly frank, that the U.K. 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 Court³² and the majority UKSC judgments,³³ 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, 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 great deal of sophisticated reasoning which was 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 determined by the prevailing tone of political sentiment. A belief in constitutionalism and against Parliamentary sovereignty has exerted very considerable influence on the development of U.K. public law since the passage of the Human Rights Act 1998,³⁴ 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 would have made the ultimate ruling had it dismissed the case. But the

³² *Miller* [2016] EWHC (Admin) 2768, [43]–[44].

³³ *Miller* [2017] UKSC 5, [66]–[67].

³⁴ See *supra* note 2.

High Court's actual ruling had a very different, indeed completely opposed, constitutional significance, for by accepting that it could and should "clarify the procedural steps necessary for the UK to trigger Article 50 in line with the UK constitution,"³⁵ the High Court was asserting supremacy over Parliament. The SSEEU did not oppose this.

Nor did the SSEEU challenge that Mrs. Miller and Mr. Dos Santos had standing to bring their action. The applicants of course argued that Brexit would cause them to lose some important rights derived from membership of the E.U., and this 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: "It is not difficult to identify people with standing to bring the challenge since virtually everyone in the United Kingdom or with British citizenship will . . . have their legal rights affected if notice is given."³⁶ But the obverse of this argument is that the claimants were indeed no different to any other U.K. citizen, and that, by passing the European Referendum Act 2015,³⁷ Parliament had decided that the procedure by which all such rights of all U.K. 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 all one like myself, who remains rooted in an earlier way of viewing the issues derived from Dicey, 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 not at all difficult to understand as a matter of adversarial pleading. A process of, it can fairly be said, very extensive liberalization of the standing requirement, to the point where it is all but extinguished in reported cases,³⁸ which began in the 1970s but has been much accelerated by the passage of the Human Rights Act 1998, 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 tantamount to vexatious.³⁹ Nevertheless, the question whether "the

³⁵ MISHCON DE REYA LLP, *supra* note 6; *see also* Daniel Grote, *Gina Miller to Front Legal Challenge to Brexit*, WEALTH MANAGER (July 19, 2016), <http://citywire.co.uk/wealth-manager/news/gina-miller-to-front-legal-challenge-to-brexit/a934276>

³⁶ *Miller* [2016] EWHC (Admin) 2768, [7].

³⁷ European Union Referendum Act 2015, c. 36 (UK).

³⁸ CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 699 n.121 (3d ed. 2009) ("A single decision, *R v. Secretary of State for the Environment, ex p. Rose Theatre Trust Co.* [1990] 1 QB 504 [(QBD) (UK)], exhibited a different judicial attitude.").

³⁹ Earlier attempts to review the U.K.'s possible decision to accede to, as opposed to *Miller's*

applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody”⁴⁰ 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 U.K. had given notice to leave, then leaving was irreversible.⁴¹ If Parliament’s effective scrutiny of the notification was to lie in a subsequent refusal to pass requisite domestic legislation, then irreversibility would nullify such scrutiny. 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 (perpetual) situation in which the U.K. would be both internationally outside and domestically inside the E.U.⁴²

Putting this aside, it is not only that Article 50(5) of the TEU specifically provides that a State which has withdrawn may subsequently apply to rejoin; nor that Article 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 Article 50 be interpreted in light of Article 68 of the Vienna Convention,⁴³ which expressly provides for revocation.⁴⁴ It is that it cannot be seriously maintained that if the U.K. 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, the new Government could not revoke. No doubt the E.U. would, perfectly legitimately, raise political difficulty about this, and one can even allow for the purposes of argument, despite the implausibility of doing so, 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 SSEEU’s manner of argument, simply relinquishing as it did these points, some of which

challenge to a decision to withdraw from, what is now the E.U. had been heard but failed largely because the issues raised were not held to be justiciable. *Blackburn v. Attorney-General* [1971] 1 WLR 1037 (CA); *McWhirter v. Attorney-General* [1972] CMLR 882 (CA); *R. v. Sec’y of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 552 (DC), [1994] 2 WLR 115. *Blackburn* and *McWhirter* were indeed important cases in the liberalization of standing heard by the leading early proponent of that liberation, Lord Denning MR.

⁴⁰ *R v. Monopolies & Mergers Comm’n, ex parte Argyll Group PLC.* [1986] 1 WLR 763 (CA) 773H.

⁴¹ *Miller* [2017] UKSC 5, [36]–[37].

⁴² *Miller* [2016] EWHC (Admin) 2768, [14].

⁴³ Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331.

⁴⁴ Although one is hardly now sure what is and is not appropriate to be taken up in legal argument, I observe that even the drafter of Article 50 has made it plain that it was intended to allow for revocation. Glenn Campbell, *Article 50 Author Lord Kerr Says Brexit Not Inevitable*, BBC NEWS (Nov. 3, 2016), <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37852628>.

undeniably could have been strong.⁴⁵ But, conscious of writing principally for a U.S. legal academic audience, I have wondered whether the “hypothetical bargain” analysis which enjoys wide currency amongst that audience, 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 Article 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.”⁴⁶ 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 cognizant 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.

The constitutional position of the Lords is that it must eventually accede to the will of the Commons, and so the Lords’ position, to put it in the interest of brevity far too bluntly, for the power of the Lords to cause delay is far from negligible, was ultimately irrelevant. But 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 favor 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 ordinary members of the Labour Party who are overwhelmingly in favor of remaining and he represents one of the thirty percent 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. But he was obliged to do so because the alternative would have seen a great proportion of the seventy percent of his Parliamentary Party whose constituents, typically unlike their representatives, wished to leave, lose

⁴⁵ So weak is the SSEEU’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 article in this Symposium issue. James Allan, *Democracy, Liberalism, and Brexit*, 39 CARDOZO L. REV. 879 (2018).

⁴⁶ *Miller* [2017] UKSC 5, [122].

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.

However, by allowing the Government to draft the shortest possible Act, the operative part of which was 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 when *Miller* was decided would be an essentially untroubled passage through Parliament. Two days of heated debate in the Lords⁴⁷ were of far more therapeutic value to their Lordships than of significance to the U.K. electorate.

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.

A. *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 November 9, 2016, six days after the High Court judgment, Lady Hale discussed the constitutional implications of the E.U. referendum at some length when giving one of a distinguished series of annual lectures on legal topics held in Kuala Lumpur, Malaysia. 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

⁴⁷ 779 Parl Deb HL (5th ser.) (2017) cols. 12–324 (UK).

comprehensive replacement for the 1972 Act.”⁴⁸

This lecture gave rise to vehement public demands that Lady Hale should recuse herself from the hearing of *Miller*, and a very strong argument for this unarguably may be based on the senior judiciary’s own *Guide to Judicial Conduct*.⁴⁹ 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 U.K.’s Domestic Court of Final Appeal by becoming the first woman to become that court’s senior judge. She did not recuse herself, nor did the UKSC acquit itself well when it issued an anodyne defense of her conduct which implausibly evaded the issues.⁵⁰

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 we have seen was 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

⁴⁸ Lady Hale, Deputy President, Supreme Court of the U.K., Sultan Azlan Shah Lecture 2016: The Supreme Court: Guardian of the Constitution? 12 (Nov. 9, 2016), <https://www.supremecourt.uk/docs/speech-161109.pdf>.

⁴⁹ JUDICIARY OF ENG. & WALES, GUIDE TO JUDICIAL CONDUCT ¶ 8.1 (2016), <https://www.judiciary.gov.uk/wp-content/uploads/2010/02/guidance-judicial-conduct-v2016-update.pdf>; see also THE SUPREME COURT, GUIDE TO JUDICIAL CONDUCT ¶ 2.5 (2009), https://www.supremecourt.uk/docs/guide-to-judicial_conduct.pdf.

⁵⁰ *A Response to Reactions to Lady Hale’s Explanation of the Article 50 ‘Brexit’ Case*, SUP. CT. (Nov. 15, 2016), <https://www.supremecourt.uk/news/lady-hales-lecture-the-supreme-court-guardian-of-the-constitution.html>.

undermine its momentous significance.⁵¹

A, one assumes chastened, Lady Hale was, as we have seen, one of those who contributed to the majority judgment.

B. *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 is sovereign.”⁵² Aware of her having said many, many things to the effect that the referendum result made her “physically sick,”⁵³ I simply discount Mrs. Miller’s profession not to have 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 U.K. She was by no means alone in this. Mr. David Lammy, a prominent Labour Member of Parliament, was among 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.⁵⁴ 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 certainly 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 U.K.’s political sovereign is not Parliament, but the U.K. 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

⁵¹ *Miller* [2017] UKSC 5, [122].

⁵² *Gina Miller on Brexit Ruling: ‘Parliament Alone Is Sovereign’*, BBC NEWS (Jan. 24, 2017), <http://www.bbc.co.uk/news/uk-politics-38729021>.

⁵³ *Gina’s Joy at Victory Over Odds . . . and Trolls*, DAILY MIRROR 6 (Jan. 25, 2017).

⁵⁴ Will Worley, *David Lammy MP Urges Parliament to Reject EU Referendum Result: ‘We Can Stop This Madness’*, INDEPENDENT (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>.

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 U.K. 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 U.K. to be a functioning democracy.

Sovereignty of Parliament is the rule of recognition of the will of the politically sovereign U.K. electorate, though use of Hart's term in this connection is misleading in that direct recognition of that will is not normally how the U.K. Parliament, nor indeed the electorate, conceives of Parliament's role in a representative democracy. The electorate's representatives inevitably and desirably have a much more active role. The E.U. referendum was an exceedingly rare occasion⁵⁵ on which, by passing the European Union Referendum Act 2015, Parliament did conceive of its role as one of direct recognition. The politics of 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, whilst it may tell one something about the way the U.K.'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 U.K. should continue to be a member of the E.U., 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 based on that principle⁵⁶ because: "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."⁵⁷

⁵⁵ There have only ever been three referendums held on issues affecting the entire U.K., two on membership of what is now the E.U. and one on electoral procedure. As the last was held only because of party politics in the most questionable sense rather than as a response to undeniable general public concern, it is most accurate to say that the U.K. has only ever held two referendums, both on membership of what is now the E.U. See John Curtice, *Politicians, Voters and Democracy: The 2011 UK Referendum on the Alternative Vote*, 32 ELECTORAL STUD. 215 (2013).

⁵⁶ DICEY, *supra* note 15, at 474–80.

⁵⁷ A.V. DICEY, *A LEAP IN THE DARK* 189 (2d ed. 1911).

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 realized in litigation by which the courts have instructed Parliament what to do, for she does not seem to realize 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 criticize 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 attributed to the senior judiciary the crude political motive of seeking to prevent Brexit, it has entirely merited the condemnation it has received from that judiciary. 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 U.K. Constitution to have hitherto managed to deny legitimacy. The astounding and commendable—it is a great constitutional achievement—degree of public confidence which the U.K. 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. This, it is respectfully and regrettably submitted, will be the more likely as it emerges in public debate that what has been done in *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 senior domestic courts of England and Wales, and thus for our purposes the U.K., 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,⁵⁸ with the creation of the Supreme Court in 2009⁵⁹ 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.⁶⁰ There are specialist courts within these Divisions, and the Administrative Court, which hears most judicial review applications, is a specialist court of the Queen’s Bench Division.

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 2768.⁶¹ 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.⁶² In normal High Court proceedings, one of these judges sits alone.⁶³ 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

⁵⁸ Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66 (UK); Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77 (UK); Appellate Jurisdiction Act 1876, 39 & 40 Vict. c. 59 (UK).

⁵⁹ Constitutional Reform Act 2005, c. 4 (UK); Constitutional Reform Act 2005 (Commencement No. 11) Order 2009, SI 2009/1604 (UK).

⁶⁰ Senior Courts Act 1981, c. 54, § 5(1) (UK).

⁶¹ R (on the application of Miller) v. Sec’y of State for Leaving the European Union [2016] EWHC (Admin) 2768, [2017] 2 WLR 583, [2017] 1 All ER 158, [2017] 1 CMLR 34, [2016] HRLR 23, [2016] ACD 134.

⁶² Senior Courts Act 1981, c. 54, § 4(1)(e) (UK).

⁶³ *Id.* § 19(3).

Chief Justice, the Head of the Judiciary of England and Wales.⁶⁴ The Lord Chief Justice's duties are predominantly administrative, but in regard of his (there has never been a female Lord Chief Justice) 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.⁶⁵ 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 am aware of only three reported cases in which the Lord Chief Justice sat as sole judge in the High Court,⁶⁶ all of which were cases of particular public importance.

When matters required to be heard by the High Court are of a particular complexity or gravity, the bench may be of two or more judges,⁶⁷ and this specially constituted bench is called a Divisional Court.⁶⁸ A three-member bench is, however, rare, and a Divisional Court is usually composed of a High Court judge and a more senior judge drawn from the Court of Appeal. *Thoburn*⁶⁹ 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 LJ, who no doubt had been 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 Cwmgiedd CJ, the Lord Chief Justice, Sir Terence Etherington MR, the Master of the Rolls, and Sir Philip Sales LJ, 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.⁷⁰ This was, in fact, a first instance hearing by the Court of

⁶⁴ Constitutional Reform Act 2005, c. 4, § 7(1) (UK).

⁶⁵ Senior Courts Act 1981, c. 54, §§ 2(2)(d), 4(1)(b).

⁶⁶ *Pharm. Soc'y of Gr. Brit. v. Boots Cash Chemists (Southern) Ltd.* [1952] 2 QB 795 (Lord Goddard CJ) (QBD) (UK); *Smith v. Leech Brain & Co.* [1962] 2 QB 405 (Lord Parker CJ) (QBD) (UK); *Attorney-General v. Jonathan Cape Ltd.* [1976] 1 QB 752 (Lord Widgery CJ) (QBD) (UK).

⁶⁷ Senior Courts Act 1981, c. 54, § 19(3)(a).

⁶⁸ *Id.* § 66.

⁶⁹ *Thoburn v. Sunderland City Council* [2002] EWHC 195, [2003] QB 151, [60]–[64].

⁷⁰ One of the earlier attempts to review issues arising from membership of the E.U. was heard by an extremely distinguished Divisional Court composed of, in addition to a High Court Judge, two Lords Justice of Appeal. *R v. Sec'y of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QBD 552 (DC).

Appeal, and indeed by a bench of that court which was as distinguished as one can really conceive. Leaving aside the eminence of the Lord Chief Justice and the Master of the Rolls, the latter being the President of the Civil Division of the Court of Appeal⁷¹ and as such second in importance only to the former amongst the judiciary of England and Wales, Sales LJ, whose previous career included distinguished service as the senior legal representative of the Crown, 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.

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. (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 directly to the House of Lords,⁷² 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.”⁷³ 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 emphasized 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,”⁷⁴ 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.”⁷⁵ This would not, of 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

⁷¹ Senior Courts Act 1981, c. 54, § 3(2).

⁷² SUPREME COURT, PRACTICE DIRECTION 1, ¶ 1.2.17 (UK), <https://www.supremecourt.uk/procedures/practice-direction-01.html>.

⁷³ Administration of Justice Act 1969, c. 58, § 12(2) (UK).

⁷⁴ *Id.* § 12(3A)(a); SUPREME COURT, PRACTICE DIRECTION 3, ¶ 3.6.12 (UK), <https://www.supremecourt.uk/procedures/practice-direction-03.html>.

⁷⁵ *Id.* ¶ 3.6.12(c).

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 Justices⁷⁶ and currently there are eleven. 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 U.K.'s domestic court of final appeal in modern times. The but recently entirely refurbished premises of the UKSC could not comfortably accommodate, not merely the public, but those participating in the hearing, 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,⁷⁷ with additional academic arguments also playing a part.⁷⁸ What is more, the physical bench itself had to be modified to allow even all the Justices themselves a comfortable seat! The proceedings were in various ways televised, but it should be said that, though the extent of coverage was unprecedented, televising 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.⁷⁹

What these spectacles in the High Court and the UKSC amount to is, it is submitted, the creation of a U.K. 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 U.K., 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

⁷⁶ Constitutional Reform Act 2005, c. 4, § 23(2) (UK).

⁷⁷ *Miller* [2017] UKSC 5, [275].

⁷⁸ *Id.* at [11].

⁷⁹ *Article 50 'Brexit' Appeal*, SUP. CT., <https://www.supremecourt.uk/news/article-50-brexit-appeal.html> (last visited Nov. 14, 2017).

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 respect, a momentous failure to perform that duty. The public ignorance of what has been done is nowhere better 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: "It 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."⁸⁰

A. *Similar Fact Evidence*

One imagines that the procedural deliberations behind setting up the *Miller* hearings in this way will never become publicly known in any detail. 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, 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.⁸¹

Fundamental reform to civil procedure at the turn of the twentieth century allowed civil litigation to be funded by variants of contingency

⁸⁰ *Miller* [2017] UKSC 5, [240].

⁸¹ David Campbell, *The Heil v. Rankin Approach to Law-Making: Who Needs a Legislature?*, 46 COMMON L. WORLD REV. 340 (2016).

fees previously unknown or prohibited in the U.K. This led to an explosion in personal injury claims and litigation which even those in favor of the personal injury system and of this way 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 brought the legal profession 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*.⁸²

In *Simmons v. Castle*, Court of Appeal approval of a personal injury damages settlement of a sort which would normally be dealt with by 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 ten percent. Unlike the 2001 case, the hearing of which had some of the C.B. de Mille quality of *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 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 in his capacity as President of the Civil Division 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 U.K. senior judiciary is far greater

⁸² *Simmons v. Castle* [2012] EWCA 1039 (Civ), [2013] 1 WLR 1239.

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 human rights laws enshrined in statute, and, in my opinion, 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 U.S. Supreme Court. 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 the U.K.'s withdrawal from the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights). But, with *Miller*, outright judicial supremacy has been created as the UKSC has reconstituted itself as a constitutional court.⁸³ This is, of course, as yet a merely nascent development. However, no one who has witnessed the growth in human rights jurisprudence in the U.K. over the merely twenty years since the passage of the 1998 Act can, I suggest, doubt that *Miller* will grow.

I drafted this Article in November 2016 whilst the arrangements for the UKSC hearing of *Miller* were being made public. At that time, I believed my point about the constitutional court to be original to myself. Between that time and the submission of this Article to the Symposium organizers 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 U.K. gave notice of its intention to leave the E.U.: March 29, 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 a session with the President and Deputy President of the UKSC held, no doubt entirely by coincidence, on March 29, 2017. During this session, 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

⁸³ And, indeed, the analogy to *Marbury v. Madison*, 5 U.S. 137 (1803), drawn here, breaks down to the extent that the U.S. Supreme Court has never told Congress to pass a particular piece of legislation.

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?⁸⁴

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 in 2000 by the Government of Mr. Tony Blair. Lord Morgan's views may be regarded as representative of informed and highly 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 U.K. and instead vaguely reviewing the various constitutional systems of the world. Nor did the Deputy President take up this opportunity.

In this they were 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.

⁸⁴ SELECT COMM. ON THE CONSTITUTION, CORRECTED ORAL EVIDENCE WITH THE PRESIDENT AND DEPUTY PRESIDENT OF THE SUPREME COURT, 2017, at Q3 (UK), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/president-and-deputy-president-of-the-supreme-court/oral/49543.html>.