

# TRANSMUTING THE POLITICO-LEGAL LUMP: BREXIT AND BRITAIN’S CONSTITUTIONAL ORDER

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“[N]othing beneath the sun ever will or can be firm.”<sup>1</sup>

“[T]he British constitution . . . is the most flexible polity in existence.”<sup>2</sup>

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<sup>1</sup> MAURIZIO VIROLI, *MACHIAVELLI* 18 (1998).

<sup>2</sup> ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 91 (10th ed. 1961).

## INTRODUCTION

Brexit (the process that will result in Britain leaving the European Union (E.U.)) creates an opportunity for the British to enjoy the benefits of their highly distinctive constitutional order. This order is a composite of three elements. Two of these elements (the legal and the political) are institutional and, unsurprisingly, the objects of close analysis. The third element is dispositional and finds expression in the effort to identify contingencies (most obviously, internal and external threats) that may disrupt the order's operations or even compromise its viability. Those who cultivate this disposition embrace a virtue to which we can attach the label "vigilance." This dispositional element of Britain's constitutional order is less well understood than its legal and political components. However, it merits close attention since it goes a long way towards explaining British unease with the process of European integration. The thinking of those who have championed this process has given expression to the assumption that Europe, as a superstate-in-the-making, would have a legal (rather than politico-legal) constitution.<sup>3</sup> Within such a constitutional context, a highest-order norm sustains a normative space that radiates down and out from it.<sup>4</sup> Norms of this sort often give expression to a vision. This is certainly true of the E.U., where the supremacy of European Union law serves the end of "ever closer union" (between member-states) on a socially just model.

Thinking along these lines is anything but alien to the British. The idea of a highest-order norm finds clear expression in Albert Venn Dicey's account of the doctrine of Parliamentary sovereignty.<sup>5</sup> Moreover, the view that law can be (indeed, is) the source of an attractive vision has gained currency in Britain in recent years. A body of jurisprudential thought, to which Martin Loughlin has given the name "liberal . . . normativism," has encouraged this view.<sup>6</sup> More particularly, liberal normativism has fed a process of development in Britain that we will explore under the heading "the rise of the legal constitution." This process, along with European integration, threatens to turn Britain's politico-legal order into a legal constitution on the model embraced by the E.U. With the aim of explaining why this is the case, we will examine the recent Brexit-related case of *Miller and another (Respondents) v. Secretary of State for Exiting the European Union (Appellant)*.<sup>7</sup> *Miller* is, as we will see, part of the rise of the legal

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<sup>3</sup> See JOHN GILLINGHAM, *THE EU: AN OBITUARY* 106 (2016).

<sup>4</sup> See Martin Loughlin, *The Constitutional Imagination*, 78 *MOD. L. REV.* 1, 2 (2015).

<sup>5</sup> DICEY, *supra* note 2, at ch. I.

<sup>6</sup> MARTIN LOUGHLIN, *PUBLIC LAW AND POLITICAL THEORY* 206 (1992).

<sup>7</sup> *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 (appeal taken from Eng. and N. Ir.).

constitution. With the aim of gaining analytic purchase on this case and the process of which it is a part, we will draw on Stanley Fish's essay, "Transmuting the Lump."<sup>8</sup> But before turning to these tasks, we will examine the development of Britain's constitutional order.

#### I. BRITAIN'S CONSTITUTIONAL ORDER: A BRIEF HISTORY

The origins of Britain's constitutional order are obscure and a source of controversy. However, we can trace the three features noted in the Introduction (law, politics, and attentiveness to contingency) back to King Alfred the Great's reign in ninth-century Wessex. Alfred was "the first of the kings [in the pre-Norman context] to set about combining the different law codes [then existing] . . . into a single, coherent whole . . ."<sup>9</sup> He also understood politics to be a process of interest accommodation. This became apparent when, for example, he established the "Danelaw": an agreement to cede territory to Danish invaders who had beset Wessex and other parts of England in return for peace.<sup>10</sup> These points give us grounds for describing Alfred's approach to government as "politico-legal." However, he was also highly attentive to the circumstances in which he wielded legal and political power. His resort to the Danelaw illustrates this point. Alfred grasped that the Danish threat to England was existential.<sup>11</sup> His response was to establish a *modus vivendi* (the Danelaw) that was an admixture of "stability as a balance of forces and stability for the right reasons."<sup>12</sup> The Danelaw promoted stability as a balance of forces by giving the English and the Danes reasons to refrain from the use of force. It also promoted stability for the right reasons by giving Alfred the opportunity to preserve and foster an English community into which he sought to induct the Danes.

In Alfred's approach to government, we can see the elements of an order that exhibits a low level of articulation. Law and politics (as a process of interest accommodation) are resources at the disposal of the sovereign rather than the components of a system that exhibits a high level of integration. However, the state as we now know it comes more clearly into focus as a result of the process of centralization and unification set in motion in the eleventh century by William of

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<sup>8</sup> STANLEY FISH, *Transmuting the Lump: Paradise Lost, 1942–1979*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (4th prtg. 1999) (1989).

<sup>9</sup> SIMON SCHAMA, *A HISTORY OF BRITAIN: AT THE EDGE OF THE WORLD 3000 BC–1603 AD* 62 (2000).

<sup>10</sup> *Id.* at 64.

<sup>11</sup> *Id.*

<sup>12</sup> See JOHN RAWLS, *THE LAW OF PEOPLES* 44–45 (4th prtg. 2002) (1999) (discussing "stability as a balance of forces" and "stability for the right reasons").

Normandy. During the centuries of Norman and then Plantagenet rule, the institutional scene became more complex. Magna Carta (1215) gave expression to the view that law should place constraints on the power of those who govern.<sup>13</sup> With the development of the institution that acquires the name “Parliament,” we can see an intensifying commitment to politics as interest accommodation. In the common law, we find an institutional embodiment of the attentive outlook that featured in Alfred’s approach to government. For the judges and lawyers who developed the common law attended to contingency—in the form of the novel disputes to which they sought to find authoritative solutions.<sup>14</sup>

When we turn to Tudor England (1485–1603), we find in Henry VII a monarch who was “legal-minded in the extreme.”<sup>15</sup> A “participatory political culture” was also a feature of the political context in which he ruled.<sup>16</sup> In this context, “[r]oyal authority became public authority inasmuch as it was deployed on behalf of and by an informed and articulate political community that existed alongside the monarch.”<sup>17</sup> During Henry VIII’s reign, this became a context in which Thomas Cromwell (the King’s first minister) used his favored legal instrument, the statute, to give expression to England’s status as a sovereign state.<sup>18</sup> Alongside these institutional developments, attentiveness to contingency remained a feature of the practical scene. It found expression in, for example, Thomas More’s *Utopia*. More argued that those who entertained “suspicion of tyranny” on the part of a ruler could legitimately remove him from power.<sup>19</sup> “Suspicion” of the sort More describes has relevance to the descent into conflict that occurred in the seventeenth century. The Crown’s unwillingness to show respect for Parliament’s prerogatives and its resort to prerogative taxation bulk large among the causes of this conflict.<sup>20</sup> The upshot was a crisis of interest accommodation. “The Glorious Revolution,” the constitutional settlement of 1688 (which followed the cataclysm of civil war, the Interregnum, and the Restoration), was a response to this problem. This settlement muted the tension that had issued in civil war by vesting sovereign power in the Crown-in-Parliament (a monarchical-cum-representative compromise).

At this point in England’s history, a politico-legal framework that

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<sup>13</sup> ROBERT COLLS, *IDENTITY OF ENGLAND* 15 (2002).

<sup>14</sup> GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 36 (Tony Honoré & Joseph Raz eds., 1986).

<sup>15</sup> DAVID SCOTT, *LEVIATHAN: THE RISE OF BRITAIN AS A WORLD POWER* 27 (2013).

<sup>16</sup> *Id.* at 12.

<sup>17</sup> *Id.* at 28.

<sup>18</sup> *Id.* at 64.

<sup>19</sup> THOMAS MORE, *UTOPIA* 55 (Susan Bruce ed., 1999) (1516).

<sup>20</sup> NICHOLAS PHILLIPSON, *DAVID HUME: THE PHILOSOPHER AS HISTORIAN* 77–78 (2011).

has endured ever since comes into existence. A highest-order norm, the doctrine of Parliamentary sovereignty, establishes a normative space that radiates down and out from it. This space accommodates lower-order law (e.g., statutes) that derive their validity from the highest-order norm. Likewise it accommodates the common law—which judges can elaborate in ways that are compatible with the highest-order norm. However, we must not reduce this framework to an assemblage of legal norms. For it provided the context in which the democratic principle exerted increasing normative force. This force found expression in a succession of nineteenth and twentieth-century statutes that ultimately delivered universal suffrage.<sup>21</sup> The arrival of universal suffrage was both a triumph of interest accommodation and a grave threat to it. For a government with a bare majority in the House of Commons could make or unmake any law (and invoke a democratic mandate in support of its actions).<sup>22</sup> The threat posed to the interests of individuals by this state of affairs prompted Tony Blair's New Labour Government to weave human rights-related protections into British law in the 1990s. But while New Labour took this step, it put in place legislation (the Human Rights Act 1998) that made plain the doctrine of Parliamentary sovereignty's highest-order status within Britain's politico-legal order.<sup>23</sup>

Alongside the drive towards democracy that took place in nineteenth and twentieth-century Britain, we must set another process that saw Britain become “a much governed nation.”<sup>24</sup> Prior to the nineteenth century, law in Britain bore obvious resemblances to what Michael Oakeshott calls a civil association. By a civil association, Oakeshott means a modest-rule-governed framework.<sup>25</sup> On his account, those who live in such a framework may engage in freely chosen activities with a minimum of frustration. The minimum to which Oakeshott refers is a readiness on the part of individuals to act in accordance with “general rules of conduct” that sustain the framework.<sup>26</sup> Oakeshott also argues that since the nineteenth century, civil association in Britain has lost ground to enterprise association. By “enterprise association,” he means a goal-focused and highly

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21 1 W.H. GREENLEAF, *THE BRITISH POLITICAL TRADITION* 206–07 (1983).

22 See *Madzimbamuto v. Lardner-Burke* [1969] 1 AC 645 (PC) 723 (majority opinion); see also Richard Mullender, *Parliamentary Sovereignty, the Constitution, and the Judiciary*, 49 N. IR. LEGAL Q. 138, 148–49 (1998) (discussing an alternative understanding of Britain's constitutional order in which judges (exercising sovereign authority) adopt the practice of constitutional judicial review).

23 Mullender, *supra* note 22, at 165–66.

24 FREDERICK WILLIAM MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 501 (Cambridge Univ. Press 1920) (1908).

25 Civil association is a synonym for moral association. See MICHAEL OAKESHOTT, *ON HISTORY AND OTHER ESSAYS* 132 (Basil Blackwell Publisher Ltd. Rev. ed., 1983).

26 MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 184 (1962).

instrumental model of human association.<sup>27</sup> He adds that this is a context in which the commitment to the individual apparent in a civil association is weaker.<sup>28</sup> This is because those who wield power seek to co-opt all members of society into their plans. In the British context, these plans have been concerned with the pursuit of a distributively just end-state. This is the sort of end-state that British politicians have sought to make vivid in phrases such as “New Jerusalem” and the “welfare state.”<sup>29</sup>

While enterprise association has gained prominence in Britain, it has not, on Oakeshott’s account, supplanted civil association.<sup>30</sup> He adds that enterprise association in Britain occupies a position that is similar to that in other West European states such as France and Germany. Here we see a point of intersection between Britain and other member-states of the E.U. The commitment to enterprise association apparent in these states is also on display in the European Union. In the phrase “ever closer union,” the founders of the European Economic Community (EEC) made plain their determination to pursue an integrated end-state.<sup>31</sup> Moreover, in its commitment to interest accommodation (e.g., through voting arrangements within the Council) and redistribution (e.g., the social fund), the ideal of distributive justice inflects the institutions and operations of the E.U. This is the ideal of justice according to which we should seek to fashion institutions that defensibly accommodate the interests of all relevant people.<sup>32</sup>

While enterprise association on Britain’s welfarist model exhibits features that are similar to those that are apparent in France, Germany, and the E.U., it has a more revisable appearance. This reflects the continuing appeal of civil association, with its emphasis on the individual and its attractions for those who take a skeptical view of large governmental ambitions. Thus we might describe enterprise association and civil association as standing in a relationship of unstable equipoise in Britain. Moreover, we might find in this uneasy relationship intimations of the disposition we labelled attentiveness to contingency: e.g., recognition of the unsustainability of Britain’s post-war (social democratic) settlement in which a commitment to enterprise association bulked large.<sup>33</sup> We might also see the same disposition as

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<sup>27</sup> MICHAEL OAKESHOTT, ON HUMAN CONDUCT 315 (1975).

<sup>28</sup> *Id.* at 115, 119, 157–58, 206, 264, 298, 315–17.

<sup>29</sup> CORRELLI BARNETT, THE LOST VICTORY: BRITISH DREAMS, BRITISH REALITIES 1945–1950 123–64 (1995); PETER HENNESSY, NEVER AGAIN: BRITAIN 1945–51 120–26 (1992).

<sup>30</sup> OAKESHOTT, *supra* note 27, at 312–13.

<sup>31</sup> Treaty Establishing the European Community, Mar. 25, 1957, 2002 O.J. (C 325) 33 (discussing the determination “to lay the foundations of an ever closer union among the peoples of Europe”).

<sup>32</sup> See generally JOHN RAWLS, A THEORY OF JUSTICE 4 (1971).

<sup>33</sup> See RICHARD VINEN, THATCHER’S BRITAIN: THE POLITICS AND SOCIAL UPHEAVAL OF THE

being at work in British skepticism towards the process of European integration. Certainly, it is not hard to find in Britain criticism of Europe running on the theme that pursuit of an ever closer union is blinding those who engage in it to practically significant contingencies.<sup>34</sup> If this analysis is broadly correct, we might say that British vigilance or attentiveness to contingency stands in a relationship of tension with Continental vision.<sup>35</sup> But alongside this point, we must set another that brings to light a point of intersection between British politico-legal life and the project of European integration. This point of intersection comes into view when we examine the rise of the legal constitution (and the vision that has informed this process).

## II. THE RISE OF THE LEGAL CONSTITUTION

### A. *The Legal Constitution and the Rule of Law*

Before we turn to the rise of the legal constitution, we must examine some historical background relevant to this process. In Britain, the idea of a legal constitution and, likewise, the ideal of the rule of law have deep roots in the country's history. We find judges, legal academics, and historians making reference to an "ancient constitution" that predated the Norman invasion in the eleventh century. The idea of the ancient constitution occupied a prominent place in, for example, Sir Edward Coke's critique of the absolutism of the Stuart monarchs in the seventeenth century.<sup>36</sup> In the eighteenth century, commitment to the rule of law found powerful expression in, for example, *Entick v. Carrington*.<sup>37</sup> In this case an official issued a warrant the purpose of which was to authorize a search for seditious papers. However, the official had no authority to issue the warrant. Consequently, the victim of the search was able to seek redress for the civil wrong of trespass. While rendering judgment, Lord Camden declared that: "[b]y the laws of England, every invasion of private property, be it ever so minute, is a trespass."<sup>38</sup> In the nineteenth century, Dicey found, in cases such as

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THATCHER ERA (2009) (discussing the repudiation of the post-war settlement by the Thatcher Government).

<sup>34</sup> Andrew Roberts, *And We're Off*, TIMES (Apr. 2, 2017, 12:01 AM), <https://www.thetimes.co.uk/article/and-were-off-kjj6tdqk2> (discussing, *inter alia*, Margaret Thatcher's movement from "early pro-Europeanism" to "strident" Euroskepticism).

<sup>35</sup> While we cannot pursue the point here, attentiveness to contingency could equally well bring into focus the risks attendant on Britain's decision to leave the E.U. See, e.g., GEORGE WALDEN, EXIT FROM BREXIT 5–48 (2016).

<sup>36</sup> POSTEMA, *supra* note 14, at 28.

<sup>37</sup> *Entick v. Carrington* (1765), 19 State Trials 1045.

<sup>38</sup> *Id.*

*Entick*, support for his account of the rule of law as it existed in Britain. According to Dicey, commitment to this ideal involved “the equal subjection of all classes to the ordinary law of the land administered by the ordinary [l]aw [c]ourts . . . .”<sup>39</sup>

The “ancient constitution” and the other expressions of commitment to the rule of law that we have considered share a common feature. This is the assumption that legal arguments proceed in a space within which there will be considerable clarity on what people (e.g., the official in *Entick*) can or cannot do. In such a space, social life has a reassuringly predictable appearance. Reassurance of this sort is something that the practice of judicial review (as judges have elaborated it in British public law) offers. When judges engage in this practice, their job is to determine whether the conduct of, for example, a government minister has a legal basis. This means that when such an official or a public body makes a decision that exhibits irrationality, illegality, or procedural impropriety, a court may quash it.<sup>40</sup> While the practice of judicial review has been a feature of the British politico-legal order for centuries, it began to develop dramatically after World War II. This development marks the beginning of the rise of the legal constitution and liberal normativism.

### B. *Towards a New Constitutional Order?*

During the decades after World War II, judges showed greater willingness to invigilate official conduct. They were readier, for example, to identify errors of law on the face of the record (even when they were within jurisdiction).<sup>41</sup> Likewise, they applied the rules of natural justice with greater rigor so as to enhance the level of procedural protection that those in dispute with government would enjoy.<sup>42</sup> Judges also began to fashion new doctrines that placed constraints on public bodies and officials: for example, the doctrine of legitimate expectations and the duty to give reasons.<sup>43</sup> These developments prompted some judges to entertain the possibility that a court might, at some point in the future, strike down primary legislation (and thus embrace the practice of constitutional judicial review).<sup>44</sup>

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<sup>39</sup> DICEY, *supra* note 2, at 202.

<sup>40</sup> Richard Mullender, *Judicial Review and the Rule of Law*, 112 L.Q.R. 182 (1996).

<sup>41</sup> R v. Northumberland Compensation Appeal Tribunal, *ex parte* Shaw [1951] EWCA (Civ) 1, [1952] 1 KB 338.

<sup>42</sup> Ridge v. Baldwin [1964] AC 40 (HL).

<sup>43</sup> PETER CANE, *ADMINISTRATIVE LAW* 78–88 (5th ed. 2011).

<sup>44</sup> Lord Woolf, *Droit Public—English Style*, 1995 PUB. L. 57, 69; John Laws, *Law and Democracy*, 1995 PUB. L. 72, 87; Stephen Sedley, *Human Rights: A Twenty-First Century Agenda*, 1995 PUB. L. 386, 386–89.



Judicial readiness to entertain this possibility is a clear indication of the rise of the legal constitution. However, no judge has attempted to strike down primary legislation. While this is the case, the process we are considering has, if anything, intensified in recent years.<sup>45</sup> Indeed, we might describe the developments to which we will now turn as its second wave. This wave has drawn strength from sources other than English law. Judges made their readiness to draw on such sources apparent when they invoked rights within the European Convention on Human Rights and Fundamental Freedoms (ECHR) prior to Parliament giving domestic effect to these norms.<sup>46</sup> This happened in, for example, defamation cases that concerned the extent of the protection that the law should give to free expression (which the qualified right in Article 10 of the ECHR protects).<sup>47</sup> In cases such as these, judges and lawyers identified the human rights–related norms they invoked as means by which to establish a more defensible accommodation of interests within domestic law.

A similar impulse was at work when lawyers canvassed the possibility that the proportionality principle should be (along with illegality, irrationality, and procedural impropriety) a ground of judicial review.<sup>48</sup> The proportionality principle specifies that action in pursuit of socially beneficial ends should only override the significant interests of individuals where this is necessary.<sup>49</sup> To weave this ground of review into domestic law is to erode the distinction between vires and merits in administrative law.<sup>50</sup> Thus its adoption as a generally applicable ground of judicial review would place a question mark over the status of Britain’s highest-order legal norm, Parliamentary sovereignty. Save in cases that involve ECHR rights, judges have continued to confine themselves to questions of illegality, irrationality, and procedural impropriety in judicial review proceedings. They have done this on the ground that these considerations have to do exclusively with questions

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<sup>45</sup> RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 414 (2011) (noting that “[m]any lawyers, and at least some judges, now believe that Parliament’s power is . . . limited”). *But see* Richard Ekins, *Legislative Freedom in the United Kingdom*, 133 L.Q.R. 582, 600-603 (2017) (rejecting “[t]he assumption that judges are free to abandon” Parliamentary sovereignty, which Ekins identifies as “the central rule of the Westminster constitution”).

<sup>46</sup> The Human Rights Act 1998 gives “further effect” to ECHR rights on the plane of domestic law. Human Rights Act 1998, c. 42 (UK).

<sup>47</sup> *Rantzen v. Mirror Group Newspapers* [1994] QB 670, at 692 (Eng.) (holding that the courts must “subject large awards of damages to a more searching scrutiny than has been customary in the past”).

<sup>48</sup> *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL) (appeal taken from Eng.).

<sup>49</sup> Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1146.

<sup>50</sup> *Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 762–63 (Lord Ackner); *id.* at 750 (Lord Roskill).

of vires.<sup>51</sup> To embrace the proportionality principle would be to stray into the territory of merits (and this would bring judges into collision with the sovereign legislature).

While technical and typically rather dry, legal argument in the areas we have been examining gives expression to a vision that savors of liberal normativism.<sup>52</sup> A feature of this vision is law as an institution that secures people's interests and the rights that protect them. Law's ability to do this finds emphatic expression in *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant)*.

III. *R (ON THE APPLICATION OF MILLER AND ANOTHER)*  
*(RESPONDENTS) v. SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION*  
*(APPELLANT)*

A. *Miller in Context*

Before we examine the *Miller* case in detail, we must set it in the context of Britain's relationship with the E.U. Prior to and since accession to the EEC in 1973, British participation in the project of European integration has been a recurrent and sometimes acute source of controversy.<sup>53</sup> In 1975, a referendum on the question as to whether Britain should remain in the EEC yielded a clear majority in favor of staying in Europe.<sup>54</sup> However, criticism of the European project continued and grew more vociferous: e.g., Margaret Thatcher's Bruges speech of 1988, and the critical onslaught against the Maastricht Treaty mounted by Conservative Eurosceptics in the early 1990s.<sup>55</sup> In 2013 (and with the aim of bringing controversy on Europe to a halt), Britain's Prime Minister, David Cameron, promised a second (in-out) referendum if the Conservative Party won the 2015 general election.<sup>56</sup> The Conservatives were victorious and enacted the European Union Referendum Act 2015. The referendum took place in 2016. The result

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<sup>51</sup> In cases that involve rights within the ECHR, the Human Rights Act 1998 requires judicial use of the proportionality principle. See *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26, [27]–[28], [2001] 1 AC 532, 547–48 (Lord Steyn).

<sup>52</sup> LOUGHLIN, *supra* note 6, at 206.

<sup>53</sup> HUGO YOUNG, *THIS BLESSED PLOT: BRITAIN AND EUROPE FROM CHURCHILL TO BLAIR* (1998) 132–33; *id.* at 196–98 (discussing Britain's first two unsuccessful applications to join the EEC); *id.* at 244 (discussing the difficulties Edward Heath's Conservative government faced in securing the passage of the European Communities Bill through the House of Commons in 1971).

<sup>54</sup> *Id.* at 296.

<sup>55</sup> DAVID CANNADINE, *MARGARET THATCHER: A LIFE AND LEGACY* 101–02 (2017).

<sup>56</sup> TIM SHIPMAN, *ALL OUT WAR: THE FULL STORY OF HOW BREXIT SANK BRITAIN'S POLITICAL CLASS* 5 (2016).

was a (51.9% as against 48.1%) majority in favor of leaving the E.U.

Following the referendum result, Gina Miller (and a number of others) argued that the government could not use the royal prerogative as a basis on which to give notice to leave the E.U. (under Article 50(2) of the Lisbon Treaty).<sup>57</sup> More particularly, Miller argued that she enjoyed rights within E.U. law that the government could only take away from her by enacting a statute that made it plain that this was its intention. These arguments won a positive response from the Divisional Court.<sup>58</sup> The court justified its decision by reference to, among other things, a doctrine that gained currency during the rise of the legal constitution. This is the constitutional statute doctrine, according to which some pieces of primary legislation have a higher-order status in Britain's constitutional order. The Divisional Court identified the statute by means of which EEC law became effective in Britain, the European Communities Act 1972 (ECA), as such an act.<sup>59</sup> On the court's analysis, the "major constitutional importance" of the ECA meant that "the usual doctrine of implied repeal by enactment of later inconsistent legislation" could not apply in the case before it.<sup>60</sup> This meant that Parliament would have to use "especially clear" language if it wished to repeal the ECA and in this way deprive people of the rights it secures.<sup>61</sup>

### B. *Miller in the Supreme Court*

The Government appealed this decision and continued to argue, before the Supreme Court, that the U.K.'s "constitutional arrangements" allowed ministers to use the prerogative as a basis on which to give notice under Article 50.<sup>62</sup> For *Miller*, David Pannick QC responded by arguing that, if the Government used the prerogative to give notice, the effect would be decisive. By "decisive" he meant that ministers would be

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<sup>57</sup> The Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. The *Miller* litigation also encompassed a number of issues relating to devolved government in Britain. Considerations of space make it impossible to discuss these matters in this Essay.

<sup>58</sup> R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union [2016] EWHC 2768, [2016] WLR(D) 564 (Eng.).

<sup>59</sup> *Id.* at [88].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* The Divisional Court followed the lead of Lord Justice Laws in *Thoburn v. Sunderland City Council* [2001] EWHC 195, [2003] QB 151.

<sup>62</sup> In *Miller*, the judges in the Supreme Court talk of Britain's "constitutional arrangements." See, e.g., R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union [2017] UKSC 5, [3], [25], [2017] 2 WLR 583 (appeal taken from Eng. and N. Ir.) (noting that the Treaty of Lisbon (2007) inserted Article 50 into the Maastricht Treaty on European Union (1992), and that this provision establishes the "arrangements for [a member-state's] withdrawal").

“pulling . . . the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply.”<sup>63</sup> Pannick added that this would mean that “some of the legal rights which the applicants enjoy under EU law will come to an end.”<sup>64</sup> In light of these points, he concluded that giving notice on the basis that the Government proposed would be “tantamount to altering the law by ministerial action.”<sup>65</sup> Thus it would be contrary to the constitutional requirement that Parliament should use primary legislation to strip people of their legal rights.

James Eadie QC responded to these submissions by arguing that “significant legal changes” did not preclude the Government from relying on the prerogative when giving notice.<sup>66</sup> More particularly, Eadie argued that the terms of the ECA had not excluded the prerogative power to give notice. In support of this point, he advanced an argument that contained three steps. First, “the 1972 Act gave effect to EU law only insofar as the EU treaties required it.”<sup>67</sup> Secondly, the force of E.U. law in the municipal context was contingent on the U.K. remaining a party to the treaties.<sup>68</sup> Thirdly, Parliament had, in the 1972 Act, effectively stipulated that E.U. law would cease to have effect domestically in circumstances where ministers decided to withdraw from the treaties.<sup>69</sup> Alongside this argument, Eadie set the point that, while later statutes have imposed constraints on the exercise of E.U. treaty-related prerogative powers, they have not touched the power to withdraw from the Union.<sup>70</sup>

By 8-3, the Supreme Court held that Parliament would have to legislate before ministers could trigger Article 50. Lord Neuberger and his colleagues in the majority pursued the theme that “[t]he EU treaties . . . implemented pursuant to the 1972 Act were and are unique in their legislative and constitutional implications.”<sup>71</sup> In 1972, Parliament had, on the majority’s analysis, “grafted” a “dynamic, international source of law” onto “the well-established existing sources of domestic law.”<sup>72</sup> The majority added that many lawyers failed to grasp the “legal consequences” of this “unprecedented” development until the 1990s.<sup>73</sup> But while the 1972 Act had created an unprecedented

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<sup>63</sup> *Id.* at [36].

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at [37].

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at [38].

<sup>71</sup> *Id.* at [90].

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at [60].

state of affairs, it had left the doctrine of Parliamentary sovereignty intact. Consequently, Parliament could repeal the 1972 Act “like any other statute.”<sup>74</sup> In light of the ECA’s unique character, the doctrine of Parliamentary sovereignty, and the rights invoked by Miller, the majority held that there was “no prerogative power to give [n]otice.”<sup>75</sup> The majority also found support for its decision in “the principle of legality” and considerations of “constitutional propriety.”<sup>76</sup> But while talking in these broad terms, the majority ultimately relied on “the rule” that ministers could not use Article 50 to “alter UK domestic law.”<sup>77</sup>

In his dissenting judgment, Lord Reed presented a dramatically different account of relevant law. His starting point was that “the principle of Parliamentary supremacy . . . does not . . . require that Parliament must enact an Act of Parliament before the UK can leave the EU.”<sup>78</sup> He took this view in light of the fact that “the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK . . . .”<sup>79</sup> Lord Reed added that “[t]he Act imposes no requirement, and manifests no intention, in respect of the UK’s membership of the EU.”<sup>80</sup> These points prompted him to conclude that the Act “does not, therefore, affect the Crown’s exercise of prerogative powers in respect of UK membership.”<sup>81</sup> In his response to the argument that the Government would take away statutory rights by triggering Article 50, Lord Reed identified these entitlements as “inherently contingent.”<sup>82</sup> By this he meant that these and other such rights will exist only for so long as the E.U. treaties have legal force in the U.K.

More generally, Lord Reed echoed Lord Mance in *Pham v. Secretary of State for the Home Department* on the point that “European law is certainly special and represents a remarkable development in the world’s legal history.”<sup>83</sup> But Lord Reed drove home the point that accession to the EEC had not altered the status of Parliamentary sovereignty as Britain’s highest-order legal norm. Moreover, he stated that the primacy of E.U. law in the British context derives from the will of Parliament as it finds expression in the 1972 Act.<sup>84</sup> Lord Reed was

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at [36], [48], [60], [68], [133].

<sup>76</sup> *Id.* at [87], [100] (citing *R v. Sec’y of State for the Home Dep’t ex parte Simms* [2000] 2 AC 115, 131 (Eng.) (Lord Hoffmann)).

<sup>77</sup> *Id.* at [56].

<sup>78</sup> *Id.* at [177] (Lord Reed SCJ, dissenting).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at [215], [216].

<sup>83</sup> *Id.* at [224] (quoting *Pham v. Sec’y of State for the Home Dep’t* [2015] UKSC 19, [2015] 1 WLR 1591 (Eng.) (Lord Mance SCJ)).

<sup>84</sup> *Id.* at [226].

also at pains to point out that he saw no need “to consider the legal implications of the [2016] referendum” in his judgment.<sup>85</sup> However, he did observe 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.”<sup>86</sup> Lord Reed also commented critically on the use of case law by the majority and counsel for the applicants that did not, in his view, bear on the matters before the Court (e.g., the *Case of Proclamations*).<sup>87</sup> These more general observations reveal greater sensitivity on Lord Reed’s part to the nature of Britain’s politico-legal order than is apparent in the response of the majority.<sup>88</sup> However, Lord Reed’s reliance on legal grounds for his decision provides a basis on which to suggest that “the legal constitution” may be exerting considerable influence on judges and lawyers who are attuned to the politico-legal context in which they work. For Lord Reed, like his colleagues in the majority, showed no inclination to identify the issues raised by *Miller* as nonjusticiable.<sup>89</sup>

The failure of the Supreme Court majority, Lord Reed, and counsel in *Miller* to address the issue of nonjusticiability is unsurprising when we view it in the light of the rise of the legal constitution. But when we scrutinize this failure from a politico-legal position, it takes on a troubling appearance. So too does another aspect of *Miller*. James Eadie suggested that, when Parliament enacted the European Union Referendum Act 2015, it assumed that it would yield a “decisive” result.<sup>90</sup> However, Eadie did not develop this point. His decision not to do so prompted the Supreme Court majority to describe him as having gone about his business “realistically.”<sup>91</sup> The majority’s use of the adverb “realistically” merits close attention. We can draw out at least some of its import by reference to a further aspect of the majority’s decision. This is

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<sup>85</sup> *Id.* at [214].

<sup>86</sup> *Id.* at [240].

<sup>87</sup> *Id.* at [164]–[169], [177]. While Lord Reed is not entirely clear on this point, his criticism of the way in which counsel and his colleagues in the majority used case law in *Miller* seems to be informed by the assumption that the matters before him were novel. If this reading is correct, attentiveness to particularity is a feature of his judgment. See *Case of Proclamations* (1610) 77 Eng. Rep. 1352, 1353, 1354; 12 Co. Rep. 74, 75. Sir Edward Coke stated that “the King hath no prerogative, but that which the law of the land allows him” and that “the King by his proclamation . . . cannot change any part of the common law, or statute law.” See *Miller* [2017] UKSC 5 [247] (Lord Carnwath SCJ, dissenting) (discussing “the lack of any direct precedent”).

<sup>88</sup> The same sort of sensitivity is also apparent in Lord Carnwath’s briefer dissenting judgment. See, e.g., *Miller* [2017] UKSC 5 [248] (Lord Carnwath SCJ, dissenting) (discussing “the balance of power”).

<sup>89</sup> When *Miller* was in the Divisional Court, Lord Thomas and his colleagues were able to declare that it was “common ground” among counsel and judges that the issues at stake in the case were justiciable. See *R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union* [2016] EWHC 2768 [4]–[5], [2016] WLR (D) 564 (Eng.).

<sup>90</sup> *Miller* [2017] UKSC 5 [38].

<sup>91</sup> *Id.*

the distinction that Lord Neuberger and his colleagues draw between considerations with political “force” and those with legal “force.”<sup>92</sup> In not developing his point vis-à-vis the 2016 referendum result, Eadie had grasped that it had political rather than legal force. To draw on our earlier analysis, he had recognized that this political consideration would not, in the context of the legal constitution, exert normative force of a sort to which the Court would be responsive. This indicates the prominence that legal considerations now enjoy in Britain’s constitutional order.

This prominence lends strong support to the claim that Britain has, in recent decades, witnessed the rise of the legal constitution. However, the political component in Britain’s constitutional order looms into view in *Miller*. Its unmistakable outlines are apparent in the result of the 2016 referendum and the commitment to democracy of which it is the expression. While the judges and lawyers who participated in *Miller* focus their attention on law, politics haunts the court room. This is anything but surprising in the context of a politico-legal order. The claims of politics have a reality rooted in the order’s history. Consider, once again, the issue of nonjusticiability, which the Supreme Court skirted in *Miller*. Had the Justices of the Supreme Court opted to identify the issue raised in the case as nonjusticiable, they would have staked out a position that honored the democratic impulses at work in the British constitutional context. To contemplate this possibility is to experience a sense of “ontological flickering.”<sup>93</sup> For the order’s political and legal dimensions open up two normative worlds (one legal and one political) that can, and, in *Miller*, did stand at some distance from one another. But each order has a reality that anyone alive to the order’s history will recognize. While this is the case, the rise of the legal constitution is a development we cannot ignore. We can sharpen our understanding of this development by drawing on Stanley Fish’s work.

#### IV. TRANSMUTING THE LUMP

In “Transmuting the Lump,” Fish dwells on a shift, that unfolded over decades, in the way academics understood John Milton’s *Paradise Lost*. Fish notes that, in 1942, C.S. Lewis had described the last two of the twelve books that make up *Paradise Lost* as “an untransmuted lump”

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<sup>92</sup> *Id.* at [124].

<sup>93</sup> See BRIAN MCHALE, *POSTMODERNIST FICTION* 100 (1987). McHale uses the phrase “ontological flickering” to capture the way in which the texts he analyzes present fictive realities that compete for the same imaginative space in readers’ minds and consequently flicker in and out of view.

that lacked literary value and were an embarrassment to the poem.<sup>94</sup> This assessment enjoyed widespread approval at the time (and became the center of gravity in Milton scholarship). Moreover, it encouraged the view that there was no prospect of redeeming the two books. However, the commentators who embraced this view proved to be spectacularly wrong. This gives Fish his *entrée*. He traces a process (the transmutation of the lump) that resulted in books Eleven and Twelve becoming the “stabilizing and generating center” of *Paradise Lost*.<sup>95</sup> Fish drives home the point that this process is incremental. It takes the form of a series of contributions to Milton scholarship. Fish also impresses on his readers the “narrative” character of this process: it is “sequential” and “discursive.”<sup>96</sup> The elements in this narrative were, according to Fish, a sequence of “critical estimates” that acquired the character of a “project.”<sup>97</sup>

Fish argues that the upshot of the process he describes is an understanding of *Paradise Lost* as “a spatial object everywhere infused with the same meaning.”<sup>98</sup> This object, a “spatial block”, comes into existence because its “stabilizing . . . center” brings into being “a simultaneity of multiple views.”<sup>99</sup> By this Fish means that all parts in the block or space “radiate out from,” owe their significance to, and, hence, cohere with its center.<sup>100</sup> In light of these points, he draws the conclusion that those who contemplate the block confront “a system of understanding” that “*speaks* [the] landscape and declares the shape of everything in it.”<sup>101</sup> He also argues that this system of understanding prompts those who fall under its sway to turn away from “succession” in the form of the sequence of literary contributions that issued in the emergence of the block.<sup>102</sup> Thus they lose sight of the fact that “literary works are the products as well as the objects of our activity . . . .”<sup>103</sup> This seems surprising when viewed in light of the fact that the process Fish describes is not just a project but a reversal.<sup>104</sup> However, when we recognize that the project of reversal that Fish describes has the purpose of establishing a new “reigning judgment,” the impulse to turn away from succession becomes easier to understand.<sup>105</sup> To dwell on the

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<sup>94</sup> FISH, *supra* note 8, at 267.

<sup>95</sup> *Id.* at 269, 274–77.

<sup>96</sup> *Id.* at 270.

<sup>97</sup> *Id.* at 259 (“critical estimates”); *see also Id.* at 267 (“project”).

<sup>98</sup> *Id.* at 281.

<sup>99</sup> *Id.* at 284 (quoting JACKSON COPE, *THE METAPHORIC STRUCTURE OF PARADISE LOST* 14–15 (1962)).

<sup>100</sup> *Id.* at 277.

<sup>101</sup> *Id.* at 249.

<sup>102</sup> *Id.* at 275.

<sup>103</sup> *Id.* at 250.

<sup>104</sup> *Id.* at 260.

<sup>105</sup> *Id.* at 286.



process that has issued in a reigning judgment (a hard won achievement) is to alert those who dissent from it to the possibility that they could embark upon a new process of reversal.

While Fish presents us with a fine-grained account of the process that issues in the transmutation of the lump he states that it is “nowhere announced as now beginning.”<sup>106</sup> Rather, it begins as so much “grumbling” (in the form of none-too-focused expressions of discontent with the status quo) and acquires the character of a project in stages.<sup>107</sup> In this feature of the literary scene, Fish finds support for the conclusion that, in literature as in practical life, “there is no final word . . .”<sup>108</sup> Instead, there are “only the words provoked by those intended as final.”<sup>109</sup> Thus Fish presents us with a practice of interpretation that has no obvious stopping point—notwithstanding the efforts on the part of those pursuing particular projects to stake out not merely authoritative but also enduring positions.

#### V. TRANSMUTING THE POLITICO-LEGAL LUMP

Fish’s account of the transmutation of the lump has applicability to Britain’s politico-legal order. As we noted earlier, this order is an institutional admixture of law and politics. In such a context, it takes no great feat of imagination to contemplate the possibility that either law or politics could assume a dominant position within it. In such circumstances, the order’s other institutional component (be it law or politics) could take on a rather beleaguered appearance reminiscent of books Eleven and Twelve of *Paradise Lost* (when viewed in the light of Lewis’s reading). These points give us grounds for thinking that the rise of the legal constitution (as we examined it earlier) is analogous to the process Fish describes in “Transmuting the Lump.” For a particular understanding (“the legal constitution”) of the larger whole (“the politico-legal order”) has assumed a dominant position. On this view, law now “*speaks* [the] landscape and declares the shape of everything [significant] in it.”<sup>110</sup> This is apparent in the Supreme Court’s response to the issues at stake in *Miller*. The judges in both the majority and the minority (and likewise counsel) treated only arguments with legal “force” as suitable grounds for decision. This explains, among other things, the absence from Lord Reed’s dissenting judgment of any consideration of the question as to whether the issue before the Court

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<sup>106</sup> *Id.* at 268.

<sup>107</sup> *Id.* at 286.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 249.

was nonjusticiable.

While Fish's account of the transmutation of the lump has applicability to the context we are considering, we need to proceed cautiously in our use of his thinking. As we noted earlier, the British politico-legal order comprises not just the institutional components of law and politics but also a dispositional element (attentiveness to contingency or vigilance). The order's strong receptivity to contingency means that it does not have a fixed shape. Its shape alters as a result of the responsiveness of politicians and lawyers to contingencies. This is a point we can refine by recognizing that the order's existing institutional commitments mediate the responses that politicians and lawyers make to the pressures that impinge upon the contexts in which they work. Thus when, for example, the need to prosecute a total war arises, this may prompt politicians to intensify existing commitments to enterprise association.<sup>111</sup> Likewise, it may prompt judges to reduce the protection the law gives to individuals.<sup>112</sup>

If this account of the British politico-legal order is broadly correct, it means that we are dealing with circumstances that are more complex than those that feature in Fish's account of the transmutation of the lump. However, it does not follow from this fact that his analysis is of no assistance to us. But it is the case that we have to apply his insights in a context that is not stable. One way in which we can seek to do this is by offering an account of politicians and judges as possessing resources that equip them to respond to changing circumstances more or less aptly. In this context, "apt" relates to more than attentiveness to circumstances (a faculty we might capture in the figure of a weather eye). It also has to do with the fitness of law and politics as means to address the matters under scrutiny (and the readiness to engage in critical reflection on this subject). In making apt responses to the contingencies that confront them, politicians and judges play a part in creating what the French sociologist Pierre Bourdieu has called "a[n] [institutional] reality . . . that keeps coming into being."<sup>113</sup> Those who undertake tasks of this sort bear onerous burdens of judgment. Institutional history and the practical outlook it fosters are significant guides to action. A judge, for example, might consider (in light of earlier practice) whether he should treat an intensely controversial matter of political concern as justiciable. This task might also involve him in

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<sup>111</sup> See, e.g., GREENLEAF, *supra* note 21, at 62 (on the Emergency Powers (Defence) (No 2) Act 1940 which, on Greenleaf's analysis, put everything and everybody at the state's disposal).

<sup>112</sup> *Liversidge v. Anderson* [1942] AC (HL) 206, 252 (Lord Macmillan) (noting that in pursuit of the public interest, "it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy").

<sup>113</sup> PIERRE BOURDIEU, *ON THE STATE: LECTURES AT THE COLLÈGE DE FRANCE 1989–1992* 337–38 (Patrick Champagne et al. eds., 2014).

considering whether matters that embrace the interests of broad aggregates of people (and that may have a “many centered” character) are suitable for judicial resolution.<sup>114</sup>

We can press this analysis further by bringing into the discussion the two epigrams that appear below this Essay’s title. Machiavelli tells us that “nothing beneath the sun ever will or can be firm.” Dicey declares that “the British constitution . . . is the most flexible polity in existence.” They each describe a reality that (to use Bourdieu’s phrase) “keeps coming into being.”<sup>115</sup> Thus we might say that Britain’s politico-legal order is an institutional reality that keeps coming into being in response to a reality (an ever-changing world) that keeps coming into being. If our earlier analysis of vision as it features in the E.U. and liberal normativism is correct, they each promise a set of practical arrangements that may not be sufficiently sensitive to our ever-changing circumstances.

#### CONCLUSION

Law now occupies a more prominent position in Britain’s politico-legal order than was the case half-a-century ago. This is a development that reflects the rise of the legal constitution. The rise of the legal constitution is a process on which Stanley Fish’s “Transmuting the Lump” throws light. For the “critical estimates” on which Fish focuses his attention have an incremental effect that bears similarities to that wrought by the rise of the legal constitution. While this is the case, we must not lapse into overstatement. Fish tells us that the result of the process he describes is a new understanding of books Eleven and Twelve of *Paradise Lost* that “speaks [the] landscape and declares the shape of everything in it.” In Britain’s constitutional order, matters have not gone this far. While the judges of the Supreme Court and the barristers who argued before them in *Miller* thought it “realistic” not to dwell on political considerations, politics haunted the proceedings in which they participated—but not in the manner of Banquo’s ghost. For politics remains a component of Britain’s constitutional order. For this reason, we should classify the rise of the legal constitution in Britain as a process of intensification and not one of transformation.

While commitment to the legal constitution has intensified, Britain’s constitutional order remains politico-legal. This became plain to see when its political component loomed into view during the 2016 referendum campaign and its aftermath. In this Essay we have probed

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<sup>114</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–95 (1978), (discussing “many centered” (or polycentric) disputes).

<sup>115</sup> BOURDIEU, *supra* note 113, at 337.

the relationship between the order's political and legal components by introducing the idea of "ontological flickering." We owe this idea to a commentator on postmodern fiction (Brian McHale) who has used it to capture the sense of worlds that are insubstantial and that, consequently, flicker in and out of view. In the case of Britain's constitutional order matters are different in ways that are worth noting before we close. Both law and politics, as they exist in Britain, present us with the stuff of normative worlds: spaces that are rich in practical significance. Moreover, they each make up elements in a history that is thick with detail (institutional and dispositional) and rich in moral appeal (an egalitarian philosophy of government that finds expression in law and politics). Clearly, the legal and political components of Britain's constitutional order are anything but insubstantial. Thus we should not be surprised if they fade from view only to burst back into sight and make insistent claims—as in the political controversy that has attended Brexit and, more particularly, the 2016 referendum result.

Finally, the emphasis on attentiveness to contingency in Britain's constitutional order affords a basis on which to explain unease in the U.K. with the process of European integration. Attentiveness to contingency finds expression in a disposition that prompts those who cultivate it to keep a weather eye on sources (or potential sources) of practical difficulty. Critics of the E.U. have, for many years, found them in the fear that a long-lived form of (British) life is under threat. Likewise, they have found them in more particular concerns including *inter alia*, economic dislocation arising from European monetary union and the migration crisis of 2015.<sup>116</sup> These considerations help explain why many Britons are chary of the vision that animates the advocates of European integration. Hence, we might draw the conclusion that Brexit is a triumph of vigilance (or attentiveness to contingency) over vision. In a world where "nothing beneath the sun ever will or can be firm,"<sup>117</sup> this may be to Britain's advantage.

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<sup>116</sup> GILLINGHAM, *supra* note 3, at 158, 233–36.

<sup>117</sup> VIROLI, *supra* note 1, at 18.