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Ekins, R. and Gee, G.D. (2018) Miller, constitutional realism and the politics of Brexit. In: Elliott, M., Williams, J. and Young, A., (eds.) *The UK Constitution after Miller: Brexit and Beyond*. Hart Publishing , Oxford . ISBN 9781509916405

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Miller, Constitutional Realism and the Politics of Brexit

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I. INTRODUCTION

The Miller litigation was a product of the politics of Brexit. Its central legal question was fairly discrete and technical: whether the Government could use the prerogative to give notice for the purposes of Article 50 of the Treaty on European Union of the UK's intention to withdraw from the EU, or whether statutory authorization was required.¹ However, the political context in which this legal question arose was fraught, with sore feelings and ragged nerves shaping public debate in the months after the referendum. It is not possible to make sense of Miller—the genesis and framing of its legal question, the hopes that many invested in the action, the frenzied atmosphere leading up to the oral hearing in the Supreme Court, and the reasoning that led a majority of the Justices to decide against the Government—without a heavy dose of constitutional realism. This requires, above all else, seeing Miller for what it was: an attempt by members of the political and legal elite to use the courts to delay political action implementing the result of the referendum in the hope that, somehow, it might ultimately be possible to thwart such action.

In this chapter, we strive to pierce some of the myths and misunderstandings that have built up around Miller. In Part II we reflect on the difficulty so many in the political and legal elite had incoming to terms with the result of the referendum.² This difficulty manifested itself in three powerful dynamics that have moulded much of the political and legal debate over the last year: namely, elite-led efforts to delegitimize the referendum; an elite-concocted narrative of 'constitutional crisis'; and sustained and scattershot attempts to use litigation to delay and disrupt the process of withdrawing from the EU. Miller should be understood in light of these overlapping dynamics. In Part III, we consider the framing of and motivations for the Miller litigation, noting that it was argued in a way that was politically astute and powerful. The Supreme Court ought nonetheless to have upheld settled law and rejected the claim. Part IV examines the Court's judgment, arguing that the majority conflated constitutional practice and constitutional law, making unprincipled appeals to what they deemed realistic and unrealistic. In Part V, we consider why the Court may have decided as it did, pointing to the dubious account of the separation of powers at work in the majority's reasoning. We close in Part VI by reflecting on *Miller's* legacy, arguing that unless the reality of the litigation and judgment are squarely confronted, we may expect to see more ill-judged attempts to leverage judicial intervention into the political process for partisan advantage.

II. THE REFERENDUM AND THE ELITE CRY OF RAGE

The result of the referendum was a shock (despite neither the Leave nor Remain Campaigns having a decisive lead in the polls and notwithstanding the long-standing and widespread popular dissatisfaction with the UK's membership of the EU). It was especially shocking to the legal and political elite, most of whom had strongly favoured remaining in the EU, with the weeks and months after the referendum notable for the difficulty many seemed to have in accepting the voters' decision.

* We are grateful to Nick Barber, Mikolaj Barczentewicz, Timothy Endicott, John Finnis and the editors for comments on an earlier draft; the usual disclaimer applies.

¹ R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, [2017] 2 WLR 583.

² We use the term 'political elite' to refer to politicians, civil servants and—following Dennis Kavanagh—'political entrepreneurs' such as political advisers, members of think-tanks, researchers and academics for whom high profile political activity at or near the heart of political life is part-time or a by-product of other roles. See D. Kavanagh, 'Changes in the Political Class and its Culture' (1992) 45 Parliamentary Affairs 18, 27. 'Legal elite' denotes senior judges, leading practitioners, legal journalists and legal academics, all of whom in different ways are engaged in high profile legal arguments which help to shape the dominant legal culture. There are overlaps between the two categories, and the membership of each is not fixed. There were political and legal elites on both sides of the referendum, but it is widely accepted that the strong preponderance of political and legal elite opinion favoured remaining in the EU. This chapter's focus is on the many members of the political elite and (especially) legal elite who sought to use the law to delay or block political action implementing the referendum.

The public for the most part greeted the result with equanimity, with most voters who had supported continued membership appearing to view the referendum as a legitimate exercise in self-government. In this, the public exhibited a sound and reassuring democratic impulse. The contrast is notable. An elite ‘cry of rage’³ reverberated in the period after the referendum, with many striving to frustrate the process of leaving the EU (and, in some cases, to delay that process in order to increase the likelihood of being able to frustrate it). No doubt the motives varied between the politicians, lawyers and others who considered themselves as under a (dubious) ‘democratic duty’ to oppose Brexit.⁴ Some took great care to voice their concerns about the referendum in a measured and respectful fashion, but alas many did not. Many despaired (in public and with far less restraint in private) that the conduct and result of the referendum reflected the public’s ignorance, gullibility and—above all—prejudice.⁵ In this, the referendum exposed not only the deep divide that ran across class, educational and generational lines,⁶ but also the staggering (and troubling) disregard that many elites felt about the voters’ ability to reach an informed and public-spirited assessment of the polity’s governing arrangements. Many elites steadfastly refused to view the referendum as a wholly intelligible (if contestable) evaluation by the public that, on balance, the UK’s long-term interests — economic, social, cultural and political—would be best served by ceasing to be part of the EU.

This elite cry of rage let loose three related and mutually reinforcing dynamics. The first was the attempt by many politicians and lawyers to delegitimize the referendum. Their objections were wide-ranging, embracing referendums in general and also this referendum in particular. Referendums should have no place, it was said, in a system of representative democracy. In respect of this specific referendum, it was argued that a decision of the magnitude of leaving the EU should have required a supermajority and/or majorities in each of the four nations of the UK. The franchise for this particular referendum was also characterised as unfair, on account of the exclusion of EU nationals in the UK who would be among those most affected by any decision to leave, and because votes had not been extended to 16 and 17 year olds.⁷ A common refrain was that the referendum was advisory not merely as a matter of law but also as a matter of constitutional practice, such that Parliament remained as free as ever—politically as well as legally—to depart from the ‘advice’ of the voters.⁸ Finally, motivated by a barely concealed disapproval of the result of referendum, some argued that the decision to leave the EU was of such significance that a second referendum was required, in which voters could select between the terms of any deal that the Government negotiated on the shape of the UK’s post-Brexit relationship with the EU on the one hand and remaining in the EU after all on the other.⁹

None of these objections were persuasive. A convincing case can be made in representative democracies for occasional use of ‘constitutional referendums’¹⁰ as a tool for resolving vital questions about the long-term identity of the state, such as the UK’s membership of the EU. This case has particular force whenever elite consensus works to prevent certain questions that agitate the public at large from piercing the mainstream political agenda.¹¹ Popular and elite assessments of the EU had diverged since the 1975 referendum. Over the same period the nature and scope of the European project had changed dramatically, and integration in particular had accelerated over the previous 25

³ R Ekins, ‘Restoring Parliamentary Democracy’ (2018) 39 *Cardozo L Rev* 101.

⁴ See e.g. A Wheale, ‘The Democratic Duty to Oppose Brexit’ (2017) 88 *Political Quarterly* 170.

⁵ Vernon Bogdanor offers an alternative view. Reflecting on the reaction of many elites to the referendum, Bogdanor comments that ‘[in Britain...the danger of bigotry arises not from the exercise of popular sovereignty or populism but from the intolerance of elites—many of them university-educated’: V Bogdanor, ‘On Popular Sovereignty’ in D Galligan (ed), *Constitution in Crisis: The New Putney Debates* (London, IB Tauris & Co, 2017) 39, 43.

⁶ M J Goodwin and O Heath, ‘The 2016 Referendum, Brexit and the Left Behind: An Aggregate-Level Analysis of the Result’ 87 *Political Quarterly* 323. See also H D Clarke, M Goodwin and P Whiteley, ‘Why Britain Voted For Brexit: An Individual-Level Analysis of the 2016 Referendum Vote’ (2017) 70 *Parliamentary Affairs* 439.

⁷ See e.g. Y Nehushtan, ‘Why the EU Referendum’s Result Is Not Morally-Politically Binding’, *UK Const L Blog* (5 July 2016).

⁸ See e.g. P Eleftheriadis, ‘A New Referendum is a Constitutional Requirement’, *Oxford Law Business Blog* (4 July 2016); and P Eleftheriadis, ‘Constitutional Illegitimacy Over Brexit’ (2017) 88 *Political Quarterly* 182.

⁹ For an example of an overwrought piece that attempts to delegitimize the referendum on multiple grounds before calling for a second referendum that could arrive at ‘the appropriate answer’, see L Blom-Cooper, ‘The Referendum of 23 June 2016: Voting on Europe’ [2017] *PL (Brexit Special Issue)* 2, 9 (‘Second thoughts, as other EU members have found, may produce appropriate answers’).

¹⁰ See generally S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford, OUP, 2012).

¹¹ See generally R Ekins, ‘The Value of Representative Democracy’ in C Charters and D Knight (eds), *We the People(s): Participation in Governance* (Wellington, Victoria University Press, 2011) 29, 48.

years. Sustained discontent with European integration had been a feature of national politics for much of the last 40 years, yet 1983 was the last time that withdrawal had been advocated by a major party that enjoyed significant representation at Westminster.¹² Seen in this light, the referendum was not just an appropriate way to test whether voters continued to consent to EU membership, but perhaps the only way of doing so. Arguments that the referendum was merely advisory as a political—and not just a legal—matter were at best obtuse or specious at worst. It was true that the European Union Referendum Act 2015 did not provide for how any decision to leave the EU was to be implemented, but no one who followed the campaign or who was familiar with the relevant political context, including the background to the 2015 Act itself, could have had any doubts that the referendum was intended to settle the question of whether or not to leave.¹³ Imposing a supermajority requirement for a decision to leave the EU or a requirement for a majority in each of the four nations would have broken new ground for a referendum in the UK and would have been read rightly as an attempt to squeeze out the prospect of any change to the status quo. Any elevated threshold would also have been inconsistent with the principle of the equality of each voter. Similarly unconvincing were arguments that the franchise was unfair.¹⁴ The franchise replicated that adopted in general elections, which was prudent given that any departure from this might have been interpreted as an underhand attempt to stack the deck in favour of the status quo.¹⁵ More generally, the time for raising objections such as these—and particularly arguments about the need for a second referendum—was before the referendum was held. There might have been a reasonable case to be made for sequential referendums—the first on whether or not to leave and a second on the terms of leaving—but only if provision for this had been made in advance, not as an *ex post facto* attempt by elites to upend the result of the referendum.

A narrative of ‘constitutional crisis’ developed alongside the elite-led attempts to delegitimize the referendum, and this was the second dynamic unloosed by the elite cry of rage.¹⁶ On this view, the referendum triggered a constitutional crisis¹⁷ (or, in some of the more sophisticated accounts, had laid bare fissures within and between the nations of the UK that will likely over time, and possibly a very short time, precipitate a constitutional crisis).¹⁸ This crisis narrative encompassed four overlapping themes. First, the referendum revealed deep fractures within a constitution that had traditionally commanded broad consensus that traversed ideological, geographical and socio-economic lines. Second, the referendum had catapulted to the top of the political agenda questions that risked fermenting division within—and ultimately the break-up of—the territorial constitution; questions, for example, about the future of the land border with the Republic of Ireland and questions about the allocation of repatriated powers between central and devolved tiers of government.¹⁹ Third, the constitution lacked the sort of clear and principled constitutional law needed to address questions such as these²⁰ and, more generally, to manage political and legal change of the scale and complexity involved in leaving the EU. The domestic processes for withdrawal would be shaped instead by

¹² Some might quibble with this and suggest instead that only a small section of the public ranked discontent with EU membership as amongst their main political priorities. It is difficult to deny, however, that discontent has been a central theme of the UK’s membership of the EU, with a strong streak of scepticism a long-standing current in political discourse about the EU, albeit with the levels of discontent unevenly distributed across the UK. The literature on the tradition of Euroscepticism in UK politics is large, but useful overviews include: A Gamble, ‘Better Off Out? Britain and Europe’, (2012) 83 *Political Quarterly* 468; and O Daddow, ‘Margaret Thatcher, Tony Blair and the Eurosceptic Tradition in Britain’, (2013) *British Journal of Politics and International Relations* 210.

¹³ It was clear throughout the parliamentary debates on the 2015 Act that the referendum was intended to give voters the final say on whether the UK should remain in the EU.

¹⁴ Cf. J Shaw, ‘The Quintessentially Democratic Act? Democracy, Political Community and Citizenship In and After the EU Referendum of June 2016’ (2017) 37 *Journal of European Integration* 559.

¹⁵ The question of whether to extend the franchise to EU citizens and 16–17 year olds featured prominently in the parliamentary debates on the 2015 Act, but Parliament chose to adopt the franchise used in general elections. A legal challenge to the terms of the franchise was dismissed: *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469, [2017] QB 226.

¹⁶ The language of constitutional crisis had been building in the months leading up to the referendum; see e.g. V Bogdanor, *The Crisis of the Constitution: The General Election and the Future of the United Kingdom* (London, Constitution Society, 2015).

¹⁷ See eg D Galligan (ed), *Constitution in Crisis: The New Putney Debates* (London, IB Tauris & Co, 2017); and A C Grayling, *Democracy and Its Crisis* (London, Oneworld, 2017).

¹⁸ See e.g. S Douglas-Scott, ‘Brexit, Article 50 and the Contested British Constitution’ (2016) 79 *MLR* 1019, 1038; and M Loughlin, ‘The End of Avoidance: The UK Constitutional Crisis’ *London Review of Books* (28 July 2016).

¹⁹ For a clear-headed and sophisticated discussion, see: A McHarg and J Mitchell, ‘Brexit and Scotland’ (2017) *BJPIR* 1.

²⁰ See e.g. F Matthews, ‘Whose Mandate Is It Anyway? Brexit, the Constitution and the Contestation of Authority’ (2017) 88 *Political Quarterly* 1.

politics, with the risk that constitutional practice untamed by constitutional law would enable a power-hungry central executive to sideline the UK Parliament and the devolved institutions. Finally, the constitution was about to take a step back into an age of unreason by eschewing the stable legal framework of the EU and returning to the permissive national legal framework that had existed prior to 1972. This was only the first such step: over time other progressive pillars of the constitution such as the Human Rights Act and the European Convention on Human Rights would be targeted by the reactionary forces that successfully campaigned for withdrawal from the EU. Running throughout this narrative of crisis was concern about the constitution's capacity to manage the radical change involved in unpicking political and legal relations with the EU and a fear of 'the coming constitutional instability'.²¹ But for many in the political and legal classes, this genuine concern was very difficult to disentangle from a deep and personally felt disappointment that the referendum had mandated radical constitutional change that not only disturbed the status quo, but departed from their preferences.

In the aftermath of the referendum, this crisis narrative was never too far from the surface in debates about the implications of and process for leaving the EU.²² However, the language of crisis is cheap,²³ and much of the post-referendum narrative was (as Levinson and Balkin put it in a different context) 'the equivalent of pounding the table and marking one's upset about some state of affairs in the world'.²⁴ In any case, there was no constitutional crisis.²⁵ There were abnormally high levels of political change and uncertainty, a partial consequence of the confluence of the Prime Minister's resignation the morning after the referendum and a failed coup against the Leader of the Opposition. New political territory was being entered: the process of leaving the EU would be overseen by a Parliament that strongly favoured the UK's continued membership. This mismatch between elite and popular assessments of European integration gave rise to various complications, including the lack of adequate contingency work by the civil service in the event that the voters voted to leave the EU. The months following the referendum had also heightened tensions between the UK Government and the devolved administrations, and the Scottish Government in particular (but, once again, the public showed greater forbearance insofar as one of the consequences of the referendum was to temper enthusiasm for Scottish independence, at least in the short term). All of this could perhaps be said to have amounted to a political crisis, but it falls short (indeed, in our view, very significantly short) of a constitutional crisis.²⁶ Such a crisis occurs principally where a constitution no longer makes politics possible; where serious failures within the constitutional architecture prevent politics addressing political uncertainty, change and conflict. A crisis, in other words, involves a serious breakdown of the constitutional order. This might arise where disputes cannot be resolved within the existing framework, or where key actors no longer adhere to the rules of the constitutional game.²⁷

There had been no such breakdown in the UK. Holding the referendum was an intelligible response to the diverging elite and popular assessments of the EU,²⁸ and in its aftermath the Government was rightly intent on implementing the voters' decision to leave. The governing apparatus has been tested in numerous ways since June 2016, and at various junctures the machinery of government has not always looked like a beacon of excellence. But there has been no rupture in basic constitutional processes. The constitution in action had enabled the governing institutions to

²¹ P Eleftheriadis, 'The Coming Constitutional Instability' [2017] PL 347.

²² Invoking the language of crisis was not confined to those elites who were opposed to or concerned by the referendum result. Notably, The Daily Mail warned in November 2016 that the Divisional Court's decision in *Miller* 'could trigger [a] constitutional crisis', although it is at least arguable that a genuine crisis would have resulted from the House of Commons or House of Lords defying the referendum result by refusing to pass legislation authorizing ministers to give notice under Article 50. It is also true that one might expect tabloid newspapers to be more sensationalist in their use of language than, for example, legal academics. See Daily Mail, *Enemies of the People* (4 November 2016).

²³ See generally C Hay, 'A Crisis of Politics in the Politics of Crisis' in D Richards, M Smith and C Hay (eds), *Institutional Crisis in 21st Century Britain* (Basingstoke, Palgrave, 2014) 60, 77.

²⁴ S Levinson and J M Balkin, 'Constitutional Crises' (2009) 157 *U Penn L Rev* 707, 714.

²⁵ *ibid.*

²⁶ Aileen McHarg offers a measured account, arguing that there was a political crisis in the months following the referendum, but that it remains an open question whether this might engender a constitutional crisis: A McHarg, 'Navigating Without Maps: Constitutional Silence and the Management of the Brexit Crisis' (2018) *ICON* (forthcoming).

²⁷ K E Whittington, 'Yet Another Constitutional Crisis?' (2002) 43 *Wm & Mary L Rev* 2093.

²⁸ Plainly views differ on whether the referendum was either necessary or desirable: c.f. P Craig, 'Brexit: A Drama in Six Act's (2016) 41 *ELR* 447 and H Thompson, 'Inevitability and Contingency: The Political Economy of Brexit' (2017) *BJPR* 1.

grapple with the novel, complex and challenging questions to which leaving the EU gives rise, although of course assessments will differ as to the soundness of the answers proffered to those questions. In saying all of this, we do not mean to downplay the scale of the challenges presented by leaving the EU. The challenges for the governing institutions are not merely political and legal, but cultural (adjusting to governing processes leavened by the removal of a supranational legal framework) and organizational (recruiting civil servants with new skill-sets, reallocating officials to new jobs and creating and staffing in short order a new department of state). We also do not deny that there have been episodes since the referendum where this or that actor has tried to stretch constitutional practice. We also acknowledge that there remain thorny questions still to be addressed, most notably questions relating to Northern Ireland. Our claim is simply that the crisis narrative was the concoction of panicked elites; the constitution has to date enabled politics to work in established ways and through settled processes, and in so doing has provided sufficient political stability to absorb the shock of the referendum result. For some, this might seem like a cavalier or complacent reading of the reverberations caused by the referendum, one that puts too much confidence in the traditional constitution to accommodate the unpredictable political forces unleashed by leaving the EU. However, in our view, precipitately invoking a narrative of crisis poses serious risks to the constitutional order. It distorts how political and legal actors discharge their constitutional functions—perhaps even motivating them to neglect or betray their responsibilities—which risks bringing about the very crisis it aims to answer.

These two dynamics—the elite critique of the referendum’s legitimacy and the elite-contrived narrative of constitutional crisis—fuelled a final and related dynamic: the repeated attempts to initiate litigation to delay or disrupt the process of leaving the EU. The Miller litigation was only the most high profile of a number of attempts to relocate the politics of Brexit from the political realm to the legal arena. Other attempts included: a case brought in parallel to Miller asking whether the Northern Ireland Act 1998 had abrogated the Government’s prerogative to give notice under Article 50;²⁹ the unsuccessful attempt by an English barrister to litigate in Dublin the question of whether notice under Article 50 was revocable, where the ultimate goal was to engineer a preliminary reference by the Irish High Court to the Court of Justice of the EU; and the threat hanging over the Government of litigation to secure the release of studies on the economic impact of the UK leaving the EU. Two further sets of legal proceedings are underway at the time of writing. The first is a case before the Court of Session, where a group of Scottish MPs, MEPs and MSPs—coordinated by the same English barrister behind the Dublin litigation—seek reference to the Luxembourg Court about whether the UK can unilaterally revoke its notice under Article 50. The second is in the High Court, where the claimant argues that the European Union (Notification of Withdrawal) Act 2017 does not include a formal ‘decision’ to leave the EU as required under Article 50. The first is arguable (if difficult to square with Miller itself), but the second is not and should be dismissed out of hand. Some legal academics have been industrious in dreaming up other outlandish and—to be frank—legally absurd ways of attempting to upend the voters’ decision to leave the EU. Philip Allott, for example, proposed that the courts could conclude that departing the EU was unlawful on the grounds that holding the referendum was not in the public interest and its ultimate result was unreasonable.³⁰ Equally lacking any legal foundation was Yossi Nehushan’s contention that it would be unlawful for the Prime Minister to take the referendum’s result to be morally authoritative and that instead the courts should require her to treat the referendum as merely advisory and to consider it alongside the factors that weigh against withdrawal.³¹ Perhaps the high-water mark of this hyperactivity amongst the legal class was a letter in July 2016 to the Prime Minister signed by 1054 barristers purporting to reconcile ‘the legal, constitutional and political issues’ that arose from the referendum by proposing ‘a Royal Commission or an equivalent independent body to receive evidence and report, within a short, fixed timescale, on the benefits, costs and risks of triggering Article 50 to the UK as a whole, and all of its constituent populations’.³² This

²⁹ *Re McCord’s Application* [2016] NIQB 85, [2017] 2 CMLR 7.

³⁰ P Allott, ‘Forget the Politics – Brexit May Be Unlawful’, *The Guardian* (30 June 2016).

³¹ Y Nehushan, ‘Why Is It Illegal for the Prime Minister to Perceive the EU Referendum’s Result as Morally-Politically Authoritative?’, *UK Const L Blog* (11 July 2016).

³² ‘In Full: The Letter From 1,000 Lawyers to David Cameron Over EU Referendum’ *The Independent* (10 July 2016).

letter garnered press headlines but no political traction; it was emblematic, however, of the extent to which many in the legal class sought to conceal their own preferences for continued membership of the EU in the finery of (weak and ill-founded) ‘legal analysis’. The Miller litigation should be understood in the light of the wider pattern of lawyerly hyperactivity relating to Brexit; hyperactivity that preceded Miller and that has continued in its wake. As we explain in the next section, Miller differed from some of the other more fanciful legal analyses proposed in the aftermath of the referendum because it presented an arguable legal question that the claimants crafted in a politically potent fashion.

III. POLITICS BY OTHER MEANS? FRAMING STRATEGIC LITIGATION

The litigation in Miller was framed around a focused and technical question of constitutional law: whether the Government could use the prerogative to give notice of the UK’s intention to leave the EU for the purposes of Article 50. The claimants submitted that fresh legislation was required to authorize the Government to initiate the Article 50 process, and relied on two main arguments to support this. First, the European Communities Act 1972 (‘ECA’) creates statutory rights that can only be diminished or abrogated by another statute. The triggering of Article 50 would lead to the UK leaving the EU, which would necessarily frustrate or erase these statutory rights. Since only an Act of Parliament can abrogate statutory rights, a statute was required to authorize ministers to trigger Article 50. Second, the ECA’s purpose was to provide for the UK’s membership of the EU and to give effect in domestic law to the EU Treaties. Triggering Article 50 would put in motion a chain of events that would culminate in leaving the EU and the Treaties ceasing to have effect in the UK, thereby rendering the ECA an empty shell and frustrating its purpose. It was settled constitutional law that the Government cannot use its prerogative powers to frustrate a statute, and thus a statute was required to authorize ministers to issue the Article 50 notice. The claimants contended in the alternative that the ECA and subsequent statutes relating to the EU had impliedly abrogated the Government’s prerogative to withdraw from the EU Treaties.

The claimants’ arguments were cleverly crafted, but legally unsound for the reasons noted in section IV, not least because they mistook the contestable requirements of constitutional practice (i.e. what good practice and political prudence requires in a constitution such as the UK’s) for the requirements of constitutional law (i.e. what is required as a matter of law).³³ Although legally flawed, the claimants’ arguments were a beguiling blend of tradition, prudence and politics, which was astute and powerful in political terms. The litigation was framed not as an attempt to flout the referendum but as vindicating traditional principles, most notably representative democracy and parliamentary sovereignty. By arguing that only an Act of Parliament could authorize ministers to invoke Article 50, the claimants depicted themselves as insisting only on lawful processes that would safeguard Parliament’s role in this momentous constitutional change. Echoing throughout the claimants’ submissions was the claim that for ministers to initiate the Article 50 process without statutory authorization would be the sort of executive overreach traditionally subject to parliamentary resistance and judicial checks. It is easy to forget, especially following the 2017 general election, the degree to which this resonated with concerns widely held by elites in the months after the referendum that Theresa May led an overbearing government that faced no credible opposition inside Parliament from a Labour Party distracted by its own internal schisms. What is more, the claimants’ arguments overlapped with what many viewed as sound constitutional practice and political prudence. Even putting to one side any supposed legal requirement, it was arguable that, as a matter of constitutional practice and political prudence, ministers should have invited Parliament to signify its support for the triggering of Article 50, whether by way of primary legislation or a resolution of each chamber.³⁴ Or to put this more bluntly: the litigation was intended, and widely thought, to place in a political bind those who believed that leaving the EU would lead to the reinvigoration of parliamentary sovereignty in a constitution freed from the constraints of EU law. Such Brexiteers might have felt instinctively

³³ See generally R Ekins, ‘Constitutional Practice and Principle in the Article 50 Litigation’ (2017) 133 LQR 347.

³⁴ See House of Lords Select Committee on the Constitution, *The Invoking of Article 50*, HL44 (13 September 2016).

suspicious of the litigation yet found appealing its emphasis on giving Parliament the final decision whether and when to initiate Article 50.

The litigation was presented as an attempt to affirm parliamentary sovereignty and to avoid ministers exceeding their lawful powers, but a *realpolitik* reading would see it as a subtle legal strategy that was seized on (and perhaps also concocted by) elites to delay or frustrate (or to delay in the hope of frustrating) the referendum result.³⁵ Indeed, whatever the litigants' actual motivations, the Miller litigation was 'undoubtedly perceived [at least by many]... as an attempt to prevent or to delay Brexit'.³⁶ Motivations are complex of course, and may not always be fully understood by those who act on them. Still, it would be unsurprising if the political preferences of those most invested in the referendum tracked their support for (or opposition to) this litigation. The lead claimant, Gina Miller, described the litigation as about 'process not politics', but it bears noting that she was an active supporter of the Remain Campaign who described herself as having felt 'physically sick' on learning of the voters' decision to leave,³⁷ and who in the 2017 election led a tactical voting initiative designed to empower candidates who might vote against the Government's deal with the EU.³⁸

Litigation was clearly an intelligent way, and perhaps the only realistic way, to delay the triggering of Article 50. Reflecting a year on from their influential blog-post that was the intellectual genesis for the litigation,³⁹ Nick Barber, Tom Hickman and Jeff King acknowledge that delay was a fact that led them to explain why, in their view, legislation was required before Article 50 could be triggered. As they saw it, the requirement to legislate would slow down the process of initiating Article 50 'at a time of political crisis within the UK' and therefore 'provide much needed breathing space for political actors'.⁴⁰ Delay would be in the national interest since it would allow the Government more time to determine its negotiating position as well as providing an opportunity to obtain commitments from the EU and other member states concerning the substance and process of the UK-EU negotiations.

If delay is an admitted reason for litigation, then, it is important to acknowledge that, for many,⁴¹ the attraction of delay must also have been that it made it space for the UK to reverse course; if, for example, the economy soured encouraging public opinion to turn against withdrawal. Initiating the litigation itself generated delay. As importantly, if successful, litigation promised much more delay: the parliamentary process taking time and overcoming opposition in the House of Lords by way of the Parliament Acts 1911 and 1949 might take at least a year. The litigation was never directly going to frustrate implementation of the referendum result, notwithstanding some of the wilder legal arguments noted above, for the courts clearly had no authority to rule as much. However, the litigation promised to (and in the end did) pass the decision whether or not to trigger Article 50 to MPs and peers, the overwhelming majority of whom had favoured the UK remaining a member of the EU and some of whom were openly contemplating defying the vote. In this way, the ensuing delay could be used to ramp up the pressure on Parliament to buck the will of the voters. Politically motivated litigation is far from unusual of course, and the motives of the litigants or those who were supportive of them are not strictly relevant to how the Supreme Court should have discharged its role. But it is reasonable to reflect frankly on the reasons why litigation was probably undertaken in order to grasp its constitutional significance and, relatedly, the importance attached to it by many in public life.

³⁵ Some might suggest that the salient question was not why the claimants brought the action, but why the Government contested it. See e.g. P Craig, 'Brexit, A Drama: The Interregnum' (2017) 35 YEL 1.

³⁶ A McHarg, 'Navigating Without Maps: Constitutional Silence and the Management of the Brexit Crisis' (2017) ICON (forthcoming).

³⁷ J Llewellyn Smith, 'One Woman's Lonely Battle to Prevent A Rush for the Brexit' *The Times* (15 October 2016).

³⁸ D Roberts, 'Gina Miller to Launch Tactical Voting Initiative Against Hard Brexit' *The Guardian* (19 April 2017).

³⁹ NW Barber, T Hickman, J King, 'Pulling the Article 50 Trigger: Parliament's Indispensable Role' *UK Const. L. Blog* (27 June 2016).

⁴⁰ N W Barber, T Hickman, J King, 'Reflections on Miller' (2016-17) 8 *UK Supreme Court YB* (forthcoming).

⁴¹ Not for all: Jeff King, writing after the Divisional Court's judgment, explicitly states that it would be politically illegitimate for Parliament to block on second reading a bill authorising the triggering of Article 50, that there is a political duty on the Government and Parliament to commence negotiations for exit from the EU in good faith, and relatedly that any bill should not be loaded with conditions that would make Brexit practically impossible. If Parliament wishes to block Brexit, he says, it must do so openly. See J King, 'What Next? Legislative Authority for Triggering Article 50' *U.K. Const. L. Blog* (8 November 2016).

IV. CONSTITUTIONAL LAW AND CONSTITUTIONAL PRACTICE IN THE SUPREME COURT

The Supreme Court upheld the claim and ruled that fresh legislation was required to trigger Article 50. This would have been an unobjectionable ruling if it had been truly required by law. But in fact the judgment is legally unsound, as this section documents. Few notice, but strictly the Court did not take up the claimants' sweeping claims about the frustration of rights. Those claims were obviously problematic, for EU legal rights are not statutory rights. Parliament has never enacted the rights in question, but has instead made provision for rights in international law to have force in domestic law. EU legal rights in domestic law are treaty-based rights, not ordinary statutory rights. They depend for their force on the enabling statute and on their standing in international law. The Government lacks authority to set aside the ECA or to declare that EU legal rights in UK law are to be set aside. But it does not follow from this that the Government may not exercise the prerogative to change the position in international law, which in turn changes domestic law in accordance with the terms of the enabling statute itself.

John Finnis analysed treaty-based rights in a series of papers for Policy Exchange's Judicial Power Project,⁴² which the Government relied on in argument before the Court. Elaborating and clarifying a line of argument that the Government introduced, but mishandled, before the Divisional Court, Finnis explored the parallel with double-tax treaties, a parallel established well before 1972.⁴³ Treaty-based rights rest on two bases: statute and treaty. An asymmetry exists in how treaty-based rights are introduced into domestic law and the manner in which they are terminated. They cannot be introduced into domestic law without both legislation and prerogative, but they can be terminated by prerogative alone, including via the exercise of termination rights within the relevant treaty itself. This asymmetry follows from the scheme of the legislation, which makes domestic law turn on the position at international law. Plainly, the constitutional significance of the treaty-based rights arising under double-tax treaties is relatively muted, at least as compared with EU legal rights under the EU Treaties. But it is this fact that makes the parallel instructive insofar that thinking about double-tax treaties renders the interplay between prerogative and legislation in the context of treaty-based rights clearer. The point is not that treaty-based rights are somehow unimportant, as Sionaidh Douglas-Scott wrongly assumed Finnis to be suggesting,⁴⁴ and so ought to be liable to be destroyed without parliamentary debate. Rather, Parliament has made provision for these rights to have this particular foothold in domestic law, which entails that the Government is able to take action in the international realm that results in changes in domestic law, changes which Parliament itself intends and authorizes by virtue of the scheme of the legislation in question. (Contrast cases in which Parliament chooses to incorporate international obligations directly into statute, such that changes in international law do not in turn change domestic law.) The Government remains answerable to Parliament for its actions. Parliamentary debate, or the threat of debate, may stop a proposed course of action, but legislation is not required. The Court did not properly consider the double-tax parallel. The majority dismissed it in short order,⁴⁵ noting that the parallel had not been explored in oral argument (but it was made out clearly in written submissions, which included responses to all counter-arguments identified by claimants' counsel). The majority merely asserted that the parallel had been answered in unspecified ways and with unspecified arguments by unnamed third parties. This is not the careful attention to logically make-or-break, decisive detail that one might reasonably expect from eight judges in an important and high profile case.⁴⁶

⁴² J Finnis, 'Terminating Treaty-Based UK Rights', Judicial Power Project (26 October 2016); and J Finnis, 'Terminating Treaty-Based UK Rights', Judicial Power Project (2 November 2016).

⁴³ Finnis focused on s2 of the Taxation (International and Other Provisions) Act 2010, but noted that substantially identical provisions could be found in earlier taxation legislation, including in examples prior to 1972.

⁴⁴ S Douglas-Scott, 'Brexit and the British Constitution: An Update on Sionaidh Douglas-Scott, "Brexit, Article 50 and the Contested British Constitution"' (2016) 79(6) MLR 1019-40' [2017] MLR Forum 004 at 3 (available from <http://www.modernlawreview.co.uk/brexit-british-constitution/>).

⁴⁵ Miller (n 1), [98].

⁴⁶ For a biting critique of the intellectual rigour of the majority's reasoning, see M Elliott, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (2017) 76 CLJ 257.

Still, the majority clearly saw that EU legal rights are not ordinary statutory rights and that they can and do change without parliamentary involvement, for the content of EU legal rights is a question of EU law.⁴⁷ However, the majority went on to say that the constitutional processes by which UK law is made can only be changed by Parliament and that using the prerogative to withdraw from the Treaties would amount to the executive unilaterally removing a source of domestic law. This would ‘effect a fundamental change in the constitutional arrangements of the [UK]’⁴⁸ by ‘cut[ting] off [this] source of law entirely’.⁴⁹ The majority proceeded to assert that fundamental constitutional change (of this kind?) requires legislation. They rejected the argument articulated by Lord Reed in dissent, viz. that withdrawal effected by executive action changes the international legal position, to which the Act then gives effect.⁵⁰ As we see it, the majority’s argument turned on a deeply confused account of how EU law is received in domestic law.

The majority recognised, of course, that EU law’s standing in domestic law turned entirely on the ECA, hence the rule of recognition had not been changed,⁵¹ but, remarkably, added that ‘in... a more realistic sense where EU law applies in the [UK], it is the EU institutions which are the relevant source of that law’.⁵² Likewise, it was said to be ‘unrealistic to deny that, so long as that [ECA] remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law’.⁵³ This emphasis on what the majority regarded as unrealistic led the majority to the extraordinary conclusion that the ECA constitutes EU law as ‘an independent and overriding source of domestic law’.⁵⁴ The majority also asserted that the ECA ‘effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU lawmaking institutions’.⁵⁵ In the same paragraph the Court refers to passages quoted in Lord Reed’s dissent from *Van Gend en Loos*⁵⁶ and *Costa v ENEL*.⁵⁷ According to the majority, those passages ‘demonstrate that rules which would...normally be incompatible with UK constitutional principles, became part of our constitutional arrangements as a result of the ECA and the 1972 Accession Treaty for as long as the ECA remains in force’.⁵⁸

The references to what is realistic or unrealistic indicated that the majority had abandoned principled legal analysis.⁵⁹ The position the Court adopted was incoherent on its own terms and inconsistent with settled law: EU law is not an independent, overriding or direct source of UK law.⁶⁰ The effect of EU law in the UK is radically dependent on the ECA, and hence neither independent nor direct. EU law does not override other sources of law as such, but rather takes effect notwithstanding inconsistency with other legal propositions, per the terms of section 2(1) and (4) of the ECA, to the extent that subsequent Acts take for granted and thus maintain this rule of priority.⁶¹ As Lord Reed notes in his dissent, section 2(1) ‘enables EU law to be given direct effect in our domestic law, but within a framework established by Parliament, in which parliamentary sovereignty remains the fundamental principle’.⁶² As he explains later on in his dissent, ‘[s]ince EU law has no status in UK law independent of statute, it follows that the only relevant source of law has at all times been statute’.⁶³ Parliament cannot transfer its law-making powers to any other institution; it can only give effect to some other institution’s acts. Further, the UK, like many other member states, has never accepted the Court of Justice’s self-understanding. In affirming that the status of EU law is dependent on a continuing statutory basis, section 18 of the European Union Act 2011 makes this clear, as

⁴⁷ Miller (n 1), [62].

⁴⁸ Miller (n 1), [78].

⁴⁹ Miller (n 1), [79].

⁵⁰ Miller (n 1), [217], per Lord Reed.

⁵¹ Miller (n 1), [60].

⁵² Miller (n 1), [61].

⁵³ Miller (n 1), [61].

⁵⁴ Miller (n 1), [65].

⁵⁵ Miller (n 1), [68].

⁵⁶ Case C-26/62 [1963] ECR 1, 12.

⁵⁷ Case C-6/64 [1964] ECR 585, 593.

⁵⁸ Miller (n 1), [68].

⁵⁹ For discussion of the absence of principled legal analysis in the majority’s reasoning, see M Elliott, ‘Judicial Power and the United Kingdom’s Changing Constitution’ (2017) UQLJ (forthcoming).

⁶⁰ R Ekins, ‘Legislative Freedom in the United Kingdom’ (2017) 133 LQR 582.

⁶¹ R Ekins, ‘Constitutional Practice and Principle in the Article 50 Litigation’ (2017) 133 LQR 347, 349.

⁶² Miller (n 1), [183].

⁶³ Miller (n 1), [227].

indeed do dicta from the Supreme Court's decisions in *Pham*⁶⁴ and *HS2*.⁶⁵ In *Miller*, the majority's 'realism' led it to contrive a deeply mistaken account of how EU law takes effect in domestic law.⁶⁶

The reception of EU law in UK law depends on the ECA and the Treaties, which entails that the continuing effect of EU law in domestic law expires either if the ECA is repealed or if the Treaties cease to apply to the UK. The ECA might have limited the Government's power to withdraw from the Treaties, but if it did not then the Government may set in motion Article 50's provisions for bringing the application of the Treaties to the UK to an end. As Lord Reed made clear, the ECA 'simply creates a scheme under which domestic law reflects the UK's international obligations, whatever they may be'.⁶⁷ Lord Reed noted that the ECA came into force before the Treaties were ratified, such that for a time there were no Treaties to which the ECA applied and it introduced no new legal rights into our law.⁶⁸ In answer to Lord Reed, the majority suggested that:

by the 1972 Act, Parliament endorsed and gave effect to the UK's future membership of the European Union, and this became a fixed domestic starting point. The question is whether that domestic starting point, introduced by Parliament, can be set aside, or could have been intended to be set aside, by a decision of the UK executive without express Parliamentary authorisation.⁶⁹

The majority raises an arguable point about the intention of the ECA.⁷⁰ However, what bears emphasis is that the ECA does not commit the UK to membership of the EU. Indeed, it did not even require entry into the EEC, as it then was.⁷¹ The ECA's long title is '*an Act to make provision in connection with the enlargement of the European communities*', not an Act to make provision for such enlargement, as some have wrongly said.⁷² Nor does the ECA in any other way purport to bring about this enlargement, as the Divisional Court mistakenly suggested.⁷³ More generally, the majority misunderstood the ECA. The structure of the ECA is that if and when defined Treaties come into force or change internationally, domestic law changes too. Changes in domestic law might follow from executive action (whether on or under the Treaties) and need not involve legislation. While section 1(2) requires primary legislation to amend the Act to recognise major new treaties, section 1(3) recognises ancillary treaties that are declared as such by Order in Council and supported by a resolution of each House.⁷⁴ This is a scheme for parliamentary control, but not a scheme that requires primary legislation for the scope of effective EU law (including any or all of the EU Treaties that have come into force) to change.

The crux of the majority judgment in *Miller* was a striking and unsubstantiated assertion that withdrawal from the Treaties would be a constitutional change that cannot be for ministers alone. Such a momentous constitutional change, the majority claimed, could only be affected through legislation. The majority noted that withdrawing from the EU would be as significant a change as that which occurred when the ECA had first incorporated EU law into domestic law.⁷⁵ They further noted

⁶⁴ *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.

⁶⁵ *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] UKSC 3, [2014] 2 All ER 109.

⁶⁶ See AL Young's contribution to this volume for further discussion of what might be meant by a 'realistic' interpretation.

⁶⁷ *Miller* (n 1), [217].

⁶⁸ *Miller* (n 1), [192].

⁶⁹ *Miller* (n 1), [82] and [77].

⁷⁰ See generally M. Barczentewicz, 'Miller, Statutory Interpretation, and the True Place of EU Law in UK Law' (2017) PL (Brexit Special Issue) 10, 14-16.

⁷¹ *Miller* (n 1), [193]-[195].

⁷² The long title is wrongly stated in the blog-post which was the intellectual inspiration for the *Miller* litigation: N W Barber, T Hickman, J King, 'Pulling the Article 50 Trigger: Parliament's Indispensable Role' UK Const L Blog (27 June 2016). It was also wrongly re-stated in J King and N Barber, 'In Defence of Miller', UK Const L Blog (22 November 2016). For discussion of the relevance of the long title, as correctly stated, see J Finnis, 'Brexit and the Balance of Our Constitution', Judicial Power Project (2 December 2016); and M Barczentewicz, 'The Core Issue in Miller: The Relevance of Section 1 of the 1972 Act' (4 January 2017).

⁷³ *R (Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at [62], [66], and [93].

⁷⁴ M Barczentewicz, 'Miller, Statutory Interpretation, and the True Place of EU Law in UK Law' [2017] Public Law (Brexit Special Issue) 10, 16-23.

⁷⁵ However, the ECA had no constitution-changing effect before the accession treaty went into force, a point that is omitted from the majority's judgment, as noted in M Barczentewicz, 'Miller, Statutory Interpretation, and the True Place of EU Law in UK Law' (2017) PL (Brexit Special Issue) 10, 15. Further, even after the treaty came into force the ECA, while no doubt constitutionally significant, made no

that once notification of withdrawal is given to the EU under Article 50 this change will occur irrespective of whether Parliament repeals the ECA. It was in this light that the majority asserted that:

It would be inconsistent with long-standing and fundamental principles for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone.⁷⁶

The majority continued by saying:

We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.⁷⁷

The majority cited no authority for these propositions. The reason for the lack of authority is very simply stated: there is none. No principle of the UK constitution—or of UK constitutional law in particular—requires that major change must be realised by primary legislation.⁷⁸ The history of the UK’s membership of the EU illustrates the point. Entry into the EU treaties was an act of immense significance. But it was neither required nor authorised by legislation and was, in law, an exercise of the prerogative. It is true that Parliament by resolution approved in principle the entry into the Treaties, with the ECA subsequently enacted to make provision in connection with the Treaties in due course. This is not the same, however, as requiring ratification of the Treaties, and likewise is not the same as withdrawal. If Parliament chooses to make major legal consequences turn on the power of ministers to change UK obligations in international law, then ministers may make very significant decisions, and so it is with the ECA.

In asserting (without evidence) that significant constitutional change in the UK can only be effected via legislation, the majority ran together what may or may not be good constitutional practice with what is valid constitutional law. Several points later on in the judgment confirm that the majority confused the two (or: possibly abandoned the latter to secure its perception of the former). The first is the assertion that it is implausible to say that ministers could have withdrawn the UK from the Treaties on or after the ECA came into force, with or without the referendum or even in defiance of a popular vote to remain.⁷⁹ Strikingly, the majority noted that ‘it would clearly be appropriate’ for withdrawal from the Treaties to be a power that did not exist unless and until Parliament explicitly accorded it to ministers.⁸⁰ The majority also remarked later, albeit without relying on the point, that because withdrawal will necessitate much legislation, there is ‘a good pragmatic argument’ that ministers should not impose this burden on Parliament without prior authorization by statute, all of which confirmed for the majority the scale of the change, and thus ‘the constitutional propriety of prior Parliamentary sanction’.⁸¹ The majority addressed the counter-argument that ministers would of course be accountable for their exercise of the prerogative, dismissing it as ‘a potentially controversial argument constitutionally’.⁸² It is true that ministerial accountability is not a reason to be cavalier about the scope and legal limits of executive power, but what the majority fails to recognize is the relevance (or: constitutional importance) of responsible government. The Government’s accountability to Parliament, and especially to the House of Commons, is a vital restraint on its powers, including for example its undeniable legal power to commit the UK to war with any or all other EU member states. This then is the answer to the majority’s scepticism about withdrawal from

change to the fundamentals of the UK constitution: J.Finnis, “Postscript” in R. Ekins (ed.), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2017), 157, 160-162.

⁷⁶ Miller (n 1), [81].

⁷⁷ Miller (n 1), [82].

⁷⁸ As Mark Elliott notes, the majority’s proposition ‘lacks support in authority, imports into the law a novel and highly imprecise criterion by which prerogative power is delimited and rests upon normative constitutional foundations that are unarticulated and arguably absent’: M Elliott, ‘The Supreme Court’s Judgment in Miller: In Search of Constitutional Principle’ (2017) 76 CLJ 257, 258.

⁷⁹ Miller (n 1), [91]. See also S Douglas-Scott, ‘Brexit, Article 50 and the Contested British Constitution’ (2016) 79 MLR 1019, 1029.

⁸⁰ Miller (n 1), [92].

⁸¹ Miller (n 1), [100].

⁸² Miller (n 1), [92].

the EU apart from or in defiance of the referendum result. It would not be constitutionally improper for the Government to trigger Article 50 if supported by the House of Commons, if say it had contested an election on a manifesto commitment to withdrawal. It would be politically unthinkable for the Government to propose to initiate the Article 50 process in defiance of a popular vote to remain, and the House of Commons would ensure as much. It might be contended that this would be unlawful in any event in view of voters' legitimate expectation that ministers would implement the outcome of the referendum. But it would be much better to say that the referendum's outcome should be honoured, and if the Government proposed otherwise it would have to explain itself to the Houses of Parliament and the electorate. It is the principle of responsible government that renders intelligible the scheme that Parliament enacted in 1972, and took for granted and extended in subsequent legislation.⁸³ Recognizing the relevance and force of this principle avoids the rash assumption that legal disability is required to prevent the misuse of executive power.

On our reading, the majority's conclusion—that the prerogative does not extend to triggering Article 50 and withdrawal from the Treaties—was driven by presuppositions about what is and is not constitutionally proper. The presuppositions are not well made, and are contestable at best. More to the point they do not support the Supreme Court's conclusions about the law. It is almost too obvious a point to state, but clearly bears emphasis: the Court does not have authority to enforce constitutional principle writ large. Its authority is confined to law, a point on which the majority quite properly relied in dismissing the challenges arising from the devolutionary settlements.⁸⁴ The only plausible legal ground on which Miller could rest is that the ECA impliedly limited the exercise of the prerogative to withdraw from the Treaties. This is a question ultimately about Parliament's intention in 1972, to be answered by attending to the context of the ECA's enactment. The assertion that Parliament simply must have intended to oust the prerogative is ungrounded and does not cohere with the interplay between executive and legislative action in taking the UK into the EEC. It implausibly attributes the EU's legal self-understanding to the 1972 Parliament. The majority also turned the idea of legality on its head, asserting first that one cannot attribute to Parliament 'the notion that it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights'⁸⁵ and later that '[t]he fact that a statute says nothing about a particular topic can rarely, if ever, justify inferring a fundamental change in the law'.⁸⁶ Yet, it was the majority that took the silence of the ECA to have effected a fundamental change: namely, abrogation of the Government prerogative of making and unmaking treaties. Parliament did not clothe ministers with anomalous authority in enacting the ECA. Rather, Parliament avoided anything suggesting intent to abrogate the prerogative, the continuing exercise of which it took for granted, as subsequent Acts confirm, with ministers always remaining accountable to Parliament when exercising the prerogative.

V. WHO GUARDS THE CONSTITUTION?

Miller is remarkable, but not in a good way. Eight of eleven Supreme Court justices commit themselves to a judgment that perceives, at least in part, the central flaw in the claimants' case, but nonetheless gives judgment in her favour by adopting an incoherent, incompletely reasoned and unprincipled account of EU law's standing in UK law. Their judgment conflates constitutional propriety (itself misunderstood) with constitutional law, and in so doing departs from the rule of law, and, finally and in consequence, misconstrues the ECA. The judgment is constitutionally confused, unnecessary, and dangerous. It risked exposing the Justices to political criticism and could have been disastrous for their reputation and the rule of law.

⁸³ On this point, see M Barczentewicz, 'Miller, Statutory Interpretation, and the True Place of EU Law in UK Law' (2017) PL (Brexit Special Issue) 10, 17.

⁸⁴ For a different view, see C McCrudden and D Halberstam, 'Miller and the Northern Ireland: A Critical Constitutional Response' (2017) 8 UK Supreme Court YB (forthcoming).

⁸⁵ Miller (n 1), [87].

⁸⁶ Miller, (n 1), [108]. See also [86].

But why did the Court decide in this way? The judgment betrays an ambition to superintend constitutional practice rather than to uphold constitutional law. The majority reasons that in our constitution it should be Parliament rather than the Government that decides that the UK should withdraw from the Treaties. It then transmutes this (contestable) proposition about constitutional practice into a rule of constitutional law, which it attributes to the Parliament that enacted the ECA. What is more, the Court's claim is not just that the Government must seek express authorization from the Houses of Parliament, or at least the Commons, before triggering Article 50, say by a resolution, but that the decision to trigger must be authorized by a statute. (A resolution had of course been adopted by the House of Commons on 7 December 2016.) Within the logic of its own reasoning, the majority has no choice but to insist on legislation, rather than resolution, because to be satisfied by the latter would have made it clear that parliamentary support is not a legal requirement. More importantly, parliamentary control is not for judges to secure. The Supreme Court is not the guardian of the constitution, somehow charged with spurring the political authorities to do their constitutional duty. The Court betrays its own responsibility when it acts in such a way.

Not everyone appreciates this. It is all too common for lawyers to speak unthinkingly of the Justices as 'the guardians of the constitution', as indeed Lady Hale did in an ill-judged speech in Malaysia shortly after the Divisional Court's decision in *Miller*.⁸⁷ True, the majority (including Lady Hale) seemed to distance itself from such grandiose thinking when saying, rightly, that 'judges are neither the parents nor the guardians of political conventions'.⁸⁸ But this welcome discipline did not inform the balance of the Court's judgment, where its view of constitutional practice was refashioned into an enforceable point of constitutional law.⁸⁹

Or to put this point differently: the litigation succeeded because the Supreme Court took up the claimants' implicit invitation to serve as the guardian of the constitution by protecting a browbeaten Parliament from an over-mighty executive. To fulfill its guardianship function, the Court—on this thinking—had to disable the executive from initiating the withdrawal process without Parliament's assent to primary legislation. Intervening without any legal basis in the relationship between the Houses of Parliament and the Government was a misuse of the Court's jurisdiction. The decision also provides further evidence that many of our leading judges do not have a good grasp of the nature and dynamics of that relationship. That relationship is animated by the principle of responsible government, framed by constitutional convention, and is the site of complex political and electoral dynamics. It is not true that unless an Act of Parliament is required to trigger Article 50, the Government would be free from parliamentary control. It is also a serious over-simplification to suggest that the Government's duty is to act on direction from the Houses of Parliament. The Government is drawn from and can at any point be unseated by the Commons. But it is constitutionally entitled to frame and execute its policy, which (other) parliamentarians are able to scrutinize, critique, or oppose. It is true that the Government initially refrained from inviting the Houses of Parliament to express their support for Article 50 to be triggered, whether by resolution or by legislation, perhaps because it feared that one or other chamber, or possibly both, might obstruct its policy of honouring the referendum. This may have been unwise or it may have been an intelligent response to the politics of the moment, of which the narrative of constitutional crisis and attacks on the legitimacy of the referendum chronicled above formed major parts. In any case, the Houses of Parliament were not passive bystanders: they had the capacity, which they used, to question the Government's approach, both on process and substance. The rhetoric about the litigation saving Parliament from being sidelined is simply misleading (and misunderstands the executive-legislative relationship), as is the subsequent complaint that Parliament squandered the opportunity which the courts (and the claimants) secured for them. *Miller* is alas not the first (and at this rate will not be far

⁸⁷ Lady Hale, *The Supreme Court: Guardian of the Constitution*, Sultan Azlan Shah Lecture (9 November 2016). See also Lord Mance, 'The Role of Judges in a Representative Democracy', Lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas (24 February 2017) at para 32.

⁸⁸ *Miller* (n 1), [146].

⁸⁹ For a critical take on the Supreme Court's handling of conventions in *Miller*, see Aliene McHarg's contribution to this volume. See also C McCrudden and D Halberstam, 'Miller and the Northern Ireland: A Critical Constitutional Response' (2017) 8 UK Supreme Court YB (forthcoming).

from the last) case in which senior judges fail to understand responsible government and either fail to respect, or attempt to compensate for perceived deficiencies in, political accountability.⁹⁰

In any case, it is beyond artificial to treat this case as if the Government somehow decided to trigger Article 50 in a fit of pique. If, as we suggest, the majority was concerned with optimal constitutional practice—or, to use language adopted by the majority, if constitutional ‘realism’ is the focus—then the referendum matters. The Court sets this aside as irrelevant. If in the rest of its judgment, the Court had hewed closely to settled law, leaving both the prerogative unimpaired and the significance of the referendum to the free flow of political argument between the political authorities and the electorate, this would have been an unobjectionable analysis. However, the majority is inconsistent in its interest in and recourse to constitutional realism: certain aspects of constitutional practice are plucked out as relevant in order to offer a realistic analysis, whilst other things are ignored. This can be seen in the odd conception of the status of EU law within the UK, even if the majority has somehow persuaded itself that its (novel and incoherent) account is legally sound. It is especially evident in the majority’s assertions about the importance of withdrawal and the importance of Parliament rather than Government making a decision of this magnitude. What about the electorate itself, which Parliament had invited to decide the question by way of the referendum established by the European Union Referendum Act 2015? The point is not that that Act authorizes triggering Article 50. It does not. But the referendum was the means that Parliament chose to settle the question of whether or not to withdraw.⁹¹ In proposing to trigger Article 50 the executive acted in reliance on the electorate’s decision, which rather upends the Court’s framing of the question as whether Parliament or Government should decide. Finally, those disappointed claimants who relied on the devolution settlements might reasonably ask why constitutional realism is good for some claimants but not for them.⁹² In short, the Court’s asymmetric constitutional realism is a major problem: the preferences and dispositions of some are privileged by the judgment.⁹³

Timothy Endicott, as stern a critic of the judgment as any, speculates about whether it might nevertheless be possible to rationalize Miller as a justified constitutional innovation, like others before it.⁹⁴ There have been times in the UK’s long constitutional tradition after all when the courts have helped to secure constitutional principle by changing the law of the constitution. This was not such a time (and indeed the claimants and judges disavow any such ambition, insisting that it was simply application of settled law). Courts ought not to be innovating in this way. Recall what innovation in a high-stake and politically salient case involves: exposure to fierce (and likely justified) political criticism for departing from settled law. In any case, as Endicott points out, the judgment serves no grand principle. It is at best an exercise in formality, in which courts demand sanctification of a major decision. Requiring an Act of Parliament before Article 50 is triggered does not correct a shortcoming in our constitutional arrangements and stands in poor comparison to the great cases of earlier times.

Still, the echo of history is at work in the judgment. Writing shortly after the Divisional Court’s decision, one of us observed that ‘[t]he temptation for the Justices will be to abandon the law under the guise of apparent continuity with constitutional history. This whole litigation has been an exercise in tempting the courts. There are reasons to hope that in the end a majority will resist the temptation’.⁹⁵ The claimants—and their many supporters in the press, bar and academy—played up

⁹⁰ For discussion of other recent examples, see J N E Varuhas, ‘Judicial Capture of Political Accountability’, Judicial Power Project (6 June 2016).

⁹¹ Miller (n 1), [214]. As Lord Reed put it, ‘in enacting the 2015 Act, Parliament considered withdrawal from the EU, and made the holding of a referendum part of the process of taking the decision under article 50(1). It laid down no further role for itself in that process’.

⁹² Miller involved an appeal not only from the Divisional Court of the High Court of England and Wales, but also from a series of cases in Northern Ireland. McCrudden and Halberstam offer a scorching critique of how the Supreme Court handled the legal issues arising from the latter cases. Part of their critique is related to the Court’s failure to appreciate (what they regard as) the reality of the constitutional nature of the devolution arrangements, especially (although not exclusively) relating to Northern Ireland: C McCrudden and D Halberstam, ‘Miller and the Northern Ireland: A Critical Constitutional Response’ (2017) 8 UK Supreme Court YB (forthcoming).

⁹³ For a somewhat similar discussion framed in terms of the majority’s inconsistent reliance on ‘form and ‘substance’, see P Daly, ‘Miller: Legal and Political Fault Lines’ [2017] PL (Brexit Special Issue) 73, 74 (‘...on the juridical effect of triggering art 50, substance trumped form, but when it came to the impact of triggering art 50 on the devolution arrangements, form trumped substance; the “constitutional” nature of the [ECA] weighed heavily in the balance, but other constitutional innovations, such as referendums and devolution, exerted next to no weight at all’).

⁹⁴ T Endicott, ‘Gina Miller’s Case and the Principles of Our Constitution’ (2017) 8 UK Supreme Court YB (forthcoming).

⁹⁵ R Ekins, ‘A guide to the Supreme Court justices’, Spectator, 3 December 2016.

the opportunity for the courts at a time of supposed constitutional crisis to stand with their illustrious forbears, once again defying executive abuses to vindicate the privileges of Parliament, not to mention the doctrine of parliamentary sovereignty. The ‘stubborn stain theory’ of executive power, as Endicott terms it,⁹⁶ is much in evidence, where the executive is taken to be the wicked stepmother of the constitution, with any and all restrictions imposed on it being to the good.⁹⁷ However, it flatters the Justices to present them as a bench of latter-day Edward Cokes resisting King James. References in public debate to the ‘ancient’ royal prerogative, complete with clanking chains, were a parody of the true state of affairs. The Government was not arbitrary, imperious or unaccountable, and the prerogative power to conduct foreign policy is neither mysterious nor disreputable. Indeed, in this context, the Government was acting in pursuit of the constitutional obligation entailed by the referendum, and stands in favourable contrast to the MPs, peers and others who contemplated defying its outcome. As we explained earlier, the Miller litigation was designed to disrupt, if only through delay, the Government’s intention to honour the undertaking (which was Parliament’s as much as the Government’s) to voters to give effect to their decision that the UK should leave the EU.

The Supreme Court’s eventual judgment was not unexpected and of course explains the reasons on which it is based. Our commentary above suggests how that reasoning should be understood. However, more can be said about how the Court ended up deciding as it did and this reflection is useful in evaluating the judgment and in determining what its legacy for our constitution may be. We have already noted that the litigation arose in the febrile atmosphere after the referendum, in which an enraged minority (disproportionately represented in media, law, and the academy) flailed about in desperate search of a way to spike the referendum’s guns and of encouraging a narrative of constitutional crisis. Unsurprisingly, the litigation served as a lightning-rod (and a reservoir of hope) for efforts to stop Brexit in its tracks. Its success seemed to offer the only salient, if far-fetched, means so to do. Some of the Justices might have shared these hopes, but we very much doubt they ruled against the Government in order to spike Brexit (not least since it was clear that this was a forlorn hope when—coincident with the third day of the oral hearing before the Supreme Court—MPs adopted a resolution backing withdrawal by 448 to 75). But some of them might have viewed a defeat for the Government as a salutary blow against the Brexiteers, exposing their alleged hypocrisy in abandoning parliamentary sovereignty when convenient. They may also have shared the perception that the UK constitution was in (or on the precipice of) a constitutional crisis. Here, the vehement media criticism of the Divisional Court’s judgment, together with the frenzied overreaction of the legal community to the Lord Chancellor’s supposed failure to respond adequately to it,⁹⁸ was likely relevant in stiffening the resolve of the Justices to defend their colleagues and defy the rabble-rousers. Similarly, the legal reaction to the substance of the Divisional Court’s judgment is important as well, for many lawyers and commentators began to speak of the judgment as irrefutable and to characterise the Government’s appeal as hopeless. If the Divisional Court had ruled against the claimants it would have been more difficult for the Supreme Court to go astray. Finally, the resolution of the Commons that coincided with the hearing suggested that defeat in the Supreme Court would be unlikely to frustrate the triggering of Article 50 since ministers would be able to secure fresh legislation if need be. This lowered the political salience of the litigation, which may have made the Court less responsible in ruling that legislation was required.⁹⁹

VI. NOTES ON THE NEXT ‘CRISIS’

⁹⁶ T Endicott, ‘The Stubborn Stain Theory of Executive Power: From Magna Carta to Miller’, *Judicial Power Project* (7 September 2016).

⁹⁷ Emblematic of the hold of ‘the stubborn stain’ theory is Douglas-Scott’s bemused query about how the judgment in Miller can be thought to be a judicial power-grab if it does not undermine legislation or take power from the legislature. The answer is that the court has blocked the Government from exercising its lawful powers, and thus delivering on its undertaking to the electorate. See S Douglas-Scott, ‘Brexit and the British Constitution: An Update on Sionaidh Douglas-Scott, “Brexit, Article 50 and the Contested British Constitution” (2016) 79(6) *MLR* 1019-40’ [2017] *MLR Forum* 004 at 3 (available from <http://www.modernlawreview.co.uk/brexit-british-constitution/>).

⁹⁸ See generally G Gee, ‘A Tale of Two Constitutional Duties: Liz Truss, Lady Hale and Miller’ *Judicial Power Project* (28th November 2016).

⁹⁹ On our reading, the Court was reckless when disposing of the central question in Miller when deciding whether legislation was required to authorize the initiation of the Article 50 process, but much more responsible in its treatment of the potentially explosive devolution claims.

The Supreme Court was wrong to rule that the Government had no legal power to trigger Article 50. However, the Government accepted the Court's ruling with no public fuss, and moved swiftly to introduce a Bill in Parliament. The Bill was narrowly cast, comprising only two sections that empowered the Prime Minister to give notice to the EU under Article 50 and made clear that this power was not subject to any other enactment.¹⁰⁰ The resulting Act in one sense reversed the outcome of Miller, restoring the antecedent legal position in which the Government had the authority to trigger Article 50. Of course one can equally say that the Act could not and did not reverse Miller, for the whole point of that judgment (in law) was to hold that an Act was required, and the judgment did not specify the form legislation would have to take to authorize withdrawal. The narrowness of the European Union (Notification of Withdrawal) Act 2017 disappointed many, not least those who hoped that, duly empowered, Parliament would refuse to support withdrawal or at least impose onerous preconditions and/or make provision for a second referendum. Yet, despite some lawyers hinting otherwise,¹⁰¹ it would have been outrageous, and unlawful, for the Supreme Court to dictate to Parliament the terms on which it had to proceed to manifest an intention to authorize the Government to begin withdrawal.

Still, the Supreme Court's judgment in Miller had more constitutional significance than its swift legislative disposition might imply. It changed the nature of the exchange between the Government, Lords and Commons, forcing it to take the form of deliberation about a bill, rather than a more open-ended debate culminating in a resolution. Many amendments were moved by MPs and peers, including some wrecking amendments. The Commons decisively supported a narrowly cast bill and did so in the face of initial resistance from the House of Lords. Indeed, the main implication of Miller, as was clear throughout the litigation, was the empowerment of the Lords, making its assent necessary for Article 50 to be triggered and giving peers the power to delay withdrawal by up to a year, if the Parliament Acts 1911 and 1949 had to be invoked. The Commons kept faith with the resolution of 7th December and with the outcome of the referendum and were unwilling to accept amendments proposed by the Lords—and in the end the Lords too assented. Seen in light of these developments, the outcome of the Miller litigation was in a sense happy. The Court's judgment introduced merely the possibility, not the reality, of delay or frustration of withdrawal from the EU. The judgment might easily have been received in a very different temper, with the electorate asking why the Court was lending its authority to a scheme to keep the UK within the EU. (It is likely that the fact that three judges dissented helped minimise damage to the Court's reputation.) The Court acted wrongly but otherwise the constitution worked: the Government responded swiftly, the Commons was politically responsible, and the Lords acknowledged the primacy of the Commons. If the Lords and the Commons had acted otherwise, the judgment would have been momentous and might very well have invited withering (and justified) political criticism, possibly culminating in a genuine crisis. Something similar can be said for the general election that took place a few months later, in which the overwhelming majority of the newly returned House of Commons was elected on manifesto commitments to honour the referendum, to withdraw from the EU, and to bring free movement to an end. These political dynamics further confirm, if there was any doubt, the shallowness of all of the loose talk about a constitutional crisis and the subversion of parliamentary sovereignty. Rather, a referendum for which Parliament made provision in 2015 is being taken seriously by the UK's representative institutions and electors.

However, there is a sting in the tail. The dynamics unleashed in the post-referendum elite cry of rage, and from which the Miller litigation emerged, have not altogether receded. Lawyers continue to threaten all manner of outlandish lawsuits when the twists and turns of parliamentary and electoral politics seem to them inauspicious. Strictly speaking, the various lawsuits could be viewed as lawyers advising clients on questions put to them, and in so doing merely opining on the merits of possible litigation. This analysis stretches credulity. Much (and perhaps most) of the legal posturing is

¹⁰⁰ European Union (Notification of Withdrawal) Act 2017, section 1(2).

¹⁰¹ In an exceptionally ill-advised comment shortly after the Divisional Court's judgment and when it was known that the Government intended to appeal to the Supreme Court, Lady Hale had suggested in the context of the Miller litigation that '[a]nother question is whether it would be enough for a simple Act of Parliament to authorise the government to give notice, or whether it would have to be a comprehensive replacement for the 1972 Act'. This question had not featured in the Divisional Court's judgment or the claimants' submissions. Lady Hale, *The Supreme Court: Guardian of the Constitution*, Sultan Azlan Shah Lecture (9 November 2016) at 12.

politically motivated, and many (and perhaps most) of the prominent lawyers involved are willing participants in this dynamic, initiating (threats of) litigation, coordinating various legal proceedings, and acting pro bono or for reduced fees in exchange for political access and impact. The strategic threat of litigation is constitutionally problematic. Consider the so-called “Three Knights” Opinion, published by eminent lawyers in February 2017 while the Bill providing for notification under Article 50 was under consideration.¹⁰² The Opinion asserts that the Bill then before Parliament was incapable of authorising the UK’s withdrawal from the EU as a matter of UK law. The argument was two-fold: first, the Bill did not specify which rights were to be abrogated and therefore, under the principle of legality, it should not be interpreted to bring to an end the effect of any EU legal rights in UK law; second, and more fundamentally, no statute could authorise withdrawal at this stage because the shape of any UK-EU deal was unknown and Parliament must legislate expressly to authorise the terms of any withdrawal. Neither limb to the opinion is at all persuasive. The 2017 Act, as it now is, clearly authorised Article 50 to be invoked, as it subsequently was in March 2017, and in due course the EU Treaties will cease to have effect in the UK. The Opinion seriously misconstrues the principle of legality (as in quite a different way did the majority in *Miller*), posits an absurd reading of Parliament’s intention in enacting the 2017 Bill, and is flatly at odds with the premise of *Miller* that triggering Article 50 will in due course lead to the termination of EU legal rights. So the Opinion is hopeless, despite the eminence of its authors, and should be rejected.¹⁰³ Yet, it is nonetheless being deployed in parliamentary politics, with some MPs and others warning the Government, and other MPs, of the risks of a replay of *Miller* if the right type of legislation is not forthcoming.

In a recent article, Helen Mountfield QC (one of the authors of the Opinion, who was also one of the barristers in *Miller*) reflected on other legal consequences of the judgment.¹⁰⁴ She speculates about the likelihood of legal challenges to the exercise of the prerogative to withdraw from the ECHR or to commit the UK to international treaties that call for domestic legal change.¹⁰⁵ These would be far-reaching changes to our constitutional arrangements. They are not spelled out in *Miller*, which might very well be limited, on its own terms, to the specific context of EU law’s reception. The judicially-divined principle on which the judgment is grounded—the constitutional importance of withdrawal from the EU—is at best uncertain. Mountfield is doubtless right that *Miller* encourages future litigation. Whether such litigation would succeed may depend on the extent to which the bar, bench and academy remain in a state of alarm and whether the shortcomings of the majority’s reasoning in *Miller* are frankly acknowledged, not least by the legal community itself. However, the process of withdrawal from the EU is far from straightforward and the legal and political culture that gave rise to the *Miller* litigation and the Supreme Court judgment may not be spent. In which case, there is a real risk that the post-referendum dynamics may run and run, with lawyers leveraging judicial process for political advantage and the courts failing to heed Lord Reed’s sage admonition that ‘the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary’.¹⁰⁶

VII. CONCLUSION

There was nothing close to a constitutional crisis in the sequence of decisions by which Parliament provided for a referendum on membership of the EU, the electorate voted for withdrawal, and the Government undertook to trigger Article 50 and begin the process of leaving the EU. The constitution is open to radical politics and often relies on political discipline, rather than legal disability, to restrain abuse of power. For some, one of the primary virtues of EU membership has been precisely to overlay

¹⁰² D Edward, F Jacobs, J Lever, H Mountfield and G Facenna, ‘Opinion in the Matter of Article 50 of the Treaty on European Union’ (10 February 2017).

¹⁰³ For critiques of the Opinion, see M Elliott, ‘“The Three Knight Opinion”: A Response’, *Public Law for Everyone* (17 February 2017); and M Barczentewicz, ‘The Principle of Legality and EU-Withdrawal Statute’ *UK Const L Blog* (21 February 2017).

¹⁰⁴ H Mountfield, ‘Beyond Brexit: What does *Miller* Mean for the UK’s Power to Make and Break International Obligations?’ (2017) 22 *Judicial Review* 143.

¹⁰⁵ See also G Phillipson and A L Young, ‘Would Use of the Prerogative to Denounce the ECHR “Frustrate” the Human Rights Act? Lessons from *Miller*’ [2017] *PL* (Brexit Special Issue) 150.

¹⁰⁶ *Miller* (n 1), 240.

this scheme with hard-edged legal control. Many lawyers and others were dismayed by the way in which the traditional constitutional scheme (with its latent potential for radical politics) was being used to unpick the UK's membership of the EU. The Miller litigation is an episode in the politics of Brexit, part of an elite-led rearguard action waged against implementation of the referendum. The majority's judgment cannot be properly understood apart from the political character and context of the litigation and the related crisis of confidence in our constitutional order on the part of many in public life.¹⁰⁷ The judgment did not itself cause a crisis but it might easily have provoked serious and sustained tensions if the political context had been different. Indeed, the mostly calm and patient reaction of ministers and other elected politicians to the legal proceedings in Miller is commendable, and a sharp contrast with the post-referendum panic of many others in politics, the legal profession and the academy. Judges are on safe ground when they hew close to the law; when they depart from law, or extend it in novel ways, they expose themselves to political criticism. The Supreme Court's judgment was very weak and should be remembered as such. Misunderstanding of and lack of respect for the political constitution is at the heart of Miller. If judges and others fail to recognize these shortcomings we may be doomed to witness further attempts to misuse the law to gain advantage in the political process.

¹⁰⁷ For a markedly different account of the political character of the Miller litigation that defends the majority's judgment in what is depicted as a 'landmark' case, see P Craig, 'Epilogue: Miller, the Legislature and the Executive' in S Juss and M Sunkin (eds), *Landmark Cases in Public Law* (Hart: Oxford, 2017) 305.