

**BREXIT AND THE TROUBLE WITH AN UNCODIFIED
CONSTITUTION: *R (MILLER) v. SECRETARY OF STATE FOR
EXITING THE EUROPEAN UNION***

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ABSTRACT	297
INTRODUCTION.....	298
I. AN UNCODIFIED CONSTITUTION.....	300
II. CONSTITUTIONAL ARRANGEMENTS IN THE UNITED KINGDOM	304
III. THE UNITED KINGDOM IN EUROPE	307
IV. THE BREXIT VOTE.....	309
V. ARTICLE 50 OF THE TREATY ON EUROPEAN UNION	310
VI. THE PROBLEM	312
VII. THE DIVISIONAL COURT CASE	314
VIII. THE SUPREME COURT CASE.....	320
IX. THE AFTERMATH	330
X. THE TROUBLE WITH AN UNCODIFIED CONSTITUTION	333
XI. PROPOSALS.....	339
CONCLUSION	342

ABSTRACT

On June 23, 2016, the United Kingdom voted, unexpectedly, to leave the European Union.¹ That such a decision would have constitutional implications was not surprising, but the vote also caused an unforeseen constitutional crisis: who has the power to begin the process of leaving the European Union?² While the government believed that it could exercise its Crown prerogative to conduct foreign affairs, others demanded that

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† The author would like to thank Professor Mac Sithigh, Dr. Pedersen, Professor Brewer, Catherine Padhi, Christopher Mackie, and the editors of the Vermont Law Review for their helpful comments and assistance as well as Chris O’Meara and Viorica Vita for their encouragement to write the Article. Any errors remain the author’s own.

1. Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Nov. 13, 2017), <http://www.bbc.com/news/uk-politics-32810887>; see also *Brexit: Europe Stunned by UK Leave Vote*, BBC NEWS (June 24, 2016), <http://www.bbc.com/news/uk-politics-eu-referendum-36616018> (chronicling reactions across Europe to the historic referendum).

2. See Robert Brett Taylor, *Constitutional Conventions, Article 50 and Brexit*, U.K. CONST. L. ASS’N (July 15, 2016), <https://ukconstitutionallaw.org/2016/07/15/robert-brett-taylor-constitutional-conventions-article-50-and-brexit/> (explaining that “constitutional commentators” were “embroiled” in discussions about who held the power to trigger the United Kingdom’s departure from the European Union).

Parliament must authorize the decision to leave.³ The United Kingdom's constitution, relying mostly on precedent and custom, seemed to provide no answer.⁴ The decision was left to the courts and there ensued many months of constitutional and political uncertainty as the so-called "Brexit litigation" worked its way through the legal system.⁵

The Brexit litigation has been described as "the most important constitutional case for a generation."⁶ It caused much excitement and engendered much debate amongst both lawyers and the general public in Britain throughout the fall of 2016 and into early 2017.⁷ This Article seeks to explain the constitutional arrangements that led to the need for the litigation. It will provide a detailed explanation of the case and the decision of the court, argue that the uncertainty caused was both unnecessary and avoidable, and make some suggestions about changes that could be made to the United Kingdom's constitution to prevent such a situation from occurring in the future.

INTRODUCTION

On January 23, 2013, the United Kingdom's then Prime Minister, David Cameron, addressed Bloomberg on the subject of the European Union.⁸ He told those listening that, in the United Kingdom, "[p]eople feel that the EU is heading in a direction that they never signed up to. They resent the interference in our national life by what they see as unnecessary rules and regulation. And they wonder what the point of it all is."⁹ He then promised that the country would be given a referendum to ask whether the

3. Compare *id.* (arguing that the power to trigger Article 50 lay with the government) and Catherine Barnard, *Law and Brexit*, 33 OXFORD REV. ECON. POL'Y S4, S4–S5 (2017) (explaining that the government argued that it could trigger Article 50), with Nick Barber, Tom Hickman & Jeff King, *Pulling the Article 50 "Trigger": Parliament's Indispensable Role*, U.K. CONST. L. ASS'N (June 27, 2016), <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/> (arguing that "the Prime Minister is unable to issue a declaration" triggering the United Kingdom's withdrawal from the European Union).

4. See Barnard, *supra* note 3, at S4–S5 (explaining that the United Kingdom found itself in "unchartered territory" as a result of the unwritten constitution).

5. See Keith Ewing, *Brexit and Parliamentary Sovereignty*, 80 MOD. L. REV. 711, 711–12 (2017) (describing the litigation).

6. David Allen Green, *Why the Article 50 Case May be the Most Important Constitutional Case for a Generation*, JACK OF KENT BLOG (Oct. 13, 2016), <http://jackofkent.com/2016/10/why-the-article-50-case-may-be-the-most-important-constitutional-case-of-a-generation/>.

7. See *Brexit and the Law: The Practical Effects on Litigation*, LAWYER MONTHLY (Apr. 18, 2017), <https://www.lawyer-monthly.com/2017/04/brexit-and-the-law-the-practical-effects-on-litigation/> (explaining that Brexit continues to cause political excitement).

8. David Cameron, Prime Minister of U.K., EU Speech at Bloomberg (Jan. 23, 2013), <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>.

9. *Id.*

electorate wanted to stay in the European Union, or leave.¹⁰ As a result, a little over three years later, the United Kingdom found itself at the polls, choosing whether or not to remain in the European Union.¹¹

The decision to leave shocked both the media and the political class and plunged the country into a constitutional crisis that no one had foreseen.¹² Given the nature of the United Kingdom's constitution, it was not clear who had the power to communicate the decision to leave to the European Union.¹³ The government believed that the power rested with the executive, exercising the Crown's ancient prerogative power; others believed that the decision could only be taken by Parliament.¹⁴ The crisis led to a case which has been described as "the most important constitutional case for a generation," during which the nature of the constitution, the division of power between the Crown and Parliament, and the very nature of sources of rights and obligations were argued, echoing debates which have taken place in Britain for centuries.¹⁵ In the end the Supreme Court ruled—but not unanimously—that the power to notify the European Union under Article 50 of the Treaty on European Union lay with Parliament and not with the executive government.¹⁶ Since judgment was given by the Supreme Court, Parliament has passed an Act authorizing the Prime Minister to serve notice indicating the United Kingdom's intention to withdraw from the European Union.¹⁷ That power has been exercised and the United Kingdom now finds itself negotiating its departure from Europe.¹⁸

This Article has three main purposes. The first is to explain the constitutional background in the United Kingdom, the relationship between the United Kingdom and the European Union, and the referendum, which led to Brexit. The second is to provide a detailed explanation of the court case. The litigation provides an excellent case study of constitutionality in

10. *Id.*

11. See Hunt & Wheeler, *supra* note 1 ("A referendum . . . was held on Thursday 23 June, 2016, to decide whether the UK should leave or remain in the European Union.").

12. See Libby Brooks & Peter Walker, *Theresa May Warned of Risk of Constitutional Crisis over Brexit Deal*, *GUARDIAN* (Oct. 23, 2016), <https://www.theguardian.com/politics/2016/oct/24/theresa-may-constitutional-crisis-brexit-deal-institute-for-government> (expecting a constitutional crisis after the vote to leave).

13. See Barnard, *supra* note 3, at S4–S5 (describing the situation as "unchartered territory").

14. *Brexit: Supreme Court Says Parliament Must Give Article 50 Go-Ahead*, *BBC NEWS* (Jan. 24, 2017), <http://www.bbc.com/news/uk-politics-38720320>.

15. Green, *supra* note 6.

16. *BBC NEWS*, *supra* note 14.

17. European Union (Notification of Withdrawal) Act 2017, c. 9, § 1(1) (UK).

18. Letter from Theresa May, Prime Minister, U.K., to Donald Tusk, President, European Council (Mar. 29, 2017).

Britain, demonstrating, particularly for those unfamiliar with the British constitution, both its fundamentals and the approach taken to it by the British legal system. The third purpose is to argue that the political, social, and financial uncertainty caused by the litigation was unacceptable and unnecessary, and to suggest changes, which could be made to prevent such uncertainty occurring in the future.

I. AN UNCODIFIED CONSTITUTION

It may come as something of a surprise to an American lawyer—schooled in the supreme significance of their own constitution—that there are countries in the world which do not have a constitution, or at least not one that is written down. To a British lawyer, trained in a legal system with no constitutional document to which he or she can refer, it is surprising how few there are. Most countries in the world have a formal written constitution; there are only three countries that do not have a codified constitution: Israel, New Zealand, and the United Kingdom.¹⁹ Of these, Israel has a “Basic Law” which some—notably the Israeli Supreme Court’s former president, Aharon Barak—consider to be a constitution.²⁰ Even countries such as Somalia, Afghanistan, and Syria now have written constitutions.²¹

The United States was the first nation state to have a written constitution (except for Oliver Cromwell’s short-lived Agreement of the People 1653),²² followed by France in 1791.²³ The world’s newest constitution is that of the Ivory Coast, which was adopted on November 8, 2016, following a high level of approval in a referendum a week earlier.²⁴

For those countries which have a written constitution it takes the form of a document, which describes or even authorizes the way in which power is allocated in the country, and will usually establish the relationship

19. VERNON BOGDANOR, *THE NEW BRITISH CONSTITUTION* 8 (2009) [hereinafter *NEW BRITISH CONSTITUTION*].

20. Aharon Barak, Justice, Supreme Court of Isr., Speech upon Receiving Doctor of Philosophy Degree from the University of Haifa, *A Constitutional Revolution: Israel’s Basic Laws* (May 18, 1992), in 9 *CONST. F.* 83, 83 (1993).

21. *THE FEDERAL REPUBLIC OF SOMALIA [CONSTITUTION]* Aug. 1, 2012; *CONSTITUTION OF AFGHANISTAN*, Jan. 3, 2004; *CONSTITUTION OF THE SYRIAN ARAB REPUBLIC*, Feb. 27, 2012.

22. *NEW BRITISH CONSTITUTION*, *supra* note 19, at 11.

23. A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 *U. RICH. L. REV.* 9, 12 (2007); *LA CONSTITUTION FRANÇAISE*, Sept. 14, 1791; *U.S. CONST.*

24. *Ivory Coast Voters Back New Constitution*, *AL JAZEERA* (Nov. 1, 2016), <http://www.aljazeera.com/news/2016/11/ivory-coast-voters-constitution-161101205411361.html>; *CONSTITUTION OF THE IVORY COAST*, Nov. 8, 2016.

between citizens and their government, the organization of governmental institutions, and the ways in which those in power can be held accountable.²⁵ Constitutions usually have some form of elevated legal status, making it more difficult to change the constitution than it would be to pass other laws within the state.²⁶ Many countries also have a specific court with the authority to interpret the constitution.²⁷ Like with the United States and France, constitutions are often drafted or changed after a significant change in the political landscape in a country, such as gaining independence or undergoing a civil war or a revolution.²⁸ Constitutions are often aspirational, demonstrating the new regime's hopes for and values of their country; the United States Constitution is an excellent example of this, with its preamble setting out the its lofty purpose: “[I]n Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity”²⁹

It is common for people to say that the United Kingdom has no constitution—Alexis de Tocqueville even declared that “[e]n Angleterre . . . elle n’existe point” (in England . . . it does not exist)—but this is not strictly true.³⁰ While it may not have a document called a constitution, the United Kingdom does have constitutional arrangements that govern how society is organized and governed.³¹ It would not even be true to say that the United Kingdom has no written constitution, as many of the constitutional arrangements are written down, just not in a single document.³² The written documents that form part of the British constitution range from Magna Carta 1215, the Bill of Rights 1688, and the Act of Union with Scotland 1707 to Acts of Parliament passed in recent years, such as the Human Rights Act 1998, which introduced the terms of the European Convention on Human Rights into domestic law, and the

25. A.W. BRADLEY ET AL., *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 3 (16th ed. 2015); MARK ELLIOTT & ROBERT THOMAS, *PUBLIC LAW* 7 (2d ed. 2014).

26. Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE* 319, 325 (Roger D. Congleton & Birgitta Swedenborg eds., MIT Press 2006); see, e.g., GRUNDGESETZ [GG] [Basic Law] art. 79, *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0421 (amending Germany's Basic Law requires two-thirds majority of the Bundesrat).

27. BRADLEY ET AL., *supra* note 25, at 3.

28. *Id.* at 5.

29. U.S. CONST. pmbl.

30. Alexis de Tocqueville, *De la Démocratie en Amérique*, in *OEUVRES COMPLÈTES D'ALEXIS DE TOCQUEVILLE* 166–67 (14th ed. 1864).

31. NEW BRITISH CONSTITUTION, *supra* note 19, at 8–9.

32. *Id.* at 216.

Constitutional Reform Act 2005, which created a new Supreme Court.³³ Written judicial decisions can also form part of the constitution, either because they set out a common law principle relating to the constitution or because they interpret a constitutional statute.³⁴ Given its importance in deciding a major constitutional issue, the case at point in this Article will become, along with many others, one of the written sources of the constitution.

As well as the written sources, there is also a wide range of unwritten sources of the United Kingdom's constitution. These take the form of customs or conventions which have never been written down but which are understood and observed as rules (albeit ones which are enforced politically rather than legally).³⁵ An example of a constitutional convention is the rule that the Queen must give Royal Assent to all bills passed by Parliament before they become Acts of Parliament.³⁶ In theory, the Queen could refuse to give assent to a bill, but the last time a monarch did this was in 1708 when Queen Anne refused to give Royal Assent to the Scottish Militia Bill, a bill which would have armed the Scottish militia.³⁷ Even then, the Queen was supported in her refusal by her government which, on the day the Act was due to receive Royal Assent, had received news that a Franco-Jacobean fleet was sailing towards Britain and, believing that the Scottish militia may be disloyal in the event of an invasion, decided that an armed militia was no longer in the country's interest.³⁸ Another constitutional convention calls on an incumbent Prime Minister to resign if his party can no longer command the confidence of the House of Commons after an election.³⁹ This convention was tested in 2010 when there was no overall winner of the election and the incumbent Prime Minister took a week to step down while

33. BRADLEY ET AL., *supra* note 25, at 12–14.

34. *Id.* at 15.

35. *Id.* at 18, 21.

36. *Id.* at 19.

37. *Id.*; GEOFFREY HOLMES, BRITISH POLITICS IN THE AGE OF ANNE 186 (The Hambledon Press 1987) (1967).

38. BRADLEY ET AL., *supra* note 25, at 19; WILLIAM EDWARD HEARN, THE GOVERNMENT OF ENGLAND: ITS STRUCTURE AND ITS DEVELOPMENT 61 (1867). The British monarch continued to refuse Royal Assent to acts of the colonies. DECLARATION OF INDEPENDENCE (U.S. 1776). One of the complaints listed in the Declaration of Independence 1776 was that the British King, George III, was refusing to give Royal Assent to the laws passed by the colonies, was not allowing laws to be passed without assent, and was ignoring requests for Royal Assent, thereby effectively vetoing laws passed by colonial governors: "He has refused his assent to laws, the most wholesome and necessary for the public good. He . . . forbid[] his governors to pass laws of immediate and pressing importance, unless suspended in . . . operation till his assent should be obtained; . . . when so suspended he has utterly neglected to attend to them." *Id.*

39. CABINET OFFICE, THE CABINET MANUAL 14–15 (1st ed. 2011).

attempting to form a coalition government.⁴⁰ It is not entirely clear what would happen if the Prime Minister refused to step down, if the negotiations over coalition became overly protracted, or if the incumbent Prime Minister resigned before a new government was formed.⁴¹ This is one of the many questions left unanswered by the United Kingdom's constitution, much like the question with which the court was concerned in this case.

The main reason why the United Kingdom has never codified its constitution is that it has never needed to do so.⁴² As discussed above, constitutions are usually created after a major political change, such as independence, war, or a revolution.⁴³ The political history of the United Kingdom has seen no such momentous events, certainly since the Restoration of the Monarchy in 1660, and even this was seen as a reversion to a system that had been in place until Oliver Cromwell took power in 1649.⁴⁴ The British system was stable throughout the nineteenth and twentieth centuries when most of the rest of the world was writing its constitutions and there was therefore no need to change a system that was working well.⁴⁵ Perhaps the nearest that the country got to a political event that could have resulted in the writing of a constitution was the Glorious Revolution in 1688, which saw King James II and VII deposed and William and Mary of Orange invited to take the throne.⁴⁶ No written constitution emerged as a result of the revolution, but Parliament did pass the Bill of Rights in order to limit the power of the monarch and assert the rights of Parliament.⁴⁷

Britain's constitution has been described as "unique in being an 'historic' constitution" because unlike the constitutions of most of the rest of the world, it was neither designed nor created, but came about spontaneously and has been passed down and developed over time.⁴⁸ Dickens was being satirical when his character, Mr. Podsnap, told his

40. *Gordon Brown Resigns as UK Prime Minister*, BBC NEWS (May 11, 2010), http://news.bbc.co.uk/2/hi/uk_news/politics/election_2010/8675913.stm.

41. BRADLEY ET AL., *supra* note 25, at 242–43; CABINET OFFICE, *supra* note 39, at 14–15.

42. NEW BRITISH CONSTITUTION, *supra* note 19, at 11–12.

43. *Id.* at 11.

44. ELLIOTT & THOMAS, *supra* note 25, at 74.

45. *See* NEW BRITISH CONSTITUTION, *supra* note 19, at 11–12 (explaining that "[t]here has been no fundamental change in the nature of the English state since the time of Oliver Cromwell").

46. *See generally* EDWARD VALLANCE, *THE GLORIOUS REVOLUTION* 2, 162, 167–68 (1st ed. 2008) (chronicling the history of the overthrow of James II and the ascension of William and Mary).

47. Bill of Rights, (1688), 1 W. & M. 2 (Eng.).

48. A.V. DICEY, *GENERAL CHARACTERISTICS OF ENGLISH CONSTITUTIONALISM: SIX UNPUBLISHED LECTURES* 59–60 (Peter Raina ed., 2009); NEW BRITISH CONSTITUTION, *supra* note 19, at 12.

foreign guest about “Our Constitution, Sir. We Englishmen are Very Proud of our Constitution, Sir. It Was Bestowed Upon Us By Providence. No Other Country is so Favored as This Country.”⁴⁹ But there is an element of truth in the idea that the British Constitution is seen as a source of national pride; King George III, after all, characterized it as “the most perfect of human formations.”⁵⁰ Even today, many British people would probably agree with their early twentieth century compatriots that the British governmental system with its uncodified constitution “is incomparably the best in the world,” and would feel no desire to break the country’s links with its history by drafting a new constitution.⁵¹ The constitution’s “historical” nature and lack of design⁵² also mean that it is intricate, complicated, and often idiosyncratic, all of which have acted as deterrents for anyone who might have considered attempting to write it down. Any attempt accurately to capture in writing the complex collection of conventions and understandings, which underpin the British constitution, would almost certainly be futile. With no fundamental changes in governmental power,⁵³ a system of such complexity as to defy being rendered onto paper,⁵⁴ and perhaps a slight sense of British superiority, the creation of a codified constitution has never become necessary.

II. CONSTITUTIONAL ARRANGEMENTS IN THE UNITED KINGDOM

There are some fundamental principles of the United Kingdom’s constitution that should be understood before considering the constitutional issues in the Brexit litigation. The key constitutional theory is that Parliament is sovereign. The celebrated British jurist, A. V. Dicey, wrote in 1885 that:

49. CHARLES DICKENS, *OUR MUTUAL FRIEND* 137 (Adrian Poole ed., Penguin Books 1997) (1865).

50. EARL STANHOPE, *LIFE OF THE RIGHT HONOURABLE WILLIAM PITT* app. x (John Murray ed. 1861).

51. A. LAWRENCE LOWELL, *THE GOVERNMENT OF ENGLAND* 507 (1908); *NEW BRITISH CONSTITUTION*, *supra* note 19, at 3.

52. *See* COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT AND MATERIALS* 6 (7th ed. 2011) (maintaining that the constitution has a historical nature, but also a lack of consensus).

53. *NEW BRITISH CONSTITUTION*, *supra* note 19, at 215 (explaining that there have been no major changes in governmental power); DUNCAN WATTS, *BRITISH GOVERNMENT AND POLITICS: A COMPARATIVE GUIDE* 20 (2d ed. 2012) (indicating continuity and tradition have been significant elements of British political development).

54. TURPIN & TOMKINS, *supra* note 52, at 5 (describing “the British constitution [as] ‘indeterminate, indistinct and unentrenched’”).

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined [as the Queen, the House of Commons, and the House of Lords]⁵⁵ has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recogni[z]ed by the law of England as having a right to override or set aside the legislation of Parliament.⁵⁶

There are no limits on Parliament's law-making powers—it can make any law which it so desires and undo any laws made by previous Parliaments.⁵⁷ Any Act that is passed by Parliament becomes law, and no court or other authority can overturn that law.⁵⁸ Unlike in the United States, the British courts have no power to strike down laws passed by Parliament as being unconstitutional (although, controversially, they will disapply an Act if it is inconsistent with European Union law on the basis that Parliament has voluntarily accepted a limit on its sovereignty in relation to the European Union).⁵⁹ Aligned with the principle of Parliamentary sovereignty is the rule that Parliament cannot bind a future Parliament.⁶⁰ This is because the future Parliament will also be sovereign and will also have the power to make or unmake any law.⁶¹ It means that no Acts of Parliament are so entrenched that they cannot be repealed, either explicitly or by implication in a future Act.⁶² Parliaments sometimes attempt to bind their successors, but their attempts have no legal power.⁶³ A recent example

55. The House of Commons is the elected lower legislative chamber and the House of Lords is the (largely) appointed upper legislative chamber. *Parliament and the Government*, PARLIAMENT.UK, <https://www.parliament.uk/about/how/role/relations-with-other-institutions/parliament-government/> (last visited Dec. 7, 2017).

56. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 37–38 (8th ed. 1915).

57. David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 *VAND. J. TRANSNAT'L L.* 863, 917 (2003).

58. *Id.* at 918.

59. *R v. Sec'y of State for Transp., ex parte Factortame Ltd. (No 2)* [1991] 1 AC 603 (HL) 635 (appeal taken from Eng. and Wales) (UK); BRADLEY ET AL., *supra* note 25, at 134; H.W.R. Wade, *Sovereignty—Revolution or Evolution?*, 112 *L.Q. REV.* 568, 568, 571, 575 (1996) (arguing that the House of Lords created a constitutional revolution by changing the rule of recognition by allowing Community law to prevail over statute).

60. DICEY, *supra* note 56, at 65.

61. *Id.* at 66.

62. *Id.*

63. *See, e.g.*, Scotland Act 2016, c. 11, § 1 (UK) (stating the Scottish Parliament and Scottish Government are a permanent part of the UK's constitutional arrangements); Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 *NW. U. L. REV.* 543, 551 (2014) (maintaining that Parliaments cannot bind successor Parliaments). This overlooks the fact that any future Parliament could repeal the Scotland Act 1998 and thereby end devolution to Scotland.

can be found in section one of the Scotland Act 2016, which states: “The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom’s constitutional arrangements.”⁶⁴ This overlooks the fact that legally—if not necessarily politically—any future Parliament could repeal the Scotland Act 1998, which created the Scottish Parliament and Government, and thereby end devolution to Scotland.

As a result of these theories, the traditional understanding has been that there is no hierarchy of Acts of Parliament: the Human Rights Act 1998 has the same status as the Dangerous Dogs Act 1991.⁶⁵ However, this has been challenged in recent years, beginning with some comments made, obiter dicta, by Lord Justice Laws in a case regarding whether fruit and vegetables could be sold in pounds and ounces, or had to be sold in grams and kilograms as required by European Community law.⁶⁶ Lord Justice Laws suggested that the common law had created a class of constitutional statutes, which could be repealed by a future Parliament, but only if done so explicitly.⁶⁷ A later Act of Parliament which was inconsistent with a constitutional statute would not result in the constitutional statute being impliedly repealed.⁶⁸ This novel conclusion has, remarkably, become accepted, and in 2014, the Supreme Court provided a list, albeit not definitive, of “constitutional instruments.”⁶⁹ There are a number of Acts that will obviously be designated as constitutional statutes, such as the Acts of Union 1707 and the Human Rights Act 1998,⁷⁰ but the limits of which statutes have constitutional status have yet to be tested. The modern rule is changing the traditional view of Parliamentary sovereignty, and while Parliament will remain free to repeal Acts which the common law has designated as constitutional, the courts may require them to do so explicitly in the future.⁷¹

In understanding the Brexit litigation, it is important to realize that power in the United Kingdom has been devolved to three of the nations that

64. Scotland Act 2016, c. 11, § 1 (UK).

65. *Compare* Human Rights Act 1998 (UK), *with* Dangerous Dogs Act 1991 (UK) (demonstrating in general terms that there is no hierarchy for Acts of Parliament).

66. *Thoburn v. Sunderland City Council* [2003] QB 151 [3], [60]–[64] (Eng. and Wales).

67. *Id.* [63].

68. *Id.* [37].

69. *R v. Sec’y of State for Transp.* [2014] UKSC 3 [207] (appeal taken from Eng. and Wales) (UK).

70. *See, e.g.*, Union with Scotland Act 1706, 6 Ann. c. 11, art. I (Eng. and Scot.); Union with England Act 1707, 5 Ann. c. 7 (Scot.); Human Rights Act 1998 (UK) (uniting the Kingdoms of England and Scotland into the Kingdom of Great Britain, and establishing the superiority of the European Court of Human Rights); *see also* NEW BRITISH CONSTITUTION, *supra* note 19, at 4–5 (noting that the Human Rights Act of 1998 is considered part of the constitution).

71. *Sunderland City Council* [2003] QB 151, [3], [63].

make up the union: Scotland, Wales, and Northern Ireland.⁷² The devolution arrangements are different in each of the nations, but in general, the Scottish Parliament and Northern Irish Assembly are competent to legislate for Scotland and Northern Ireland respectively, in all matters except those which are reserved to Westminster; whereas, while the Welsh Assembly has the power to legislate for Wales, it may only do so on matters which have been devolved to the assembly.⁷³ Executive power is wielded in Scotland by the Scottish Government, in Northern Ireland by the Executive Committee of the Assembly, and in Wales by the Welsh Government. In Northern Ireland, control of the Executive Committee is by way of power sharing with unionists and nationalists sharing the positions of First Minister and Deputy First Minister.⁷⁴

III. THE UNITED KINGDOM IN EUROPE

The United Kingdom joined the European Economic Community (“EEC”), now the European Union, on January 1, 1973.⁷⁵ The country had tried to join the EEC as early as 1961, but the then French President, Charles de Gaulle, opposed the application on two separate occasions.⁷⁶ It was only when de Gaulle left office in 1969 that the United Kingdom was able to negotiate membership; the Treaty of Accession of Denmark, Ireland, and the United Kingdom was signed on January 22, 1972, and came into effect the following year.⁷⁷ In anticipation of the United Kingdom’s accession, Parliament passed the European Communities Act 1972, giving legal effect in British law to all of the relevant laws, rights, and obligations of what is now the European Union.⁷⁸ Section two of the European Communities Act 1972 states:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the [European] Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the

72. BRADLEY ET AL., *supra* note 25, at 36.

73. *Id.*; Scotland Act 1998, c. 46, § 28 (UK); Northern Ireland Act 1998, c. 47, § 4(1), schs. 2–3 (UK); Government of Wales Act 2006, c. 32, § 108(1), (4) (UK).

74. BRADLEY ET AL., *supra* note 25, at 42.

75. R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union [2017] UKSC 5 [1] (appeal taken from Eng., Wales, and N. Ir.) (UK).

76. ANN LYON, CONSTITUTIONAL HISTORY OF THE UK 446 (2d ed. 2016).

77. *Id.* at 446–48; Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community, Jan. 22, 1972, 1979 O.J. (L 73).

78. European Communities Act 1972, c. 68, § 2 (UK).

Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recogni[z]ed and available in law, and be enforced, allowed and followed accordingly⁷⁹

The Act caused something of a constitutional revolution within the United Kingdom.⁸⁰ In acceding to the EEC, Parliament deliberately handed over its power to enact laws to another body, a concept unrecognized in Dicey's constitutional theory.⁸¹ By passing regulations, which are automatically binding on Member States and have direct applicability without any need for further Parliamentary legislation, or Directives, which require each Member State to enact certain laws, the European Union can change domestic British law or require Parliament to do so.⁸²

The Court of Justice of the European Union has repeatedly stated that European Community law takes precedence over national law.⁸³ In *Costa v. Enel*, an Italian case regarding the nationalization of the Italian electricity companies contrary to European community law, the Court of Justice of the European Union held that European law was supreme because "the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."⁸⁴ This principle was accepted in the United Kingdom in the early 1990s, when, in two leading cases in the House of Lords,⁸⁵ their Lordships reasoned (albeit obiter) that the United Kingdom had voluntarily accepted the supremacy of Community rules over national law in the areas of law where the European Union has authority.⁸⁶ Since the decision in *Factortame*, the United Kingdom's courts have, on occasion, held that legislation passed by Parliament is incompatible with European Union law, and set aside that legislation.⁸⁷ For those who subscribe to Dicey's theory of

79. *Id.*

80. LYON, *supra* note 76, at 448.

81. *Id.* at 448–49.

82. *Id.*

83. Paul Craig, *Britain in the European Union*, in *THE CHANGING CONSTITUTION* (8th ed. 2015); ELLIOTT & THOMAS, *supra* note 25, at 330; Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 2, 12; Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 630, 632; Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1126, 1133–34.

84. Case 6/64 *Costa v. Enel*, 1964 E.C.R. 587, 588, 593.

85. The Appellate Committee of the House of Lords was the most senior court in the United Kingdom until the establishment of the Supreme Court in 2009. ELLIOTT & THOMAS, *supra* note 25, at 253–54.

86. *R v. Sec'y of State for Transp., ex parte Factortame Ltd.* [1990] 2 AC 85 (HL) 152 (appeal taken from Eng. and Wales) (UK); *R v. Sec'y of State for Transp., ex parte Factortame Ltd.* (No 2) [1991] 1 AC 603 (HL) 658–59 (appeal taken from Eng. and Wales) (UK).

87. ELLIOTT & THOMAS, *supra* note 25, at 333; *Thoburn v. Sunderland City Council* [2003]

constitutional law, the idea that another body has supremacy over Parliament, and in particular, that a British court could give precedence to that body over Parliament, is problematic.⁸⁸ If the European Union had gained supremacy over Parliament, then it seemed to many that Parliament had given up—albeit voluntarily and reversibly—its sovereignty.

IV. THE BREXIT VOTE

It was, at least in part, a belief that the United Kingdom had handed over control of the country by giving up Parliamentary sovereignty to the European Union and allowing Brussels to dictate everything from the type of light bulbs that people can buy,⁸⁹ to the weights which can be used to sell produce in British marketplaces,⁹⁰ which led to the calls for the electorate to be given a chance to vote on whether to remain in the European Union.⁹¹ The vote was not the first such referendum: in 1975, soon after joining the EEC, the country was asked whether it wished to continue its membership, and the electorate voted overwhelmingly (67.2% to 32.8%) to remain in the EEC.⁹²

David Cameron first promised a referendum in 2013, but was unable to hold one while his Conservative Party was in coalition government with the more Europhilic Liberal Democrats.⁹³ When the Conservative Party won the General Election in 2015,⁹⁴ there was nothing preventing Cameron from calling for a referendum. Parliament passed the European Union

QB 151 [60], [61], [67] (Eng. and Wales); *R v. Sec'y of State for Emp't, ex parte Equal Opportunities Comm'n* [1995] 1 AC (HL) (appeal taken from Eng. and Wales) (UK); *R (on the application of HS2 Action All. Ltd.) v. Sec'y of State for Transp.* [2014] UKSC 3 [206] (appeal taken from Eng. and Wales) (UK).

88. Wade, *supra* note 59, at 568.

89. Commission Regulation 244/2009 of Mar. 18 2009, Implementing Directive 2005/32/EC, art. 1, 2009 O.J. (L 76) 3, 5.

90. Council Directive 80/181/EEC, art. 1, 1979 O.J. (L 39) 1, 3; *Sunderland City Council* [2003] QB 151, [3].

91. Oliver Wright & Charlie Cooper, *Brexit: What Is It and Why Are We Having an EU Referendum?*, INDEPENDENT (June 23, 2016), <http://www.independent.co.uk/news/uk/politics/what-is-brexit-why-is-there-an-eu-referendum-a7042791.html>.

92. See European Union Referendum Act 2015, c. 36, § 1 (UK); ELLIOTT & THOMAS, *supra* note 25, at 309; BRADLEY ET AL., *supra* note 25, at 111; DAVID BUTLER & UWE KITZINGER, THE 1975 REFERENDUM 263 (1976).

93. Cameron, *supra* note 8 (maintaining that Cameron was in support of a referendum); see *David Cameron Promises in/out Referendum on EU*, BBC NEWS (Jan. 23, 2013), <http://www.bbc.com/news/uk-politics-21148282> (discussing Cameron's promise of a referendum on the EU and the Liberal Democrats' reaction).

94. Steven Erlanger & Stephen Castle, *David Cameron and Conservatives Get Majority in British Election*, N.Y. TIMES (May 8, 2015), <https://www.nytimes.com/2015/05/09/world/europe/david-cameron-and-conservatives-emerge-victorious-in-british-election.html?mcubz=1>.

Referendum Act 2015, which required a referendum to be held on a non-election date to be appointed prior to December 31, 2017.⁹⁵ The referendum took place on Thursday, June 23, 2016.⁹⁶ The question posed to the electorate was: “*Should the United Kingdom remain a member of the European Union or leave the European Union?*”⁹⁷ The ballot paper contained two options for each voter to choose between: “Remain a member of the European Union” or “Leave the European Union.”⁹⁸

Turnout was high: the debate had been furious, and by the time June came, the British public was ready to have its say. In total, 72.2% of the electorate cast their ballot.⁹⁹ Much to the surprise of the political and professional classes, in the early hours of Friday, June 24, it became clear that the referendum had not gone their way.¹⁰⁰ The country had voted, by 51.9%, to leave the European Union, and, as a consequence, to give up the right to free movement of persons, the free market, and the political integration, which had led to peace since the end of World War II.¹⁰¹ The shock was palpable, but to many, particularly those who felt that immigration had changed their communities,¹⁰² that they were being left behind economically,¹⁰³ or who believed that money sent to the European Union would now be plowed back into the National Health Service,¹⁰⁴ the vote came as no surprise; Brexit offered them a chance to take back the control they felt they had lost.

V. ARTICLE 50 OF THE TREATY ON EUROPEAN UNION

As soon as the dust settled after the referendum, many questioned how the United Kingdom would go about leaving the European Union. The Act of Parliament, which had granted permission for the referendum, made no

95. European Union Referendum Act 2015, c. 36, § 1(3) (UK).

96. European Union Referendum Regulations 2016, SI 2016/278, ¶ 3 (UK).

97. European Union Referendum Act 2015, c. 36, § 1(4) (UK).

98. *Id.* § 1(5).

99. ELECTORAL COMM’N, *EU Referendum Results*, <https://www.electoralcommission.org.uk/finformation-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> (last visited Dec. 7, 2017).

100. See BREXIT: SOCIOLOGICAL RESPONSES viii (William Outhwaite ed., 2017) (describing reactions to the surprise result).

101. ELECTORAL COMM’N, *supra* note 99; Jonathan Freedland, *We Have Woken Up in a Different Country*, GUARDIAN (June 24, 2016), <https://www.theguardian.com/commentisfree/2016/jun/24/eu-referendum-britain-different-country>.

102. *Eight Reasons Leave Won the UK’s Referendum on the EU*, BBC NEWS (June 24, 2016), <http://www.bbc.com/news/uk-politics-eu-referendum-36574526>.

103. *Id.*

104. *Id.*

provision for what would occur should the country vote to leave.¹⁰⁵ While the early treaties governing the EEC made no mention of any procedure for a country choosing to leave the Union,¹⁰⁶ the Treaty of Lisbon included a basic procedure, written, according to its author, Lord Kerr, in case there was a coup in a European nation and that country's new dictator wished to leave.¹⁰⁷ Now incorporated into the Treaty on European Union, Article 50 states:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.¹⁰⁸

Article 50's wording, which had not appeared in earlier treaties governing the European Union,¹⁰⁹ created a problem for the United Kingdom. While the other European Member States have written constitutions setting out precisely how to go about deciding how to withdraw from the European Union, or at least how to make major

105. *See generally* European Union Referendum Act 2015 (UK) (containing no provision for the procedure following a decision to leave the EU).

106. Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 1.

107. Glenn Campbell, *Article 50 Author Lord Kerr Says Brexit Not Inevitable*, BBC NEWS (Nov. 3, 2016), <http://www.bbc.com/news/uk-scotland-scotland-politics-37852628>.

108. Treaty on European Union art. 50(1)–(3), Oct. 26, 2012, 55 O.J. (C 326) 1, 43–44.

109. *See generally* Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 1 (showing none of Article 50's wording); Treaty of Rome, Mar. 25, 1957 (demonstrating that nowhere in this earlier treaty was there any language similar to the language in Article 50).

constitutional changes, the United Kingdom, with its uncodified constitution, has no obvious “constitutional requirements,” as referred to in article 50(1).¹¹⁰ No one in the United Kingdom knew who held the power to invoke Article 50, and it was confusion and uncertainty over this issue that led to the Brexit litigation.¹¹¹ The case, while mostly a dispute about a detailed point of constitutional law, caught the imagination of the British press and public, becoming one of the most important cases in recent times.

VI. THE PROBLEM

The problem faced by the courts was who had the right to trigger the withdrawal of the United Kingdom from the European Union under Article 50.¹¹² Some argued that the power lay with Parliament, while others said that the Crown, acting through the executive government, could act by exercising its prerogative power.¹¹³

Prerogative powers are the common law powers, which previously belonged to the King and, since the nineteenth century, have been exercised by the executive as the representative of the monarch.¹¹⁴ The executive can use the prerogative powers without recourse to Parliament, unless Parliament has otherwise legislated to confer power on the executive.¹¹⁵ Dicey described prerogative powers thus:

The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. . . . The prerogative is the name for the remaining portion of the Crown’s original authority Every act which the executive government can lawfully do without the

110. ELLIOTT & THOMAS, *supra* note 25, at 81.

111. Green, *supra* note 6; Elizabeth Campion, *The Constitutional “Ripple Effect” of the European Union (Notification of Withdrawal) Act 2017*, UK CONST. L. ASS’N (Mar. 27, 2017), <https://ukconstitutionallaw.org/2017/03/27/elizabeth-campion-the-constitutional-ripple-effect-of-the-european-union-notification-of-withdrawal-act-2017/>.

112. *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2768 [4], [9] (Eng. and Wales).

113. Compare Taylor, *supra* note 2 (arguing that the power to trigger Article 50 lay with the government), and Barnard, *supra* note 3, at S4–S5 (explaining that the government argued that it could trigger Article 50), with Barber, Hickman & King, *supra* note 3 (arguing that “the Prime Minister is unable to issue a declaration” triggering the United Kingdom’s withdrawal from the European Union).

114. See TURPIN & TOMKINS, *supra* note 52, at 491 (stating that the prerogative power used to be limited to the common law powers possessed solely by the Crown); ELLIOTT & THOMAS, *supra* note 25, at 145 (explaining that the Prime Minister exercises the executive functions as a representative of the monarch).

115. ELLIOTT & THOMAS, *supra* note 25, at 144.

authority of the Act of Parliament is done in virtue of this prerogative.¹¹⁶

There are some limits on the exercise of the prerogative powers. In 1610, the Case of Proclamations defined the parameters of the prerogative power of King James VI and I. In that case, Sir Edward Coke said: “the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.”¹¹⁷ The Bill of Rights 1688 confirmed this: “the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall.”¹¹⁸

The residual Crown prerogative power, now held by the government, exists where Parliament has not otherwise legislated, but cannot be used to change British domestic law.¹¹⁹ Key prerogative powers include the power to declare war, the deployment of the armed forces, the issuing of passports, the right to conduct foreign affairs, and the power to enter or ratify treaties.¹²⁰ It is this final power—the power to negotiate and enter into treaties—that was the subject of the litigation over Brexit.

The United Kingdom has a dualist approach to international law.¹²¹ The government conducts foreign affairs on an international level as an exercise of its prerogative power.¹²² However, while the government can enter into treaties, without further legislation from Parliament, those treaties will have no effect in domestic law because the government cannot use a prerogative power to change the “common law, or statute law.”¹²³

116. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 424–25 (10th ed. 1959).

117. *Proclamations* (1610) 12 Co. Rep 74 [75] (Eng. and Wales) (citation omitted).

118. *Bill of Rights 1688*, 1 W. & M. c. 2 (UK); *R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5 [44] (appeal taken from Eng., Wales, and N. Ir.) (UK).

119. *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2768 [32] (Eng. and Wales).

120. *TAMING THE PREROGATIVE: STRENGTHENING MINISTERIAL ACCOUNTABILITY TO PARLIAMENT*, 2003-4, HC 422, ¶ 24 (UK); TURPIN & TOMKINS, *supra* note 52, at 489.

121. See David Feldman, *Monism, Dualism and Constitutional Legitimacy*, 20 AUSTL. Y.B. INT’L L. 105, 105 (1999) (describing the United Kingdom as a dualist system).

122. See ELLIOTT & THOMAS, *supra* note 25, at 144 (listing the prerogative powers). The prerogative power to enter into treaties is now subject to a statutory restriction that Parliament can veto the United Kingdom entering into a treaty. *Constitutional Reform and Governance Act 2010*, c. 25, §§ 20–25 (UK).

123. See Feldman, *supra* note 122, at 105 (explaining that legislation is required to transform a treaty obligation “into rules of the municipal legal order”); *Proclamations* (1610) 12 Co. Rep 74 [75] (Eng. and Wales).

In the case, the government argued that it had the prerogative power both to enter into and to leave any treaty, and therefore did not require the consent of Parliament to invoke Article 50 in order to begin the process by which the United Kingdom would leave the European Union.¹²⁴ The claimants argued that the prerogative power did not extend to invoking Article 50 on the basis that, by doing so, the executive would be changing domestic law, which was beyond the scope of the prerogative power.¹²⁵ The claimants said that the government required authorization in the form of an Act of Parliament before they could invoke Article 50.¹²⁶ The government argued that this would risk preventing the government from being able to “give effect to the will and decision of the people,” because Parliament would not be obliged to vote in the same way as the electorate.¹²⁷

VII. THE DIVISIONAL COURT CASE

The case was initially brought in the High Court in London.¹²⁸ There were two main claimants: Gina Miller, a 51 year-old investment manager originally from Guyana, and Deir Tozetti Dos Santos, a Spanish hairdresser now living in London.¹²⁹ There were also two sets of interested parties: a group known as the “People’s Challenge,” represented by “Grahame Pigney & Others” who were funded by an online crowdfunding campaign; and another group of people (named only as “AB, KK, PR and Children”), whose immigration status may be affected because, in each case, it is based on the European Community rights of their children.¹³⁰ In addition, there was a group of interveners, “Mr. George Birnie & Others,” who had business interests in various European countries.¹³¹ The defendant was the

124. Skeleton Argument of the Secretary of State, *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2768 [8] (Eng. and Wales).

125. Skeleton Argument of the Lead Claimant, Gina Miller, *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2768 [42] (Eng. and Wales).

126. *Id.* [51].

127. Skeleton Argument of the Secretary of State, *supra* note 124, [4].

128. *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2768 (Eng. and Wales).

129. *Brexit Court Case: Who is Gina Miller?*, BBC NEWS (Jan. 24, 2017), <http://www.bbc.com/news/uk-politics-37861888>.

130. Sec’y of State for Exiting the European Union [2016] EWHC 2768, [7]; Julia Salasky, *The Supreme Court Brexit Case Only Happened Because of Crowdfunding—And You Won’t Have Heard of the People Who Did It*, INDEPENDENT (Dec. 6, 2016), <http://www.independent.co.uk/voices/supreme-court-brexit-case-judges-crowd-funding-only-happened-gina-miller-grahame-pigney-who-did-it-a7458431.html>; Case for AB, KK, and Children (“the AB Parties”) v. Sec’y of State for Exiting the European Union [2016] UKSC 196 [4] (UK).

131. See Secretary of State for Exiting the European Union [2016] EWHC 2768, [7] (discussing the interests of interveners, who live in other European countries, in notification under Article 50).

Secretary of State for Exiting the European Union (a new cabinet position created by Prime Minister Theresa May following the referendum).¹³²

The High Court usually sits with only a single judge. However, given the importance of the case, a decision was made¹³³ that it would sit as a Divisional Court,¹³⁴ presided over by three Court of Appeal judges, including two of the most senior judges in the country: the Lord Chief Justice, Lord Thomas of Cwmgiedd, and the Master of the Rolls, Sir Terence Etherton.¹³⁵ The third judge was Lord Justice Sales.¹³⁶ The case was one of judicial review, with the question for the court being “whether, as a matter of constitutional law of the United Kingdom, the Crown—acting through the executive government of the day—is entitled to use its prerogative powers to give notice under Article 50 for the United Kingdom to cease to be a member of the European Union.”¹³⁷ Ms. Miller and the other claimants sought:

[A] declaration that it would be unlawful for the Defendant or the Prime Minister on behalf of Her Majesty’s Government to issue a notification under Article 50 of the Treaty on European Union to withdraw the United Kingdom from the European Union without an Act of Parliament authori[z]ing such notification.¹³⁸

The Divisional Court sat for three days in October 2016 and heard arguments from some of the most eminent public law barristers in the

132. *Secretary of State for Exiting the European Union*, GOV.UK, <https://www.gov.uk/government/ministers/secretary-of-state-for-exiting-the-european-union> (last visited Dec. 7, 2017).

133. Skeleton Argument of the Lead Claimant, Gina Miller, *supra* note 125, [2]–[3].

134. The High Court is the first instance court in England and Wales. *See* ALISDAIR GILLESPIE, *THE ENGLISH LEGAL SYSTEM* 188 (2d ed. 2009) (explaining that the High Court “has unlimited jurisdiction in civil matters”). When the High Court sits with two or more judges, it is known as the Divisional Court. *See* Senior Courts Act 1981, c. 54, § 66 (Eng. and Wales) (authorizing the use of Divisional Courts); GILLESPIE, *supra*, at 190 (explaining how the Divisional Court works).

135. For historical reasons, the head of the judiciary, the Lord Chief Justice, is a Court of Appeal judge rather than a Supreme Court judge. *See The Court of Appeal*, CTS. AND TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/> (last visited Dec. 7, 2017) (explaining that the Lord Chief Justice sits on the Court of Appeal). This is because, prior to the establishment of the Supreme Court under the Constitutional Reform Act 2005, cases were appealed to the Appellate Committee of the House of Lords, and the judges that sat on that committee were considered to be Law Lords rather than judges, so the Court of Appeal judges (under the Lord Chancellor) were the most senior judges in the country. *See The Supreme Court*, CTS. AND TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/the-supreme-court/> (last visited Dec. 7, 2017) (explaining that, historically, the Court of Appeal was the highest court in the land and that the Lord Chief Justice still serves as the head of the judiciary).

136. *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2768 (Eng. and Wales).

137. *Id.* [4].

138. Skeleton Argument of the Secretary of State, *supra* note 124, [3].

United Kingdom, including Her Majesty's Attorney General, the Rt. Hon. Jeremy Wright QC HM,¹³⁹ Lord Pannick QC,¹⁴⁰ and James Eadie QC.¹⁴¹

The claimants argued that prerogative powers could not be used to “frustrate or substantially undermine rights and duties established by Acts of Parliament” and that invoking Article 50 would “extinguish, or at the very least substantially reduce,” rights which are part of United Kingdom law by virtue of the European Communities Act 1972.¹⁴² In giving notice under Article 50, the executive would remove rights granted by Parliament, and this would not be remedied even if Parliament were given the opportunity to ratify any agreement reached under Article 50.¹⁴³ The claimants also argued that no express or implied authority was granted to the executive to invoke Article 50 under the European Communities Act 1972 or the European Union Referendum Act 2015.¹⁴⁴ In the alternative, the claimants argued that the Crown prerogative itself had been removed by the European Communities Act 1972, or by the subsequent legislation regarding the European Union.¹⁴⁵

The Secretary of State argued that the European Union Referendum Act 2015 “neither expressly nor implicitly” required there to be a further Act of Parliament following the referendum and that, as Parliament had not removed the prerogative power, it was constitutionally “settled” that the government had the power to invoke Article 50 without requiring the consent of Parliament.¹⁴⁶ His skeleton argument stated: “Decisions as to the making of and withdrawal from treaties are paradigm examples of the use of the prerogative.”¹⁴⁷ The Secretary of State also argued that there was nothing in the European Communities Act 1972 that prevented the executive from exercising its prerogative power, and that the designation of the statute as constitutional or otherwise was irrelevant.¹⁴⁸ In relation to devolution, the Secretary of State argued that the conduct of foreign affairs was a matter reserved to Westminster, so devolution to Scotland, Wales, and Northern Ireland had no impact on the right to exercise the Crown

139. R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union [2017] UKSC 5 (appeal taken from Eng., Wales, and N. Ir.) (UK).

140. QC stands for Queen’s Counsel, which is an honor bestowed on the most senior barristers. *Queen’s Counsel*, BLACK’S LAW DICTIONARY (10th ed. 2014).

141. Secretary of State for Exiting the European Union [2016] EWHC 2768, [6].

142. Skeleton Argument of the Lead Claimant, Gina Miller, *supra* note 125, [2]–[3].

143. Secretary of State for Exiting the European Union [2016] EWHC 2768, [74].

144. *Id.*

145. *Id.* [75].

146. Skeleton Argument of the Secretary of State, *supra* note 124, [8].

147. *Id.*

148. *Id.* [30], [66].

prerogative power.¹⁴⁹ While the devolution legislation assumes membership of the European Union, none of the relevant Acts require it.¹⁵⁰ The Secretary of State maintained that there was no obligation under international law to obtain the consent of Parliament merely on the basis of the rights of the children represented in the case.¹⁵¹ He commented that the real purpose of the claimants was to challenge the decision to leave the European Union, and that neither this decision nor its implementation was a justiciable matter.¹⁵²

Judgment in the case was handed down on November 3, 2016.¹⁵³ The Divisional Court, in a single, unanimous judgment found for the claimants, holding that “the Secretary of State does not have power under the Crown’s prerogative to give notice pursuant to Article 50 of the [Treaty on European Union] for the United Kingdom to withdraw from the European Union.”¹⁵⁴ In setting out some preliminary matters, the court acknowledged that both sides had agreed that the issue was justiciable and that the government had conceded that any notice given under Article 50 could not later be revoked so that once notice was given, the United Kingdom’s withdrawal from the European Union was “inevitabl[e].”¹⁵⁵

Having dealt with the preliminary matters, the court turned to a discussion of the constitutional theories which were relevant to the case, such as the nature of the uncodified constitution, Dicey’s theory of Parliamentary sovereignty, the role of the Crown’s prerogative powers, and the effect of the European Communities Act 1972 on domestic law.¹⁵⁶ The court also explained the role of the Crown’s prerogative power to enter into

149. *Id.* [69]–[70].

150. *Id.* [70].

151. *Id.* [72].

152. *Id.* [53]–[54].

153. R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union [2017] UKSC 5 [7] (appeal taken from Eng., Wales, and N. Ir.) (UK).

154. R (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC (Admin) 2768 [111] (Eng. and Wales).

155. *Id.* [5], [10]–[11]. This is actually quite a controversial point, but was conceded by the government, possibly because any question about the revocability of the notice could have led to a reference being made to the Court of Justice of the European Union and embroiled the government in protracted litigation seeking an authoritative answer. *Id.* [5]. Given the backlog at the Court of Justice of the European Union, this could have held up the entire Brexit process by months, if not years. See Marc van der Woude, *Towards a European Council of the Judiciary: Some Reflections on the Administration of the EU Courts*, in *DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION* 63, 65–66 (Flora A.N.J. Goudappel & Ernst M.H. Hirsch Ballin eds., 2016) (describing the backlog in the Court of Justice of the European Union).

156. Secretary of State for Exiting the European Union [2016] EWHC 2768, [18]–[20], [22], [24], [41]–[42].

and to leave international treaties.¹⁵⁷ However, the court argued that the “conduct of international relations” is usually outside the “purview” of the courts because treaties exist and create rights and obligations on an international plane, but have no effect on domestic law or on domestic rights or obligations without some form of enabling legislation from Parliament.¹⁵⁸ The court quoted Lord Kingsdown, who said in an 1859 Privy Council case arising out of India, that “[t]he transactions of independent States between each other are governed by other laws than those which Municipal Courts administer”¹⁵⁹ Lord Oliver in *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* stated:

[T]he Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights . . . which they enjoy in domestic law without the intervention of Parliament. . . . Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.”¹⁶⁰

The court concluded that “the Crown cannot through the use of its prerogative powers increase or diminish or dispense with the rights of individuals or companies conferred by common law or statute or change domestic law in any way without the intervention of Parliament.”¹⁶¹ This finding became key to the final decision that the court reached in the case.

Back in 1972, the government exercised its Crown prerogative to enter into the treaty which saw the United Kingdom joining the European Economic Community.¹⁶² It took, however, an Act of Parliament—the European Communities Act 1972—to give effect to the rights and obligations arising out of membership of the EEC in domestic law rather than in international law.¹⁶³ The court considered the different types of rights created by the European Communities Act 1972 and under European Union law, and identified three different categories. The first category of rights included those rights which could be replicated within domestic law even after withdrawal from the European Union.¹⁶⁴ These rights are ones

157. *Id.* [32].

158. *Id.*

159. *Secretary of State in Council of India v. Kamachee Boye Sahaba* [1859] 15 Eng. Rep. 9, 28.

160. MANISULI SSENIONJO, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW* 261 (2nd ed. 2016).

161. *Secretary of State for Exiting the European Union* [2016] EWHC 2768, [33].

162. *Id.* [1].

163. *Id.* [41]–[42].

164. *Id.* [58].

which, if it so decided, would be within the power of Parliament to grant and include, for example, the rights currently found in the European Union's Working Time Directive, which limits the maximum number of hours an employee can work each week.¹⁶⁵ The second category of rights included those rights which British citizens and corporations currently exercise in other EU Member States by virtue of the United Kingdom's membership of the European Union, such as the right to free movement of persons and the freedom to provide cross-border services.¹⁶⁶ These are rights which are not, and could not, be granted by Parliament.¹⁶⁷ The third category of rights included those which are relevant within Britain's domestic law, but could not be replicated by Parliament because they are rights which "flow[] from the membership of 'the EU club,'" such as the right to vote or stand in elections for the European Parliament.¹⁶⁸ The Secretary of State conceded that rights in this third category would be lost if the United Kingdom left the European Union.¹⁶⁹

The court held that it was the European Communities Act 1972 which gave effect to the first category of rights in domestic law, and that, were the Crown to be allowed to use its prerogative power to withdraw from the European Union, this would "deprive[] domestic law rights created by the [European Communities Act] 1972 of effect."¹⁷⁰ In relation to the second category of rights, the Secretary of State argued that these came not from domestic British law, but from a combination of European Union law and the domestic law of the member state in which the British citizen was exercising the right.¹⁷¹ In an unusual turn of phrase, the court said the Secretary of State's contentions "[i]n a highly formalistic sense . . . may be accurate," but went on to conclude that this ignored the reality of the position that the European Communities Act 1972 "provide[d] the foundation" for British citizens to acquire those rights.¹⁷²

Instead, the court found that, because the Crown prerogative could not be used to alter domestic law, and because membership of the European Union, and the European Communities Act 1972, gave British citizens rights in domestic law, the Crown prerogative could not be used—even on an international level—in such a way as would alter those rights in

165. Council Directive 2003/88/EC, 2003 O.J. (L 299) 9 (EC).

166. Secretary of State for Exiting the European Union [2016] EWHC 2768, [60].

167. *Id.* [65].

168. *Id.* [61].

169. *Id.* [62].

170. *Id.* [64].

171. *Id.* [65].

172. *Id.* [66].

domestic law.¹⁷³ The court also held that it was not the intention of Parliament in enacting the European Communities Act 1972 that the Crown would be able to deprive the Act of the treaty on which the Act relied:

Parliament having taken the major step of switching on the direct effect of EU law in the national legal systems by passing the [European Communities Act] 1972 as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again.¹⁷⁴

The court held that Parliament intended to introduce European Union law into domestic law and did not intend that this could be “undone by exercise of Crown prerogative power.”¹⁷⁵ Parliament having impliedly removed the Crown prerogative in this area,¹⁷⁶ the executive could not use the Crown prerogative to issue notice under Article 50 without further authority from Parliament.¹⁷⁷ The court therefore found for the claimants and ordered that declaratory relief would be granted,¹⁷⁸ the terms of which would be decided once the judgment had been seen by the parties.¹⁷⁹

VIII. THE SUPREME COURT CASE

Given the importance of the case and the urgency with which a definitive answer was required if the litigation was not to affect the political timetable for Brexit, the appeal was dealt with under a procedure colloquially known as “leapfrog[ging].”¹⁸⁰ The Divisional Court granted a certificate allowing the Secretary of State to bypass the usual appeal to the

173. *Id.* [96].

174. *Id.* [87].

175. *Id.* [92].

176. The court relied on authority found in *Att’y Gen. v. De Keyser’s Royal Hotel Ltd.* [1920] AC 508 (HL) (appeal taken from Eng. and Wales) (UK), *Laker Airways Ltd. v. Department of Trade* [1977] 2 All ER 182 (Eng. and Wales), and *R v. Sec’y of State for the Home Dep’t ex parte Fire Brigades Union* [1995] 2 All ER 244 (HL) (appeal taken from Eng. and Wales) (UK) (all discussed in detail below) to support its finding that “Crown prerogative powers may be impliedly abrogated by primary legislation . . .” *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2768 [97] (Eng. and Wales).

177. *Secretary of State for Exiting the European Union* [2016] EWHC 2768, [92].

178. *Id.* [109].

179. *Id.*

180. *See* Administration of Justice Act 1969, c. 58, § 12 (Eng., Wales, and N. Ir.) (establishing the mechanism known as leapfrogging); PD 3.6.1 (UK) (describing the Practice Direction for leapfrog appeals); Hazel Moffat, Camilla Macpherson & James McGachie, *Brexit: What’s Next in the Article 50 Judicial Review?*, DLA PIPER (Nov. 3, 2016), <https://www.dlapiper.com/en/uk/insights/publications/2016/11/brexit-what-next-in-article-50>.

Court of Appeal and instead appeal directly to the Supreme Court.¹⁸¹ On November 8, 2016, a panel of three Justices of the Supreme Court granted permission to appeal.¹⁸² At the same time, it was decided that for the first time ever, every one of the Supreme Court justices would sit on the case, a decision which reflected the importance of the case to the United Kingdom's constitution.¹⁸³

The Supreme Court heard oral argument over four days in December 2016.¹⁸⁴ The case was broadcast live on the Supreme Court's website and transcripts of each half-day session were provided within hours of the session's conclusion.¹⁸⁵ A number of media outlets also featured live broadcasts of the proceedings.¹⁸⁶ The Supreme Court public relations team did an excellent job of using social media and the internet to educate the public about what to expect.¹⁸⁷ This was important because the Supreme Court is fairly new in the United Kingdom (having only been established in

181. 616 Parl Deb HC (6th ser.) (2016) col. 1255–57 (UK) (recording that the Secretary of State for Exiting the European Union informed Parliament that “the Government [has] been granted a certificate to bypass the Court of Appeal and leapfrog the case to the Supreme Court”).

182. *Article 50 (“Brexit”) Case*, SUPREME COURT (Nov. 8, 2016), <https://www.supremecourt.uk/news/permission-to-appeal-decision-08-november-2016.htm>.

183. Readers should note, however, that it is not normally possible for all of the justices to sit on a case as there are usually 12 justices, and they are only allowed to sit in uneven numbers. Owen Bowcott & Peter Walker, *Senior Judges Prepare to Hear Brexit Supreme Court Appeal*, GUARDIAN (Dec. 5, 2016), <https://www.theguardian.com/law/2016/dec/05/senior-judges-prepare-to-hear-brexit-supreme-court-appeal>. In January 2017, the court only had 11 justices following the retirement of Lord Toulson. *Id.* Despite this, the court that sat in this case is still the largest bench ever to have sat in the United Kingdom Supreme Court. See *The 11 Supreme Court Judges Who Ruled on UK’s Brexit Appeal*, BBC NEWS (Jan. 24, 2017), <http://www.bbc.com/news/uk-politics-37874388> (noting the unprecedented en banc hearing); Jane Croft, *UK Supreme Court Sets December Date for Article 50 Appeal*, FIN. TIMES (Nov. 8, 2016), <https://www.ft.com/content/8b625b3e-331a-38a6-9db2-3a1553462a5e> (“As expected, all 11 Supreme Court justices will sit to decide the case—this reflects the constitutional importance of the case as previously the largest Supreme Court panel to hear a case has consisted of nine justices.”).

184. See *R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5 (appeal taken from Eng., Wales, and N. Ir.) (UK) (listing the dates of the hearing).

185. See *Access to the Supreme Court Building*, SUPREME COURT, <https://www.supremecourt.uk/news/access-to-supreme-court-building-article-50-brexit-case.html> (last visited Dec. 8, 2017) (describing the procedure to access the Supreme Court building and alternative methods to view the hearing); Joshua Rozenberg, *Brexit in the Supreme Court: A Preview*, FULL FACT (Nov. 28, 2016), <https://fullfact.org/law/brexit-supreme-court/> (explaining to the public that it can watch the hearing on the UK Supreme Court’s website).

186. See *Access to the Supreme Court Building*, *supra* note 185 (“[V]arious broadcasters are . . . running complementary feeds.”); Rozenberg, *supra* note 185 (“[S]ome of [the four-day hearing] will be shown live on television.”).

187. See *Access to the Supreme Court Building*, *supra* note 185 (predicting a heavy flow of traffic in the Supreme Court building during the hearing and encouraging the public to access the hearing via alternative methods, such as the Supreme Court website and broadcasts).

place of the Appellate Committee of the House of Lords in 2009),¹⁸⁸ so many laypeople would have been unfamiliar with its procedures.

The case brought by Miller in the Divisional Court was joined by two references relating to the position in Northern Ireland: first, a reference by the Attorney General for Northern Ireland; and second, a reference by the Northern Ireland Court of Appeal.¹⁸⁹ These references both arose from a case which had been heard in Northern Ireland at the same time that *Miller* was being heard by the Divisional Court in England and Wales.¹⁹⁰ The case was a combined one brought by Raymond McCord, the father of a man killed during the Troubles, and by a group of politicians and public interest organizations, including Steven Agnew, Colum Eastwood, the Committee on the Administration of Justice, and the Human Rights Consortium.¹⁹¹ The parties argued that the government could not use the prerogative power to issue notification under Article 50; the Northern Ireland Act 1998 displaced the royal prerogative; the agreement of the Northern Ireland Assembly was required before Westminster could grant the power to leave the European Union and the terms of the Belfast Agreement; the peace agreement in Northern Ireland, known as the Good Friday Agreement meant that the United Kingdom could not leave the European Union without the consent of the people of Northern Ireland.¹⁹²

A number of interested parties and interveners were also allowed.¹⁹³ These included the Lord Advocate, representing the Scottish government, the Counsel General for Wales, representing the Welsh government, and the expatriate British citizens who had been allowed to intervene in the case in the Divisional Court.¹⁹⁴ Given the limited time available for oral argument, most of the interveners were only granted permission to make written submissions.¹⁹⁵

188. See Constitutional Reform Act 2005, c. 4, § 23 (UK) (establishing a Supreme Court of the United Kingdom); ELLIOTT & THOMAS, *supra* note 25, at 253–54 (stating that the Supreme Court of the United Kingdom was created in October 2009).

189. Sec’y of State for Exiting the European Union [2017] UKSC, [7], [9].

190. See *id.* (stating the dates of judgment for the case heard by the Divisional Court of England and Wales and the case heard by the Northern Ireland High Court were to be November 3, 2016 and October 28, 2016, respectively).

191. McCord’s (Raymond) Application [2016] NIQB 85, [2]–[3] (N. Ir.).

192. Sec’y of State for Exiting the European Union [2017] UKSC, [126]–[135]; R (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC (Admin) 2768, [104] (Eng. and Wales).

193. R (on the application of Miller & Dos Santos) v Secretary of State for Exiting the European Union: *Updates on Interveners*, SUPREME COURT (Nov. 25, 2016), <https://www.supremecourt.uk/news/interveners-article-50-brexite-case.html>.

194. *Id.*

195. *Id.*

The Supreme Court reached a conclusion with remarkable speed. On January 24, 2017, the Court handed down a lengthy judgment with eight of the justices—Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, and Lord Hodge—giving a joint majority opinion, and Lord Reed, Lord Carnwath, and Lord Hughes giving dissenting opinions.¹⁹⁶ The primary issue on appeal was the same as that which had been argued before the Divisional Court: whether the Crown’s prerogative power allowed the executive to issue notification under Article 50, or whether it was prevented from doing so without the consent of Parliament.¹⁹⁷ The secondary question was that raised by the case referred from Northern Ireland and the interventions on behalf of the Scottish and Welsh governments, namely what was the effect of devolution on the prerogative power.¹⁹⁸

In relation to the primary issue, the Supreme Court, like the Divisional Court before it, began by setting out the background to the legal arguments in ways similar to those already described above, beginning with the United Kingdom’s entry into the EEC and moving on to the relationship between the United Kingdom and Europe, the nature of the uncodified constitution, the role of prerogative powers, and the European Communities Act 1972.¹⁹⁹ In relation to the role of prerogative powers, the Court paused to consider a number of previous cases, which defined and explained the limits of the power. Three leading cases were considered: *De Keyser’s Royal Hotel Ltd.*, *Laker Airways*, and *Fire Brigades Union*.²⁰⁰

The case of *Attorney General v. De Keyser’s Royal Hotel Ltd.* arose soon after the end of World War I.²⁰¹ During the war, the government required accommodation for soldiers in London.²⁰² The plaintiff²⁰³ owned

196. *R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5 (appeal taken from Eng., Wales, and N. Ir.) (UK).

197. *Id.* [5].

198. *See id.* [4], [6] (“[U]nless Parliament provides for such withdrawal by a statute, it would not be possible for formal notice of the United Kingdom’s withdrawal from the EU Treaties to be given without first consulting or obtaining the agreement of the devolved legislatures.”).

199. *Id.* [13]–[26].

200. *Att’y Gen. v. De Keyser’s Royal Hotel Ltd.* [1920] AC 508 (HL) (appeal taken from Eng. and Wales) (UK); *Laker Airways Ltd. v. Department of Trade* [1977] 2 All ER 182 (Eng. and Wales); *R v. Sec’y of State for the Home Dep’t ex parte Fire Brigades Union* [1995] 2 All ER 244 (HL) (appeal taken from Eng. and Wales) (UK).

201. *De Keyser’s Royal Hotel Ltd.* [1920] AC (HL) at 509.

202. *Id.*

203. In the United Kingdom, the party bringing a case was known as plaintiff until 1998 and is now known as claimant. *See* Civil Procedure Rules 1998 (Eng. and Wales) (stating that the party bringing a claim is now known as the claimant); Robert Verkaik, *Centuries of Obscure Legal Jargon Abolished*, INDEPENDENT (Apr. 21, 1999), <http://www.independent.co.uk/news/centuries-of-obs-cure-legal-jargon-abolished-1088834.html> (demonstrating that claimants used to be known as plaintiffs).

an upmarket hotel on the Victoria Embankment next to the River Thames.²⁰⁴ In May 1916, the Crown—claiming to act under the Defence of the Realm Regulations—took possession of the hotel and billeted the Royal Flying Corps there.²⁰⁵ The plaintiff claimed compensation under the Defence Act 1842.²⁰⁶ The Crown argued that it had been acting under its prerogative power and that it had been entitled to seize the property without the payment of compensation.²⁰⁷ The House of Lords held that the Crown was not entitled to rely on its prerogative.²⁰⁸ Their Lordships reasoned that the prerogative power ceased to exist once Parliament had brought the matter under statutory control, which it had done by passing the Defence Act 1842.²⁰⁹ The plaintiff was therefore entitled to, and was awarded, compensation under the 1842 Act. The Supreme Court in the present case quoted Lord Parmoor’s speech from *De Keyser’s Royal Hotel* saying that, once a matter “has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament”²¹⁰

Laker Airways Ltd. was a British airline planning to offer low-cost flights between London and New York in the early 1970s.²¹¹ The airline was granted an air transport license under the Civil Aviation Act 1971.²¹² In 1973, Britain notified the United States government that the airline should be granted status as a designated carrier under the relevant international treaty, the Bermuda Agreement 1946.²¹³ In 1975, the British Secretary of State changed his mind and withdrew permission for Laker Airways to offer the service.²¹⁴ This decision was communicated to the United States, which withdrew the airline’s permit.²¹⁵ The airline challenged the decision, and the court held that it was an improper use of the prerogative power on the part of the Crown to remove the airline’s status as a designated carrier

204. *De Keyser’s Royal Hotel Ltd.* [1920] AC (HL) at 566; see also Dan Roberts, *Supreme Court Sets the Scene for Latest Twists in Brexit Tale*, GUARDIAN (Dec. 5, 2016), <https://www.theguardian.com/politics/2016/dec/05/supreme-court-sets-the-scene-for-latest-twists-in-brexit-tale> (identifying *De Keyser’s Royal Hotel* as a hotel on the Thames).

205. *De Keyser’s Royal Hotel Ltd.* [1920] AC (HL) at 508.

206. *Id.* at 508–09.

207. *Id.* at 547.

208. *Id.* at 580.

209. *Id.*

210. *R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5 [48] (appeal taken from Eng., Wales, and N. Ir.) (UK) (quoting *De Keyser’s Royal Hotel Ltd.* [1920] AC (HL) at 575).

211. *Laker Airways Ltd. v. Department of Trade* [1977] 2 All ER 182, 186 (Eng. and Wales).

212. *Id.*

213. *Id.*

214. *Id.* at 189–90.

215. *Id.* at 190.

through actions under the Bermuda Agreement 1946, thereby rendering the air transport license granted under an Act of Parliament useless.²¹⁶ Lord Justice Lawton said: “By necessary implication the Act, in my judgment, should be construed so as to prevent the Secretary of State from rendering licences useless by the withdrawal of designation when he could not procure the [Civil Aviation Act 1971] to revoke them nor lawfully do so himself.”²¹⁷

The third case cited was *R v. Secretary of State for the Home Department ex parte Fire Brigades Union*.²¹⁸ In 1964, the government used the Crown prerogative to set up a Criminal Injuries Compensation Scheme in order to compensate victims of violent crimes.²¹⁹ While the scheme was originally non-statutory, it was later given a statutory basis under the Criminal Justice Act 1988 with the Act delegating power to the Secretary of State to give effect to the scheme.²²⁰ However, instead of bringing the statutory provisions into force, the government proposed an alternative, non-statutory scheme, which would bring down the cost of compensating victims.²²¹ The plaintiffs, the Fire Brigades Union and a number of other trade unions representing members who, in their roles as fire fighters, nurses, teachers, prison officers, etc., were more likely than the general public to have recourse to the fund, challenged the decision.²²² Both the Court of Appeal and the House of Lords held that, while the Secretary of State was under no obligation to implement the statutory scheme, he was not able to use the prerogative power to create an alternative scheme unless the statutory scheme (described by Lord Bingham “as an enduring statement of Parliament’s will”) was repealed; attempting to do so was an abuse of the prerogative power.²²³

The Supreme Court, having considered the role and extent of the prerogative in these leading cases, concluded that the executive has the

216. *Id.* at 191.

217. *Id.* at 211.

218. *R v. Sec’y of State for the Home Dep’t ex parte Fire Brigades Union* [1995] 2 All ER 244 (HL) (appeal taken from Eng. and Wales) (UK).

219. *Id.* at 244; P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L. J. 1002, 1040 (demonstrating that the British compensation scheme was introduced in 1964).

220. Criminal Justice Act 1988, c. 33, §§ 108, 110–11, 171, schs. 6–7 (UK); Robert S. Goldberg, *Victims of Criminal Violence in the Workplace: An Assessment of Remedies in the United States and Great Britain*, 18 COMP. LAB. L.J. 397, 416 (1997) (stating that the Criminal Injuries Compensation scheme was non-statutory).

221. Goldberg, *supra* note 220, at 417–18 (maintaining that the alternative tariff scheme would “halve the annual cost of compensating victims of criminal injuries”).

222. *Sec’y of State for the Home Dep’t ex parte Fire Brigades Union* [1995] 2 All ER at 246 (UK).

223. *Id.* at 269.

power to make (and, by extension, unmake) treaties, but that power may be curtailed by the existence of a statutory power, and may not be exercised if it would “frustrate the purpose of a statute or a statutory provision, for example by emptying it of content”²²⁴ The prerogative power exists only because international law and domestic law exist on separate planes and treaties “give rise to no legal rights or obligations in domestic law.”²²⁵ The court identified two situations where the exercise of a prerogative power could have domestic legal consequences.²²⁶ First, where individual rights were affected, but the law was not changed; second, where the exercise of the prerogative power changed the facts of a situation, but not the law, such as when the Crown declared war and caused various actions, which were previously legal, to become proscribed by legislation which had no effect during times of peace.²²⁷ Returning to this line of argument once it had decided that the European Treaties created a new source of domestic law and of domestic rights, the court held that the prerogative power could not be exercised in relation to the European Treaties, as they operated on a domestic plane as well as an international one.²²⁸

Having found that, as a general rule, the prerogative power enabled the government to enter into and leave treaties, the Supreme Court had to consider whether the wording of the European Communities Act 1972 precluded use of that power.²²⁹ James Eadie QC, acting for the government, had argued before the court that the European Communities Act 1972 gave effect to whatever international obligations existed under the European Treaties “from time to time,” and that, if the United Kingdom left the European Union, section two of the Act would remain law, but there would be no treaty obligations to which it would apply.²³⁰ The court found this argument to be unpersuasive.²³¹ Instead they found that the European Communities Act 1972 created a new source of domestic law, an “entirely new, independent and overriding source of domestic law,” with the European Communities Act 1972 acting “as a conduit pipe by which EU law is brought into the domestic UK law.”²³² Joining the European

224. *R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5 [51] (appeal taken from Eng., Wales, and N. Ir.) (UK).

225. *Id.* [55].

226. *Id.* [52].

227. *Id.* [52]–[53].

228. *Id.* [86].

229. *See id.* [74]–[93] (discussing whether the European Communities Act 1972 precluded the use of prerogative power).

230. *Id.* [74]–[75].

231. *See id.* [76] (disagreeing with part of the Secretary of State’s argument).

232. *Id.* [80].

Economic Community was a huge constitutional change, and leaving the European Union would be as big a constitutional change. The court said: “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 recogni[z]es, namely by Parliamentary legislation.”²³³ This finding led to that described above—the prerogative power could not be used by the executive, as the European Treaties were “inextricably linked with domestic law” and did not operate on a purely international plane.²³⁴

The court then dealt with a number of minor points raised by the Secretary of State, such as the argument that Parliament did not need to give consent because it would “inevitabl[y]” be involved in the withdrawal process as primary legislation would be needed to effect the withdrawal; or the argument that there were other types of treaties that affected domestic rights, such as the bilateral double taxation treaties, and that the executive exercised the Crown prerogative in relation to these treaties.²³⁵ However, the court dismissed these arguments and the other minor arguments made.

The court considered whether the Act of Parliament that sanctioned the referendum conferred the power to invoke Article 50.²³⁶ The Secretary of State argued that Parliament authorized the referendum and cannot have intended, should the people of the United Kingdom vote to leave the European Union, for the question to revert back to Parliament.²³⁷ The court found that this argument was not credible because Parliament did not intend for the referendum to have a legally binding effect, merely a politically binding one, and that other Acts authorizing referendums had required the question to be referred back to Parliament.²³⁸ Therefore, it was possible that Parliament had intended the same to occur in this case.²³⁹ The court reiterated its previous finding that, where there was to be a change in the law, it could only be done by way of Parliamentary legislation.²⁴⁰

In relation to the devolution matters, the Court was able to deal briefly with the points in issue. The Court found that the Acts providing for devolution proceeded on the basis that the United Kingdom was and would remain a member of the European Union, but nothing in the wording of the

233. *Id.* [82].

234. *Id.* [86].

235. *See id.* [94]–[100] (addressing the Secretary of State’s other minor arguments).

236. *See id.* [118]–[122], [124] (discussing the effect of the Act of Parliament on the power to invoke Article 50).

237. *Id.* [120].

238. *Id.*

239. *Id.*

240. *Id.* [121].

Acts prevented the United Kingdom from leaving.²⁴¹ Issues of both foreign affairs and relations with the European Union are reserved in Scotland,²⁴² excepted in Northern Ireland,²⁴³ and not devolved to Wales,²⁴⁴ which means that such matters remained entirely within the power of Westminster.²⁴⁵ The various Acts that authorized devolution included constraints preventing the devolved legislatures from acting in breach of European Union law.²⁴⁶ The purpose of these Acts, however, was to prevent the devolved legislatures from putting the United Kingdom in breach of its European Union obligations, not to give the devolved governments the power to prevent Westminster from taking the United Kingdom out of the European Union.²⁴⁷

There are occasions when Westminster and the devolved institutions have overlapping areas of competence because the devolution statutes reserve the right of Westminster to legislate all matters, even those where power has been transferred.²⁴⁸ While Westminster is legally competent to legislate, a convention has arisen, known as the Sewel Convention, by which “Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament.”²⁴⁹ This convention was first formalized with respect to all of the devolved legislatures in a Memorandum of Understanding in 2001 and was given statutory authority in 2016.²⁵⁰ As a general rule, Westminster does not legislate on devolved matters without the consent of the devolved administration.²⁵¹ The Supreme Court in this case, however, while acknowledging the existence and importance of the convention, found that

241. *Id.* [129].

242. Scotland Act 1998, c. 46, § 30(1) (UK).

243. Northern Ireland Act 1998, c. 47, § 4, sch. 2 (UK).

244. *See generally* Government of Wales Act 2006, c. 32, § 108(1), (4) (UK) (illustrating an absence of any provision speaking to devolution concerning foreign or national affairs to the Welsh people).

245. *See* TURPIN & TOMKINS, *supra* note 52, at 202–03 (noting that such matters are reserved to the Westminster Parliament).

246. *See* Sec’y of State for Exiting the European Union [2017] UKSC, [130] (describing the purpose of EU constraints on the devolved legislatures).

247. *Id.*

248. Northern Ireland Act 1998, c. 47, § 23 (UK); Scotland Act 1998, c. 46, § 28(7) (UK); Government of Wales Act 2006, c. 32, § 107(5) (UK).

249. 592 Parl Deb HL (5th ser.) (1998) col. 791 (UK).

250. Memorandum of Understanding and Supplementary Agreements, Office of the Deputy Prime Minister 5 (Dec. 2001) (UK); Scotland Act 2016, c. 11, § 2 (UK) (amending Scotland Act 1998 c. 46, § 28 (UK)).

251. Scotland Act 1998, c. 46, § 28(8) (UK) (stating “[b]ut it is recogni[z]ed that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”).

the convention was of a political nature, not a legal nature, and the Court was unable to enforce it.²⁵² The Court therefore found that none of the devolved legislatures had the power to veto the withdrawal from the European Union, and their consent was not required prior to Westminster passing an Act of Parliament regarding such a move.²⁵³ As such, the majority in the Supreme Court dismissed the appeal of the Secretary of State.²⁵⁴ The Court ruled that the executive did not have a prerogative power under Article 50 to notify the European Union of the United Kingdom's intention to leave without an Act of Parliament conferring such a power on the executive, and that the devolved powers could not veto—and were not required to consent to—any decision made by Westminster regarding the European Union.²⁵⁵

Three judges dissented in the case: Lord Reed, Lord Carnwath, and Lord Hughes.²⁵⁶ Lord Reed gave a detailed judgment,²⁵⁷ while Lord Carnwath and Lord Hughes joined Lord Reed's dissent and included additional comments of their own.²⁵⁸ At the heart of the dissent was a disagreement on the existence and extent of any limitations on the exercise of the prerogative power.²⁵⁹ The dissenting judges found that, while the principle that Parliament was supreme over domestic law was true, it did not affect the Crown's prerogative power to conduct affairs in relation to the European Union.²⁶⁰ This was because the European Communities Act 1972 was "inherently conditional on the application of the EU treaties to the UK"²⁶¹ The Act did not require membership of the European Union; it merely gave legal effect in the United Kingdom to any treaties, which applied at any given time.²⁶² Lord Reed explained: "If the Treaties do not apply to the UK, then there are no rights, powers and so forth which, in accordance with the Treaties, are to be given legal effect in the UK."²⁶³ This argument was supported by the observation that the European Communities Act 1972 came into force on October 17, 1972, but that the

252. Sec'y of State for Exiting the European Union [2017] UKSC, [145]–[146], [148].

253. *Id.* [150].

254. *Id.* [152].

255. *See id.* (summarizing the majority opinion).

256. *See generally id.* [153]–[283] (presenting the three dissenting opinions by Lord Reed, Lord Carnwath, and Lord Hughes).

257. *See generally id.* [153]–[242] (presenting Lord Reed's detailed judgment).

258. *See generally id.* [243]–[283] (showing the judgments of Lord Carnwath and Lord Hughes).

259. *See id.* [177], [257]–[258], [281] (disagreeing in unison with the majority).

260. *Id.* [177], [257], [281].

261. *Id.* [177].

262. *Id.*

263. *Id.* [191].

United Kingdom did not accede to the EEC until January 1, 1973; and so, for the first few weeks, section two of the Act had no effect.²⁶⁴ Had ratification of the accession treaty been delayed or never occurred, the section would have continued to have had no effect.²⁶⁵ It was this conditionality of section two of the European Communities Act 1972 which led the dissenting judges to find that the Act did not provide the limits on the Crown's prerogative power, although the majority argued that it did.²⁶⁶ Lord Carnwath also noted that the notification itself would have no immediate effect on domestic law—it is merely the start of a negotiation process—and that Parliament would be involved in any final agreement concluded.²⁶⁷

IX. THE AFTERMATH

Despite both courts having carefully set out that the question they were seeking to answer was purely one of law and not of the merits or otherwise of leaving the European Union,²⁶⁸ the judgments—particularly that of the Divisional Court—led to outcry in the press. The Daily Mail branded the Divisional Court judges as “[e]nemies of the people” and accused them of “frustrat[ing] the verdict of the British public.”²⁶⁹ The paper also made abusive remarks about the judges’ professional and personal lives, in particular Sir Terence Etherton, who was described as an openly gay ex-Olympic fencer.²⁷⁰ The Daily Express described the decision as “[t]ruly . . . the day democracy died.”²⁷¹ The Daily Telegraph ran with the headline “[j]udges vs the people.”²⁷² The New Statesman characterized the response

264. *Id.* [192].

265. *Id.*

266. *Id.* [177], [257], [281].

267. *Id.* [259].

268. *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC (Admin) 2768 [5] (Eng. and Wales); *Sec’y of State for Exiting the European Union* [2017] UKSC [3]–[4] (explaining that the proceedings raise legal issues, not political issues).

269. James Slack, *Enemies of the People: Fury Over “Out of Touch” Judges Who Have “Declared War on Democracy” by Defying 17.4m Brexit Voters and Who Could Trigger Constitutional Crisis*, DAILY MAIL (Nov. 4, 2016), <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>.

270. *Id.*

271. *We Must Get Out of the EU*, DAILY EXPRESS, Nov. 4, 2016, at 1.

272. Peter Dominiczak, Christopher Hope & Kate McCann, *Judges vs the People: Government Ministers Resigned to Losing Appeal Against High Court Ruling*, TELEGRAPH (Nov. 3, 2016, 10:00 PM), <http://www.telegraph.co.uk/news/2016/11/03/the-plot-to-stop-brexit-the-judges-versus-the-people/>.

as “hysteria beyond imagination.”²⁷³ The reaction was heavily criticized by many lawyers, politicians, and other sections of the press with calls made for the Lord Chancellor “to condemn the recent attacks on the judiciary” and make a stand for an independent judiciary, as was her statutory duty;²⁷⁴ the Lord Chancellor refused to do so, which the Lord Chief Justice later described as “constitutionally absolutely wrong.”²⁷⁵ The response was a little more muted after the Supreme Court decision, but the Daily Mail still responded saying “[y]et again the elite show their contempt for Brexit voters!”²⁷⁶ The response of the press went far beyond criticism of the decision in the case and became personal abuse aimed directly at the judges. Judges in the United Kingdom have a lower press profile than those in the United States, so such vitriolic coverage is highly unusual.²⁷⁷

The political response to the judgment was swift. A brief Bill granting the Prime Minister the power to notify the European Union of the United Kingdom’s decision to withdraw from the European Union was placed before the House of Commons on January 26, 2017, a mere two days after the decision of the Supreme Court.²⁷⁸ The Bill dealt only with the power to notify under Article 50(2) on the basis that, constitutionally accurate or not, the decision to leave under Article 50(1) had been taken by the people of the United Kingdom in the referendum.²⁷⁹ The Right Honorable David Davis MP, the Secretary of State for Exiting the European Union, told the House of Commons:

It is not a Bill about whether the UK should leave the European Union or, indeed, about how it should do so; it is simply about Parliament empowering the Government to implement a decision already made—a point of no return already passed. We asked the

273. *Liz Truss Has Failed Spectacularly and Should Resign*, NEW STATESMAN (Nov. 5, 2016), <http://www.newstatesman.com/politics/uk/2016/11/liz-truss-has-failed-spectacularly-and-should-resign>.

274. Press Release, Bar Council, Bar Council Calls on Lord Chancellor to Condemn Attacks on Judiciary (Nov. 5, 2016), <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/november/bar-council-calls-on-lord-chancellor-to-condemn-attacks-on-judiciary/>.

275. SELECT COMMITTEE ON THE CONSTITUTION, UNCORRECTED ORAL EVIDENCE: ORAL EVIDENCE SESSION WITH THE LORD CHIEF JUSTICE, 2017- 1, UKHL, at 8 (UK).

276. Jane Martinson, *The Daily Mail Leads the Way in Brexit Bile*, GUARDIAN (Jan. 24, 2017), <https://www.theguardian.com/commentisfree/2017/jan/24/daily-mail-brexit-tabloid-press-britain-european-union>.

277. Cf. Charles Falconer, *The Vicious Assault on UK Judges by the Brexit Press is a Threat to Democracy*, GUARDIAN (Nov. 4, 2016), <https://www.theguardian.com/commentisfree/2016/nov/04/assault-uk-judges-brexit-press-judiciary-constitution> (comparing the press profiles of judges in the United Kingdom to those in the United States).

278. European Union (Notification of Withdrawal) Bill 2017, HC Bill [132] cl. 1 (UK).

279. European Union (Notification of Withdrawal) Act 2017, c. 9, § 1(1) (UK).

people of the UK whether they wanted to leave the European Union, and they decided they did.²⁸⁰

The Bill was passed in the House of Commons, but the House of Lords proposed two amendments: one which would have forced the Prime Minister to make arrangements to secure the rights of European Union citizens resident in the United Kingdom within three months, and one which would have prevented the Prime Minister from concluding an agreement with the European Union without the approval of both Houses of Parliament.²⁸¹ Both of these amendments were defeated in the House of Commons, and the House of Lords decided not to insist on the amendments

280. 620 Parl Deb HC (6th ser.) (2017) col. 818 (UK). This raises an interesting side note to the litigation. The claimants at the Divisional Court framed their case entirely in terms of the power to give notification to the European Union under Article 50(2). *See* Skeleton Argument of the Lead Claimant, Gina Miller, *supra* note 125, [5] (discussing the power to give notification to the European Union under Article 50). The Secretary of State's skeleton argument explained that this conflated two parts of Article 50: first, the taking of the decision to withdraw from the European Union, and second, the notification of that decision to the European Union. Skeleton Argument of the Secretary of State, *supra* note 124, [6]. Both courts skirted around the issue, but ultimately gave judgment solely in terms of the power to notify the European Union. *See* R (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC (Admin) 2768 [4] (Eng. and Wales) (discussing the issue surrounding the power to give notice under Article 50). However, any argument that the prerogative power did not exist in relation to the power to notify under Article 50(2) must also apply to the power to make the decision to leave the European Union under Article 50(1), especially when the court said that "[w]e cannot accept that a major change to UK constitutional arrangements can be achieved by ministers [i.e., the executive] alone . . ." R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union [2017] UKSC 5 [82] (appeal taken from Eng., Wales, and N. Ir.) (UK). It would be difficult to argue that, despite having lost the prerogative power to act under Article 50(2), the executive retained a prerogative power in relation to Article 50(1). In the European Union (Notification of Withdrawal) Act 2017, Parliament either chose not to, or failed to, include a statement to the effect that it was making the decision to leave the European Union or to confer a power to make the decision on the executive. David Wolchover, *Article 50: The Trigger That Never Was?*, COUNSEL, <https://www.counselmagazine.co.uk/articles/article-50-the-trigger-never-was> (last visited Dec. 8, 2017). Given that the referendum was merely advisory, the electorate did not have the legal power to make the decision under Article 50(1). *Id.* It appears that, despite the attention given to the constitutional arrangements, no one with the power to do so actually made the formal decision to leave the European Union. *Id.* Parliament had the power, but did not make the decision, and neither the electorate nor the executive had the power to make the decision. *Id.* It is a shame that those involved did not take more care to ensure that the constitutional process was followed, because it renders the notification made under Article 50(2) vulnerable to challenges on the basis that the decision to leave was taken without lawful authority. *Id.* (discussing that, while the decision to leave was not done properly, it is not likely to impede the withdrawal process). Any such challenge would cause further unnecessary uncertainty in the United Kingdom. *Id.*

281. Lords Amendments to the European Union (Notification of Withdrawal) Bill 2017, HC Bill [152] (UK).

being included.²⁸² The Bill received Royal Assent in its original form on March 16, 2017.²⁸³

The Prime Minister exercised the power granted to her under the European Union (Notification of Withdrawal) Act 2017 on March 29, 2017.²⁸⁴ A letter was signed in London the day before and sent by night train to Brussels before being hand delivered to the European Council's President, Donald Tusk, by Britain's permanent representative to the European Union, Sir Tim Barrow.²⁸⁵ In the letter, the Prime Minister explained that the country had voted "to restore, as we see it, our national self-determination," and as such, she was giving notification of "the United Kingdom's intention to withdraw from the European Union."²⁸⁶ The letter expressed the Prime Minister's desire for both the United Kingdom and the European Union to "establish[] a deep and special partnership that contributes towards the prosperity, security[,] and global power of our continent."²⁸⁷ According to the Treaty on European Union, the United Kingdom has two years to negotiate a withdrawal agreement. If no agreement can be reached by March 28, 2019, then the European treaties will simply cease to apply to the United Kingdom on that date.²⁸⁸ It is generally believed, and was conceded by the government during the Brexit litigation, that the Article 50 notification is irrevocable—so it is now fairly certain that the United Kingdom will leave the European Union.²⁸⁹

X. THE TROUBLE WITH AN UNCODIFIED CONSTITUTION

It is not often that a case provides an occasion to assess a nation's principal constitutional arrangements, but *Miller* provided such an opportunity. The case allowed lawyers and judges to test theories, which, despite underpinning the entire constitutional system, are rarely discussed after the first year of law school. As a result, the litigation felt something like a law school course with the BBC even describing it as having "rapidly

282. *Brexit Bill: Lords Back Down over Issue of Residents' Rights*, BBC NEWS (Mar. 13, 2017), <http://www.bbc.com/news/uk-politics-39249721>.

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

284. Letter from Theresa May to Donald Tusk, *supra* note 18.

285. *Id.*

286. *Id.*

287. *Id.*

288. Treaty on European Union art. 50, Oct. 26, 2012, 55 O.J. (C 326) 1, 43–44.

289. *R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union* [2017] UKSC 5 [26] (appeal taken from Eng., Wales, and N. Ir.) (UK).

[taken] on the feel of an academic seminar”²⁹⁰ While the case showed that the British system has many strengths, it also demonstrated a number of weaknesses inherent in an uncodified constitutional system. For instance, the British constitution has a high level of uncertainty in the system, is far too easy to change, and while it is flexible, it does not easily adapt to novel situations. There are also insufficient arrangements in place for the holding of referendums.

Miller demonstrated that certain parts of the United Kingdom’s constitution are confusing or uncertain. The level of debate in the courts, Parliament, and the press demonstrated that it was by no means clear who held the power to begin the process of leaving the European Union. Dealing with the attempts to ascertain the constitutional arrangements surrounding Brexit expended an inordinate amount of governmental time, which civil servants and ministers could otherwise have been spending on beginning the preparations for Brexit. The dispute also cost tax payers a huge amount of money (the amount of which the government has, thus far, refused to admit),²⁹¹ and left politicians, the public, and the European Union not knowing what would happen next, thereby adding to the confusion and distress already caused by the Brexit decision. The uncertainty was reflected in the value of the currency, with the pound, which had fallen about 17% against the dollar since the Brexit vote, losing 0.6% of its value in the immediate aftermath of the Supreme Court’s decision.²⁹² There would always be some inevitable uncertainty surrounding Brexit because it represents a significant change for many people, but much of the uncertainty was caused by the country being unaware of its own constitutional arrangements or who had the power to begin the process of leaving the European Union.²⁹³ The very purpose of a constitution is to

290. Clive Coleman, *Last Day of Supreme Court Brexit Case: “A Fine Example of the Rule of Law and British Constitution in Action”*, BBC NEWS (Dec. 8, 2016), <http://www.bbc.com/news/live/uk-politics-37976580>.

291. Ben Kentish, *Government Does Not Know Full Cost of Its Article 50 Supreme Court Challenge Due to “Electricity and Printing Charges,”* INDEPENDENT (Feb. 6, 2017), <http://www.independent.co.uk/news/uk/politics/uk-government-article-50-legal-challenge-supreme-court-gina-miller-electricity-printing-charges-a7565461.html>.

292. Zlata Rodionova & Josie Cox, *Pound Sterling Falls as Government Loses Brexit Supreme Court Appeal*, INDEPENDENT (Jan. 24, 2017), <http://www.independent.co.uk/news/business/news/brexit-legal-challenge-pound-sterling-drop-supreme-court-rules-theresa-may-article-50-parliament-a7542836.html>.

293. See Richard Corbett, *The Brexit Nightmare We Will Soon Be Unable to Ignore*, NEW STATESMAN (Nov. 17, 2016), <https://www.newstatesman.com/politics/staggers/2016/11/brexit-nightmare-we-will-soon-be-unable-ignore> (posing questions concerning regulation in a post-EU Britain); Dan Roberts, *As the Brexit Vote Turns One, Leaving Has Never Been More Uncertain*, GUARDIAN (June 23, 2017), <https://www.theguardian.com/politics/2017/jun/23/as-the-brexit-vote-turns>

define the allocation of power²⁹⁴ and, on this occasion, the United Kingdom's uncodified constitution was unable to do this with certainty or precision until the Supreme Court gave judgment. A country should not plunge into months of political and economic uncertainty on the basis that no one knows who has a particular constitutional power; such a situation is unacceptable in a modern democratic society.

The case also showed that the United Kingdom's constitution, while remarkably flexible, does not easily adapt to entirely novel situations. Article 50 requires a country deciding to leave the European Union to do so "in accordance with its own constitutional requirements."²⁹⁵ For any country with a codified constitution, this clause causes no problems; it merely looks to its constitutional document to see what it requires. Take, for example, Finland. Its constitution provides that the country is a member of the European Union and, while this could be changed, section 94 of the constitution requires parliamentary approval for the denunciation of international obligations with "provisions of a legislative nature" or ones which are "otherwise significant."²⁹⁶ Where those obligations concern the constitution or transfer of power to the European Union, the Eduskunta (Finnish Parliament) must pass the approval by a margin of two-thirds.²⁹⁷ France provides another example. Article 88 of the French Constitution states that the country will be a member of the European Union.²⁹⁸ Any change to this would require amending the constitution, which is done following a procedure set out in Article 89 with a bill proposing the amendment requiring either approval of both *assemblées* (houses) and support in a referendum, or a three-fifths majority of a *Parlement* (Parliament) convened en *Congrès* (in Congress).²⁹⁹ A codified constitution clarifies how the process of deciding to leave the European Union should take place—either by using special arrangements particular to the European Union, or just the ordinary procedure for amending the constitution. The United Kingdom, however, has no such blueprint and nothing to refer to in order to decide who should make the decision and subsequent notification

one-leaving-has-never-been-more-uncertain (explaining that the uncertainty surrounding Brexit was caused partly because the country did not know who had the power to leave).

294. See ELLIOTT & THOMAS, *supra* note 25, at 7 ("[A] key purpose of a constitution is to ensure that those entrusted with power are required to exercise it responsibly and called to account when they do not.")

295. Treaty on European Union art. 50, Oct. 26, 2012, 55 O.J. (C 326) 1, 43.

296. THE CONSTITUTION OF FINLAND, June 11, 1999, §§ 1, 94.

297. *Id.* §§ 73, 94–95.

298. LA CONSTITUTION FRANÇAISE, Oct. 4, 1958, art. 88.

299. *Id.* art. 89.

under Article 50.³⁰⁰ When a country has a constitution which relies heavily on precedent and on custom, it cannot easily adapt to entirely novel situations. While the decision to join the EEC was taken in line with the traditional constitutional procedure for international treaties, the decision to leave the European Union, a decision simultaneously taking place on both international and domestic planes, was novel.³⁰¹ The Supreme Court eventually came up with a solution, but it took many months of legal dispute, cost hundreds of thousands—if not millions of pounds—and caused much distraction from the work of preparing to leave the European Union.

The litigation also highlighted various issues relating to the role of the referendum in the United Kingdom. The referendum is a fairly new phenomenon within the British constitution. As recently as 1945, when Winston Churchill suggested that a referendum could be held to approve the continuation of the wartime coalition government, Deputy Prime Minister Clement Attlee responded that he “could not consent to the introduction into our national life of a device so alien to all our traditions as the referendum”³⁰² Margaret Thatcher, in a debate in Parliament in 1975, opposed the idea of introducing referendums in the United Kingdom, stating that “[p]erhaps the late Lord Attlee was right when he said that the referendum was a device of dictators and demagogues,” referencing the many referendums held to legitimize the Nazi regime during the 1930s, and the plebiscites held by Napoleon III.³⁰³

While the lack of a codified constitution means that there is nothing either sanctioning or preventing their occurrence, referendums have very

300. See Adam Taylor, *This is the Process for Leaving the E.U. Except Nobody's Ever Used It*, WASH. POST (June 24, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/24/article-e-50-the-untested-piece-of-e-u-legislation-that-will-control-britains-future/?utm_term=.a8548b1099cc (explaining that Article 50 directs the Member State to “withdraw from the Union in accordance with its own constitutional requirements”); Jennifer Rankin, Julian Borger & Mark Rice-Oxley, *What is Article 50 and Why Is It So Central to the Brexit Debate?*, GUARDIAN (June 25, 2016), <https://www.theguardian.com/politics/2016/jun/25/article-50-brexite-debate-britain-eu> (explaining the difficulties the United Kingdom will face withdrawing from the European Union under Article 50 because the country lacks clear and obligatory procedures for such a withdrawal).

301. See *Into Europe*, PARLIAMENT.UK, <http://www.parliament.uk/about/living-heritage/transformingsociety/tradeindustry/importexport/overview/europe/> (last visited Dec. 8, 2017) (describing the process and constitutional procedure of the UK joining the EEC); Taylor, *supra* note 300 (explaining that no country has ever gone through the novel process of withdrawing from the European Union under Article 50).

302. VERNON BOGDANOR, *THE PEOPLE AND THE PARTY SYSTEM: THE REFERENDUM AND ELECTORAL REFORM IN BRITISH POLITICS* 35 (1981).

303. 888 Parl Deb HC (5th ser.) (1975) col. 314 (UK); Geoffrey Wheatcroft, *Europhobia: A Very British Problem*, GUARDIAN (June 21, 2016), <https://www.theguardian.com/politics/2016/jun/21/br-exit-eurosepticism-history>.

rarely been used. Prior to the Brexit referendum in 2016, there had been only two national referendums: the first in 1975 regarding EEC membership, and the second in 2011 on the voting system used to elect Parliament.³⁰⁴ Referendums have taken place in the regions and nations, notably regarding devolution and, in 2015, independence in Scotland.³⁰⁵ With no constitution setting out how referendums should work, in 2000, Parliament passed an Act which governs their use.³⁰⁶ In most of the referendums held prior to the Brexit referendum, the Act of Parliament that authorized the referendum also stated what should occur following the referendum.³⁰⁷ In the Parliamentary Voting System and Constituencies Act 2011, section eight provided that, if more votes were cast in the referendum in favor of the proposition that the voting system should be changed, then the Minister must bring the relevant provisions into force; but if more votes were cast opposing the proposition, then he must repeal the provisions.³⁰⁸ In the European Union Referendum Act 2015, however, no such provisions were made.³⁰⁹ It would have been easy for Parliament to state what should occur after the referendum, whether that be a vote in Parliament or granting power to the executive to implement the will of the people, but no such plans were made.³¹⁰ As a result, when the vote went a different way to that expected by the political elite, it was not clear what constitutional arrangements were in place to begin the process of leaving the European Union. This demonstrated a weakness in the constitution, namely that because referendums are not a traditional part of the United Kingdom's constitution, there are insufficient arrangements and procedures in place to govern their use. Despite the fact that the calling of a referendum is a significant constitutional action, Parliament was able to call the referendum without thinking about what steps should be taken following the vote.³¹¹

304. R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union [2017] UKSC 5 [117] (appeal taken from Eng., Wales, and N. Ir.) (UK).

305. *Id.*

306. *See generally* Political Parties, Elections and Referendums Act 2000, c. 41 (UK) (“An Act . . . to make provision about election and referendum campaigns and the conduct of referendums . . .”).

307. *See, e.g.*, Parliamentary Voting System and Constituencies Act 2011, c. 1, § 8 (UK) (explaining what actions will occur with a “yes” vote and a “no” vote).

308. *Id.*

309. *See generally* European Union Referendum Act 2015, c. 36 (UK) (containing no provision setting forth the procedure for after the election based on the possible outcomes).

310. Patrick Wintour, *Cameron Accused of “Gross Negligence” Over Brexit Contingency Plans*, *GUARDIAN* (July 20, 2016), <https://www.theguardian.com/politics/2016/jul/20/david-cameron-gross-negligence-brexit-contingency-plans>.

311. Akash Paun, *The Referendum and the British Constitution: Strange Bedfellows?*, *INST. GOV'T* (June 20, 2016), <https://www.instituteforgovernment.org.uk/blog/referendum-and-british->

Parliament's failure to consider what would happen after the referendum led directly to the confusion and uncertainty about what should happen following the vote to leave the European Union.³¹² This confusion and uncertainty could have been avoided, but once the referendum had been held, it could not be resolved without litigation.³¹³

It is often said that one of the strengths of the British constitution is its flexibility.³¹⁴ *Miller* demonstrated the weakness in the corollary of this aspect of the constitution: it is extremely easy to change it. Without any constitutional requirement to the contrary, a referendum on a significant constitutional change to the country was held on the basis of a bare majority.³¹⁵ Likewise, the vote in Parliament to grant the government the power to invoke Article 50 was done on a bare majority.³¹⁶ Many European countries have significantly greater safeguards for constitutional changes. Germany's Basic Law, for example, requires a two-thirds majority in both the Bundestag (lower house) and the Bundesrat (upper house) to amend the Basic Law or to make significant changes to it in relation to the European Union.³¹⁷ Portugal's constitution requires a two-thirds majority in the Assembleia da República (Assembly of the Republic), with constitutional

constitution-strange-bedfellows (stating that referendums have been used to solve questions of constitutional character).

312. Nicola Slawson, *Theresa May "Acting like a Tudor Monarch" by Denying MPs a Brexit Vote*, GUARDIAN (Aug. 28, 2016), <https://www.theguardian.com/politics/2016/aug/27/theresa-may-acting-like-tudor-monarch-in-denying-mps-a-vote-over-brexit> (detailing the confusion surrounding initiating the Brexit process).

313. *See id.* (stating May received advice from a lawyer that a parliamentary vote is not required, and discussing constitutional implications of May's actions, thereby setting the stage for a legal battle); *see also* Stephen Castle & Steven Erlanger, "Brexit" Will Require a Vote in Parliament, U.K. COURT RULES, N.Y. TIMES (Nov. 3, 2016), <https://www.nytimes.com/2016/11/04/world/europe/uk-brexit-vote-parliament.html?mcubz=1> (maintaining that a leader for the Liberal Democrats was disappointed that the government undermined parliamentary sovereignty—forcing the courts to make the decision).

314. Jenkins, *supra* note 57, at 922.

315. *See* Michael White, *The Brexit Vote Aftermath, Explained: A Wild Week in UK Politics*, GUARDIAN (July 2, 2016), <https://www.theguardian.com/politics/2016/jul/02/brexit-eu-referendum-week-labour-party-boris-johnson> (stating a 52% leave vote was sufficient to begin the process of leaving the EU, and that there was no set percentage, such as two-thirds, needed to leave). *See generally* European Union Referendum Act 2015, c. 36 (UK) (failing to provide a percentage required to withdraw from the EU, so bare majority was assumed).

316. *See* Anushka Asthana, Rowena Mason & Lisa O'Carroll, *Parliament Passes Brexit Bill and Opens Way to Triggering Article 50*, GUARDIAN (Mar. 13, 2017), <https://www.theguardian.com/politics/2017/mar/13/brexit-vote-article-50-eu-citizens-rights-lords-mps> (stating the House of Commons voted 335 to 287 to eliminate the first House of Lords amendment to the bill, which the House of Lords accepted by a vote of 274 to 135; the House of Commons voted 331 to 286 to eliminate the second House of Lords amendment, which the House of Lords accepted 274 to 118).

317. GRUNDGESETZ [GG] [Basic Law] art. 79, *translation at* https://www.gesetze-im-internet.de/englisch_gg/index.html.

amendments only allowed five years after the previous change, unless there is a four-fifths majority in the Assembleia.³¹⁸ These measures acknowledge that making a constitutional change has significant impacts on citizens, businesses, and government—and that there should be safeguards in place to ensure that changes are not made lightly. The documents and conventions, which make up the United Kingdom’s constitution, have no elevated legal status and can be amended in the same way as any other law. There are, therefore, no safeguards to prevent the constitution from being amended carelessly or capriciously.

XI. PROPOSALS

At this point, it would be easy—obvious even—to argue that the United Kingdom should codify its constitution. A well-drafted, codified constitution could define the division of power between Parliament and the executive, would include safeguards preventing capricious amendment, and could solve many if not all of the problems with the current constitutional arrangements, which this case has identified. The problem with this argument is that it is the very foundation of the constitution, Parliamentary sovereignty, which prevents it from being codified. Parliament is sovereign and can create and repeal any law, but it cannot endow a law with an elevated status or entrench a law, as would be required for a constitution.³¹⁹ Neither can Parliament bind its successors by limiting their power or creating a body that could declare a future Act of Parliament unconstitutional.³²⁰ While it may not be possible to create a codified constitution, there are actions which could be taken to reduce future uncertainty and confusion similar to that followed by the Brexit referendum. Three ideas are outlined below: (1) more of the constitution should be written down; (2) the prerogative power to conduct foreign affairs should be given a statutory basis with properly defined limits; and (3) in future referendums, Parliament should set out what action should be taken following the vote.

While it would not be possible to create a fully codified constitution for the United Kingdom—such as that which exists in the United States and in almost all other countries—it would be possible to codify more of the

318. CONSTITUTION OF THE PORTUGUESE REPUBLIC Apr. 25, 1976, art. 284, 286.

319. See NEW BRITISH CONSTITUTION, *supra* note 19, at 12–14 (explaining that Parliament can “legislate as it chooses” and that a constitution would need to “limit the sovereignty of Parliament”).

320. See *id.* at 12–15 (“It means that Parliament can make or unmake any law, and that a court does not have the power, as, for example the American Supreme Court does, to declare a statute invalid.”).

constitution than has already been written down. As discussed above, in recent years the courts have begun accepting the idea that some statutes have constitutional status, which elevates them above ordinary statutes and makes them immune to implied repeal.³²¹ This idea is still novel, but the Court of Appeal and the Supreme Court have commented upon it positively.³²² Both the Divisional Court and the Supreme Court in *Miller* noted that the European Communities Act 1972 had constitutional status.³²³ It would be feasible for Parliament to create an Act of Parliament with the same constitutional status as the European Communities Act 1972, which sets out the basics of the constitution, codifies many of the conventions currently in place, and identifies which statutes should have constitutional status, rather than the current position where no one really knows which Acts are given such status.³²⁴ This Act would not have the status of a codified constitution, as it could be repealed or amended by a future Parliament; but if it was given the status of a constitutional Act, Parliament would only be able to change it if they did so expressly. Producing a constitutional statute in this form would retain the flexibility that has served the British constitution for so long, while introducing a greater level of certainty and predictability about the allocation of power within the country. There have already been projects which could provide a starting point for the text, including a full proposed constitutional text prepared as an academic exercise and published by the Smith Institute, or the Cabinet Manual, which sets out how the government works and already serves as a non-binding handbook for Civil Servants and the executive.³²⁵ The next few years will see many constitutional changes in the United Kingdom, and with them, much discussion about the constitution and the way the country is governed. Brexit would provide a good opportunity for committing these arrangements, both new and historic, to paper.

As was clearly explained by the courts in the Brexit litigation, the Crown prerogative power only exists to the extent that the power has not otherwise been granted or limited by legislation.³²⁶ Given the problems

321. *Thoburn v. Sunderland City Council* [2003] QB 151, [60] (Eng. and Wales); see ELLIOTT & THOMAS, *supra* note 25, at 42 (explaining that Lord Justice Laws in *Thoburn* suggested obiter dicta that some statutes—due to their constitutional status—cannot be impliedly repealed).

322. See *R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union* [2017] UKSC 5 [60] (appeal taken from Eng., Wales, and N. Ir.) (UK) (“[I]n constitutional terms the effect of the 1972 Act was unprecedented.”).

323. *Id.*

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

325. See THE SMITH INST., TOWARDS A NEW CONSTITUTIONAL SETTLEMENT 152–76 (Chris Bryant ed., 2007) (providing a proposed constitutional text).

326. *Sec'y of State for Exiting the European Union* [2017] UKSC, [43] (explaining that the Crown prerogative is limited because it is only exercisable through Parliament).

demonstrated in this case, it is almost certainly time for Parliament to legislate to define the limits of the power, particularly in relation to foreign affairs, but perhaps in all areas in which it still operates. This has already been done in relation to other prerogative powers such as in the Fixed-term Parliaments Act 2011, which placed the prerogative power to dissolve Parliament on the statute book and carefully defined its limits.³²⁷ It would be fairly simple for Parliament to grant the executive the power to conduct foreign affairs and to enter into treaties, and set the parameters of that power. The prerogative power is archaic and undemocratic. It is a relic of a bygone era with boundaries that are so ill defined that, in assessing the limits of the power, the courts were forced to refer to cases from over 400 years ago.³²⁸ It may seem quaint, but it is no way to define power in a modern democratic state. Parliament should take this opportunity to end the common law royal prerogative and create, if so desired, a legislative power for the executive to deal with matters currently covered by prerogative powers.

All of the constitutional problems raised by the Brexit litigation could have been foreseen and, had they been properly considered in advance, the entire case and the uncertainty it created could have been avoided. Parliament must take at least some of the blame for passing an Act that granted the power to hold a non-binding referendum but made no provision for what should occur next. It was careless, and it demonstrated a level of arrogance in the political elite who did not believe that the people would vote to leave the European Union. It would not be difficult to prevent this from occurring again. An Act of Parliament—particularly one given constitutional status—could require any Bill proposing a referendum to make provision for what happens in the event of any given outcome. The Act would not be able to prevent a future Parliament from repealing it and legislating for a referendum without making such provision, but it would set an expectation that plans for the outcome ought to be included in any Act which authorizes a referendum—unless Parliament is explicit in its view that no provision should be made regarding the outcome of a particular referendum. The requirement would need to be in an Act with constitutional status to prevent implied repeal. Ideally, there would be arrangements in place to enable Parliament, where necessary, not to follow the requirement

327. See Fixed-term Parliaments Act 2011, c. 14 (UK) (detailing terms and procedures regarding dissolution of Parliament and polling days for parliamentary general elections).

328. Jack Straw, *Time to Change the Rule: Royal Prerogative Is an Unaccountable Power that Must Come Out From Behind the Throne*, INDEPENDENT (July 16, 1994), <http://www.independent.co.uk/voices/time-to-change-the-rule-royal-prerogative-is-an-unaccountable-power-that-must-come-out-from-behind-1414386.html>.

without needing to repeal the Act. However, even in cases where Parliament chose not to follow the requirement, the very act of choosing not to comply would force debate and discussion about why no plans were being made. This would almost certainly be sufficient to prevent the carelessness and lack of forethought associated with the European Union Referendum Act 2015.

CONCLUSION

It was always going to be the case that, should the United Kingdom vote to leave the European Union, it would cause something of a constitutional crisis. What no one in authority apparently foresaw was that no one knew, and no provision had been made regarding, who had the power to invoke Article 50 of the Treaty on European Union and begin the process of leaving the Union. As a result, when the unthinkable happened and the United Kingdom voted to leave, it led to litigation regarding the extent of powers that have belonged to the monarch since before the time of Magna Carta. Both the Divisional Court and the Supreme Court ruled that, although the executive—acting under the Crown’s prerogative power—had the authority to conduct foreign affairs, this power did not enable it to invoke Article 50 because to do so would result in a change to domestic law as a result of the effect of the European Communities Act 1972, which acts as a “conduit pipe” by which the laws of the European Union become domestic law.³²⁹ The government of the United Kingdom had intended to invoke Article 50 following the referendum outcome, but—as a result of the Supreme Court’s decision—it was forced to return to Parliament to ask for the power to begin the process of withdrawing from the European Union. That power was granted and has now been exercised with the United Kingdom’s departure from the European Union due to take place no later than the end of March 2019.³³⁰

The Brexit litigation highlighted a number of weaknesses in the United Kingdom’s constitutional arrangements, which are not seen in the constitutions of other EU Member States: the constitution is unable to adapt to entirely novel situations, there are insufficient arrangements in place for the holding of referendums as a result of referendums not being a traditional part of the country’s constitutional arrangements; it is possible for

329. R (on the application of Miller and another) v. Sec’y of State for Exiting the European Union [2017] UKSC 5 [65], [86] (appeal taken from Eng., Wales, and N. Ir.) (UK).

330. Jennifer Rankin, *The Countdown: How the UK’s Departure from the EU Could Unfold*, GUARDIAN (Mar. 29, 2017), <https://www.theguardian.com/politics/2017/mar/29/brexit-countdown-how-uks-divorce-from-eu-could-unfold>.

Parliament to take significant constitutional actions, such as calling for a referendum, without really considering the consequences, and there are no safeguards preventing capricious amendment of the constitution. This Article has argued that the uncertainty that led to this litigation was unacceptable and entirely avoidable. Actions such as giving legislative authority to more of the country's constitutional arrangements, replacing the archaic royal prerogative with properly defined executive power granted by Parliament, and the creation of a rule or expectation that referendums should only be held if provision has been made for what will happen following the poll, would all act to reduce the chances of a repeat of the unnecessary constitutional chaos seen in the United Kingdom surrounding Brexit.