

# The Roads to Reversing Brexit: Local and Transnational Constitutional Principles

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This essay by Professor Robert Howse was already published in *Cardozo Law Review* (Volume 39, issue 3, page 1041). Jointly with the author, we have decided to republish it in the Institute of European Law's Working Paper series to make its seminal analysis and passionate call even more available and contribute to the debate in the weeks the separate us from Brexit day.

Luca Rubini

Birmingham, 27<sup>th</sup> November 2018

THE ROADS TO REVERSING BREXIT: LOCAL AND  
TRANSNATIONAL CONSTITUTIONAL PRINCIPLES

*Rob Howse*<sup>†</sup>

INTRODUCTION

Support for Brexit as pursued by Prime Minister Theresa May is shaky and probably waning. An opinion poll conducted in August 2017 suggests that if another referendum on Brexit were to occur, the “Remain” side would win it comfortably.<sup>1</sup> Moreover, as the government has pursued negotiations with Brussels on Brexit, its strategy has often been unclear and the “hard Brexit” approach of Britain—leaving without retaining access to the single market—has even less support than the general idea of Brexit and indeed is alarming to Britain’s business community.<sup>2</sup> If these trends continue, and if a deal on Brexit that is acceptable to the majority of the public in the United Kingdom (U.K.) becomes ever more elusive, then the idea of simply reversing Brexit and stopping the process dead in its tracks, will undoubtedly gain traction.

But is such a reversal constitutionally and legally possible, taking into account both formal and informal norms of democracy? In this Essay I argue that the answer to that question is a resounding “yes”—both under the U.K. and the European Union (E.U.) legal and political orders. The Resolution of the European Parliament on Brexit Negotiations—voted in early April 2017—indicates that reversal of Brexit would occur, from the E.U. perspective, by the revocation of notice to leave under Article 50<sup>3</sup> of the E.U. treaty (Treaty of Lisbon).<sup>4</sup> The European Parliament (E.P.) suggests that “revocation of notification needs to be subject to conditions set by all EU-27, so that it cannot be used as a procedural device or abused in an attempt to improve on the current terms of the United Kingdom’s membership.”<sup>5</sup> Two separate points are at issue here. First, the E.P. affirms, in suggesting that the revocation of Article

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<sup>1</sup> See Ben Quinn, *Majority of UK Public Backs Brexit ‘Transition Period’*, *Poll Finds*, *GUARDIAN* (Aug. 19, 2017, 2:20 PM), <https://www.theguardian.com/politics/2017/aug/19/british-public-believes-transition-period-necessary-for-brexit>.

<sup>2</sup> See Patrick Jenkins, *UK Businesses Want Answers on Brexit Deal*, *FIN. TIMES* (Sept. 24, 2017), <https://www.ft.com/content/60fb2830-a12f-11e7-9e4f-7f5e6a7c98a2>.

<sup>3</sup> European Parliament Resolution of 5 April 2017 on Negotiations with the United Kingdom Following Its Notification That It Intends To Withdraw from the European Union (2017/2593 (RSP)) [hereinafter E.P. Resolution].

<sup>4</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 50, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

<sup>5</sup> E.P. Resolution, *supra* note 3, at L.

50 needs to be subject to conditions, that the Treaty of Lisbon itself permits such revocation; this is clear from the language of Article 50 of the Treaty of Lisbon. Article 50 refers to *notice* of an “intention” to withdraw; an intention is far from an irreversible decision, simply in terms of the ordinary meaning of words. The second point is that the right of revocation cannot be entirely open-ended as it could then be used or abused in bad faith for strategic objectives; thus conditions are needed, to be decided by consensus of the other twenty-seven E.U. Member States. The resolution implies that, in the absence of such conditions decided by consensus (less the U.K.), the right to revoke notice under Article 50 would be unlimited.

## I. GETTING BEYOND THE OBJECTIONS TO REVERSAL

### A. *Democracy Is About Changing Your Mind*

One of the most frequently-heard normative arguments against the reversal of Brexit (especially through a second referendum) is that “democracy” requires no going back once the people have spoken. As I shall endeavor to explain, this is a concept of democracy that lacks a proper basis either in the ancient Greek tradition of direct democracy or in modern Anglo-American representative democracy. The idea of the “people” having spoken is closely related to a myth that Jan-Werner Mueller has identified as at the heart of at least some prominent forms of populist ideology—the notion that support of a transitory majority coalition represents the backing of the people in the sense of a mythic self-determining unity, the resistance to which must come necessarily from enemies of the people.<sup>6</sup> If there is a theoretical source for the notion that once the people have spoken there is no turning back, it might be the likes of Schmittian decisionism.<sup>7</sup> Democracy or popular will is epitomized by the decisive historical moment where the people, understood as a homogenous unity, turns over its fate or destiny to a leader or movement. If democracy is thus understood, one can understand the rage of Brexiters when confronted with the possibility that constitutional rules, or another kind of democratic process (that of representative democracy), or even another referendum might interfere with that encounter with destiny; or that those outside their understanding of the homogenous unity of the people—the likes of Gina Miller or Jewish law lords, for instance—would throw a wrench in the works.

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<sup>6</sup> See generally JAN-WERNER MÜLLER, WHAT IS POPULISM? 20 (2016) (“[P]opulists are always anti-pluralist; populists claim that they, and only they, represent the people. . . . The core claim of populism is . . . a moralized form of anti-pluralism.”).

<sup>7</sup> CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 49–52 (George Schwab ed. & trans., 2005).

When we turn to non-fascistic notions of democracy, however, what is remarkable is the common ground that exists between ancient direct democracy (by which the referendum device is somehow inspired) and modern representative democracy: in both instances, democracy is very much about changing one's mind. One of the critiques of elitist and conservative elements within Athens of its practice of democracy was, in fact, that democracy resulted in the people changing their minds and the laws, all the time. In Plato's *Minos*, this critique is in fact raised by an unnamed interlocutor with somewhat autocratic sensibilities, and Socrates responds to it by proposing a definition of law as wishing to be what is—the idea that change is a form of experimentation in the process of getting a legal-political result that best represents the best intentions of the assembly of citizens.<sup>8</sup>

A considerably more famous attack on democracy as changing one's mind is relayed in Thucydides' *The History of the Peloponnesian Wars*.<sup>9</sup> In a moment of collective anger, the Athenians decide to punish the residents of the island of Mytilene for rebelling against Athens' imperial rule by killing the entire adult male population. Then the assembly makes a resolution to reconsider that decision through further deliberation. The demagogue Cleon is none too happy about the idea of another debate; he argues that the people decide best when they do so in the heat of passion. Anger is the authentic mode of democratic decision, and when the people calm down and listen to the various points of view calmly, they easily get taken in by the tricks of sophisticated "liberal" orators. In response, the philosophical Diodotos, Cleon's arch protagonist, propounds the reverse (an early articulation of the logic of what we would call deliberative democracy); people may be more likely to discern the true collective interests of a society when assuming a more reflective, less reflexive mode. In the end, the majority of Athenians decide to spare all but the leaders of the rebellion against Athens. In Diodotos' speech, he presents the human condition as one of transgression followed by repentance or reconsideration; this provides a deep ground for the idea of democracy as changing one's mind.

Be that as it may, it is difficult to see—without importing alien notions of collective destiny—how the original Brexit referendum result must prevail over a later expression of democratic will, either through parliament (as long as we are not just talking about the unelected upper house), another referendum, or an election. That an expression of popular opinion in June 2016 would carry more weight than a vote in 2019 once there is, possibly, a developed framework for the conditions of Brexit; and thus, much

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<sup>8</sup> 9 PLATO, PLATO IN TWELVE VOLUMES 315a–b, 316c (W.R.M Lamb trans., 1925).

<sup>9</sup> THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR: A NEW AND LITERAL VERSION (Henry Dale trans., Harper & Bros. 1891) (1526).

more information about what it entails seems simply perverse.

This is not to say that modern representative democracies do not make use of hand-tying devices that make it difficult, at least in the short term, to reverse certain kinds of democratic outcomes that emerge through referenda or other kinds of democratic processes (for example, constitutional rules to which onerous amendment procedures are attached, or specification in certain laws that they can only be altered by super-majority vote). As the Supreme Court of the U.K. noted in the *R v. Secretary of State for Exiting the European Union (Miller)*<sup>10</sup> judgment, the U.K. Parliament itself had in the past enacted referendum laws that provided for some change in the legal situation to be the *automatic* outcome of a positive vote, effectively not permitting backtracking (though of course at the limit Parliament could break that promise through a further act of Parliament). But, as the Court also observed, the 2015 referendum legislation did not provide that any set of consequences at all would be triggered automatically by a yes vote, nor was there any definition of what yes meant: a bare majority of voters or, let's say, a clear majority (a concept the Supreme Court of Canada developed with respect to referenda on another kind of fundamental political and constitutional change, during the attempted secession of a province from Canada).<sup>11</sup> Parliament might also have prescribed minimum thresholds of support that were required in each region of the U.K., or at least in England, Scotland, Wales, and Northern Ireland. The 1992 Canadian Constitutional Referendum was operated against—if not a legal requirement at least a clearly enunciated norm—that the fundamental constitutional changes being put to a vote would only go ahead if there were a majority not only in the country as a whole, but in each province of Canada.

In the case of the Brexit referendum legislation,<sup>12</sup> the U.K. Supreme Court observed:

[T]he 2015 Act, which authorised referendums about membership of the European Community or European Union, made [no] provision for any consequences of either possible outcome [of a majority yes or no vote]. . . . [T]he 2016 referendum was described as advisory by some ministers and as decisive by others, but nothing hangs on that for present purposes. Whether or not they are clear and consistent, such public observations, wherever they are made, are not law: they are statements of political intention.<sup>13</sup>

In sum, the legal framework and political context of the initial

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<sup>10</sup> *R v. Sec'y of State for Exiting the European Union (Miller)* [2017] UKSC 5, [118]–[20] (appeals taken from Eng. & N. Ir.).

<sup>11</sup> See generally Sujit Choudhry & Robert Howse, *Constitutional Theory and the Quebec Secession Reference*, 13 CAN. J.L. & JURIS. 143 (2000).

<sup>12</sup> European Union Referendum Act 2015, 2015 O.J. (C 36) (Eng.).

<sup>13</sup> *Miller* [2017] UKSC 5, [119].

referendum do not provide for any hand-tying with respect to further tests of popular will prior to the final decision to exit the E.U. either under an agreement or, after two years, without an agreement.

### B. *The Futility of Resisting “History”*

A different sort of objection to any move to reverse Brexit is as appealing to the pragmatic sensibility as it is normatively slippery. The argument, if I may stylize it thus, is that Brexit—as well as Trump and Orban, and certain other developments—reflect a shift that it is futile to resist because it is grounded in some deep sociological or moral truth that liberals, cosmopolitans, Europeanists, whatever one calls us, have been able to avoid facing for a long time. Individual rights and cosmopolitan politics are flattening. They do not respond to much of what is most powerful most of the time in human nature, which is not the demand for emancipation, but for organic community and belonging; not individual originality and secular struggle for universal equality, but for patriotic songs and holy rituals.

Among anti-liberals, Carl Schmitt at least had a certain probity. He confessed that it boils down to anthropological confessions of faith—how one understands humankind, as capable of an (albeit often interrupted) emancipatory trajectory toward universal humanity, or as fearful, anxious, and seeking protection and security within the comfort of the closed group, ideally under the wing of a strong State and its strong leaders.<sup>14</sup> If one has the latter confession of faith, then it is logical to see a phenomenon such as Brexit as a confirmation of one’s predetermined understanding of the human condition as a means by which the permanent order of things has revealed itself in the face of liberal cosmopolitan delusions. To resist Brexit, to try actually to *reverse* it, is to deny historical truth—Nigel Farage and Boris Johnson as *evangeloi*.<sup>15</sup>

Indeed, Damon Linker goes so far as to say as that with Brexit and Trump, human nature has revealed itself.<sup>16</sup> But the contrary evidence is clear: whether with Brexit or Trump, the reactionary xenophobic vision is one that does not catch on with young people in the Anglo-American world—the rising generation of democratic citizens. Why judge human nature by the weight of the past—the

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<sup>14</sup> See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 57–59 (George Schwab trans., 2007).

<sup>15</sup> This idea of the voice of the “people” as an organic whole as having spoken (regardless of the closeness of the vote in the real world) is considered by Jan-Werner Müller to be at the core of the ideology of “populism.” See MÜLLER, *supra* note 6, at 56.

<sup>16</sup> See Damon Linker, *How Brexit Shattered Progressives’ Dearest Illusions*, WEEK (June 27, 2016), <http://theweek.com/articles/632380/how-brexit-shattered-progressives-dearest-illusions>.

old—rather than the promise of the future—the young? As Leo Strauss noted in his great work on Machiavelli, modern political thought as progressive thought has always pinned its hopes on the young.<sup>17</sup>

One can also view non-reversibility as taking the side of history in a sense that history is pointing to some malaise or perhaps incurable pathology of the E.U. itself. But what is this malaise? Is it bureaucracy; is it lack of energizing passion and commitment to ideals; or is it rather, a crisis of neoliberalism (austerity, the ascendancy of German economics, etc.)? The former communitarian view is reflected in, for example, the work of Alexander Somek.<sup>18</sup> One would give some precedence to the crisis of neoliberalism, the immense human cost and waste of human opportunity produced by the punitive German style of neoliberal economics. A good social democrat would say yes there is fear, but fear is produced not by ontological anxiety, but the hollowing out of the social contract and the erosion of the rights provided by the welfare state. Had the left been mobilized with full solidarity behind the Remain in the Brexit referendum campaign, the overall result might have been different; the ambivalence of the left, arguably fateful in the short term, again would show that underlying the present moment might well be the crisis of neoliberalism as the dominant orientation of the E.U., rather than the proto-cosmopolitan, post-national ideal of Europe as such. In sum, only a shallow or self-serving analysis of the present moment could lead to the conclusion that history has stacked the cards in favor of the Brexiters.

### C. *The Value of Certainty and Stability*

Quite aside from the supposed futility of countering the forces of history (rather than trying to accommodate or work with them) is another pragmatic notion: we need to move on for the sake of certainty and stability. This is perhaps the most dangerous objection to reversing Brexit in that it appeals to the values of many of those who have been attracted to Remain. If one's case for Remain was the dangers of upsetting the status quo and entering uncharted waters, one might think that the Burkean institutional conservative view is now on the side of the Brexiters—the U.K. having already moved to the stage of triggering Article 50. One might think of Kant's attitude to the French Revolution: he was ostensibly horrified by the idea of revolution, but once a revolution succeeds (at least of the liberal kind) he thought one needs to

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<sup>17</sup> See LEO STRAUSS, THOUGHTS ON MACHIAVELLI 82 (1958).

<sup>18</sup> See, e.g., Alexander Somek, *Solidarity Decomposed: Being and Time in European Citizenship* (Univ. of Iowa Legal Studies Research Paper No. 07-13, 2007), <https://ssrn.com/abstract=987346>.



welcome it as the new legitimate order.<sup>19</sup> There are doubtless deeper subtleties grounding Kant's position. Be that as it may, the key point must be that the notion of a new status quo of Brexit is largely an illusion and indeed a dangerous one. There is persistent disagreement, even at the highest levels of the May government and the ruling Conservative party, about what Brexit should look like and what kind of future for Britain it implies. This is not merely the difficulty in constructing a negotiating position for talks with Brussels or mastering the technical questions entailed in a complex and unprecedented transition. It is about the priorities, goals, and values that are being pursued through Brexit, around which there is no consensus at any level. We must remember that for then British Prime Minister David Cameron, the referendum may have been, to some real extent, a *deus ex machina* for political dissensus around the future place of Britain in Europe and the world.<sup>20</sup> The result in no way ended the dissensus. At the current moment in the Brexit process, one cannot do better than the words of Lord Bolingbroke (of another century): "I expect little from the actors that tread the stage at present. They are divided, not so much as it has seemed, and as they would have it believed, about *measures*; the true division is about their different *ends*."<sup>21</sup>

In sum there is no new status quo to accept, however reluctantly and regrettably, for the sake of stability or certainty. And it must be clearly understood that the U.K. remains fully in the E.U. (with the main exception being for participation in processes related to the formulation of the E.U. position on Brexit itself) until the effective date of an agreement on Brexit or, in the absence of an agreement or an extension of the negotiation process, until withdrawal without an agreement just under two years hence. Given the above-noted uncertainty about what the top political circles in Britain seek in the way of a post-Brexit outcome, as well as the range of political events that might affect Europe in coming months or years, there is really no appletart to upset in returning to a status quo ante (E.U. membership) that, as a legal/constitutional matter, has yet to be disrupted. The Brexiters present Brexit as a process that is well-underway to its pre-determined conclusion. In fact, despite all the posturing about starting talks on post-Brexit trade agreements, the vague white paper on the Great Repeal Bill and so forth, no process has yet really *begun*.

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<sup>19</sup> See Sidney Axinn, *Kant, Authority, and the French Revolution*, 32 J. HIST. IDEAS 423 (1971).

<sup>20</sup> See generally Steven Erlanger & Stephen Castle, *In 'Brexit' Vote, David Cameron Faces Problem of His Own Making*, N.Y. TIMES, (June 21, 2016), <https://www.nytimes.com/2016/06/22/world/europe/david-cameron-brexit-european-union.html>.

<sup>21</sup> HENRY ST. JOHN BOLINGBROKE, LETTERS, ON THE SPIRIT OF PATRIOTISM: ON THE IDEA OF A PATRIOT KING: AND ON THE STATE OF PARTIES, AT THE ACCESSION OF KING GEORGE THE FIRST (1749).

## II. OPPORTUNITIES FOR REVERSING BREXIT: THE U.K. AND E.U. CONSTITUTIONAL FRAMEWORKS

### A. *The Significance of Miller*

In *Miller*, the petitioners succeeded before the U.K. Supreme Court in establishing that Brexit entailed the legal change of a constitutional character and that under the U.K. constitutional framework, the ultimate control over such a process must rest with Parliament and not the government (although Parliament can by legislation delegate explicitly to the government particular actions in this process).<sup>22</sup> It was largely uncontroversial in *Miller* that, *eventually*, Parliament would have to act to change legislation that presupposed the U.K.'s continued membership in the E.U. But the Brexiters conceived this role as a matter of a housekeeping exercise once the government had signed off on all the important decisions in the Brexit process, and Brexit was a full faith accomplice, as it were. In *Miller*, the explicit claim of the petitioners was: given that Brexit, if achieved, must contemplate legal changes of a constitutional character, the very triggering of Article 50 must be authorized by a law of Parliament.<sup>23</sup> The Supreme Court, in a majority decision, accepted this argument. For some, this must have seemed a pyrrhic victory, since as a political matter Parliament was not going to block the government from triggering Article 50. And indeed, Parliament passed the needed law (the Court said it could be quite laconic and still be constitutionally adequate) authorizing the triggering of Article 50.

But the Court did *not* say that the constitutional principle that it recognized is exhausted in practical significance once Parliament authorizes by law the government to trigger Article 50. It could equally apply—if not even more emphatically—I would argue, to subsequent decisions about Brexit of equal or greater constitutional significance: should Parliament not have to debate and authorize by law the formal negotiating position of the government with the European institutions, and indeed authorize by law any agreement resulting from the negotiations, and certainly, any decision to proceed to Brexit without an agreement? In the court of first instance, the petitioners' counsel had urged the "bullet" theory: the reason that the initial step triggering Article 50 required authorization by Parliament was that it is like pulling a trigger on a gun, once the trigger is pulled the bullet cannot be stopped.<sup>24</sup> In other words, this would be Parliament's only opportunity to meaningfully direct a process, the inevitable result of, which would be legal change of a constitutional character. But significantly, the bullet theory played no role whatever in the legal

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<sup>22</sup> *Miller* [2017] UKSC 5 [46] (appeals taken from Eng. & N. Ir.).

<sup>23</sup> *Id.* [36].

<sup>24</sup> *Id.*

reasoning of the Supreme Court. When we turn to the resulting *legislation*, it is limited to the authorization of the government to trigger Article 50, but this is where the delegation to the government also ends. The Act in no way hands over all further consequent decisions about Brexit to the government; thus, on the principle enunciated by the Supreme Court there would be good arguments that the law-making authority of Parliament must be employed in the case of later decisions with weighty implications for legal change of a constitutional character. I would think this would, above all, be the case for decisions about the form of Brexit that affect the rights of individuals under existing laws of a constitutional or quasi-constitutional character. Finally, with all due respect to Lord Pannick, whose advocacy I admire greatly, the bullet theory depends on an erroneous reading of Article 50. Article 50 provides ample means to stop, slow down, suspend, or delay the process begun by the U.K. giving notice; though in fairness to Lord Pannick, it is debatable to what extent the U.K. can take any of these steps unilaterally once Article 50 is triggered. It is to Article 50 that we now turn.<sup>25</sup>

B. *The E.U. Constitutional Framework: Article 50 of the Treaty of Lisbon*

Article 50 reads as follows:

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.

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<sup>25</sup> *Id.*

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.<sup>26</sup>

Reading paragraphs one and two together, it is clear that in order for a notification under Article 50 to be valid, a Member State must have already made a decision in accordance with its own constitutional requirements to leave the E.U. One may question whether, in light of the constitutional principle enunciated by the Supreme Court, a valid decision to leave the E.U. has been properly taken by the U.K. The law authorizing the government to trigger Article 50 does not decide that the U.K. shall leave the E.U. Parliament has not explicitly decided that question.

Be that as it may, paragraph two outlines a process for negotiating an agreement with the withdrawing state that entails several steps: the formulation of guidelines by the European Council; the determination of a framework for the withdrawing state's future relationship with the E.U.; the negotiation of an agreement based on that framework; the consent of the European Parliament to the agreement reached; and, once that consent is granted, the approval of the European Council.<sup>27</sup> Now we come to paragraph three, which provides that, failing an agreement, the withdrawal of the State in question becomes effective two years after it gave notice under Article 50.<sup>28</sup> However, by unanimous consent of the other E.U. Member States and the withdrawing State, this can be postponed.

It should be noted, first of all, that the two-year period relates only to the scenario where there is no agreement. Where there is a withdrawal agreement, the date that the withdrawal agreement is effective is a matter for negotiation. In theory, the withdrawal agreement could be set, for example, a year or more after the agreement is reached. This would allow more time for deliberation on the agreement and, in the U.K., for reopening the question of Brexit itself in light of the information revealed by the terms of the agreement. It would also allow for the process by which Parliament, as argued in the earlier section, would authorize by law

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<sup>26</sup> Treaty of Lisbon, *supra* note 4.

<sup>27</sup> *Id.*

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

the government to bind the U.K. to the agreement.

What of the case of revocation of the notice of withdrawal, which would seem on many scenarios a necessary instrumentality for the halting or reversal of Brexit? First of all, let's consider revocation prior to reaching an agreement and prior to the end of the two-year period. In the words of Jean-Claude Piris, a former senior legal official of the E.U., the "Article 50 procedure provides for notification by the interested state only of its 'intention' to leave. . . . In law, the word 'intention' cannot be interpreted as a final and irreversible decision. Legally, you may withdraw an intention, or change it, or transform it into a decision."<sup>29</sup> A stronger turn of phrase would be needed to imply a commitment that could not be reversed, at least without the consent of others affected by it. Since Article 50 does not contain any *lex specialis* concerning the issue of revocation of the notice of withdrawal, we would logically turn to the default rules in the *Vienna Convention on the Law of Treaties*.<sup>30</sup> These rules do not contain any suggestion that a State's notice of intent to withdraw from a treaty is irrevocable (that is, unless the other parties to the treaty consent to the revocation). As noted at the outset of this Essay, the European Parliament in its recent resolution has stipulated that conditions could, and should, be put on revocation by unanimous consent of the twenty-seven E.U. Member States less the U.K.<sup>31</sup> As the present analysis suggests, the legal basis for imposition of such conditions is to be found neither in the text of Article 50, nor in the *Vienna Convention on the Law of Treaties*.

What about revocation after the end of the two-year period? As noted, Article 50 explicitly provides for the possibility that the two-year period for automatic withdrawal failing an agreement may be extended by unanimous consent of the European Council and the withdrawing state. It has been widely noted that (up to the time of this Essay going to press) progress in the Brexit negotiations has been slow, with impasses on many key issues. At some point the actors involved will be faced with the very real possibility of withdrawal into a legal black hole if the period is not extended, perhaps even for another year or eighteen months. While it is possible to imagine a scenario of such impasse and acrimony that there is a lack of unanimity to extend, under most circumstances the pressure to extend would be enormous. As for the U.K. side, based upon the constitutional principle in *Miller* a decision to, in effect, embrace Brexit without an agreement—an outcome that would be clearly fraught with serious, if not grave consequences for the rule of law and the orderly operation of the legal and constitutional framework—would need, arguably, the

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<sup>29</sup> Jean-Claude Piris, *Article 50 Is Not For Ever and the UK Could Change Its Mind*, FIN. TIMES (Aug. 31, 2016), <https://www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926>.

<sup>30</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

<sup>31</sup> See E.P. Resolution, *supra* note 3.

authorization of Parliament by statute. If there were an extension of the two-year period to allow the orderly completion of all the steps required to get to the conclusion of an agreement—and that I think is the most likely outcome—then the same principles would continue to apply to revocation as did within the two-year period. It is fully permissible.

What if the U.K. were to decide to reverse Brexit after an agreement was concluded, but before it entered into force? Pursuant to Article 50, paragraph five, in this scenario the U.K. would arguably have to reenter the E.U. under Article 49.<sup>32</sup> But clearly, the procedures in Article 49 presume the need for a legal transition.<sup>33</sup> The withdrawal agreement not yet having entered into force, there is no transition to manage as the status quo of E.U. membership is still intact. So the withdrawal agreement might simply be terminated or the U.K. might withdraw from the withdrawal agreement.

## CONCLUSION

Those of us who oppose Brexit on the merits need not, and must not, accept a presumption—normative, practical, or legal—against the reversibility of the current government’s choice to seek the exit of the U.K. from the E.U. Neither the referendum result, nor the giving of notice under Article 50, nor indeed any valid decision of any legal or political authority, either in the U.K. or in the E.U., justifies such a presumption. To reverse Brexit will require a new political situation and extraordinary political entrepreneurship and leadership, but the opportunity is there. It is our duty to do all that is possible to make the current process as slow as it can be, to demand the maximum involvement of legislatures, and to use every legal and procedural device to string it out until the required political entrepreneurship and leadership emerges. Not to make this effort is to betray the rising generation of U.K. citizens, who en masse do not want this madness and will pay the largest price if it is not stopped.

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<sup>32</sup> See Treaty of Lisbon, *supra* note 4, at art. 50(5).

<sup>33</sup> See *id.* at art. 49. Article 49 reads:

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements. The conditions of eligibility agreed upon by the European Council shall be taken into account.

*Id.*