This article critically analyses the Supreme Court’s Miller judgment, taking it as an opportunity to reflect on the true place of EU law in UK law and on the right way to advance legal arguments on that point. It argues that the Miller majority did not provide an adequate answer to two strong arguments regarding interpretation of the European Communities Act 1972. Firstly, to the argument from the time-gap between enactment of the ECA and the moment Community law became directly effective in the UK. Secondly, to the argument from the purpose of s. 1(3) ECA, showing that the 1972 Act was enacted on the assumption of the orthodox dualist model.

1 University College, University of Oxford. My thanks for immensely helpful conversations on the issues discussed here to Robert Craig, Richard Ekins, Pavlos Eleftheriadis, Mark Elliott, John Finnis, Graham Gee, Alison Young, Gavin Phillipson, Ewan Smith, and Jack Williams; as well as to the audiences at Durham and Oxford. I also thank those who helped hone the arguments presented here in the course of our Twitter exchanges and through comments on the UK Constitutional Law Association Blog. The usual disclaimer very much applies. Unless otherwise stated, all URLs were last accessed 2 April 2017. Transcripts of hearings and the written submissions in the Miller appeal before the Supreme Court are available at https://www.supremecourt.uk/news/article-50-brexit-appeal.html.
INTRODUCTION

Miller was incorrectly decided. The Supreme Court should have reversed the Divisional Court. The Justices should have concluded that it is within prerogative powers to notify an intent to withdraw from the European Union under Article 50 of the Treaty on European Union. This claim is, of course, controversial. The reader will perhaps be disappointed that I do not here provide a comprehensive discussion of all the sundry nuances of the majority judgment in Miller. Instead, I take the Miller judgment as an opportunity to reflect on the true place of EU law in UK law and on the right


way to advance legal arguments on that point. While doing so I hope to convince the reader that the majority did not provide adequate reasons for their decision.

Crucial both for the Miller litigation and for the broader question of the place of EU law in UK law is the proper interpretation of relevant legislative choices made by Parliament in, and since, the European Communities Act 1972 (ECA). The majority judgment in Miller is unsafe in this respect. I suggest that Parliament provided for domestic effect of EU law without giving it the kind of legal significance of which the majority in Miller spoke. Furthermore, this choice of the 1972 Parliament, and many similar subsequently choices, have not been overridden by a shift in 'political fact’ at the foundations of law.4

My argument does not rely on a literal interpretation of any statute. I agree that the words of the ECA do not provide a conclusive answer in Miller. There is more to interpreting a legislative choice of Parliament than the text itself.5 However, this is not a licence to rely on considerations that were not part of the context in which Parliament made its choice to change the law. In particular, it is not a licence to interpret a decades-old statute as if it had been enacted today. I propose a purposes interpretation of the ECA that differs from that adopted by the majority in Miller. In doing so, I draw on the debates in Parliament in 1972. While not legally authoritative, this source can expand our interpretative horizons and direct us to understandings of the legislative choice, which may seem ‘most improbable’6 today, but appeared uncontroversial to those who enacted the statute.

More specifically, I argue that the Miller majority did not provide adequate answers to two strong arguments regarding interpretation of the ECA 1972, or a coherent account of the foundational model of UK law relied upon. First, I consider the issue of effect of the ECA in its first months, between the day it came into force and the day EU (Community) law became directly effective in the UK. Second, I present an argument from the purpose of s. 1(3) ECA (‘Parliament’s shield’ in the ECA). This is intended to show that the ECA was enacted on the assumption of the orthodox dualist model. My argument should not be construed as a denial of the authoritative nature of the Supreme Court’s judgment. Having authority means that one’s decisions are binding even if wrong.7

6 Miller [2017] UKSC 5 at [90].
7 J. Raz, Practical Reason and Norms (OUP, 1999), at pp.64–65.
Also, even though I argue that the majority decided incorrectly, I am open to the possibility that the best argument for their decision has not been fully developed. In other words, that the decision is justifiable, even though it was not justified by the reasons given by the Court: a common law court may change the law partly for non-legal reasons. In this paper, I take the majority decision on its own terms. That is, to focus on what decision was legally required in Miller, leaving aside that it may have been (legally) open to the Court significantly to change the law.

The common ground: frustration of a statute as the core issue

While it may have been difficult to see from some of the written submissions and from the course of the hearings, the best legal arguments for and against the majority judgment share significant common ground. The best case for the judgment is that there is significant risk that triggering the Article 50 procedure will result in frustrating a legislative choice of Parliament, especially the ECA 1972. It should be uncontroversial that the executive does not have a self-standing power to frustrate Parliament’s legislative choices. The executive can only do so if authorised by Parliament. This is what Robert Craig helpfully dubbed ‘the frustration principle’. 

Craig was also right to insist on distinguishing frustration from ‘abeyance’ or ‘abrogation’ of prerogative power to act for the UK on the international plane. In general terms, such prerogative power clearly exists (it was not abrogated). It has been continuously exercised by ministers, for instance, in negotiating revisions of EU Treaties. Arguably, it is also exercised by ministers when they represent the UK in the EU Council.

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8 Miller [2017] UKSC 5 at [51]; see also R. Craig, “Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum” (2016) 79 MLR 1041 at 1045.
10 Craig, “Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum” (2016) 79 MLR 1041 at 1048–1049.
12 Miller [2017] UKSC 5 at [95]; M. Barczentewicz, “Consequences of the High Court’s Reasoning in the Article 50 Judgment: EU Law-making Unlawful”, UK
Therefore, the issue was not whether the prerogative power to act for the UK on the international plane in respect to the EU has been removed or abrogated. The issue was much narrower: whether it is within the scope of this prerogative power to trigger Article 50. And whether triggering Article 50 is within the scope of prerogative depends on whether doing so would frustrate a legislative choice of Parliament. The core issue of Miller thus depended on statutory interpretation.13

It is not clear that the majority took the core issue to be about statutory interpretation. As I argue later, their view on the relationship between the ECA 1972 and the special status of EU law in UK law is unclear and, on the natural reading of the majority’s express words, unsound. Hence, my claim is merely that, properly understood, Miller turned on statutory interpretation.

PARLIAMENT’S CHOICES

Given that Miller turned on whether triggering Article 50 will frustrate a legislative choice of Parliament, it is important to know what were Parliament’s legislative choices. The Supreme Court was right to focus on the ECA 1972 as the most significant.14 If the ECA suggests one solution of the Miller issue or if it is neutral, then we are unlikely to find any other Act of Parliament which would undermine this solution or be of more help. This is because Parliament made in the ECA 1972 the most comprehensive, systemic provision for giving domestic effect to EU law (or Community law as it then was).15

To put this more concretely: if – as I argue – Parliament decided in 1972 to give effect to EU law conditionally on the UK’s membership in the EU,

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14 See, eg, Miller [2017] UKSC 5 at [60] (per curiam), [177] (per Lord Reed), [257] (per Lord Carnwath), [281] (per Lord Hughes).

15 For simplicity, I will refer both to Community law and EU law as ‘EU law’, and use ‘the EU’ while referring both to the former European Communities as well as to the European Union.
neither authorising actions on the international plane to bring this membership about (or to end it), nor requiring or prohibiting them, then without clear contrary evidence we have no reason to think that any subsequent legislation changed this legal position. However, what sort of evidence regarding a later statute would be required depends crucially on the interpretation of the ECA and of the law as it was before the ECA. Subsequent statutes, like the European Union Act 2011, that expressly deal with legal conditions of executive action on the international plane, must be interpreted against this background.

Thus, I first turn to the 1972 Act and then I approach post-1972 statutes in the light of its provisions.

The ECA 1972: uniqueness and continuity

There are two attractive narratives we can tell about the ECA 1972. The first is the one repeatedly stressed by the majority in Miller. It is the narrative of uniqueness. On this view, the ECA ‘was unprecedented’, it had ‘constitutional character’, its effect was of ‘exceptional nature’, it had an ‘unusual legislative history’, and so on. This narrative puts emphasis on how much legal change the ECA 1972 brought about.

The second narrative, significant in the dissenting judgments in Miller, but also in the government’s arguments and in John Finnis’s much-discussed commentary, is that of continuity. Here, the emphasis is on continuity of the ECA scheme with the law as it was before. Stressing lack of evidence ‘that Parliament intended to depart’ from what was established in background law is a characteristic feature of this account.

Neither narrative tells the whole story. Both are correct, to an extent. My charge against the majority’s interpretation of the 1972 Act is that they take insufficient notice of continuity. The majority did not give appropriate weight to the extent to which Parliament decided in 1972 not to depart from

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16 For instance, Miller [2017] UKSC 5 at [13], [60], [67], [68], [88], [90].
17 Miller [2017] UKSC 5 at [60], [67], [68], [88].
19 Miller [2017] UKSC 5 at [203] (per Lord Reed).
the law as it was before. However, I fully admit that one must not go too far in the opposite direction. The ECA 1972 did change UK law in far-reaching and unprecedented ways. Nevertheless, it does not follow that it changed everything. The burden of proof is on those who argue that Parliament intended change, as the majority rightly noted.20

I will start with what is uncontroversial about the ECA. The ECA defines, in s. 1 ECA, ‘the EU’ and ‘the EU Treaties’. It then provides, in s. 2(1) ECA, that

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties ... as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law.

The 1972 Act also does many other specific things, including conferring a power to make delegated legislation to implement EU law (s. 2(2) ECA) and granting domestic authority to the judgments of the EU courts (s. 3(1) ECA). What the ECA does to EU law in UK law is often labelled as ‘incorporation’ of EU law into domestic law. ‘Incorporation’ is arguably one of the most confusing legal concepts, with meaning so unsettled that its use does more harm than good in legal debates. Miller is one of those rare cases that forces us to move past the label and to understand the nature of the position of EU law in UK law.

What was the effect of the ECA in its first months?

The first moment of tension for the two narratives on the ECA arises during the very first days and months of the Act. The ECA received Royal Assent on 17 October 1972. It came into force the same day.21 Was EU law ‘recognised and available’ in UK law from day one? The express words of the statute may reasonably suggest that it should have been.22 As a matter of practice, it was not, and no one suggests this was incorrect. It has been universally accepted

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20 Miller [2017] UKSC 5 at [108]; see also at [203] (per Lord Reed).
21 Miller [2017] UKSC 5 at [15], [192] (per Lord Reed).
22 Eg s. 1(2)(b) ECA and Schedule 1 to the ECA, which do not refer to any international measure not yet in force, in public international law, on 17 October 1972. Of course, in international law, those measures were not yet effective in relation to the UK. However, notably, s. 1 ECA does not contain language akin to s. 21(1) of the Human Rights Act 1998, which defines ‘the Convention’ as ‘the Convention for the Protection of Human Rights and Fundamental Freedoms … as it has effect for the time being in relation to the United Kingdom’ (emphasis added).
that operation of s. 2(1) has been conditional on the UK being bound, in public international law, by the EU Treaties. That begun on 1 January 1973.\(^{23}\)

The \textit{continuity} account of the ECA’s effect between its coming into force and the moment EU law became ‘recognised and available’ in UK law (1 January 1973) is straightforward. It starts with the uncontroversial claim that operation of s. 2(1) was conditional on the entry into force of the Treaty of Accession. How was the entry into force to be brought about? It was to be done by the executive exercising its prerogative powers to act for the UK on the international plane. In background law, there was no doubt that Parliament (domestically) and the executive (internationally) operate independently.

On the \textit{continuity} view, unless we have specific reasons to think otherwise, we ought to conclude that Parliament left entirely to the executive the issue of whether the condition was ever going to be satisfied. The consequence of this for the core issue in \textit{Miller} is that it gives credence to the view that Parliament did not intend to give domestic effect to EU law in a way that would have restrained prerogative power to act on the international plane, \textit{including} the power to withdraw from the EU Treaties.

The majority’s \textit{uniqueness} account disputed this. However, what the majority did not say is interesting. They did not deny that the operation of s. 2(1) was conditional on entry of the Treaty of Accession into force. In other words, they did not deny that in the first months of the ECA’s existence, the Act had none of the consequences for UK law that the majority relies on (no new ‘domestic rights’ and no new ‘source of law’). Instead, the majority fudged.

They said: ‘by the 1972 Act, Parliament endorsed and gave effect to the UK’s future membership of the European Union, and this became a fixed domestic starting point.’\(^{24}\) How are we to understand this? How come the ‘starting point’ was ‘fixed’ if no one claims that the ECA itself somehow constituted an instrument of ratification of the Treaty of Accession? The majority did not claim that it would have been beyond the scope of prerogative powers not to ratify the Treaty or to denounce it before it came into force.\(^{25}\)

\(^{23}\) I refer to the full obligations arising under the Treaty of Accession, not to the ‘obligation not to defeat the object of a treaty prior to its entry into force’ but after ratification from Article 18 of the Vienna Convention on the Law of Treaties 1969.

\(^{24}\) \textit{Miller} [2017] UKSC 5 at [82].

\(^{25}\) \textit{Miller} [2017] UKSC 5 at [192]-[195] (per Lord Reed); see also Lord Millett, “Prerogative Power and Article 50 of the Lisbon Treaty” (2016) 7 The UK Supreme Court Yearbook 190 at 192.
Interestingly, even though the majority did not deny conditionality of operation of s. 2(1) and other ECA provisions on the situation under public international law, their rhetoric downplays one significant fact. That is, the fact that Parliament did not choose in the ECA to effect any legal change merely by its own action, but made all the changes that the majority describes conditional on prerogative action on the international plane. 26 Conceivably, Parliament could have rejected the past practice and taken the driver’s seat even on the international plane (eg by deciding that the Act of Parliament itself was to constitute ratification, deputising the Speaker of the Commons to submit instruments, prohibiting executive action to denounce, and so on), but it did not. 27

I suggest that the majority intended to make a more limited, but rather striking, claim. Earlier in the judgment, they specified that ‘Parliament endorsed and gave effect’ to the UK’s EU membership under the EU Treaties ‘in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties’. 28 On my reading, the majority wanted to say that, in the ECA, Parliament made a choice inconsistent only with withdrawal by prerogative; but not with entry (or lack thereof!) by prerogative. This is a striking asymmetry.

It is hard to see how any prerogative action taken before 1 January 1973 would have frustrated the ECA in any of the ways the majority discusses. Again, there were then no ‘EU domestic rights’ to abrogate and no ‘EU source of domestic law’ to drain. Given this, perhaps the majority wanted to qualify the claim further, to mean that withdrawal by prerogative would have been inconsistent with the ECA only once the Treaty of Accession came into force (i.e. when the UK acquired new ‘domestic rights’ and a new ‘source of law’).

But if the majority had in mind this even more limited claim, then it follows that the majority had no substantive response to Lord Reed’s powerful analysis of this point. 29 The challenge for the majority may be summarised in the following way. The Miller majority stressed that withdrawal from the EU ‘will constitute as significant a constitutional

26 For instance: ‘It [withdrawal] will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act.’ Miller [2017] UKSC 5 at [81]. Nothing here about the fact that the alleged ‘constitutional change’ would not have happened without prerogative action.

27 Miller [2017] UKSC 5 at [194] (per Lord Reed).

28 Miller [2017] UKSC 5 at [77].

29 Miller [2017] UKSC 5 at [192]-[197].
change’ as conferral of domestic effect on EU law. Making EU law ‘recognised and available’ in UK law entailed, among other things, loss or change of many domestic rights. Also, ’filling’ or ‘connecting’ of the new EU source of domestic law was done by prerogative.

Therefore, it may seem that if general constitutional principles preclude prerogative action to withdraw (due to ‘rights’, ‘source of law’ and ‘constitutional change’ issues), they also precluded prerogative action to enter. On the other hand, if they did not preclude entry by prerogative, why would they have precluded withdrawal by prerogative? The ECA did not contain express words authorising the executive to act on the international plane to bring this about. That is, the Act did not contain express words of authorisation that would have been expected had such action been outside of the scope of prerogative powers.

If it was lawful for the executive to ratify the Treaty of Accession under prerogative, then it means that the general constitutional principles the majority relies on, taken alone, cannot help with the issue of withdrawal. Hence, the ground of the distinction of lawfulness of prerogative action to effect entry and to effect withdrawal must be in the ECA 1972. But the majority did not provide an argument for it and Lord Reed is rather persuasive that there is no ground to be found there.

The majority’s implicit point seems to have been that the distinction was implied, even though it was not express it was still part of Parliament’s legislative choice. All the majority provides in support of this is an assertion that they thought it most improbable that Parliament intended to allow withdrawal from the EU by the executive acting alone under prerogative. This is a big implication to construe out of statutory silence.

And the question of the distinction (of the asymmetry) still poses a problem. Is it plausible that Parliament intended to give the executive free reign on the international plane before 1 January 1973 and not after? If it is not reasonable to attribute an intent to make such distinction to Parliament, then perhaps Parliament intended to authorise and constrain executive action even before 1 January 1973. In other words, the Miller claimants were correct that ratification of the Treaty of Accession was statutorily authorised and mandated. However, is it plausible that Parliament intended that? Could a judicial review have succeeded, in 1972, to compel the government to ratify the Treaty of Accession and to forego from denouncing it?

30 Miller [2017] UKSC 5 at [81].
31 Miller [2017] UKSC 5 at [90].
32 Miller [2017] UKSC 5 at [193] (per Lord Reed).
33 Compare Miller [2017] UKSC 5 at [92].
we think through the consequences of the majority’s implied answer to Lord Reed, it ceases to be as self-evident as the majority appears to have taken it.

For another example of the majority fudging in this context, consider their rejection of the government’s submission on withdrawal by prerogative from the European Free Trade Agreement. The majority insisted on distinguishing that case because ‘no directly effective rights had been created as a result of UK membership of EFTA’. But the same was the case with the ECA until 1 January 1973, so no ground for distinction here. Notably, to distinguish the EFTA withdrawal, the majority also invoked the fact that ‘the formal notice withdrawing from EFTA was only served after both Houses of Parliament had “approve[d]” the “decision of principle to join the European Communities”’. One can justifiably be puzzled as to why resolutions of the Houses, short of an Act of Parliament, would have been at all relevant on the majority’s view.

**Why Parliament needed the shield of s. 1(3) ECA?**

There is one other issue over which there is significant tension between *uniqueness* and *continuity*, and which illustrates well how the *Miller* majority misconstrued the 1972 Act. It is the question of the purpose of s. 1(3) ECA. As I noted earlier, the express words of s. 1 and s. 2 ECA do not resolve the core issue in *Miller* (whether Parliament intended to give domestic effect to EU law in a way that will be frustrated by withdrawal from the EU). It is necessary to engage in purposive interpretation. Section 1(3) ECA is significant, because the proper understanding of its purpose allows to look at the core issue in *Miller* in a way that differs to that of the majority.

This statutory provision, properly seen, showcases the extent to which *continuity* with existing law defined Parliament’s legislative choice in the ECA 1972. Careful analysis of the legislative work on s. 1 ECA gives significant credence to the view that Parliament did not intend to depart from the then accepted legal position on dualism. According to that legal position, the executive and Parliament act independently on the international plane and in the sphere of domestic law, respectively. Changing this would have been a departure from the accepted legal position. And especially, to change it in a way that Parliament’s legislative choice would be frustrated by refusal to ratify or by withdrawal from an international treaty.

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34 *Miller* [2017] UKSC 5 at [97].
35 *Miller* [2017] UKSC 5 at [97].
36 *Miller* [2017] UKSC 5 at [97].
Of course, Parliament was free so to depart. The question is: why would we think that Parliament intended to do so?

_Dualism_

The parliamentary debates on what became the ECA give us ample reason to think that Parliament did not intend such change.\(^{37}\) The _Miller_ majority was too quick in concluding what was ‘most improbable’ to attribute to the 1972 Parliament.\(^{38}\) In fact, it is probable that Parliament intended not to depart from the dualist model.

Dualism allows for the possibility that the executive and the legislature act out of step.\(^{39}\) The executive may bind the UK internationally and Parliament may refuse to perform those obligations in domestic law (and `so leave the State in default’\(^{40}\)). Also, the executive may denounce the UK's international obligations, even those given domestic effect, while Parliament is slow to accommodate this in domestic law. In this sense, executive action on the international plane is like action of a foreign state, with crucial differences that it can be legally limited if Parliament so chooses and that government is responsible to Parliament.\(^{41}\) As Lord Atkin helpfully presented the position in _Attorney-General for Canada v Attorney-General for Ontario_ \(^{42}\) ‘it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone’. It was not a coincidence that Lord Atkin’s strong statement of the independence of actions of the executive and of the

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38 _Miller_ [2017] UKSC 5 at [90].


legislature under dualism was treated as canonical during the legislative work on what became the ECA.\footnote{Barczentewicz, “The core issue in Miller”, Policy Exchange / Judicial Power Project, 4 January 2017 (available at http://judicialpowerproject.org.uk/mikolaj-barczentewicz-the-core-issue-in-miller-the-relevance-of-section-1-of-the-1972-act/), at pp.16–17.}

Overview of the argument
The following argument shows that the ECA should be understood as neither imposing, nor having been enacted on the assumption of, a legal requirement of an Act of Parliament to authorise ratification of, even major, treaties amending the EU Treaties (initially, the Community Treaties). The Lead Claimant in Miller was correct in her written submission that

> It would make no sense for an Act of Parliament to be required to authorise an amendment to section 1(2) to add a new Treaty where this will alter domestic law, but for no Act of Parliament to be needed for the UK to notify that the UK will be leaving the EU …\footnote{Miller, Written case for the Lead Claimant, Mrs Gina Miller, at [60](3).}

The implication is true, but its antecedent is false: the ECA did not impose the requirement the Lead Claimant spoke of. If the ECA did not institute such requirement for even major amendments, then why would we conclude that it gave domestic effect to EU law in a way that would be tantamount to imposing such a requirement on withdrawal from the EU? I believe that we indeed should not and that this powerfully counts against the majority’s decision in Miller.

The argument proceeds as follows. First, I show what would have been the legal effect of s. 1 and s. 2 ECA had s. 1(3) ECA not been enacted. That is, automatic ‘recognition and availability’ of all new treaties entered into by the UK ‘ancillary’ to the EU Treaties, without a legal requirement of any parliamentary involvement. I also argue that the category of ‘ancillary’ treaties included some of the major treaties amending the original Community Treaties.

Second, I discuss the purpose of s. 1(3) ECA. On the view I advance, s. 1(3) was enacted to provide a legal requirement of consent of the Commons and of the Lords (but not of an Act of Parliament) in giving ‘recognition and availability’ to some major amending treaties where otherwise would have been none. But on the Miller majority’s view, there should have already been a stronger requirement (of an Act of Parliament), even without s. 1(3) ECA.
I then consider two responses available to defenders of the majority’s view. On the first response, ratifying ancillary treaties is not the sort of executive action that requires specific statutory authorisation. On the second answer, the purpose of s. 1(3) ECA was to make it easier to give ‘recognition and availability’ to EU law, without an Act of Parliament. Both answers go against the understating of the background law and against the unquestioned view of the purpose of s. 1(3) in Parliament that enacted the ECA.

Finally, I reject an objection that enactment of s. 1(3) ECA shows Parliament’s more general intent to restrain the executive’s freedom to act on the international plane. Firstly, it is difficult to see how a requirement of resolutions of the Commons and of the Lords would support a much stronger requirement of an Act of Parliament as in Miller. Secondly, s. 1(3) does not impose a legal condition on ratification of any treaty, but merely on whether they become one of ‘the Treaties’ for the purposes of the ECA, i.e. on whether they receive domestic effect in the UK. Thus, we have strong reasons to believe that Parliament did not intend to depart from the then accepted model of dualism, as sketched above.

What if s. 1(3) ECA had not been enacted?
To understand the purpose of s. 1(3) ECA it is helpful first to look at s. 1(2) and s. 2(1) ECA in isolation. First, s. 1(2) (as enacted):

In this Act ... “the Treaties” ... means, subject to subsection (3) below, the pre-accession treaties [from Schedule 1 to the ECA], …

a) [the Treaty of Accession from 22 January 1972] …

b) [the decision of the Council from 22 January 1972] …

and any other treaty entered into by any of the Communities, with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom; …

In this provision, Parliament defined what are now the ‘EU Treaties’. Crucially for the present argument, the definition of ‘the Treaties’ is open-ended (or future-oriented). According to s. 1(2) ECA, taken without s. 1(3) ECA, all the international measures caught by the paragraph before the last semicolon are automatically among ‘the Treaties’ for the purposes of the ECA. Automatically, that is once they begin their existence on the

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45 Miller [2017] UKSC 5 at [181] (per Lord Reed).
46 Notably, the treaties of the first category (‘entered into by any of the Communities, with or without any of the member States’), not entered into by the United Kingdom, are automatically among ‘the Treaties’. Section 1(3) does not affect that. It merely provides for an evidentiary device of Orders in Council
international plane. Of the two categories, the second one will be of interest: ‘any other treaty … entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom’.

What are those treaties ‘ancillary to any of the Treaties’? The majority in Miller adopted, without question, Lord Pannick’s argument, according to which ancillary treaties could only be treaties other than those ‘concerned with changing the membership or redefining the rules of the EEC’. Neither Lord Pannick, nor the majority gave an adequate argument for this. Lord Pannick’s argument established only that s. 1(3) ECA, to which I will soon turn, is concerned exclusively with ancillary treaties, which is correct. But this says nothing about what is the scope of ‘treaties ancillary to…’ in s. 1(2) ECA. True, Lord Pannick did make an additional claim that

what has happened on all occasions when the main Treaties have been amended, is that they have been the subject of express parliamentary approval under section 1(2) before ratification.48

But this does not prove a relevant legal distinction between ancillary treaties and amending treaties, as it is consistent with the interpretation advanced here (see below).

The common understanding of the scope of treaties ‘ancillary to any of the Treaties’ during legislative work on what became the ECA was that it included at least some treaties significantly amending the Community Treaties (i.e. ‘redefining the rules of the EEC’).50 As the Solicitor General, Sir Geoffrey Howe QC MP, and the Chancellor of the Duchy of Lancaster, Geoffrey Rippon QC MP, have repeatedly stated in Parliament, even amending treaties ‘altering the ambit and nature of the powers’ of the declaring them as one of ‘the Treaties’. Section 1(3) clearly uses the language of evidence: ‘shall be conclusive that it is to be so regarded’. In other words, those treaties are among ‘the Treaties’ even if no Order in Council so declares, but if an Order in Council so declares it is conclusive evidence. This understanding was uncontroversial during the legislative work on the European Communities Bill in 1972, see Barczentewicz, “The core issue in Miller”, Policy Exchange / Judicial Power Project, 4 January 2017 (available at http://judicialpowerproject.org.uk/mikolaj-barczentewicz-the-core-issue-in-miller-the-relevance-of-section-1-of-the-1972-act/), at p.13 fn 15.

47 Miller [2017] UKSC 5 at [17]. See also Miller, Transcript of proceedings, Tuesday 6 December 2016, 196-197.
48 ibid, 197.
49 Miller [2017] UKSC 5 at [17].
Communities were to be covered by s. 1(2) ECA as ancillary and thus automatically ‘incorporated’, if it were not for s. 1(3) ECA. The only voices of disagreement were of those Members of Parliament who thought that the category of ancillary treaties is even broader than the government representatives admitted. In the face of clear evidence that this understanding of ‘ancillary’ was accepted in Parliament that enacted the ECA 1972, it is remarkable that the majority in Miller gives no arguments for the contrary understanding it adopted.

As I noted above, s. 2(1) ECA provided that ‘all such rights, powers, … under the [EU] Treaties … shall be recognised and available in law’. Taken together and without regard to s. 1(3) ECA, s. 1(2) and s. 2(1) ECA would have provided for automatic domestic effect of all future ancillary treaties on their entry into force under international law, effected – for the UK – by prerogative action. Just like they provide for automatic effect of future Community (EU) treaties not entered into by the UK. Or would they have? In other words, what was the purpose of s. 1(3) ECA? What did it change in the ECA scheme?

The purpose of s. 1(3) ECA

The content of s. 1(3) ECA significant for the present purposes is in its second part, after the semi-colon:

a treaty entered into by the United Kingdom after the 22nd January 1972 ... shall not be so regarded [as one of the Community Treaties] unless it is so specified [in an Order in Council], nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament.

Uncontroversially, s. 1(3) ECA means that no future ancillary treaty (as defined in s. 1(2) ECA) will be automatically given domestic effect in UK law


53 As I already noted and will consider in more detail below, the subsequent practice of enacting statutes before ratification of amending treaties is not an argument against this understanding of ‘ancillary’, because the practice is perfectly consistent with both rival understandings.

54 See n 46 above.
by a joint operation of s. 1(2) and s. 2(1) ECA. For any treaty to have domestic effect under s. 2(1) and other ECA provisions, it must first count as one of ‘the Treaties’ in s. 1(2). Section 1(3) added an otherwise absent requirement, that a treaty will only be ‘so regarded’ if ‘it is so specified’ in an Order in Council, a draft of which ‘has been approved by resolution’ of the Commons and of the Lords.

What is the point of s. 1(3) ECA if the majority in Miller is correct that established UK constitutional principles already required statutory authorization for prerogative action on the international plane with consequences for domestic law? There are two possible answers, both of which fail.

On the first answer, executive action to bind the UK by ancillary treaties would not be the sort of executive action requiring statutory authorisation. In interpreting the ECA, the Miller majority claimed that there is a ‘vital difference’ between withdrawal from the EU and how ‘EU law varies’:

section 2 of [the ECA] envisages domestic law, and therefore rights of UK citizens, changing as EU law varies, but it does not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.\(^5\)

On the majority’s view, even changes in ‘the content of EU law arising from further EU Treaties’ are provided for by the ECA and caught by the ‘from time to time’ provision in s. 2(1) ECA.

This distinction between withdrawal and treaty amendment is implausible and unrealistic. An amending treaty, still counting as ancillary, could render the EU-source of domestic law an empty shell, eg by making EU legislative procedure so onerous as to make any legislation impossible. That could mean effective removal of the whole conduit pipe, draining the source, or whatever one’s preferred metaphor is. Drawing this distinction between treaty amendment and withdrawal would be an exercise of the sort of formalism that both the Divisional Court and the majority condemned.\(^6\) As Lord Reed argued, there is no basis whatsoever for such distinction in the text of the ECA.\(^7\)

If some executive actions to bind the UK by an ancillary treaty would be caught by ‘the Miller principle’, then the difference made by s. 1(3) is obvious and embracing it is the second possible answer to my challenge. On this view,

\(^{55}\) Miller [2017] UKSC 5 at [83].
\(^{56}\) See, eg, Miller (DC) [2016] EWHC 2768 (Admin) at [66]; Miller [2017] UKSC 5 at [61].
\(^{57}\) Miller [2017] UKSC 5 at [187], [217] (per Lord Reed).
the difference would be that s. 1(3) ECA made it easier to achieve domestic effect of future ancillary treaties. It did so, because s. 1(3) ECA provided a less onerous procedure than enactment of an Act of Parliament: an Order in Council approved by mere resolutions of the Commons and the Lords. Moreover, s. 1(3) ECA meant that the sovereign Queen-in-Parliament was not to get a say at all. Assuming that under the law as it was before the ECA, Parliament would have had control over ratification of ancillary treaties (if s. 1(2) and s. 2(1) ECA were enacted but not s. 1(3) ECA), on this interpretation Parliament decided in s. 1(3) ECA to give up a good deal of its power to the executive (and to the two Houses, acting by resolutions).

This may seem plausible, but only if we pay no attention to the concerns the Parliament of 1972 actually responded to. It was clear to everyone who then spoke on the issue that s. 1(3) ECA was a ‘necessary protection’ for Parliament and that without it prerogative ratification of an amending treaty would have had automatic domestic effect. The only disagreement was on whether s. 1(3) ECA went far enough in protecting Parliament – whether it was an ‘effective’ protection.58 The striking novelty of the conclusion in Miller is here in full view: the point on the limits of prerogative power in connection with ‘incorporation’ of EU law, taken by the Miller majority as well-established in constitutional principle and almost self-evident, has not appeared to anyone during the parliamentary debates on s. 1 ECA when it would have been very relevant.

The Miller majority was incorrect to say:

the provisions of new EU Treaties are not automatically brought into domestic law through section 2: only once they have been statutorily added to “the Treaties” and “the EU Treaties” in section 1(2) can section 2 give effect to new EU Treaties.59

It is true that the provisions of (at least some) amending treaties are not ‘automatically’ ‘recognised and available’ in UK law, but that is solely because of s. 1(3) ECA. The purpose of that provision was to give the Commons and the Lords (but not to Queen-in-Parliament) the kind of influence they would have otherwise lacked.

Each of the Houses of Parliament received a veto power on giving domestic effect to future ancillary treaties. The practical effect of this was


59 Miller [2017] UKSC 5 at [76]. Similarly Miller (DC) [2016] EWHC 2768 (Admin) at [98](8).
perfectly anticipated by the Solicitor General during parliamentary debates in March 1972.\(^{60}\) Why the subsequent amending treaties were not ‘specified’ as ‘EU Treaties’ in Orders in Council, but instead were added by statutes to s. 1(2) ECA? At least some of those amending treaties certainly counted as ancillary on the understanding accepted in the 1972 Parliament. Hence, there was no legal requirement to use the s. 1(2)-amendment route instead of relying on the future-oriented provision of s. 1(2) regarding ancillary treaties, triggered by an Order in Council.

What happened instead was that, for political reasons, the government of the day chose to table a bill even though it legally could have tried to get a draft Order in Council accepted by the two Houses.\(^{61}\) It may have been because the ministers thought the Commons or the Lords would oppose the Order-in-Council procedure or because the ministers wanted Parliament to enact some other legal rules on the occasion. This subsequent political and legislative practice is not evidence against the interpretation presented here, as it is fully compatible with it.

However, someone might object that even if I am right about all the above, even if there would have been no requirement of statutory authorisation had s. 1(3) ECA not been enacted, the very inclusion of this provision is evidence of Parliament’s intent to restrict prerogative powers to withdraw from the EU. This objection, if successful, would still not support the conclusion of the majority in Miller. Given the background of no legal restrictions, the ECA instituted against it a requirement of affirmative resolutions in the Commons and in the Lords. It is a leap from there to say that Parliament intended that withdrawal from the EU would require an Act of Parliament. At most, one could derive from s. 1(3) ECA a requirement of affirmative resolutions.

More importantly, the objection is unsound because an intent to restrict prerogative powers to withdraw from the EU does not follow from s. 1(3) ECA. Section 1(3) ECA did not impose a legal condition on prerogative action on the international plane.\(^{62}\) That is, it did not make it a legal requirement of ratification of an ancillary treaty that it be approved in


\(^{61}\) Miller [2017] UKSC 5 at [161] (per Lord Reed).

resolutions by the two Houses. This is an indication of Parliament’s intent not to depart from the dualist model of relationship between domestic law and international law as described above.

Concluding, the majority in Miller appears to have thought the orthodox dualist model inappropriate for this day and age, especially in the context of EU membership: hence, their insistence on uniqueness of the ECA 1972. But what this insistence conceals is a departure from continuity. From the perspective of uniqueness, lack of express regulation of withdrawal on the international plane contrasted with express measures to control domestic effects of executive international action under s. 1(3) ECA, looks like an oversight: an oversight to be remedied by purposive interpretation of the rest of the statute as incompatible with executive international action with domestic effect. Notably, the Miller majority does not go quite this far. They allow for prerogative actions on the international plane with domestic effect and without specific statutory authorisation: just not withdrawal from the EU.  

The Miller majority gave insufficient reasons for this departure from the accepted legal position against which Parliament legislated in enacting the ECA 1972. Once we see that Parliament changed the law on the assumption of the orthodox dualist model, and in particular while accepting that there were no legal restrictions on prerogative action on the international plane of the sort proposed in Miller, then the alleged oversight appears, rightly, as a choice. Continuity militates against interpreting provisions like s. 1 and s. 2 ECA as inconsistent with prerogative action, which Parliament chose not to regulate expressly or by much stronger implication than that the majority themselves purport to rely on.

Other statutes

Lord Reed was entirely right in his dissenting judgment that other post-1972 statutes, beyond the ECA (and perhaps the European Union (Amendment) Act 2008), are ‘of only secondary importance’. The majority adopted a similar stance in their analysis. Following their lead, without going into details of other EU-related statutes, I will make one general observation.

What significance, if any, do we attribute to post-1972 statutes in the context of the core issue in Miller, heavily depends on the view we take on

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63 See, eg, Miller [2017] UKSC 5 at [52]-[54], [95].
64 See, eg, Miller [2017] UKSC 5 at [84], [87], [90].
65 Miller [2017] UKSC 5 at [205] (per Lord Reed).
66 Miller [2017] UKSC 5 at [103]-[115].
the law as it was before the ECA and on the content of the legislative choice in the 1972 Act. As I have framed it, we have here the competing narratives of *uniqueness* and *continuity*. On the *continuity* view of the ECA, Parliament did not depart in the 1972 Act from the background model of dualism as described above. Hence, the freedom of the executive to act on the international plane, including effecting withdrawal from the EU, was retained. Any later statute, which regulated exercises of the international prerogative is to be seen against this background, as an exception.67

However, according to the view taken by the *Miller* majority, there was no relevant prerogative power to withdraw from the EU after 1972. Thus, all subsequent statutes regulating *other* aspects of interaction with the EU on the international plane, are to be interpreted against this background.68 Given that they say nothing about withdrawal, they do not change the background position, which is that it is not within the scope of the prerogative.69 Therefore, I agree both with the majority and with Lord Reed that those statutes do not change the position.

**CONCLUSION**

I argued that the legislative choice of Parliament in the ECA 1972 did not support the majority judgment in *Miller*. I admit that in interpreting the ECA 1972, what seems ‘improbable’70 to an interpreter (or what would satisfy her that Parliament ‘squarely confronted’71 an issue) is highly affected by the general perspective adopted – what I attempted to capture by my distinction between *uniqueness* of the 1972 Act and the place of EU law in UK law and their *continuity* with law as it was before. The *Miller* majority went too far in the direction of *uniqueness*. I hope I do not do the same in the contrary direction.

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68 *Miller* [2017] UKSC 5 at [205] (per Lord Reed).

69 *Miller* [2017] UKSC 5 at [111].

70 *Miller* [2017] UKSC 5 at [90].

71 *Miller* [2017] UKSC 5 at [87]; citing *R v Secretary of State for the Home Department, ex parte Simms and another* [2000] 2 AC 115 at 131 per Lord Hoffmann.
As I mentioned in the introduction, it could be that the reasons that do justify the Miller judgment are not fully developed there. The following may be seen as the core claim of the majority judgment:

We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.\(^72\)

The majority follows it by stating that to them this appears ‘to follow from the ordinary application of basic concepts of constitutional law’.\(^73\) I do not think that it does. However, perhaps a better way to understand Miller is as an attempt to develop UK constitutional law, in response to non-legal reasons of prudence and political morality, while building on constitutional principles that did not determine the decision in this case. If this is what the majority did, then it raises a familiar question of whether the public reasons given should have reflected it more openly. As I aim to show in this paper, the majority judgment is more than likely to leave a cautious reader with feelings of doubt and confusion.

\(^72\) Miller [2017] UKSC 5 at [82].

\(^73\) Miller [2017] UKSC 5 at [82].