Miller and Brexit: Prerogatives on Parliament and Public Law

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In *R (MILLER) v Secretary of State for Exiting the European Union* [2017], the Supreme Court considered whether an Act of Parliament had to be passed in order to invoke Article 50 of the TEU and give formal notice to commence proceedings for leaving the EU, or whether ministerial exercise of the Royal prerogative would suffice.[1] The case also raised a host of devolution issues spanning the precise justiciability of the Good Friday Agreement and Sewel Convention, but for reasons of length these will not be covered herein. The Court ruled, 8-3, that an Act of Parliament was required prior to the invocation of Article 50, with Lords Reed, Hughes, and Carnwath dissenting. The devolution issues proved less divisive, with the Court unanimously finding that the Sewel Convention, even after the Scotland Act 2016, was non-justiciable, and that it was thus unnecessary to consult or secure the consent of the devolved governments prior to triggering Article 50.

This casenote will begin by summarising the central issues which formed the crux of disagreement between the majority and dissenting judgments: a) the relevant constitutional background to the instant facts, b) whether the text of the European Communities Act 1972 ('ECA 1972') permits or precludes the use of prerogative power to trigger an exit from the EU, and c) precisely which non-textual considerations are relevant in ascertaining the precise ambit of the ECA 1972, and what bearing these considerations have on specifically texturing the Government's prerogative power. After establishing the array of considerations upon which the two sides disagreed, this note will suggest that while there are valid criticisms of the majority judgment, notably from Lord Millett (extra-judicially) concerning the 'Trigger Mechanism' and the argument that triggering Article

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1 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

50 *necessarily* impinges on existing domestic rights, the majority's view is still to be preferred.[2] In reaching this conclusion, Lord Reed's dissenting views on the appropriate interpretation of the ECA 1972, Professor Feldman's argument on the canons of interpretation *viz* what conclusions the Court could legitimately have reached,[3] as well as Professor Finnis' position on the applicability of double taxation treaty analogies to illustrate the Royal prerogative's continuing effect on domestic law, will all be addressed.[4] This casenote will conclude by highlighting the *fons et origo* of the disagreement: the relevant conceptual starting points adopted by each side, and how those perceptions of the nexus of operation between EU Law and domestic law indelibly shaded subsequent analysis. This nexus, arguably left nebulous since the 1972 Act itself, represents the central novel point of law in a case that is otherwise almost startling in its continuity: the main disagreement centred on questions of statutory interpretation that appear fairly commonly in judicial review. For the first-ever case that all eleven justices of the Supreme Court heard *en banc*, the distinctly discordant cacophony of the public discourse belies a fairly orthodox application of the norms of statutory interpretation, underpinned by the real disagreement as to how EU Law and UK Law have interacted over the past fifty years.

Turning first to a summary of the central struts of argumentation, the applicable constitutional background proved the first hotbed of dissension. The majority, at [40]-[59], outlined how 'the Royal prerogative … (was) progressively reduced as Parliamentary democracy and the rule of law developed', making reference to seminal cases such as *The Case of Proclamations* and Coke CJ's admonishment that 'the King…cannot change any part of the common law, or statute law',[5] as well as Lord Reid's dictum in *Burmah Oil* that the Royal prerogative 'is a source of power which is "only available for a case not covered by statute"'.[6] This was accentuated in the context of statutory provisions, with the majority noting at [51] that 'ministers cannot frustrate the purpose of a statute or a statutory provision… by emptying it of content or preventing its effectual operation', relying on *Laker Airways*,[7] Lord Browne-Wilkinson in *Fire Brigades Union*,[8] and *De Keyser's Royal Hotel*.[9] Granted, the majority recognised two categories of cases in which the exercise

[2] Peter Millett, 'Prerogative Power and Article 50 of the Lisbon Treaty' [2016] 7 UK Supreme Court Yearbook 190.

[3] David Feldman, 'Brexit, the Royal Prerogative, and Parliamentary Sovereignty' *UK Constitutional Law Blog* (8 November 2016) < http://ukconstitutionallaw.org > (accessed 16 October 2017).

[4] John Finnis, 'Terminating Treaty-Based UK Rights' [2016] Judicial Power Project 26.

[5] [1610] EWHC KB J22.

[6] [1965] AC 75.

[7] [1977] QB 643.

[8] [1995] 2 AC 513.

[9] [1920] AC 508.

of prerogative powers would have domestic legal consequences, even without changing domestic law *per se*: First, where it is 'inherent in the prerogative power that its exercise will affect the legal rights or duties of others', such as in the context of employment for Crown employees. Second, where the 'effect of an exercise of prerogative powers is to change the facts to which the law applies', such as in the case of declarations of war or extension of territorial waters. This caveat aside, the majority's vision of the relevant constitutional background to this case is one of sustained and progressive narrowing to the ambit of prerogative powers in line with the sovereignty of Parliament. This expressly recognises that even the dualist system the UK adopts, which requires treaties to be incorporated into domestic law before they have domestic legal effect, 'is a necessary corollary of Parliamentary sovereignty… [which] exists to protect Parliament, not ministers'.

By contrast, in his dissent, Lord Reed emphasised the continuing power vested in the prerogative, and sought to raise questions as to the applicability of *Laker Airways* and *Fire Brigades Union* as part of the relevant constitutional background. While not denying Parliament's centrality should it have adjudicated on a particular matter, Lord Reed, at [159]-[160], underscored the centrality of the Crown's prerogative powers in the context of treaty-making, asserting that Blackstone's 18th Century argument that 'unanimity, strength, and despatch' justified the unity of power to manage international relations was 'as evident in the 21st Century as they were in the 18th'.[10] Lord Reed went on to cast aspersions on the cases the majority relied on to establish that the Crown cannot use the prerogative to regulate a matter differently from Parliament's regulation, noting that in *Laker Airways* only Roskill LJ relied on that principle ('contrast Lord Denning MR at 705G-706A and Lawton LJ at 728A') and that the decision in *Fire Brigades Union* relied on a different principle altogether ('see Lord Browne-Wilkinson at 553G and Lord Lloyd at 573C-D'). Moreover, Lord Reed cited with approval Lord Denning's dicta in *McWhirter v AG*, that 'the Crown retained, as fully as ever, the prerogative of the treaty-making power', noting that neither the Bill of Rights nor the Scottish Claim of Right restricted the Crown's prerogative in relation to foreign affairs.[11] Taken cumulatively, Lord Reed's conception of the relevant constitutional background places far more emphasis on the continuing viability and vigour of the prerogative, and expends comparably less ink on the legal history of the prerogative's narrowing.

Pace Lord Reed, the most defensible reading of *Laker Airways* remains contestable: Lord Denning MR noted that if the Secretary of State could 'displace the statute by invoking a prerogative', it 'would mean that, by a side-wind, Laker

[10] Blackstone, *Commentaries on the Laws of England* Bk 1, 143.
[11] [1973] 1 AllER 689.

Airways would be deprived of the protection which the statute affords…such a procedure was never contemplated by the Statute'. Similarly, Lawton LJ's position can be read as an affirmation of the view that the prerogative, even in treaty-making spheres, cannot infringe on rights granted by Parliament: 'the Secretary of State cannot use the Crown's powers in this (international relations) sphere in such a way as to take away the rights of citizens: see *Walker v Baird* (1892)'.[12] Granted, this focuses on 'taking away rights' more specifically as compared to general Parliamentary statute, but the notion of the prerogative being curtailed by Parliament remains clearly present.

Either way, neither side disputes the rule that the Royal prerogative may not affect domestic law, or the primacy of the Executive in exercising the Royal prerogative in managing international relations. Where they differ is in the emphasis granted to each: For the majority, the emphasis placed on non-infringement of domestic law translates into a greater guardedness against potential infringements of domestic rights by application of unincorporated treaties. For the minority, the enduring vivacity of the Crown's prerogative powers contours their attention to the suggestion that the treaty obligations which introduced EU Law fall squarely and solely within the legitimate treaty-making powers of the Executive. The impact of this difference in emphasis thus should not be understated.

The second key area of contention, which formed a major part of both the majority and dissenting analyses, seeks to answer whether the text of the ECA 1972 permits or precludes the operation of prerogative power to trigger Article 50. The majority argued that the ECA neither 'contemplates nor accommodates the abrogation of EU Law…without prior Parliamentary authorisation' and that instead, Parliament acted 'in a way inconsistent with the future exercise by ministers of any prerogative power to withdraw'. In rejecting Eadie QC's argument for the Secretary of State that the rights under the ECA 1972 were 'ambulatory' and applied only insofar as there were EU Law rights that the 1972 Act could 'latch onto', the majority noted a 'vital difference' between the evolving nature of EU Law and the 'fundamental change in the constitutional arrangements of the UK' associated with wholesale exit. Granted, this notion of a 'fundamental change' is a question of scale. It a) raises questions of just how fundamental a treaty-induced change must be before it is protected against the prerogative, and b) draws attention to further questions on precisely *how* EU Law was able to effect such a fundamental change. At [82], the majority, in interpreting the 1972 Act, took EU membership as a 'fixed domestic starting point' which 'followed from the ordinary application of basic concepts of constitutional law'. That is to say, the majority interpreted the 1972 Act as evincing Parliament's intention, at the time of its passing, to be that

[12] [1892] AC 491.

the UK should enter into EU membership, making prerogative-based withdrawal irreconcilable with the Act.

This claim by the majority as to Parliament's intention is buttressed by three arguments: First, any argument that the words 'from time to time' in Section 2(1) of the ECA demonstrate contemplation that a time might arise where there were no EU treaty obligations is undermined by the absence of a similar phrase in Section 1 of the Act.[13] Second, the long title of the Act ('An Act to make provision in connection with the enlargement of the European Communities to include the UK') was noted at [88] to further elucidate Parliament's intention. Third, the common law presumption of statutory interpretation in *ex parte Simms* that 'fundamental rights cannot be overridden by general or ambiguous words' militates in favour of the interpretation that the 1972 Act does not clearly leave a power as dramatic as overarching withdrawal from the EU (and removing all associated rights) in the hands of ministers.[14]

Arrayed against this is Lord Reed's threefold argument. First, His Lordship eschews Eadie QC's submission that the ambulatory nature of the ECA translates into Parliamentary cognizance and acceptance of withdrawal, adopting instead the argument that s2 of the ECA is conditional in nature. He argues that s2 can be written as 'All such [members of a specified category] as [satisfy a specified condition] shall be [dealt with in accordance with a specified requirement].' This conditionality, as well as Lord Reed's argument that 'the form of the rule does not convey any intention that the condition *will* be satisfied', illustrated to his Lordship that Parliament had envisaged withdrawal and led to his conclusion that its declining to require statutory authorisation illustrated that withdrawal remained within the sphere of prerogative powers. Second, Lord Reed rejected the 'vital difference' between changes to the content of EU Law and wholesale withdrawal, suggesting that there was no basis 'in the language of the 1972 Act for drawing such a distinction'. Third, he argued that any rights which the ECA might incorporate into UK Law were 'obviously conditional on the UK's continued membership of the EU', and that the cessation of such rights was 'inherent' in the nature of conditional rights. He went further to suggest that 'the only logical alternative is to hold that Parliament has created a right to remain in the EU, and none of the arguments goes that far'. Thus, on Lord Reed's interpretation of the text of the ECA, the text does not preclude the operation of the prerogative to effect withdrawal, and arguably even tacitly or impliedly permits it, insofar as his conditionality argument holds.

The third ground of clash was on what non-textual considerations arose in

[13] Simon Renton, 'Historical Perspectives and the *Miller* Case', *UK Constitutional Law Blog* (19 January 2017) < https://ukconstitutionallaw.org/ > (accessed 16 October 2017).

[14] [2000] 2 AC 115.

interpreting the ECA 1972. The majority, basing the bulk of their analysis on the text of the ECA as well as the 'vital distinction' between amendment and revocation, paid considerably less attention to non-textual considerations. At [100], the majority suggested that Eadie QC's argument that it is legitimate to consider that 'Parliament will, of necessity, be involved…as a result of UK withdrawal' militates in favour of, rather than against, the view that Parliament should have to sanction giving notice. The majority explained that 'an evitable consequence of withdrawing from the EU treaties will be the need for a large amount of domestic legislation…such a burden should not be imposed on Parliament…without prior Parliamentary authorisation'. Granted, the majority expressly stipulated that they did not 'rest (their) decision on this point', but they used it to 'emphasise the major constitutional change' involved, and tacitly, to buttress the aforementioned 'vital distinction'.

By contrast, Eadie QC sought to argue that rather than looking at the ECA 1972 in isolation, its interpretation should be 'addressed by viewing the effect of the present state of the legislation as a whole'. On this approach, the ECA might be interpreted in light of the TEU/TFEU (as incorporated) and the express recognition of withdrawal as a possibility, or even the 2015 European Union Referendum Act. This, while rejected by the majority, was picked up on by Lord Reed, who suggested that post-1972 legislation was of 'secondary importance' in demonstrating that Parliament had 'legislated on the basis that the prerogative was not restricted'. Lord Reed further used it to demonstrate that Parliament is 'perfectly capable of making clear its intention to restrict the exercise of the prerogative when it wishes to do so'. His Lordship referred to the European Union Act 2011, which he argued implemented a raft of stricter Parliamentary controls. By extrapolation, Lord Reed posited that the absence of particular restrictions in the 1972 Act 'tended to support the conclusion that no such restriction was intended to arise by implication'. Neither Lord Reed's argument nor that for the majority in this context was taken to be decisive, but they illustrate the mental gymnastics involved in conjuring up arguments which characterised the struggle to convincingly interpret the ECA.[15]

Refracted through a more evaluative lens, there are difficulties with both the majority and minority positions across the judgment. First, there has been considerable extra-judicial criticism of the tactical decision by counsel for the Secretary of State to concede that invoking Article 50 would *necessarily* engender an effect on domestic rights. Paul Craig, responding to s10 of the Divisional Court's recognition of the unchallenged nature of the concession, suggested that there were two grounds on which the irrevocability of Article 50 invocations could be

[15] Jeffrey Jowell and Naina Patel, '*Miller* Is Right', *UK Constitutional Law Blog* (15 November 2016) < https://ukconstitutionallaw.org/ > accessed 16 October 2017.

contested: A) He deemed it a 'cardinal legal principle' that a party was not bound by contracts or treaties until agreement had been reached.[16] B) Craig notes that Article 68 of the Vienna Convention on the Law of Treaties expressly enshrines the principle that 'a notification or instrument…may be revoked at any time before it takes effect', and given that prior to conclusion of a withdrawal agreement (or the lapsing of two years) a notifying state has all EU rights and obligations, it follows, per Craig, that the state can revoke before that time. A further argument that calls into question the tactical decisions to avoid engagements on revocability is that of Lord Millett, who suggested extra-judicially that 'it is a strange right which Parliament can grant and revoke but which, once revoked, it cannot re-enact'.[17] It is arguable that a corollary of this is that such rights were simply not 'granted' by Parliament, and that their removal will not abrogate Parliamentary legislation, but the bigger point centres on the surprisingly unexamined notion of revocability and what implications that may yield. Granted, this under-examination of revocability and its implications is likely a function of the adversarial system and the decisions by both counsel to accept irrevocability, but the majority judgment does face difficulties vis-à-vis revocability. If Article 50 is revocable, the argument that triggering it will not *necessarily* affect domestic rights becomes far more pertinent. If it is irrevocable, however, then Lord Millett's aforementioned conundrum poses a difficulty. Granted, the Supreme Court's notion of a 'grafted' state of EU Law onto domestic law does sidle both domestic and international spheres and thus avoid Lord Millett's criticism, but even that response raises new questions of how the grafting came about, and the precise extent of integration required before such 'grafting' may be asserted.

While the majority's overall argument is not without difficulties, the notion of the irrevocable 'trigger' was barely raised in oral argument before the Supreme Court. The overwhelming bulk of the Court's attention was centred on the interpretation of the ECA 1972, and three responses may be made to Lord Reed's interpretation. First, while Lord Reed is right in that s2(1) is conditional, and correct that 'the form of the rule does not convey any intention that the condition *will* be satisfied', to suggest that there is no intention conveyed whatsoever is plainly inaccurate in light of the long title of the ECA: 'An Act to make provision in connection with the enlargement of the European Communities to include the UK'. The clear intention to join is conveyed therein, and even in the side-heading to s2 of the ECA, which concerns the 'general implementation of treaties' (and not their abrogation'). Second, Lord Reed's assault on the viability of the 'vital

[16] Paul Craig, 'Miller: Alternative Syllogisms', *OxHRH Blog*, (23 November 2016) < http://ohrh.law.ox.ac.uk/miller-alternative-syllogisms/ > accessed 16 October 2017.

[17] Millett (n 3).

difference' between changes to the content of EU Law and wholesale withdrawal, while intellectually intriguing in raising questions as to how much change to content is required before the effect is that of *de facto* wholesale withdrawal, is similarly indecisive. The main challenge to the 'vital difference' is that it is difficult for the majority to pinpoint a 'tipping-point' situation and ascertain when enough change has occurred to suffice as a 'wholesale withdrawal'. Yet, there is a clear logical distinction between amendments to a framework, and removal of that framework altogether. Even the example Eadie QC raised of the 1972 European Free Trade Agreement ('EFTA') is illustrative; the withdrawal from the EFTA was not a wholesale withdrawal from the European integration project insofar as withdrawal was part of a pre-agreed set of measures to enter the European Economic Community. Even upon withdrawal, the institutional framework and basis for continued integration continued. This would not be present upon leaving altogether, and that marks the conceptual distinction which the majority is relying on. The precise point at which a 'change' becomes a 'withdrawal' may be imprecise, but that does not elide the clear conceptual differentiation. Similarly, that the distinction upon this ground is not in the statute is neither here nor there; it may easily be deemed an implied term that an overarching exit and repudiation of even the institutions of co-operation is fundamentally different from the continued evolution and updating of terms. Third, the notion that the rights provided are 'inherently' 'conditional' upon EU membership and that cessation of membership translates into a termination of those rights is dependent on the ECA being a mere conduit for rights, devoid of any normative value as to whether those rights *should* be implemented. It has been suggested in the first rebuttal above that this description of the ECA is not wholly defensible, and the 'conditionality' argument in this form is thus similarly tenuous.

In counter, reference may be had to Feldman's arguments concerning the norms of statutory interpretation.[18] Feldman suggests, in the context of the Divisional Court's judgment, that 'the problem with the Court's interpretative approach to section 2(1) of the Act is that it relies on indications as to the proper meaning of the provision which are not normally regarded as sound guides to interpretation'. Feldman argues that the 'long title of a Bill is descriptive, not normative', with its function being to describe the '*scope*' of a Bill and not illustrate its purpose. He also doubts the utility of the long title in being a guide to the 'intention' of Parliament, suggesting that it merely offers indication as to whether proposed amendments to the Bill are within its scope for questions of admissibility. Per Feldman, similar arguments apply to the side-heading of s2(1), and it arguably is of even less utility in divining Parliamentary intention insofar as a side-heading

[18] Feldman (n 4).

cannot even be the subject of a motion to amend during the passage of a Bill. Feldman's arguments thus go some way towards resisting critiques on Lord Reed's 'conditionality-centric' interpretation of s2(1), and of the ECA as a whole.

That said, Feldman's observations are not wholly non-contentious. First, John Bell and George Engle have observed that the long title 'usually contains a general indication of the legislative purpose', suggesting that courts should not wilfully blind themselves to the hints as to intention secreted in the interstices of an Act.[19] Second, and more directly applicable to the interpretation of the ECA, there are further observations about the Act itself which are telling. Feldman himself acknowledges that the specificity of s1(2) and 1(3), which list the treaties to which the Act gives effect and stipulate that any Orders in Council to add an EU Treaty to the s1(2) list must be approved in draft by each House of Parliament, is 'not compatible' with the intention that the Executive should be able to amend domestic law simply via prerogative powers. This dovetails with the observation of the Divisional Court that 'the fact that Parliament's approval is required to give even an ancillary treaty made by exercise of the Crown's prerogative effect in domestic law is strongly indicative of a converse intention that the Crown should not be able, by exercise of the prerogative, to make far more changes in domestic law by unmaking all the EU rights set out in or arising by virtue of the principal EU treaties.' It is thus suggested that rather than providing a complete defence of Lord Reed's dissenting interpretation of the ECA, Feldman's arguments are constrained by the structure of the statutory scheme and the inferences that may rightly be drawn therein.

A further set of rebuttals to the minority approach targets the analogies and background panoply of constitutional arrangements they seek to rely on. First, Eadie QC's submission that the appropriate interpretation of the ECA 1972 (or in fact the very question of whether the prerogative will suffice to trigger Article 50) can be gleaned from 'viewing the effect of the present state of the legislation as a whole, without regard to what the position might have been at some earlier stage' is deeply problematic. As the majority noted at [113], a statute cannot normally be interpreted by reference to a later statute save insofar as they 'are given a collective title, are required to be construed as one, have identical short titles, or deal with the same subject matter on similar lines.' None of these apply to the 1972 Act, or any of the subsequent Acts, and this submission appears to be something of a tenuous stretch which seeks to foist the less EU-friendly language of recent Acts upon the interpretation of the 1972 Act. Second, Elliott's rebuttal to the majority's use of *ex parte Simms* to buttress their insistence that any alleged removal of rights by Parliament is clear and unambiguous is contentious.[20] Elliott has suggested that

[19] John Bell and George Engle, *Cross On Statutory Interpretation* (3rd Ed., Lexis Law Pub, 1995) 276.

[20] Mark Elliott, 'Analysis: The Supreme Court's Judgment in *Miller*', *Public Law for Everyone* (25

this application of *Simms* is 'misguided' insofar as 'the EU law rights at stake… are statutory rights…not the common law rights that the principle of legality as articulated in *Simms* are generally understood to protect'. However, this does not adequately take notice of Lord Reed's exhortation in *Osborn v Parole Board* that the common law falls to be developed 'in accordance with' other sources where appropriate, and the majority in *Miller* went further to note that EU Law had now been 'grafted onto…existing sources of domestic law'.[21] Granted, the notion of 'grafting' does raise the questions of precisely how and when this occurred, but it does reflect a more realistic and evolving picture of EU Law's interaction with domestic law, as opposed to a more sterile and static one. Third, it is noteworthy that the attempted analogy to Double Taxation Treaties (DTTs) raised academically by Finnis, and in written submissions by Eadie QC, is deeply problematic.[22] The argument operates to suggest that insofar as a unilateral amendment or withdrawal from a DTT by exercise of the prerogative can destroy or amend domestic law rights and obligations (since tax obligations to HMRC or any foreign customs agency would then start to run again), it is not alien to suggest that the prerogative can be used to modify or even terminate domestic rights. This argument, however, remains problematic. Kieron Beale QC noted the non-analogous nature, arguing that unlike EU Law which automatically becomes part of UK law by virtue of the ECA, DTT arrangements do not take effect automatically but only through a specific Order in Council which has to be approved by parliament.[23] As the majority noted, 'the conduit pipe metaphor which applies to the 1972 Act in relation to EU Law is inapposite for section 788…in relation to DTTs'. On this analysis, it may broadly be advanced that even the analogies and background asserted in support of the Secretary of State's claim do not appear compelling, militating in favour of the Miller claimants.

Having engaged with the central arguments raised, what arguably is the overarching nub of disagreement is this notion of 'grafting' EU Law onto domestic law and its corollary question of what the precise nexus of operation between EU and domestic law is. For the majority, EU Law is at once formally incorporated into domestic law by the operation of the ECA, but also realistically a source of domestic law in its own right. If it is treated as a source of domestic law, the prerogative's use in the context of treaty-making is otiose for the purposes of the instant litigation.

January 2017) https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/ (accessed 17 October 2017).

21 [2013] UKSC 61.

22 Finnis (n 5).

23 Kieron Beal, 'The Taxing Issues Arising in Miller' *UK Constitutional Law Blog* (14 November 2016) <https://ukconstitutionallaw.org/2016/11/14/kieron-beal-qc-the-taxing-issues-arising-in-miller/> (accessed 17 October 2017).

By contrast, Lord Reed, who sees EU Law as operating domestically *only* by virtue of the ECA, unsurprisingly takes the prerogative as the starting point for this context of international relations. This notion of starting points is thus drawn into sharp relief: If EU Law enters only via a value-neutral ECA, it falls within the realm of international relations governed by the prerogative, and the vibrancy of the prerogative is the starting point. For the majority, insofar as either a) the reality of EU Law's integration and its *sui generis* nature refract a domestic element to EU Law or b) the ECA is not value-neutral and evinces Parliamentary intention to require more than mere prerogative pronouncement for withdrawal, and EU Law can thus be clad with the breastplate of Parliamentary authority, it is apropos to begin from the bulwark of Parliamentary sovereignty and constraining of the prerogative. This notion of starting points is thus central to the case, and it is suggested that the majority's starting point is more defensible insofar as i) it better reflects the reality of how deeply intertwined and mutually-reinforcing EU Law and domestic law have become, and ii) even apart from the 'grafting' issue, the ECA itself offers a viable basis for manifesting Parliament's intent to require more than an Executive assertion of the prerogative power.

The chief difficulty herein is with i), where Elliott aptly notes the difficulty of simultaneously accepting that EU Law is now a source of domestic law in its own right, and also accepting that EU Law is part of domestic law only by the conduit of the ECA, in line with dualism in international law theory.[24] What the majority may be seeking to do, in much the same way Laws LJ in *Thoburn* sought to do with the notion of 'constitutional statutes', is to create a new category of legal sources with a more flexible and permeable nature, that can seamlessly straddle both domestic and EU Law and claim the characteristics of both.[25] It remains to be seen whether this will be borne out in subsequent cases (and in fact their Lordships were keen to assert that there was no change to the rule of recognition), but even if Elliott is right on this point, argument ii) above still operates to place Parliamentary intention squarely in the way of any assertions of the prerogative.

As the first-ever case that all eleven justices of the Supreme Court heard *en banc*, the actual effect of the *Miller* judgment, absent the raucous din of tabloid uproar and jingoism, is not all that dramatic. True, an uneasy assertion of EU Law as a source of domestic law has been made, but much of the case turned on the orthodox application of the usual arguments one might expect from judicial review cases; examinations of Parliamentary intention, recourse to the words and non-textual elements of statute to divine such intention, and whether other statutes may shed light on what was meant in the one at hand. It may be a step too far to

[24] Elliott 'Analysis: The Supreme Court's Judgment in *Miller*' (n 21).
[25] [2003] QB 151.

suggest that the case was startling in how much fanfare and writing it generated, but yet how ordinarily it was decided, but it would not be a huge step. Elliott also notes that *Miller*'s 'wider constitutional consequences might turn out to be more constrained than had perhaps been anticipated', and agrees that 'the only real novelty is the majority's view that Parliament is capable of legislating so as to institute a source of UK law independent of the legislation enacted to achieve that outcome'. With so much ink spilled on the matter, the supposed 'biggest case in fifty years' does not quite seem to live up to its billing when its internal logic is scrutinised. That said, this should not detract from the weightiness of the issues grappled with, nor should it dampen the whetstone of academic inquiry which the more contentious issues raise. It is hoped that this note has contributed, in some small way, to that ongoing questioning of how Britain's constitution continues to evolve and develop in the turbulence of the Brexit era.