



3-14-2022

THE UK'S BASIC STRUCTURE DOCTRINE: MILLER II AND JUDICIAL POWER IN COMPARATIVE PERSPECTIVE

Erin F. Delaney

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Delaney, Erin F. (2022) "THE UK'S BASIC STRUCTURE DOCTRINE: MILLER II AND JUDICIAL POWER IN COMPARATIVE PERSPECTIVE," *Notre Dame Journal of International & Comparative Law*: Vol. 12 : Iss. 1 , Article 4.

Available at: <https://scholarship.law.nd.edu/ndjicl/vol12/iss1/4>

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Cover Page Footnote

Professor, Northwestern University Pritzker School of Law. Conversation with Rosalind Dixon inspired this article, and it has benefited from discussions at ICON-S Mundo, with particular thanks again to Ros, as well as to Sam Issacharoff, Yaniv Roznai, and Yvonne Tew. And, of course, I am indebted to Stephen Tierney for inviting me to respond to his thought-provoking lecture. Meher Babbar, Adam Clark, Alexandra Dakich, Emily Grant, Jack Steele, and Cole Turner provided excellent research assistance. As always, Tom Gaylord and the staff of the Pritzker Legal Research Center have proven invaluable.

**THE UK’S BASIC STRUCTURE DOCTRINE:
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ERIN F. DELANEY*

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INTRODUCTION

In *Parliament and the Brexit Process*, Stephen Tierney argues that the Brexit process has generated rivals to parliamentary supremacy, and he outlines the potential constraints upon Parliament presented by the “people” themselves (through direct democracy), the Executive, the UK Supreme Court, and the devolved territories of the United Kingdom.¹ It is no real matter whether these challengers to Parliament have emerged from, or, as I would argue, preexisted Brexit; the upshot is that the traditional understanding of the British constitution is now at odds with the current reality.

Tierney is undoubtedly correct in his broader analysis of the tensions that Brexit has brought to light. In my response, therefore, I will focus on his assessment of one of the rivals to Parliament’s authority—what Tierney terms the “noisy neighbor”—the UK Supreme Court. He questions the Court’s decision in *R (Miller) v. Prime Minister/Cherry v. Advocate General for Scotland (Miller II)*,² in which the Court concluded that the Johnson Government’s attempt to prorogue Parliament was unlawful.

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¹ Stephen Tierney, *Parliament and the Brexit Process*, 12 NOTRE DAME J. INT’L & COMP. L. 1 (2022).

² *R (Miller) v. Prime Minister/Cherry v. Advocate Gen. for Scotland* [2019] UKSC 41 (appeals taken from Eng. & Scot.) [hereinafter *Miller II*].

An “incendiary judgment,”³ *Miller II* has been the topic of extensive debate in legal circles, with many focusing on the arguments internal to the British legal order that support or undermine the decision. In short, is the Court applying settled law or playing politics? Tierney echoes these arguments. He sees the decision as “an astonishing level of interference by the courts with the political constitution,” and wonders about future claims to judicial authority over (or constraint of) Parliament.⁴

In the following Essay, I argue that *Miller II* is better evaluated by applying an external lens. Denying the above dichotomy, I accept that the decision rests in the liminal space between law and politics and draw on the basic structure doctrine to analyze the *Miller II* decision.⁵ I play out the implications of the comparative analogy and propose a functional justification of the UK Supreme Court’s decision. In so doing, I agree with Tierney that the Court has asserted itself beyond its usual role but conclude that it is far from certain that *Miller II* itself will translate into greater judicial power.

I: *MILLER II*: BACKGROUND AND RECEPTION

On August 28, 2019, two months before the United Kingdom was set to exit the European Union (Brexit), Prime Minister Boris Johnson announced that he had advised Her Majesty Queen Elizabeth II to prorogue Parliament for a period of five weeks,⁶ from roughly 9 September until 14 October 2019.⁷ Prorogation is a prerogative act, exercised by the Crown on the advice of her Ministers, and it serves to end a Parliamentary session.⁸ As a result of prorogation, all proceedings in both Houses end, and while Parliament is prorogued, there are no formal debates, no opportunity to submit questions or otherwise scrutinize government departments or actions.⁹

³ Mark Elliott, *Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context*, 16 EUR. CON. L. REV. 625, 626 (2020) [hereinafter Elliott, *The Miller II Case*].

⁴ See Tierney, *supra* note 1, at 18.

⁵ A few commentators have gestured at this analogy. Anurag Deb, *A Constitution of Principles: From Miller to Minerva Mills*, U.K. CONST. L. BLOG (Oct. 1, 2019), <https://ukconstitutionallaw.org/2019/10/01/anurag-deb-a-constitution-of-principles-from-miller-to-minerva-mills/> (arguing that like the Indian Supreme Court, the UK Supreme Court faced the threat of “politically heavy-handed executive action dressed up in wafer-thin constitutional justification,” and responded to it by drawing on fundamental constitutional principles to prevent such action); Kaleeswaram Raj, *Lessons from a Landmark Brexit Verdict*, THE NEW INDIAN EXPRESS (Oct. 3, 2019), available at <https://www.newindianexpress.com/opinions/2019/oct/03/lessons-from-a-landmark-brexit-verdict-2042528.html> (“There is a general perception that R (Miller) v Prime Minister, in its own way, laid down the UK’s ‘Basic structure doctrine’ during a pernicious situation. The Indian judgment directed itself against executive and legislative excessiveness whereas the UK verdict tried to forestall the executive high-handedness and protect Parliament.”).

⁶ *Brexit: Boris Johnson ‘approved Parliament shutdown plan in mid-August’*, BBC NEWS, Sept. 3, 2019, <https://www.bbc.com/news/uk-scotland-scotland-politics-49550874>.

⁷ *Miller II*, *supra* note 2, at [17].

⁸ Dissolution is the other way to end a Parliamentary session. See generally Richard Kelly, *Dissolution of Parliament*, HOUSE OF COMMONS LIBR., BRIEFING PAPER NO. 05085 (Nov. 4, 2019), <https://researchbriefings.files.parliament.uk/documents/SN05085/SN05085.pdf>.

⁹ Graeme Cowie, *Prorogation of Parliament*, HOUSE OF COMMONS LIBR., BRIEFING PAPER NO. 8589 (June 11, 2019), 11–12, <https://researchbriefings.files.parliament.uk/documents/CBP-8589/CBP-8589.pdf>.

The possibility of proroguing Parliament had been floated as early as June 2019, as a means of ending the machinations surrounding the final withdrawal agreement under which Britain would leave the European Union.¹⁰ In early 2019, the House of Commons had thrice rejected the withdrawal agreement negotiated by the Theresa May Government.¹¹ In order to avoid a no-deal Brexit, Parliament, through the European Union (Withdrawal) Act 2019, required the Prime Minister to seek an extension of the notification period with the European Union.¹² And in April, Prime Minister May asked for and was granted an extension until 31 October 2019.¹³ She resigned the leadership of the Conservative Party in early June, and a leadership contest began. One leading contender for the position, Boris Johnson, had made it clear that he was prepared to leave the EU without an agreement.¹⁴ An extended prorogation would serve to end debate and avoid scrutiny of a no-deal Brexit.

The mere suggestion of using the prorogation power in this manner raised concerns from a cross-party coalition of MPs and members of the House of Lords.¹⁵ And shortly following Boris Johnson's installation as Prime Minister on 24 July 2019, they brought a petition on 30 July 2019 in the Court of Session in Scotland seeking a declaration that such a prorogation would be unlawful and an injunction (interdict) to prevent it.¹⁶ At that time, the issue was a hypothetical one, but it became live a few weeks later.¹⁷ And upon that announcement, Gina Miller brought proceedings challenging the prorogation as unlawful in the High Court of England and Wales.¹⁸

The prorogation was announced during the summer parliamentary recess, and when Parliament reconvened in early September, it passed the European Union (Withdrawal) (No 2) Act 2019, requiring the Prime Minister to seek an additional extension to the exit date on 19 October, unless prior to that date, Parliament had either approved a withdrawal agreement or approved a resolution accepting a no-deal exit.¹⁹

On 10 September, the (putative) prorogation began, and the UK Supreme Court heard arguments arising from the two lower court decisions from 17 to 19 September. The Court concluded that the issue was justiciable and the prorogation was unlawful, issuing its decision on 24 September. Following the

¹⁰ *Raab won't rule out suspending Parliament to force no-deal Brexit*, SCOTSMAN (June 5, 2019, 8:25 PM), <https://www.scotsman.com/news/uk-news/raab-wont-rule-out-suspending-parliament-force-no-deal-brexit-1416053>. See also Graeme Cowie, *Prorogation of Parliament*, HOUSE OF COMMONS LIBR., BRIEFING PAPER NO. 8589 25 (June 11, 2019), <https://researchbriefings.files.parliament.uk/documents/CBP-8589/CBP-8589.pdf>.

¹¹ *Miller II*, *supra* note 2, at [12].

¹² *Id.* at [13].

¹³ *Id.*

¹⁴ *Id.* at [14].

¹⁵ *Id.* at [23].

¹⁶ *Cherry v. Advocate Gen.*, [2019] CSIH 49 (Scot.) (Inner House unanimously ruled that the attempted prorogation was both justiciable and illegitimate).

¹⁷ Toby Helm & Heather Stewart, *Boris Johnson seeks legal advice on five-week parliament closure ahead of Brexit*, GUARDIAN (Aug. 24, 2019, 4:02 PM), <https://www.theguardian.com/politics/2019/aug/24/johnson-seeks-legal-advice-parliament-closure>.

¹⁸ *R (Miller) v. Prime Minister*, [2019] EWHC 2381 (QB) (court held the issue not justiciable and dismissed it, but also granted a "leap-frog" certificate so that the case could be argued before the Supreme Court).

¹⁹ European Union (Withdrawal) (No. 2) Act 2019, c. 26, § 1 (U.K.).

decision, John Bercow, the colorful Speaker of the House,²⁰ delivered a statement in person announcing Parliament would sit the following day at 11:30am.²¹

In response to the Supreme Court’s decision, the lawyerly and scholarly community has bifurcated into two main camps: those opposed to the decision on the grounds that it was an impermissible intrusion of the UK Supreme Court into the political constitution and thus an illegitimate use of the judicial function, and those who contend that the decision reflects constitutional orthodoxy and is properly rooted in precedent and principle. In this Part, after briefly reviewing the substance of the decision, I will outline this scholarly debate and present a third option, that the Court might have acted outside the bounds of orthodoxy but was legitimate in doing so – an argument I develop further in Part II.

A. THE DECISION

The unanimous decision of the full complement of sitting Justices addressed two main issues presented by the prorogation: (1) Could the Court adjudicate the lawfulness of the Prime Minister’s advice to the Queen to prorogue Parliament; and then, if justiciable, (2) was it lawful?²² The Court formulated the question of justiciability as a category determination. What exactly was the Court being asked? Was it to determine “*where* a legal limit lies in relation to the power to prorogue Parliament,” or “the lawfulness of a particular exercise of the power within its legal limits”?²³ The Court concluded it was being asked the extent of prerogative powers, a justiciable matter. It arrived at this determination by first situating the power to prorogue as a power recognized by the common law,²⁴ and noting that the sovereignty of Parliament and Parliamentary accountability—two “fundamental principles” of constitutional law—require some legal limits on the power of prorogation.²⁵ Without such limits, Parliament could be prorogued indefinitely, “prevent[ing] Parliament from exercising its

²⁰ Throughout Bercow’s tenure as Speaker and most acutely regarding his handling of Brexit, he was known as a champion of Parliament’s rights to his supporters and a subverter of MP–executive relations to his opponents. See Adam Cygan, Philip Lynch, & Richard Whitaker, *UK Parliamentary Scrutiny of the EU Political and Legal Space After Brexit*, 58 J. COMMON MKT. STUD. 1605, 1614 (2020); see also William James, *Speaker John Bercow, UK Parliament’s Brexit Umpire-Cum-Player, Steps Down*, REUTERS (Oct. 30, 2019), <https://www.reuters.com/article/us-britain-politics-speaker/speaker-john-bercow-uk-parliaments-brexit-umpire-cum-player-steps-down-idUSKBN1X9214>. Bercow utilized technical devices of parliamentary procedure and historical precedent in his efforts to defend, or expand, the sovereignty of Parliament. See Andrew Barry, *Afterword: ‘I Will Play My Part!’, or Parliamentary Politics in Action*, 50(2) SOC. STUD. SCI. 335, 336 (2020); see also Chris Mullin, *In Defence of John Bercow*, PROSPECT (March 2, 2020), <https://www.prospectmagazine.co.uk/magazine/in-defence-of-john-bercow-memoir-review-chris-mullin>; Christopher Watson, *House of Commons Trends: Urgent Questions*, HOUSE OF COMMONS LIBR. (Nov. 3, 2020), <https://commonslibrary.parliament.uk/house-of-commons-trends-urgent-questions/>.

²¹ Rowena Mason & Peter Walker, *MPs to Return Immediately in Wake of Supreme Court Ruling*, GUARDIAN (Sept. 24, 2019), 9:01 AM, <https://www.theguardian.com/politics/2019/sep/24/bercow-mps-return-urgent-supreme-court-ruling-suspension-parliament>.

²² *Miller II*, *supra* note 2, at [27] (noting also the issues of by what standard lawfulness should be judged and, if unlawful, what remedies were available).

²³ *Id.* at [37] (emphasis added).

²⁴ *Id.* at [30].

²⁵ *Id.* at [41].

legislative authority,”²⁶ or compromising its ability “to carry out its constitutional functions” of holding the executive accountable.²⁷

The Court then determined that the Prime Minister’s advice was not lawful, noting that the advice had an “extreme effect upon the fundamentals of our democracy” and thus warranted “a reasonable justification.”²⁸ The extreme effect was “frustrating or preventing the constitutional role of Parliament in holding the Government to account,” in the “exceptional” circumstances surrounding Brexit.²⁹ And the Court found that the Government failed to present “any reason” for the five week prorogation. In determining the remedy, a declaration that the prorogation was “unlawful, null and of not effect,” the Court also considered the relevance of Article 9 of the Bill of Rights of 1688, protecting “proceedings in Parliament” from judicial review.³⁰ The Court concluded that the prorogation was not such a “proceeding in Parliament.”

B. UNORTHODOX AND ILLEGITIMATE, ORTHODOX AND LEGITIMATE, OR UNORTHODOX AND LEGITIMATE?

The negative reaction to the *Miller II* decision was swift. Roughly a week after the decision was handed down, Oxford scholar John Finnis contributed a scathing evaluation of its reasoning in a post entitled “*The unconstitutionality of the Supreme Court’s prorogation judgment.*”³¹ In the post, he accused the Supreme Court of intruding into the political constitution,³² by “usurping the responsibility” that the constitution had “assigned to others.” Determining the boundaries of the prerogative power over prorogation was a *political* issue, not a legal one.³³ The Court erred in finding the issue justiciable, and it should have declined to hear the case.³⁴ And the Court’s effort to distinguish between the bounds of the prerogative power and its exercise was a “card-shuffle, a fudge,” an “argumentational sleight[] of hand.”³⁵

The critics read the decision as judicializing politics and threatening the traditional political constitution.³⁶ Parliamentary accountability had been

²⁶ *Id.* at [42], [45].

²⁷ *Id.* at [48], [46].

²⁸ *Id.* at [57].

²⁹ *Id.* at [55], [57].

³⁰ *Id.* at [63]–[69]. Article 9 states: “That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.” BILL OF RIGHTS, art. 9, 1688, 1 W. & M., sess. 2, c.2 (U.K.).

³¹ John Finnis, *The unconstitutionality of the Supreme Court’s prorogation judgment*, JUD. POWER PROJECT (Oct. 2, 2019), <https://judicialpowerproject.org.uk/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment-john-finnis/>.

³² Political constitutionalists argue that the central aspect of the British constitution is its having vested power in a democratic, representative body. Parliamentary sovereignty protects democracy and self-governance. There is no need for external judicial checks on parliamentary power. *See, e.g.*, Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543, 548–53 (2015).

³³ Finnis, *supra* note 31.

³⁴ *See* Edward Willis, *The United Kingdom Supreme Court’s Judgment in Miller No 2*, [2019] N.Z. L.J. 352, 352 (describing view that prorogation was “strictly a political matter” as the “prevailing expectation” and reviewing Canadian experience in support).

³⁵ Aileen McHarg, *The Supreme Court’s Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?*, 24 EDINBURGH L. REV. 88, 89 (2020).

³⁶ *See* Michel Rosenfeld, *Judicial Politics versus Ordinary Politics*, in JUDICIAL POWER 36, 44 (Christine Landfried ed., 2019) (describing the “constitutionalization of politics, understood as involving a shift from ordinary to judicial politics”). *See also* McHarg, *supra* note 31, at 89 (arguing that the Court had

understood as a political convention,³⁷ not something to be enforced by a court. Indeed, as Timothy Endicott wrote, even “the fact that Parliament should meet as appropriate does not support the conclusion that the law requires it to meet as appropriate.”³⁸ As he says, “why should the court do the protecting?”³⁹ These scholars were unpersuaded by the argument that because “prerogative power is recognized by common law[,] [] it must be exercised in accordance with (so-called) common law principles.”⁴⁰ They bristled at the idea that the Supreme Court could be claiming “an open-ended power to make constitutional principles into laws.”⁴¹ Parliament itself and the political process could be trusted to monitor the prerogative power.⁴² The Court was acting as the “primary guardian of the British constitution,” a role which it was not intended to play and not competent to assume.⁴³

In contrast, defenders claimed that *Miller II* should be understood as a statement of constitutional orthodoxy,⁴⁴ in line with the expectations of the common law constitution.⁴⁵ In the words of Paul Craig, parliamentary sovereignty “has always contained conditions for its exercise,”⁴⁶ and parliamentary accountability has long been understood as a constitutional principle animating judicial review.⁴⁷ Indeed, to the extent the decision broke new ground, it did so through the natural extension of established principles.⁴⁸ And these constitutional principles can “sound in both the political and legal spheres.”⁴⁹ At bottom, the prerogative power must be subject to the principle of

“engaged in considerable creativity in casting itself as the guardian at common law of constitutional values hitherto regarded as grounded in the political rather than the legal constitution”).

³⁷ Cf. Elliott, *The Miller II Case*, *supra* note 3, at 632 (describing ministerial accountability to Parliament as a long-established political convention).

³⁸ Timothy Endicott, *Making Constitutional Principles into Laws*, 136 L.Q. REV. 175, 178 (2020).

³⁹ *Id.*

⁴⁰ Martin Loughlin, *A note on Craig on Miller*; Cherry, 2020 PUB. L. 278, 279.

⁴¹ Endicott, *supra* note 38, at 178 (“The essential implicit premise needed to make sense of *Miller* and *Cherry* is that the High Court has an open-ended power to make constitutional principles into laws.”).

⁴² To the extent the Johnson decision to prorogue may have indicated some weakness in the political constitution, some proffered other non-judicial institutional solutions. See Stefan Theil, *Unconstitutional Prorogation of Parliament*, 2020 PUBLIC L. 529 (arguing that monarchical intervention in the face of a controversial prorogation of Parliament might be preferable to that of the judiciary).

⁴³ Martin Loughlin, *A note on Craig on Miller*; Cherry, 2020 PUBLIC L. 278, 280.

⁴⁴ See, e.g., Paul Craig, *The Supreme Court, Prorogation and Constitutional Principle*, 2020 PUB. L. 248; Alison Young, *Deftly Guarding the Constitution*, JUD. POWER PROJECT (Sept. 29, 2019), <http://judicialpowerproject.org.uk/alison-young-deftly-guarding-the-constitution/>; Nick Barber, *Constitutional Hardball and Justified Development of the Law*, JUD. POWER PROJECT (Sept. 29, 2019), <http://judicialpowerproject.org.uk/nick-barber-constitutional-hardball-and-justified-development-of-the-law/>.

⁴⁵ Common law constitutionalism imposes limitations on the legislature through the common law itself, supported by the argument that parliamentary sovereignty itself is a common law construct. See, e.g., Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OXFORD LEGAL STUD. 435 (2003); Robert Stevens, Government and the Judiciary, in *THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY* 333 (Vernon Bogdanor ed., 2003); Mark Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, 58 CAMBRIDGE L.J. 129 (1999).

⁴⁶ Craig, *supra* note 44, at 252.

⁴⁷ *Id.* at 258–59.

⁴⁸ Elliott, *The Miller II Case*, *supra* note 3, at 629. See also Young, *supra* note 42; Barber, *supra* note 42 (arguing *Miller II* “forms part of a long line of jurisprudence”).

⁴⁹ Elliott, *The Miller II Case*, *supra* note 3, at 633.

legality,⁵⁰ or parliamentary sovereignty itself is distorted to the executive's whim.⁵¹

Finnis concludes that the Court's decision—its assessment “first of risks, and then of the degree of need to avert them despite the side-effects of attempting to—is the very heart or core of this Judgment. That core is neither legal nor constitution-based. Like choices by constitution-drafters and legislatures, it is purely political.”⁵² Can such an unorthodox display nevertheless be legitimate? Some have suggested a kind of necessity argument: Jack Caird has written that, “when the constitution is under strain from all sides, it is normal that Parliament and the judiciary are asked to make decisions on questions of constitutional interpretation which are inherently political.”⁵³ And Edward Willis has suggested that “when staring into the precipice, both law and politics become secondary considerations ordered around the normative gravity of fundamental constitutional principle.”⁵⁴ But was the Court (or the country) staring into the precipice? Finnis would guffaw. He proffered that the Court was acting disingenuously, “for fear of some confessedly ‘hypothetical’ and ‘extreme’ abuse which for centuries has been judged preventable by other, existing, non-judicial constraints”⁵⁵

In the next Part, I argue that it is possible to understand *Miller II* as an example of the Court's acting outside the bounds of British constitutional orthodoxy and yet in a legitimate manner by drawing on the extensive comparative insights provided by the basic structure doctrine, including its methodology and its justification.

II: COMPARATIVE INSIGHTS AND CONTEXTUAL JUSTIFICATIONS

The debate evaluating the legitimacy of *Miller II* is largely internal to British law and does not present the possibility that the decision could be both unorthodox and legitimate: A decision that tests the bounds of the judicial role by its necessarily political nature, but that is, nevertheless, an appropriate step for the Court to take. By turning to comparative constitutionalism, it is possible to root the *Miller II* decision within an ongoing political and scholarly debate about the role of courts in moments of constitutional crisis. This Part argues that the basic structure doctrine serves as the comparative analogue to *Miller II* and draws on the literature surrounding the basic structure doctrine to derive a test for evaluating the UK Supreme Court's actions in *Miller II*.

A. BASIC STRUCTURE IN COMPARATIVE PERSPECTIVE

⁵⁰ *Id.* at 636–38; Craig, *supra* note 44, at 264.

⁵¹ Craig, *supra* note 44, at 264.

⁵² Finnis, *supra* note 31, at 15.

⁵³ Jack Simson Caird, *The Politics of Constitutional Interpretation in the UK*, JUD. POWER PROJECT, Oct. 1, 2019, available at <http://judicialpowerproject.org.uk/jack-simson-caird-bingham-centre-for-the-rule-of-law-the-politics-of-constitutional-interpretation-in-the-uk/>.

⁵⁴ Willis, *supra* note 34, at 354.

⁵⁵ Finnis, *supra* note 31, at 8.

The UK Supreme Court's definition of the UK constitution's core elements sounds in the register of "basic structure,"⁵⁶ drawn on most often by courts in systems with written constitutions when confronted with fundamentally altering constitutional amendments. The roots of the Basic Structure Doctrine lie in the Indian Supreme Court's 1967 decision, *Golaknath v. State of Punjab*,⁵⁷ which first introduced the idea that a constitutional amendment which threatened core constitutional guarantees could be invalid. The specific justifications used in that case were abandoned and replaced in 1973 in *Kesavananda Bharti v. State of Kerala*.⁵⁸ In *Kesavananda*, the Indian Supreme Court struck down the Twenty-Fourth Amendment to the Indian Constitution as an attempt to alter "the basic structure" of the Constitution.

The *Kesavananda* decision has been called perhaps *the* "most important case decided by a constitutional court in the twentieth century,"⁵⁹ and its approach has been drawn on by courts around the world.⁶⁰ The central tenets of the basic structure doctrine are (a) that there are "certain fundamental features . . . not spelt out in the Constitution but which are inherent in its very nature, design and purpose,"⁶¹ and (b) that an attempt to alter these features, even if *procedurally* adequate under constitutional provisions for amendment, may be substantively unconstitutional.

As many have noted, this articulation of the doctrine fails to provide much clarity.⁶² First: what are, as described by the Supreme Court of Pakistan in its

⁵⁶ Cf. SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA xxxi (2009); see also S.R. Bommai v. Union of India, AIR 1994 SC 1918, 1956–57 (Verma, J., concurring) (suggesting the review of an emergency proclamation is commensurate with judicial review of prerogative powers at common law).

⁵⁷ *Golaknath v. State of Punjab*, (1967) 2 SCR 762. Note that the idea of "unconstitutional constitutional amendments" in constitutional theory reaches back much farther. See Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 669–75 (2013). Roznai further identifies a 1950 decision of the Bavarian Constitutional Court as introducing the idea of unconstitutional constitutional norms to post-World War II jurisprudence. *Id.* at 676.

⁵⁸ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

⁵⁹ Vivek Krishnamurthy, Note, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 YALE J. INT'L L. 207, 225 (2009) (acknowledging that "reasonable people can disagree" as to whether it was "the first or second most important case").

⁶⁰ See, e.g., Corte Constitucional [Constitutional Court], julio 9, 2003, Sentencia C-551/03 (Colom.) (limiting constitutional amendment power under "substitution theory"); Opinion No. 0024-2005-PI/TC (02.11.2005) (Peru) (rejecting argument that amendments constitute a "non-justiciable political question"); Corte Const., 15 dicembre 1988, n. 1146, Racc. uff. corte cost. (It.) (finding "supreme values" protected from constitutional revision); Verfassungsgerichtshof [VfGH] [Constitutional Court], June 23, 1988, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] 29, No. 102/88 (Austria) (prohibiting "total revision" of constitution); Nález Ústavního soudu ze dne 09.10.2009 (US) [Decision of the Constitutional Court of Sept. 10, 2009] sp.zn. PI (Czech) (protecting "constitutive principles" of democracy); Anayasa Mahkemesi [AYM] [Constitutional Court] June 5, 2008, E. 2008/16, K. 2008/116 45 AYMKD 1195 (Turk.) (protecting secularism as unamendable norm); *Anwar Hossain Chowdhury v. Bangladesh*, 41 DLR 1989 App. Div. 165. (Bangl.) (noting twenty-one unamendable constitutional features); *Mahmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 SC 426, 458, 479-80 (Pak.) (articulating limits on amendments); J. Y. Interpretation No. 499 (03/24/2000) (Taiwan) (blocking transformation of National Assembly); *Premier of KwaZulu-Natal v. President of the Republic of South Africa*, 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC) (S. Afr.) (questioning whether an amendment can restructure constitution fundamentals); *Njoya v. Attorney General*, [2004] LLR 4788 (HCK) (Kenya) (holding amending constitution substitute or destroy the existing constitution); *British Caribbean Bank Ltd. v. Attorney Gen. of Belize*, Claim No. 597 of 2011 (Belize) (invalidating amendment for "destroy[ing]" fundamental norms). See also Roznai, *supra* note 57, at 681–707.

⁶¹ *Executive Council of the Western Cape Legislature v. President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) at para. 204.

⁶² Rosalind Dixon & David Landau, *Transnational constitutionalism and a limited doctrine of*

own discussion of the doctrine, “the salient features of the Constitution,”⁶³ and how are they to be determined?⁶⁴ Something foundational must be at stake: As Judge Jaganmohan Reddy said in *Kesavananda*, “[t]he edifice of our Constitution is built upon and stands upon several props, remove any of them and the Constitution collapses.”⁶⁵ And courts around the world have found unwritten constitutional principles to include, *inter alia*, the rule of law,⁶⁶ federalism,⁶⁷ democracy,⁶⁸ judicial independence,⁶⁹ and separation of powers.⁷⁰

Second, how is a court to know when an attempt to alter these basic structures reaches the level of unconstitutionality? In the Indian context, “[t]he phrase which best captures the standard of review applied is whether the state action ‘destroys or damages the basic features or basic structure of the Constitution.’”⁷¹ This phrase suggests a “high threshold of constitutional injury,”⁷² but as Judge Chandrachud wrote about the basic structure doctrine in *Indira Gandhi v. Raj Narain*, “one swallow does not make a summer.”⁷³ Some mixture of qualitative and quantitative analysis is needed to determine the harm to the basic structure.⁷⁴

Quite apart from the challenges in operationalizing the doctrine, it raises core legitimacy questions, pitting the operation of judicial review against exercises of the democratic will. The majority of commentary on the concept attempts to navigate this paradox of “unconstitutional constitutional amendments.” A key focus is on textual provisions in systems with written constitutions: Does the constitution itself purport to authorize its constitutional court to develop a doctrine of unconstitutional constitutional amendments?⁷⁵ Are

unconstitutional constitutional amendment, 13 INT'L J. CON. L. 606, 629 (2015) [hereinafter Dixon & Landau, *Transnational constitutionalism*].

⁶³ Roznai, *supra* note 57, at 696 (citing MARTIN LAU, *THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN* 81-88 (2006)).

⁶⁴ KRISHNASWAMY, *supra* note 56, at 147 (“The most persistent and harsh criticism of the basic structure doctrine over the many years of its existence has been directed at the open-ended nature of the basic feature catalogue.”).

⁶⁵ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, 1206 (Jaganmohan Reddy, J.).

⁶⁶ See *British Caribbean Bank Ltd. v. Attorney Gen. of Belize*, Claim No. 597 of 2011 (Belize); Reference re Secession of Quebec (*Quebec Secession Reference*), [1998] 2 S.C.R.217, para. 32 (Can.) (finding the Constitution of Canada embraces “four fundamental and organizing principles. . . : federalism; democracy; constitutionalism and the rule of law; and respect for minorities.”).

⁶⁷ See Reference re Secession of Quebec (*Quebec Secession Reference*), [1998] 2 S.C.R.217, para. 32 (Can.); Zafar Ali Shah v Pervez Musharraf, 52 PLD (SC) 869 (Pak.) (finding “[t]hat no amendment shall be made in the salient features of the Constitution i.e., independence of Judiciary, federalism, parliamentary form of government blended with Islamic provisions.”).

⁶⁸ See *Anwar Hossain Chowdhury v. Bangladesh*, 41 DLR 1989 App. Div. 165 (Bangl.); *Nález Ústavního soudu ze dne 09.10.2009 (ÚS)* [Decision of the Constitutional Court of Sept. 10, 2009], sp.zn. PI (Czech); J. Y. Interpretation No. 499 (03/24/2000) (Sing.).

⁶⁹ *Anwar Hossain Chowdhury v. Bangladesh*, 41 DLR 1989 App. Div. 165 (Bangl.); Zafar Ali Shah v Pervez Musharraf, 52 PLD (SC) 869 (Pak.).

⁷⁰ Vivek, Krishnamurthy, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 YALE J. INT'L L. 207, 208, 230 (2009) (drawing similarities between unwritten constitutional principles in Canada and India, attributed to structural similarities and necessities in interpretation of “new” constitutions). Krishnamurthy posits both courts rely on these principles as “outcome-determinative principles of constitutional law” in lieu of constitutional textual interpretation. *Id.* at 230.

⁷¹ KRISHNASWAMY, *supra* note 56, at 72.

⁷² *Id.*

⁷³ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299.

⁷⁴ Cf. KRISHNASWAMY, *supra* note 56, at 114–15.

⁷⁵ See RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS* (2019). But see KRISHNASWAMY, *supra* note 56, at 88 (“a model of basic structure review which is focussed on the text of the constitution will fail to

there eternity clauses⁷⁶ or otherwise different or tiered amendment provisions?⁷⁷ Of course, there is a distinction between unamendability provisions written into constitutions, and decisions by courts to engage with basic structure doctrines unconnected to textual requirements. Yaniv Roznai has suggested that “[t]he basic structure doctrine is ‘an attempt to identify the moral philosophy on which the Constitution is based,’”⁷⁸ which goes far beyond parsing of text.⁷⁹

In the latter case, where a court looks to the spirit of the constitutional scheme rather than to text, the justifications proffered for judicial review are necessarily more political. Roznai himself has argued that the use of the doctrine is justified by the theory of the constituent power: the people create the constitution and thus only the people—acting in their pre-constitutional form—could fundamentally alter that constitution.⁸⁰ Any action by the constituted authorities (by the government or by entities acting within the constitutionally created amendment process) must be consistent with the values of the enacted constitution.⁸¹ This argument resonates with justifications for more normal variations of judicial review,⁸² and in some ways the basic structure doctrine becomes a difference in degree, rather than a difference in kind.

Others have argued, however, that the basic structure doctrine “raises special problems of legitimacy not faced by ordinary exercises of judicial review, and thus requires special justification.”⁸³ The dramatic nature of a court’s resort to basic structure has been described as “chemotherapy for a carcinogenic body politic”⁸⁴ or “a dire cure for a drastic disorder.”⁸⁵ Commentators have recognized that danger lurks both in relying upon (or in failing to rely upon) the doctrine. And, in this vein, Dixon and Landau root the justification in a kind of democratic pragmatism.⁸⁶ Their focus on the democracy-enhancing aspects of the doctrine is not in tension with Roznai’s

preserve constitutional principles as it is both under inclusive and over inclusive in its scope of protection”).

⁷⁶ See generally SILVIA SUTEU, *ETERNITY CLAUSES IN DEMOCRATIC CONSTITUTIONALISM* (2021) (contextualizing democratic challenges of formal and implicit unamendability); Ridwanul Hoque, *Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?* In *AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES* 195-229 (Richard Albert & Bertil Emrah Oder eds., 2018).

⁷⁷ See generally Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 *GEO. WASH. L. REV.* 438 (2018) (highlighting the prevalence, benefits, and shortcomings of tiered constitutional design); Richard Albert, *The Forms of Unamendability*, in *AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES* 1-26 (Richard Albert & Bertil Emrah Oder eds., 2018) (overviewing theory of unamendable portions of constitutions).

⁷⁸ Roznai, *supra* note 57, at 692 (citing Salman Khurshid, *The Court, the Constitution, and the People*, in *THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM* 95, 98 (Pran Chopra ed., 2006)).

⁷⁹ See Gary Geoffrey Jacobsohn, *An unconstitutional constitution? A comparative perspective*, 4 *INT’L J. CON. L.* 460, 478 (2006).

⁸⁰ See generally YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS* (2017).

⁸¹ *Id.* at 478–79. Cf. Jacobsohn, *supra* note 81, at 478 (“a polis’s identity changes when the constitution (referring to more than just a document) changes as the result of a disruption in its essential commitments, much as a chorus is a different chorus when it appears in a tragedy rather than a comedy.”).

⁸² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸³ Dixon & Landau, *Transnational constitutionalism*, *supra* note 62, at 609.

⁸⁴ Upendra Baxi, *Preface to S.P. SATHE, JUDICIAL ACTIVISM IN INDIA*, at XVI (2001).

⁸⁵ Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 *J. OF DEM.* 70, 82 (2007).

⁸⁶ This approach shares similarities with the justifications used for stronger judicial review in fragile democracies. See Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 *Geo. L. J.* 961 (2011); SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES* (2015) (presenting strong constitutional courts as an antidote to threats of authoritarianism and geopolitical vulnerabilities).

focus on the “people” and delegated constituent authority,⁸⁷ but it is more expansive and can exist outside the bounds of a system with a written constitution. Dixon and Landau argue the doctrine is justified when it “poses a real risk to democratic constitutionalism” itself.⁸⁸ The legitimacy concerns are mitigated in the face of measures which work “to cut off future exercises of democratic decision-making,”⁸⁹ or function to “allow leaders to increase their hold on power or to undermine institutions that were previously acting as a check.”⁹⁰

This attention to abusive constitutional change adds important context to the second prong of the two-part test: is there evidence of democratic backsliding? Is the constitutional system no longer working as intended? These questions clearly introduce “a convergence of legal and political issues,”⁹¹ and it is unclear how effective a court can be at assessing these threats. Overestimating the danger could lead to overuse of the doctrine,⁹² undermining its legitimacy as an action of last resort.⁹³ And then again, one swallow may not make a summer, but (to stick with fauna) there is little point shutting the barn door after the horse has bolted.⁹⁴ And thus, taking a holistic view is necessary: “Constitutional changes that, by themselves, may not pose any significant threat to democracy may become far more threatening in combination, or in aggregate.”⁹⁵

In viewing the UK Supreme Court’s *Miller II* decision through the lens of the basic structure doctrine, the decision’s legitimacy will turn on the externalist, pragmatic justification provided by Dixon and Landau. The UK’s lack of codified constitution and the complications that itself presents for constituent power in the United Kingdom leave few other routes for legitimation.⁹⁶ Could the UK Supreme Court have properly viewed Boris Johnson’s decision to prorogue Parliament as a threat to the constitutional order?

B. A CONTEXTUAL ANALYSIS FOR THE UNITED KINGDOM

⁸⁷ Dixon & Landau, *Transnational constitutionalism*, *supra* note 62, at 612.

⁸⁸ *Id.* at 609. *Cf.* David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 237 (2013) (describing “certain extreme exercises of political power that threaten the institutional order itself”).

⁸⁹ Dixon & Landau, *Transnational constitutionalism*, *supra* note 62, at 612. They further suggest that some of these types of actions may be “likely to be manipulated rather than real exercises of democratic will,” thus reinforcing the legitimacy of a court’s intervention. *Id.*

⁹⁰ *Id.* at 613; *see also* William Partlett, *Courts and Constitution-Making*, 50 WAKE FOREST L. REV. 921, 927 (2015) (discussing actions which “weaken the autonomy of checking institutions and undermine individual rights”).

⁹¹ Ashok H. Desai, *Constitutional Amendments and the ‘Basic Structure’ Doctrine*, in DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW 71, 73 (Venkat Iyer ed. 2000).

⁹² *Cf.* Dixon & Landau, *Transnational constitutionalism*, *supra* note 62, at 615.

⁹³ *Cf.* Desai, *supra* note 92, at 90 (describing the doctrine as a “rare residuary power”).

⁹⁴ Some commentators seemed to accept that if the prorogation had been obviously abusive, necessity would have permitted its nullification, though in such a circumstance, the *implementation* of that judicial decision may be unlikely. Endicott, *supra* note 38, at 181 (“But if it proved to be the case that only recourse to the courts would prevent indefinite prorogation of Parliament (and if the judges were still able to get to work in the morning, and if their declarations were given effect), then you have imagined a justification for judges to assume the power to nullify a prorogation: necessity. In that case, a court could justifiably create a new legal rule to meet a constitutional need”).

⁹⁵ Dixon & Landau, *Transnational constitutionalism*, *supra* note 62, at 625.

⁹⁶ Whether the basic structure doctrine is applicable beyond constitutional amendments to regular legislative or executive action is a matter of some debate. In the context of the United Kingdom, the uncodified political constitution expands the scope of what might be considered a constitutional amendment, thus sidestepping the controversy. My thanks to Yaniv Roznai for raising this issue.

As noted in Part I, the UK Supreme Court focused on the likely *future* dangers of prorogation to the principle of Parliamentary accountability. The concern animating the Court was the risk that, during a prorogation, “responsible government *may be* replaced by unaccountable government.”⁹⁷ The Court did not determine that such a situation would have resulted by virtue of the prorogation advised by Boris Johnson, nor did it delve into the possible motivations of the Prime Minister in requesting it. The Court simply noted that as no reasonable justification for the five-week prorogation was proffered, Parliament had been unlawfully prorogued.

Recasting the *Miller II* decision in the guise of the basic structure doctrine begins easily, as the “principle of Parliamentary accountability” is generally accepted as a foundational element of the British constitutional order.⁹⁸ The principle of Parliamentary accountability can be understood as reflecting *responsible government*, a cornerstone of Westminster-style parliamentary systems around the world.⁹⁹ In the words of the Justice Kiefel of the High Court of Australia, responsible government creates a relationship “between the Parliament and the Executive [in which] the former is superior to the latter.”¹⁰⁰ In short, it requires the “accountability of ministers, or of the government as a whole, to an elected assembly.”¹⁰¹

What then of the second stage of the doctrinal analysis? Was the prorogation a single swallow, or was it somehow indicative of a larger challenge to constitutional democracy in the United Kingdom? The court itself wrote that the case “arises in circumstances which have never arisen before and are unlikely ever to arise again,”¹⁰² giving some ammunition to those who argued this was far from a constitutional crisis. But a broader view of the constitutional changes roiling the operation of the British state suggests that responsible government as a central tenet of the British constitution is “increasingly honored in the breach.”¹⁰³ And in this subsection, I argue that it is certainly plausible for a court to have concluded that responsible government was in some peril and that a five-week prorogation in these circumstances was a step too far.

A number of commentators, as well as the litigants themselves, highlighted the complicated political backdrop to the decision and the “febrile atmosphere” of late summer 2019.¹⁰⁴ As Mark Elliot has written, it was “widely believed” that the purpose of the prorogation was to prevent Parliament from taking any action to limit the Government’s freedom in effectuating Brexit.¹⁰⁵ But even

⁹⁷ *R (on the application of Miller) v. Prime Minister; Cherry and others v. Advocate General for Scotland*, [2019] UKSC 41 [48] (emphasis added).

⁹⁸ See, e.g., Graziella Romeo, *The Conceptualization of Judicial Supremacy: Global Discourse and Legal Tradition*, 21 GERMAN L. J. 904, 913 (2020) (describing parliamentary accountability as one of generally agreed upon basic elements of the British constitution); Willis, *supra* note 34, at 354 (describing parliamentary accountability as a longstanding central tenet).

⁹⁹ See David Kinley, *The Duty to Govern and the Pursuit of Accountable Government in Australia and the United Kingdom*, 21 MONASH U. L. REV. 116, 119 (1995).

¹⁰⁰ *Williams v. Commonwealth* (2012) 248 CLR 156 [579].

¹⁰¹ A.H. BIRCH, REPRESENTATIVE AND RESPONSIBLE GOVERNMENT: AN ESSAY ON THE BRITISH CONSTITUTION 20 (1964).

¹⁰² *Miller II*, [2019] UKSC 41 at [1].

¹⁰³ Elliott, *The Miller II Case*, *supra* note 3, at 632.

¹⁰⁴ Elliott, *The Miller II Case*, *supra* note 3, at 626. See also *Case for the Respondents, ON APPEAL FROM THE COURT OF SESSION FIRST DIVISION Inner House Judgment: [2019] CSIH 49, In the Supreme Court of the United Kingdom*, UKSC 2019/0193, at 9.3, 1.5(4)(i), <https://www.supremecourt.uk/docs/written-case-for-joanna-cherry-qc-mp.pdf>.

¹⁰⁵ *Id.* at 628.

assuming this purpose, some concluded that the Court was wrong to intervene, as Parliament could itself have reversed the prorogation, but it did not. Indeed, Parliament could have exercised “its key control over the executive – namely to deprive it of office by passing a vote of no confidence,”¹⁰⁶ but again it did not. Timothy Endicott views this inaction as “an indictment of the House of Commons,” which, given that the “House of Commons evidently had no confidence in the Government,” it undoubtedly is.¹⁰⁷

Evaluating inaction, however, is more complex. One view of this parliamentary inaction was as political acquiescence; on this telling, that Parliament had an opportunity to respond should have sufficed to validate the prorogation and obviated the need for judicial nullification.¹⁰⁸ But the fact that political controls were available and were not exercised cannot provide a conclusive answer to the broader underlying question: Was there a pre-existing reason to be concerned about the vitality of responsible government, such that Parliament’s acquiescence should *raise* rather than assuage judicial concern? Parliamentary accountability, or responsible government, is functionally supported by two key elements of the broader constitutional framework: the two-party electoral system and the civil service.¹⁰⁹ Both are on tenuous footing.

Party government, in the words of Albert Venn Dicey, is “not the accident or the corruption but, so to speak, the very foundation of our constitutional system.”¹¹⁰ Centrist and decisive governing capacity are the benefits of a two-party system in a “first past the post” voting system. Because any “administration that does not encompass the median voter is fragile,”¹¹¹ parties tend to the center. Extremist minority parties are usually shut out of government, preventing the instability of multi-party coalition governance.¹¹² Party allegiance is critical for effective governance; since a cohesive majority party can enact policies without seeking broader consensus, governance can be effective, efficient, and partisan. Of course, the pendulum swings easily in such a system, and “the Opposition of to-day is the Government of to-morrow.”¹¹³

But electoral politics, this “regulating wheel” of the British constitution, may well be off its axle.¹¹⁴ This two-party system has been experiencing churn.¹¹⁵ Increasing fragmentation, in part because of split loyalties and cross-

¹⁰⁶ McHarg, *supra* note 35, at 94.

¹⁰⁷ Endicott, *supra* note 38, at 176.

¹⁰⁸ *Id.*; Finnis, *supra* note 31, at 15.

¹⁰⁹ See Cheryl Saunders, *Collaborative Federalism*, 61 *AUS. J. PUB. ADMIN.* 69, 73 (2002). (noting that “governments are [not only] responsible to parliaments [but also,] through parliaments, to voters”).

¹¹⁰ A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* cxviii (8th ed. 1915). Portions of this and the following paragraph are drawn from Erin F. Delaney, *Brexit Optimism and British Constitutional Renewal*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 191, 191–210 (Mark Graber et al. eds., 2018).

¹¹¹ Iain McLean, ‘England Does Not Love Coalitions’: *The Most Misused Political Quotation in the Book*, 47 *GOVERNMENT AND OPPOSITION* 3, 6 (2012).

¹¹² *Id.* (finding only a 0.17 probability of a coalition administration being formed at a general election).

¹¹³ IVOR JENNINGS, *THE BRITISH CONSTITUTION* 30 (3d ed. 1954).

¹¹⁴ WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 204–05 (2d ed. 1872).

¹¹⁵ See *How Democratic are the UK’s Political Parties and Party System?*, DEMOCRATIC AUDIT, (Aug. 22, 2018), <https://www.democraticaudit.com/2018/08/22/audit2018-how-democratic-are-the-uks-political-parties-and-party-system/> (presenting 2017 general election and subsequent Brexit negotiations as recalibrating, and obscuring, party–issue associations); see also *THE UK’S CHANGING DEMOCRACY: THE 2018 DEMOCRATIC AUDIT* 55 (Patrick Dunleavy et al. eds., 2018) (demonstrating the fluctuation of the two-party system, which experienced a DV score swing from the most disproportionate to the least disproportionate outcome in decades from the 2015 election to the 2017 election). A variety of contributing effects have been identified, including the decline in class-based voting; the rise of

cutting political issues, threatens effectiveness. If the political dynamics surrounding a particular issue will ensure that neither party can gain electoral benefit from raising or championing that cause, it is to both parties' benefit to avoid legislating on the topic.¹¹⁶ And thus, even when there was a clear majority of parliamentarians overall to prevent prorogation,¹¹⁷ neither *party* would be benefitted by the action. In fact, as Mark Graber has argued in the context of the United States Congress, the existence of cross-cutting issues will likely lead elected politicians to defer to other actors in the constitutional scheme, such as the court.¹¹⁸ As the prorogation battled loomed, "it seems neither the Government nor the Opposition could command a majority in the Commons, and so the usual conventional accountability mechanisms appear to have broken down."¹¹⁹ The Court could well have inferred that it was the preference of Parliament to let the Court decide.

Political inaction by both parties in the face of electoral uncertainty is only one element of the changing political landscape; another is the increasing presidentialization of the role of Prime Minister, which has had an effect on party politics and the scope of executive power. It has long been a function of British elections that local MPs must advance the national party manifesto, and naturally there is a close connection to the leader's profile and electoral success.¹²⁰ But since the election of Tony Blair in 1997, some have argued that there has been an increased personalization of elections, in conjunction with new approaches to the media, including its "professional management" by spin doctors and other advisors.¹²¹ And what appears to be a decreasing importance of (or adherence to) election manifesto commitments further empowers the Prime Minister.¹²²

"alternative identities" that encourage the creation of new parties; cultural changes, such as a lack of deference to hierarchy or the politicized role of the media; and the fact of the FPTP system itself, which allows for minoritarian government. See David Sanders, *The UK's Changing Party System: The Prospects for a Party Realignment at Westminster*, 5 J. BRIT. ACAD. 92, 102–12 (2017); see also Patrick Leyland, THE CONSTITUTION OF THE UK 110 (2012) ("[A] single party receiving between 40 per cent and 45 per cent of the national vote stands a good chance of gaining an overall majority of seats in the House of Commons and therefore of forming a government.").

¹¹⁶ This provides an obvious answer to the question animating a number of different scholarly pieces: Why didn't Parliament act to repudiate the prorogation when it had the chance?

¹¹⁷ Willis, *supra* note 34, at 354 ("The Government, while formally retaining the confidence of the House of Commons, lost its working majority after many Members of Parliament defected. In addition, a cross-party group successfully passed legislation preventing a 'no deal' Brexit. In these circumstances, why did Parliament not determine to resist prorogation directly?").

¹¹⁸ See generally Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

¹¹⁹ Willis, *supra* note 34, at 355. The challenges of Brexit itself are reflective of the longstanding problem that European integration has posed to Britain's politics. See generally Erin F. Delaney, *The Labour Party's Changing Relationship to Europe: The Expansion of European Social Policy*, 8 J. EUR. INT. HIST. 121 (2002). Party instability led to the calling of the 1975 referendum (Labour) as it did of the 2016 referendum (Conservatives). And it impacted how the 2016 campaign unfolded and potentially the vote itself. See Delaney, *supra* note 110, at 191.

¹²⁰ Richard Heffernan, *Why the Prime Minister cannot be a President: Comparing Institutional Imperatives in Britain and America*, 58 PARL. AFF. 53, 6263 (2005).

¹²¹ A.W. Rhodes, *The Court Politics of the Blair Presidency*, Department of the Senate Occasional Lecture Series at Parliament House (June 27, 2005) (transcript available at <https://www.aph.gov.au/binaries/senate/pubs/pops/pop44/rhodes.pdf>).

¹²² See Sir Jeffrey Jowell, ORAL EVIDENCE TAKEN BEFORE THE HOUSE OF COMMONS POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE, H.C. 1178-ii, at Q101 (2011) (noting that "one of the most significant constitutional changes under the 1997 Labour Government . . . was the establishment of the independence of the Bank of England. There was no manifesto commitment; they just said on the first day, 'This is what we are going to do.'"); see also Emma Norris, *Manifestos Still Matter Even Though Their Promises Aren't Being Delivered*, Institute for Government (Nov. 19, 2019),

Ultimately, replying on Parliament to limit the Executive means relying on the Prime Minister's *party* to do so, an aspirational aim.¹²³

Increasing (or increasingly personalized) executive authority also plays out in other aspects of "Parliamentary accountability," including in the critical limiting function of the civil service. "Whitehall," or the executive agencies and departments of the British Government,¹²⁴ is staffed by a nonpartisan civil service that has been thought to serve as a soft-veto¹²⁵ on the tremendous executive power wielded by the leader of the party in government.¹²⁶ The civil service rests on four key principles: "non-partisanship, ministerial accountability to Parliament, admission by open competition and promotion by ability."¹²⁷ As the House of Lords Select Committee on the Constitution concluded in its 2002 inquiry on *The Accountability of Civil Servants*, "[i]t is essential that civil servants provide ministers with candid and fearless advice, including on the constitutionality of proposed actions," and if a minister is behaving in an unconstitutional manner, "it is [the civil servant's] job to go to the head of the civil service, who would take it up with the Prime Minister if necessary."¹²⁸

But changes over the past few decades have fundamentally shifted this model. First, the desire for effectiveness or "responsiveness to the government of the day"¹²⁹ has encouraged politicians in both parties to reshape "the civil service to be their tool more than their guardian."¹³⁰ Under the Thatcher Government, the "New Public Management" (NPM) movement "focused on instilling private sector managerial principles into the public sector and sought to separate between policy and service delivery through the creation of new agency structures, as well as contracting out and outsourcing."¹³¹ This led in turn to increased use of political advisors, who served as "rivals for ministerial ears"¹³² and operated outside the expectations of the civil service. The Blair Government was notable for "the increased power that advisers seemed to enjoy over career civil servants and their increasingly privileged position as policy

<https://www.instituteforgovernment.org.uk/blog/do-manifestos-matter-anymore> (finding a decrease over the past decade in implementation of manifesto commitments).

¹²³ See Mark Elliott & Stephen Tierney, *Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018*, 2019 PUB. L. 59, 83 ("the true limits of executive authority are in the gift of a Parliament whose legal capacity to vest power in the executive is unlimited, and whose political willingness to do so often knows few bounds."). Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties Not Powers*, 119 HARV. L. REV. 1 (2006).

¹²⁴ Whitehall's titling, now referring to general UK bureaucratic institutions, comes from the site of Henry VIII's palace of Whitehall, which boasted 1,500 rooms, an indoor tennis court, a bowling green, and a cock-fighting pit. The palace burnt down in 1698 and became a site for administrative offices such as the Treasury and 10 Downing Street. *Why Do We Call the British Government 'Whitehall'?*, BBC HIST. MAG. (Apr. 2014), <https://www.historyextra.com/period/tudor/why-we-call-british-government-parliament-whitehall/>.

¹²⁵ Or if Sir Humphrey Appleby is to be believed, a complete veto. See *Yes Minister* (BBC television broadcast 1980-1984).

¹²⁶ Lord Halisham, *Elective Dictatorship*, Richard Dimpleby Lecture, BBC (1976).

¹²⁷ Vernon Bogdanor, *The Civil Service in THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY* 237-79, 237 (Vernon Bogdanor ed., 2003).

¹²⁸ SELECT COMMITTEE ON THE CONSTITUTION, *THE ACCOUNTABILITY OF CIVIL SERVANTS*, 2012-13, HL 6-4, at 4, 18 (U.K.).

¹²⁹ Richard Rawlings, *A Coalition Government in Westminster* in *THE CHANGING CONSTITUTION 194-221*, 210 (Jeffrey Jowell, Dawn Oliver, & Colm O'Cinneide, eds. 2015).

¹³⁰ Scott L. Greer, *Whitehall*, in *CONSTITUTIONAL FUTURES REVISITED*, 123-38, 123 (Richard Hazell ed., 2008).

¹³¹ YEE-FUI NG, *THE RISE OF POLITICAL ADVISORS IN THE WESTMINSTER SYSTEM* 157 (2018).

¹³² Greer, *supra* note 130, at 128; see also YEE-FUI NG, *supra* note 131, at 114-15.

shapers.”¹³³ As one commentator has written, their role is “not to advise impartially, but to deliver at all costs.”¹³⁴ And the central node in this web of advice is the Prime Minister.¹³⁵

This slow but steady politicization of Whitehall has increased the threat of executive overreach.¹³⁶ Barely two weeks before Johnson prorogued Parliament, a London School of Economics (LSE) blog post argued that “the civil service is in mortal danger,” due to a rising orientation towards “political governance.”¹³⁷ As of November 2019, there were over 100 (full time equivalent) special advisers—“spads”—in government.¹³⁸ Further, it appears that vertical accountability (through ministerial responsibility and parliamentary scrutiny) “may be declining with the entrenchment of political advisors within the Westminster system.”¹³⁹

The basic structure of the nineteenth century British constitution has been under strain for some time, and the problems of party and executive power have not been fully addressed.¹⁴⁰ Indeed, the Court’s decision came shortly after Boris Johnson had been made Prime Minister through an internal Conservative party process that allowed only 160,000 eligible party members to vote for the selection of the new party leader.¹⁴¹ Viewing the *Miller II* decision against this

¹³³ Edward Page, *Has the Whitehall Model Survived?*, 76 INT’L REV. OF ADMIN. SCI. 407, 414 (2010).

¹³⁴ John Baker, *Our Unwritten Constitution*, Lecture, Maccabean Lecture on Jurisprudence, Proceedings of the British Academy, 94 (2009), available at <https://britishacademy.universitypressscholarship.com/view/10.5871/bacad/9780197264775.001.0001/upo-9780197264775-chapter-4>.

¹³⁵ See A. W. Rhodes, *The Court Politics* at 6 (“In the Westminster model, the civil service has a monopoly of advice and this advice is collated and coordinated by the Cabinet through its ministerial and official committees and the Cabinet Office. This neat and tidy picture has given way to one of competing centers of advice and coordination for which, allegedly, Blair is the only nodal point.”).

¹³⁶ Allison Young, “UK Constitutional Reform – Westminster or Whitehall?” Harry Street Lecture, University of Manchester, 21 April 2021.

¹³⁷ Patrick Diamond, *Governing as a permanent form of campaigning: why the civil service is in mortal danger*, L.S.E. (Aug. 13, 2019), <https://blogs.lse.ac.uk/politicsandpolicy/why-the-civil-service-is-in-mortal-danger/>.

¹³⁸ See Cabinet Office, *Annual Report on Special Advisors* (2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854554/Annual_Report_on_Special_Advisers.pdf; see also *Gazza, Caino & Roxstar: the Strange World of Dominic Cummings’ ‘Spads’*, GUARDIAN (June 24, 2020), <https://www.theguardian.com/politics/2020/jun/24/gazza-caino-and-roxstar-the-strange-world-of-dominic-cummings-spads>.

¹³⁹ YEE-FUI NG, *supra* note 131, at 167. In a step towards preserving ministerial responsibility under the force of parliamentary scrutiny, the Osmotherly Rules were revised in 2014 to require Ministers to appear in committee hearings if special advisors refused. *Id.* at 126. Nevertheless, breaches of the ministerial responsibility Nolan norms, such as comingling of ministerial and political work, have increasingly escaped parliamentary scrutiny in the Brexit and post-Brexit eras. Leighton Andrews, *Brexit, Cabinet Norms and the Ministerial Code: Are We Living in a Post-Nolan Era?*, 91 POL. Q. 125, 128 (2020). Ministerial responsibility is a more fine-grained way of understanding responsible government—rather than the “collective responsibility to Parliament of ministers for all actions of the Government . . . [it is] the responsibility to Parliament of individual ministers for the actions of their departments.” See Kinley, *supra* note 99, at 119–20. The perceived erosion of civil servant impartiality and accountability, then, is emblematic of a broader decline in responsible governance within the Westminster system. See Leighton Andrews, *Brexit, Cabinet Norms and the Ministerial Code: Are We Living in a Post-Nolan Era?*, 91 POL. Q. 125, 130 (2020).

¹⁴⁰ Cf. Tarun Khaitan, *Political Parties in Constitutional Theory*, 73 CURRENT LEG. PROBS. 89, 89 (2020) (noting the British constitutional tradition is “largely silent” on parties and the party system). Cf. Sujit Choudhry, *Opposition Powers in Parliamentary Democracies*, on file with author.

¹⁴¹ Neil Johnston, *Leadership Elections: The Conservative Party*, HOUSE OF COMMONS LIBR., BRIEFING PAPER NO. 01366 at 11 (Aug. 8, 2019). In the 2005 election, there were roughly 250,000 eligible voters, and in 2001, 325,000. *Id.* at 15, 18.

backdrop of a slow but steady accrual of executive power provides at least a plausible pragmatic justification for the prorogation decision.¹⁴²

* * *

The Court's decision was effective in the immediate term. Parliament went back to work. But the Court's broader efforts to bolster Parliament have had only tepid success. As Mark Elliott and Stephen Tierney write in their assessment of The EU Withdrawal Act (2018), "to the extent that [Parliamentary] 'control' is being newly exerted in the wake of referendum, it is the executive that finds itself in the driving seat."¹⁴³ And it is far from clear that *Miller II* will translate into greater judicial power. Certainly, decisions relying on the basic structure doctrine may be empowering: one way to build "institutional legitimacy [is] by reinforcing those features of the constitutional system 'about which there is already substantial agreement.'"¹⁴⁴ But the evolution of judicial power is more complex, and the next Part draws on the comparative analogy for (tentative) insights for the future of the UK Supreme Court.

III: *MILLER II* AND JUDICIAL POWER

The UK Supreme Court was insistent that the *Miller II* case presented unusual circumstances, opening the decision with an acknowledgment that this was likely a "one off."¹⁴⁵ Others were skeptical.¹⁴⁶ Finnis described the "protestation" as "entirely hollow," and expects the Court to wade into many areas heretofore considered off limits.¹⁴⁷ This fear of increased judicial power has been a hallmark of the Brexit era, with oceans of ink spilled on the occasion of the *Miller I* decision.¹⁴⁸ This Part will briefly review the relationship between the basic structure doctrine and judicial power in India, to draw some insights for thinking about how judicial power might (or might not) develop in the United

¹⁴² Elliott, *The Miller II Case*, *supra* note 3, at 631–32 ("[W]hat would have followed if the Court had decided *Miller II* in such a way as to ascribe to the executive branch an untrammelled power to prorogue Parliament. The upshot of such a decision would have been to accord to the executive a legally uncontrollable power that would have equipped it to render the sovereignty of Parliament a dead letter by proroguing Parliament at will, potentially for long periods and repeatedly.").

¹⁴³ Mark Elliott & Stephen Tierney, *Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018*, 2019 PUB. L. 37, 60.

¹⁴⁴ Partlett, *supra* note 90, at 945 (citing Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC'Y REV. 117, 156 (2001)).

¹⁴⁵ *Miller II*, [2019] UKSC 41 at [1].

¹⁴⁶ *But see* Willis, *supra* note 34, at 355 ("The one-off nature of the factual circumstances motivating the Court's intervention is repeatedly emphasised in the judgment. . . . [I]t stands as a transparent reminder that in the usual course that potential will not—and ought not to—be realized.").

¹⁴⁷ Finnis, *supra* note 31, at 26.

¹⁴⁸ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (holding that an Act of Parliament was required to initiate the process for withdrawing from the European Union). A large literature has critiqued the Supreme Court's decision. *See, e.g.*, Richard Ekins & Graham Gee, *Putting Judicial Power in its Place*, 36 QUEENSLAND L. J. 375 (2018); Mark Elliott, *Judicial Power and the United Kingdom's Changing Constitution*, 36 QUEENSLAND L. J. 273 (2018); Mikolaj Barczentewicz, *Miller, Statutory Interpretation, and the True Place of EU Law in UK Law*, 2017 PUBLIC LAW (Brexit Special Extra issue 2017) 10; Mark Elliott, *The Supreme Court's Judgment in Miller: In Search of Constitutional Principle*, 76 CAMBRIDGE L. J. 257 (2017); Richard Ekins, *Constitutional Practice and Principle in the Article 50 Litigation*, 133 L. QUART. REV. 347 (2017).

Kingdom in the wake of *Miller II*. I conclude that the future trajectory of judicial power will most likely be drawn by the Johnson Government, rather than by the Justices of the Court.

The literature surrounding the evolution of the basic structure doctrine in India expressly engages the question of judicial power. As Pratap Bhanu Mehta has written, “[t]he basic structure doctrine, in the minds of many observers, appears to have replaced parliamentary sovereignty and the separation of powers with judicial supremacy.”¹⁴⁹ But as scholars have explained, the evolution of judicial power in India has been far more complex. Three key elements provide useful insights for the United Kingdom: the role of public interest litigation; the nature of “judicial attitudes;” and the ways in which political actors respond to the judicial articulation of the basic structure.

A. PUBLIC INTEREST LITIGATION

In India, in conjunction with the rise of the basic structure doctrine was the advent of a more robust acceptance of public interest litigation,¹⁵⁰ operating against a backdrop of rights discourse and judicial enforcement of rights.¹⁵¹ The Indian Supreme Court relaxed justiciability doctrines, such as standing and pleading requirements, in order to permit a wider range of parties to come before the Court.¹⁵² These cases also were marked by the involvement of “Court-appointed investigative and monitoring commissions.”¹⁵³ The Indian Supreme Court thus took on important *governance* responsibilities, leading to its centrality (and empowerment) within the constitutional system.¹⁵⁴ The chance that the UK Supreme Court will shift towards a governance model is slim. It is true, as Aileen McHarg has written, that in *Miller II*, “the court has chosen an outcome that makes it more rather than less likely that it will be asked to rule on politically contentious questions in the future.”¹⁵⁵ But the UK Supreme Court does not operate against a backdrop of strong judicial rights review, and active public interest litigation is still in its nascency in the United Kingdom. There was virulent (and violent) condemnation of Gina Miller for bringing the litigation on triggering Article 50 at the time of the Brexit referendum (*Miller I*).¹⁵⁶ The continued efforts to challenge aspects of the ongoing Brexit process in

¹⁴⁹ Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism*, in INDIA’S LIVING CONSTITUTION 179, 180 (Zoya Hasan, E. Sridharan & R. Sudarsha eds., 2005).

¹⁵⁰ The two are naturally connected, as the articulation of basic structure demonstrated the Court could act as a plausible locus for new legal opportunities. Cf. John Ferejohn, *Judicial Power: Getting it and Keeping it*, in CONSEQUENTIAL COURTS 349, 360 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

¹⁵¹ Mehta, *supra* note 149, at 186.

¹⁵² Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. OF DEM. 70, 71 (2007).

¹⁵³ *Id.*

¹⁵⁴ Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT’L L. J. 175, 220 (2010); Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 36 (2009).

¹⁵⁵ McHarg, *supra* note 35, at 93.

¹⁵⁶ The barrage came from many fronts: from commentators decrying the suit itself as a manipulation of the judicial process to “produce a tactical, political advantage for their side of the argument” in “an essentially political dispute,” and accusing Miller of “tinkering in the democratic process,” to social media threats like a “Kill Gina Miller” Facebook group. Viscount Philips offered 5000 pounds via Facebook to the first person to “accidentally run over this bloody troublesome first-generation immigrant,” for which he was sentenced to 12 weeks in prison. Kevin Rawlinson, *Viscount Jailed for Offering Money for Killing*

the courts may have started to habituate some to the practice of this kind of public interest litigation,¹⁵⁷ but it is still outside the norm.¹⁵⁸

B. JUDICIAL “ATTITUDES”

It is true that “the judicial function is embedded in its own politics, which is defined in terms of diverse and at times conflicting judicial philosophies and approaches to constitutional adjudication.”¹⁵⁹ Will Partlett has argued that the “right” kind of judicial attitudes may function to enhance the effectiveness of courts arguing principles of basic structure. A sense that the judges share in the project of “building and preserving the integrity of democratic governance,”¹⁶⁰ may strengthen their efforts to be independent. Further, a selection process in which judges are “chosen later in life based on a strong outside reputation in the legal community,”¹⁶¹ creates a “recognition judiciary,”¹⁶² again reinforcing judicial independence. He notes that in some of the stronger courts, “judges on these courts were able to play a role in selecting their successors.”¹⁶³ The justices in the United Kingdom share many of these features: being part of a recognition judiciary,¹⁶⁴ selecting their successors,¹⁶⁵ and having a sense of responsibility for *some* role in democratic governance. However, judicial attitudes towards the judicial role are far from uniform, and there is a deep expressed commitment to parliamentary sovereignty and judicial restraint.¹⁶⁶ Lady Hale, perhaps the most vocal member of the Court to see its role as a constitutional court,¹⁶⁷ retired three

of Gina Miller, GUARDIAN (Jul. 13, 2017), <https://www.theguardian.com/uk-news/2017/jul/13/viscount-jailed-for-offering-money-for-killing-of-gina-miller>; see also GINA MILLER, RISE: LIFE LESSONS IN SPEAKING OUT, STANDING TALL AND LEADING THE WAY (2018).

¹⁵⁷ The vitriol was not only directed at Gina Miller; the judges too were labelled “enemies of the people” following the *Miller I* decision in the lower court. Claire Phipps, *British Newspapers React to Judges’ Brexit Ruling: ‘Enemies of the People’*, GUARDIAN (Nov. 4, 2016), <https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexite-ruling>. In 2021, *The Daily Mail’s* Deputy Political Editor implied running the headline was a mistake. Mail and Sun Promise Kinder, Gentler Editing, MEDIA GUIDO (Jul. 1, 2021), <https://order-order.com/2021/07/01/mail-and-sun-promise-kindler-gentler-editing/>.

¹⁵⁸ General public interest litigation entities like Liberty and Child Poverty Action Group (CPAG) have a smaller footprint and narrower scope than comparable organizations in the United States, such as the ACLU, Southern Poverty Law Center, or Natural Resources Defense Council. See *Legal Cases*, LIBERTY, <https://www.libertyhumanrights.org.uk/issues/>; *Current Test Cases*, CHILD POVERTY ACTION GROUP, <https://cpag.org.uk/welfare-rights/test-cases/current>; see also Harriett Samuels, *Public Interest Litigation and the Civil Society Factor*, 38 LEGAL STUD. 515 (2018) (arguing judicial review reform on standing and third-parties may further hamper existing entities’ efforts).

¹⁵⁹ Michel Rosenfeld, *Judicial Politics versus Ordinary Politics*, in JUDICIAL POWER 36, 37–38 (Christine Landfried ed., 2019).

¹⁶⁰ Partlett, *supra* note 90, at 942.

¹⁶¹ *Id.* at 943 (citing Nuno Garoupa & Thomas Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. L. 228 (2009)).

¹⁶² See Garoupa & Ginsburg, *supra* note 161, at 241 (contrasting career and recognition judicial structures, the latter dominated by individual reputation as perceived by external mechanisms rather than the collective reputation of the judiciary).

¹⁶³ Partlett, *supra* note 90, at 943.

¹⁶⁴ The selection process historically rested on longevity and reputation, sourced through “secret soundings” by the Lord Chancellor. See Erin F. Delaney, *Searching for constitutional meaning in institutional design: The debate over judicial appointments in the United Kingdom*, 14 INT’L J. CONST’L L. 752, 755 (2016).

¹⁶⁵ Constitutional Reform Act 2005, schedule 8.

¹⁶⁶ Jonathan Sumption, *The Reith Lectures*, 2019, available at <https://www.bbc.co.uk/programmes/m00057m8>.

¹⁶⁷ Lady Hale, *The Supreme Court: Guardian of the Constitution?*, Sultan Azlan Shah Lecture, Kuala Lumpur (Nov. 9, 2016) (stating the court acts as a “guardian” of the constitution, using the principle of

months after the *Miller II* decision.¹⁶⁸ Finally, the public's attitude towards the judiciary matters: The greater the public's level of comfort with an active and engaged judiciary, the better the chance of compliance with judicial claims to demarcating basic structure.¹⁶⁹ In the United Kingdom, even if members of the judiciary understand their (and the Court's) roles as robust protectors of the constitutional system, it is far from clear the British public shares that view.

C. THE POLITICIANS' RESPONSE

The 1973 *Kesavananda* decision was only the first chapter in the evolving story of the basic structure doctrine in India. Scholars agree that the case was not perceived as a legitimate use of the judicial function when it came down.¹⁷⁰ The *Kesavananda* decision limited the ability of the Indian Parliament to implement land reform, by finding elements of Article 24 of the Constitution to violate the "basic structure" of the Indian constitution. And indeed, the close 7-6 decision, issued in a weighty 703 pages,¹⁷¹ was not met with a positive reception from the Indira Gandhi Government. An unprecedented attack on the judiciary followed, with obvious efforts to court pack,¹⁷² as well as attempted limits on judicial review, including the declaration of a State of Emergency.¹⁷³ In the subsequent 1977 election, the Congress Party lost power.¹⁷⁴ And when Gandhi's attempts to limit judicial review came before the Court in 1980, in *Minerva Mills v. Union of India*,¹⁷⁵ her overreaching "accomplished what all previous debate over property-related amendments had failed to do—establish the legitimacy of the unconstitutional constitutional amendment."¹⁷⁶ Judicial review itself was understood to be "an integral part of good governance."¹⁷⁷

legality to protect fundamental rights and the rule of law); Lady Hale, *Who Guards the Guardians?*, Public Law Project Conference Lecture (Oct. 14, 2013) (reaffirming judicial review as "a critical check on the power of the state, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful").

¹⁶⁸ Lady Hale, *Valedictory Remarks*, Supreme Court (Dec. 18, 2019), <https://www.supremecourt.uk/watch/valedictory/lady-hale.html>.

¹⁶⁹ See Partlett, *supra* note 90, at 948.

¹⁷⁰ KRISHNASWAMY, *supra* note 56, at 224 ("An overall assessment of the sociological legitimacy of the basic structure doctrine in this period among legal and political elites [right after it emerged] leads us to the conclusion that the doctrine was perceived to be illegitimate."); S.P. Sathe, *Limitation on Constitutional Amendment*, in INDIAN CONSTITUTION: TRENDS AND ISSUES 183 (R. Dhavan & A. Jacobs eds., 1977) ("Kesavanada did not enjoy legitimacy in 1973.").

¹⁷¹ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

¹⁷² After *Kesavananda*, Prime Minister Gandhi leap-frogged three more senior judges to make a dissenting judge in *Kesavananda*, A.N. Ray, the Chief Justice of India.

¹⁷³ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299 (invalidating constitutional amendment that insulated prime minister elections from judicial review). S.P. Sathe, *Limitation on Constitutional Amendment*, in INDIAN CONSTITUTION: TRENDS AND ISSUES 183 (R. Dhavan & A. Jacobs eds., 1977) ("It was the Election case that earned legitimacy for Kesavananda."). See also KRISHNASWAMY, *supra* note 56, at xx ("The court's persistence with the doctrine in *Indira Gandhi v Raj Narain* and *Minerva Mills v Union of India* in dramatically different political circumstances convinced many sceptics that this doctrine was worthy of respect.").

¹⁷⁴ John Ferejohn, *Judicial Power: Getting it and Keeping it*, in CONSEQUENTIAL COURTS 349, 357 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013) ("In retrospect, we can see that the Court's preferred position has eventually prevailed, but that result seems due as much to the electoral rejection of Congress Party hegemony as to any doctrinal sticking power of *Kesavananda* itself.").

¹⁷⁵ *Minerva Mills v. Union of India*, AIR 1980 SC 1789 (clarifying interpretation of the basic structure doctrine and limiting the power of parliament to amend the constitution).

¹⁷⁶ Gary Geoffrey Jacobsohn, *An unconstitutional constitution? A comparative perspective*, 4 INT'L J. CON. L. 460, 475–76 (2006).

¹⁷⁷ Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH.

In short, the extent of the Supreme Court of India's power emerged only later, after the political response by Gandhi forced another high-profile case to the Court, threatening judicial review itself. The pattern of extreme majoritarianism, including the declaration of the Emergency, only reinforced the Court's role as holding the line against democratic decay. Whether *Miller II* is really a "one-off" case will rest with how far the Johnson Government goes in pushing back against it. And all indications point to ongoing tension between the Executive and the Court.

In the wake of the *Miller II* decision,¹⁷⁸ Conservatives renewed calls to rein in judicial power and codified a commitment to reform in the Conservative manifesto ahead of the December 2019 general election.¹⁷⁹ The party broadly pledged that in its first year, a Conservative government would "restore trust" in UK institutions and democracy by evaluating the "relationship between the Government, Parliament and the courts" and the "functioning of the Royal Prerogative."¹⁸⁰ In July 2020, the Johnson Government created the Independent Review of Administrative Law (IRAL),¹⁸¹ appointing and charging an independent panel of experts with broad terms of reference that contemplated sweeping reforms.¹⁸² The panel's report, issued in March 2021, did not take up this invitation, however, and advanced only two narrow reforms.¹⁸³ Indeed, the report recommended that courts apply "anxious scrutiny" on questions of public power, and judicial overreach solutions "must come from the courts" rather than legislation.¹⁸⁴ The Government bristled at this milquetoast response and did not

U. GLOBAL STUD. L. REV. 1, 36 (2009).

¹⁷⁸ Elliott, *The Miller II Case*, *supra* note 3, at 644 ("It is perfectly clear that *Miller II* forms part of the impetus for the Review, given the prominence accorded in the Review's terms of reference to concerns about justiciability and the possibility that courts may be unduly interfering with the Executive's 'right to govern.'").

¹⁷⁹ Colm O' Cinneide, *The UK's Post-Brexit 'Constitutional Unsettling'*, VERFASSUNGSBLOG (Apr. 16, 2021), <https://verfassungsblog.de/the-uks-post-brexit-constitutional-unsettling/>.

¹⁸⁰ *The Conservative and Unionist Party Manifesto 2019*, CONSERVATIVES, <https://www.conservatives.com/our-plan> (last visited Oct. 27, 2021).

¹⁸¹ MINISTRY OF JUST., *THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW* 138 (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf. The panel acknowledged this political backdrop in its report. *Id.* at 11.

¹⁸² Including codifying the grounds of judicial review, narrowing the scope of justiciability, limiting the grounds on which unlawfulness results in nullity, and altering the law of standing. MINISTRY OF JUST., *TERMS OF REFERENCE FOR THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW 2020*, <https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf>; see Mark Elliott, *The Judicial Review I: The Reform Agenda and its Potential Scope*, PUB. L. EVERYONE (Aug. 3, 2020), <https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/>.

¹⁸³ MINISTRY OF JUST., *THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW* 70 (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf (recommending that Upper Tribunal cases, namely immigration cases, should not be appealed to the High Court (so-called *Cart* review), and that judges should be able to delay the quashing of a government decision, giving public administrators the flexibility to fix errors).

¹⁸⁴ MINISTRY OF JUST., *THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW* 59, 61 (2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf.

defer to the panel's findings,¹⁸⁵ but rather interpreted the report expansively,¹⁸⁶ introduced additional proposals,¹⁸⁷ and in the Queen's speech in May 2021, confirmed it would move forward with a reform bill designed to restore the "balance of power between the executive, legislature, and the courts."¹⁸⁸

In fact, the Judicial Review and Courts Bill, introduced in the House of Commons on July 21, 2021,¹⁸⁹ makes only incremental changes to judicial review proceedings, reflecting the recommendations made by the IRAL report.¹⁹⁰ Those skeptical of judicial power were disappointed by the Bill; Richard Ekins outlined a set of possible improvements in a Policy Exchange paper that caught the attention of the politicians.¹⁹¹ A subset of Ekins's suggestions were tabled as amendments to the Bill by Sir John Hayes, a Conservative MP serving as Minister for Transport, and Tom Hunt MP.¹⁹² The alterations included, among others, a clause to render prorogation of Parliament non-justiciable, a clause to make parliamentary accountability non-justiciable, as well as a clause to affirm the unlimitable principle of parliamentary sovereignty.¹⁹³ The amendments were ultimately withdrawn, however, and are not reflected in the version of the Bill which passed Committee in late November, 2021.¹⁹⁴

The fairly modest and technical nature of the Bill may nevertheless portend a more ambitious agenda to curtail the judiciary. On the day the Bill was introduced, then-Lord Chancellor and Secretary of State for Justice Robert Buckland, speaking at the Policy Exchange, emphasized this incrementalism as a strength, the Bill thus serving as a "template or prototype" for "other proposals coming down the line which you might find more controversial."¹⁹⁵ And some

¹⁸⁵ The Bar Council raised it was "very concerned" that the Government's proposals went beyond those recommended by IRAL, calling them "far-reaching" and "fundamental." BAR COUNCIL RESPONSE TO HM GOVERNMENT CONSULTATION ON "JUDICIAL REVIEW REFORM - THE GOVERNMENT RESPONSE TO THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW" 3 (Apr. 2021), <https://www.barcouncil.org.uk/uploads/assets/3684169c-2be7-4b8c-9e6287518edc2c78/Bar-Council-response-to-HM-Government-consultation-on-Judicial-Review-Reform.pdf>.

¹⁸⁶ MINISTRY OF JUST., THE GOVERNMENT RESPONSE TO THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW 8 (2021)(extracting from the report a "growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction" and a need to uphold a system that "avoids drawing the courts into deciding on merit or moral values issues" otherwise reserved for the executive or parliament). Lord Faulks, the head of the panel, pushed back on this interpretation, stating the panel findings of a few cases of overreach are not reflective of an "over drift" and warned against equating the "particular and the general." Law in Action, *Reforming Judicial Review*, BBC 4 at 2:30 (Apr. 23, 2021), <https://www.bbc.co.uk/programmes/m000td1g>.

¹⁸⁷ See Paul Craig, *IRAL: The Panel Report and the Government's Response*, UK CONST. L. ASS'N (Mar. 22, 2021), <https://ukconstitutionallaw.org/2021/03/22/paul-craig-iral-the-panel-report-and-the-governments-response>.

¹⁸⁸ Jane Croft & George Parker, *Legal Profession Sounds Alarm Over Judicial Review Bill*, FIN. TIMES (May 18, 2021), <https://www.ft.com/content/db29e15b-dd47-493a-90d2-b8c85b988703>.

¹⁸⁹ Judicial Review and Courts Bill 2021-21, <https://bills.parliament.uk/bills/3035#timeline>.

¹⁹⁰ Judicial Review and Courts Bill 2021-21, cls. 1 & 2, <https://publications.parliament.uk/pa/bills/cbill/58-02/0152/210152.pdf>.

¹⁹¹ Richard Ekins, *How to Improve the Judicial Review and Courts Bill*, POL'Y EXCH. (2021), <https://policyexchange.org.uk/wp-content/uploads/how-to-improve-the-judicial-review-and-courts-bill.pdf>.

¹⁹² Judicial Review and Courts Bill 2021-21, Amendment Paper, Nov. 12, 2021, https://publications.parliament.uk/pa/bills/cbill/58-02/0152/amend/judicial_review_rm_pbc_1112xx.pdf.

¹⁹³ *Id.*

¹⁹⁴ Judicial Review and Courts Bill 2021-21, <https://publications.parliament.uk/pa/bills/cbill/58-02/0198/210198.pdf>.

¹⁹⁵ Lord Chancellor and Secretary of State for Justice Robert Buckland, *Banishing the Ghosts of Judicial*

have argued that the Bill is deliberately a small step, a “quick-and-dirty minimal viable product” to test the market’s appetite for and resistance to judicial reform, with more sweeping reforms to come.¹⁹⁶ It is the potential of further reforms to judicial review—perhaps in the context of “updating” the Human Rights Act 1998 or reviewing the Constitutional Reform Act 2005—that may ultimately put the Court to the test.¹⁹⁷ As Buckland said in June 2021, the Government’s vision is for the judiciary to be the “servant[] of Parliament.”¹⁹⁸ But, of course, it is the Court’s vision that the Executive be the servant of Parliament. And the Court has never been afraid to protect its own role in the constitutional scheme, particularly regarding judicial review,¹⁹⁹ which may well be a basic structure of the British constitution.²⁰⁰

Review Past, at the Policy Exchange UK (July 21, 2020), <https://www.youtube.com/watch?v=PIMTrT8uWgk>.

¹⁹⁶ Max Steinbeis, *Lean Authoritarianism: On Judicial Review and Constitutional Review*, VERFASSUNGSBLOG (Sept. 4, 2021), <https://verfassungsblog.de/?na=v&nk=9165-de24b0d6fe&id=458> (emphasis omitted).

¹⁹⁷ The 2019 Conservative Party Manifesto promised to “update” the Human Rights Act 1998, *The Conservative and Unionist Party Manifesto 2019*, CONSERVATIVES, <https://www.conservatives.com/our-plan>. The Johnson Government launched the Independent Human Rights Act Review in December 2020. MINISTRY OF JUST., THE INDEPENDENT HUMAN RIGHTS ACT REVIEW TERMS OF REFERENCE (Dec. 7, 2020),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953347/human-rights-review-tor.pdf. IHRAR delivered its report to the Lord Chancellor at the end of October, but as of November 30, 2021, neither the report nor the Government’s response had been published.

MINISTRY OF JUST., *Guidance: Independent Human Rights Act Review*, <https://www.gov.uk/guidance/independent-human-rights-act-review#about-the-independent-human-rights-act-review>. The new Lord Chancellor and Justice Minister Dominic Raab has stated his desire to restore parliamentary power “being whittled away by judicial legislation, abroad or indeed at home.”

Michael Cross, *HR Reform: Raab Plans Mechanism to Correct “Incorrect” Judgments*, L. SOC’Y GAZETTE (Oct. 17, 2021) (quoting Raab), <https://www.lawgazette.co.uk/law/hr-reform-raab-plans-mechanism-to-correct-incorrect-judgments-5110196.article>. Further, in June 2021, the Government indicated that it would carry out a review and consultation on the Constitutional Reform Act 2005. See Monidipa Fouzdar, *2005 Constitutional Reform Act up for Review*, L. SOC’Y GAZETTE, <https://www.lawgazette.co.uk/news/2005-constitutional-reform-act-up-for-review/5108835.article>. In early October 2021, the Ministry of Justice uploaded a job posting inviting applicants for the position of Deputy Director of the Constitutional Reform Act Review. See Deputy Director, Constitutional Reform Act Review, LINKEDIN, <https://www.linkedin.com/jobs/view/deputy-director-constitutional-reform-act-review-at-ministry-of-justice-uk-2761740561/?originalSubdomain=uk> (last visited Nov. 15, 2021).

¹⁹⁸ See Lord Chancellor Robert Buckland, Lord Chancellor Speaks at UCL Conference on the Constitution (Jun. 17, 2021); Mark Elliott, *Judicial Review Reform IV: Culture War?*, PUB. L. EVERYONE (Apr. 28, 2021), <https://publiclawforeveryone.com/2021/04/28/judicial-review-reform-iv-culture-war-two-visions-of-the-uk-constitution/>.

¹⁹⁹ See *R (Privacy International) v. Investigatory Powers Tribunal* [2019] UKSC 22; *R (Cart) v. Upper Tribunal* [2010] EWCA (Civ) 859; *R v. Secretary of State for the Home Dep’t., ex p Fire Brigades Union* [1995] 2 AC 513; *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374; *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 KB 223; *Ellen Street Estates Ltd. v. Minister of Health* [1934] 1 KB 590; *Attorney General v. De Keyser’s Royal Hotel Ltd.* [1920] AC 508. See also Elliott, *The Miller II Case*, *supra* note 3, at 631 (noting the Court has remarked that “access to court is a logical corollary of the principle of parliamentary sovereignty, authoritative judicial interpretation and curation of legislation being a prerequisite if Parliament is to have the capacity to enact effective law”).

²⁰⁰ See Paolo Sandro, *Do You Really Mean It? Ouster Clauses, Judicial Review Reform, and the UK Constitutionalism Paradox*, UK CONST. L. ASS’N (Jun. 1, 2021), <https://ukconstitutionallaw.org/2021/06/01/paolo-sandro-do-you-really-mean-it-ouster-clauses-judicial-review-reform-and-the-uk-constitutionalism-paradox/> (arguing proposed reforms are problematic because “the government cannot unilaterally modify the principles of judicial review . . . without fundamentally altering the balance on which the continuous feasibility of the UK model is premised”). But see Colm O’Cinneide, *The UK’s Post-Brexit ‘Constitutional Unsettling’*, VERFASSUNGSBLOG (Apr. 16, 2021), <https://verfassungsblog.de/the-uks-post-brexit-constitutional-unsettling/>.

CONCLUSION

Tierney may be right that *Miller II* is a harbinger of constitutional change: the increased (and increasing) willingness of the Court to sublimate politics (and the political constitution) to the rule of law. But as Aileen Kavanagh has written persuasively, “we should also be careful not to let an acute focus on the evils of an eroded elite blind us to the much more powerful existential threats facing the British constitutional order today, namely, the growing popular distrust of elected politicians; the erosion of shared political norms amongst the governing elites; the contracting out of key public services; and the tyranny of the tabloids, to name but a few.”²⁰¹ Add the expanding power of the Executive, the changing nature of political parties, and the weakening of the civil service to this list,²⁰² and judicialization may turn out to be a symptom rather than the cause of the UK’s constitutional distress.

²⁰¹ Aileen Kavanagh, *Recasting the Political Constitution: From Rivals to Relationships*, 30 KING’S L.J. 43, 72 (2019).

²⁰² Cf. Young, *supra* note 134.