

COMMENT

TRANSATLANTIC PERSPECTIVES ON THE POLITICAL QUESTION DOCTRINE

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On September 24, 2019, the Supreme Court of the United Kingdom (UKSC) unanimously invalidated U.K. Prime Minister Boris Johnson's attempt to suspend (or "prorogue") Parliament. The UKSC's decision, R (Miller) v. Prime Minister (Miller/Cherry), was a political thunderclap, contributing to the U.K.'s political turmoil over its exit from the European Union, or "Brexit." But the legal crux of Miller/Cherry was justiciability: was the Prime Minister's decision to prorogue parliament a non-justiciable political question? Despite this question's centrality to the case, few commentators have analyzed the Miller/Cherry decision through the lens of the political question doctrine, an area of law held largely in common between the United States and the U.K. Likewise, scholarly analysis has failed to explore the striking contrast between Miller/Cherry and Rucho v. Common Cause, the U.S. Supreme Court's most recent foray into the political question doctrine.

This Comment does both. Miller/Cherry adopted a narrow understanding of the political question doctrine and instead embraced a robust vision of judicial review which closely resembles that of famed mid-century law professor Herbert Wechsler. The U.S. Supreme Court's recent decision in Rucho v. Common Cause, however, took the opposite approach. Where Miller/Cherry offered a full-throated Wechslerian defense of the judiciary's obligation to police constitutional constraints, Rucho channeled Wechsler's contemporary and frequent interlocutor Alexander Bickel. Holding that challenges to

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partisan gerrymandering are not justiciable, Rucho, following Bickel, emphasized institutional humility and the need for courts to act cautiously in light of the “counter-majoritarian difficulty.”

Miller/Cherry and Rucho thus continue the great debate between Wechsler and Bickel, offering contradictory answers to the same foundational questions. Read together, they present a fascinating and transatlantic juxtaposition, illuminating key questions about the political question doctrine, judicial review, and the proper role of the courts.

INTRODUCTION.....	1008
I. BREXIT, PROROGATION, AND THE POLITICAL QUESTION	
DOCTRINE.....	1011
A. <i>Brexit and Prorogation</i>	1011
B. <i>The Political Question Doctrine and Its Difficulties</i>	1015
II. THE MILLER/CHERRY LITIGATION.....	1018
A. <i>Wechsler and Bickel in the Lower Courts</i>	1018
B. <i>Constitutional Principles and the Duty To Decide: The U.K. Supreme Court’s Decision</i>	1021
III. A TRANSATLANTIC JUXTAPOSITION: <i>RUCHO V. COMMON CAUSE</i>	1026

INTRODUCTION

On September 24, 2019, the Supreme Court of the United Kingdom (UKSC) issued its decision in *R (Miller) v. Prime Minister (Miller/Cherry)*,¹ and British politics turned on its head. In an understated oral announcement² and an unadorned written opinion, a unanimous Court held that Prime Minister Boris Johnson’s five-week suspension of

¹ *R (Miller) v. Prime Minister (Miller/Cherry)* [2019] UKSC 41 (appeals taken from Eng. & Scot.). The case goes by many names in its nascent scholarly treatment, including the delightful, if presumptuously historical, “*Case of Prorogations*.” E.g., Paul Daly, Talking About the Case of Prorogations, Admin. L. Matters (Sept. 27, 2019), <https://www.administrativelawmatters.com/blog/2019/09/27/talking-about-the-case-of-prorogations/> [<https://perma.cc/8U7K-JXL3>]. In order to avoid confusion with the lower court decision also captioned *R (Miller) v. Prime Minister*, I will refer to the case as “*Miller/Cherry*” both in text and in citations.

² For the video of the announcement, see Supreme Court: Suspending Parliament Was Unlawful, Judges Rule, BBC News (Sept. 24, 2019), <https://www.bbc.com/news/uk-politics-49810261> [<https://perma.cc/5UPG-EV35>].

Parliament—in Parliamentary jargon, “prorogation”³—was unlawful and therefore void. The decision overturned the Prime Minister’s latest gambit in his duel with a recalcitrant House of Commons over “Brexit,” the U.K.’s planned exit from the European Union. *Miller/Cherry* was immediately controversial, prompting calls for the Prime Minister to resign,⁴ jubilant declarations that the rule of law had been vindicated,⁵ and accusations that the Court had perpetrated a “constitutional coup.”⁶

Although many British commentators have analyzed and criticized *Miller/Cherry* since its decision,⁷ the case has not received sustained or

³ For more specifics on prorogation, see *infra* notes 22–24 and accompanying text.

⁴ E.g., Karla Adam & William Booth, U.K. Supreme Court Rules Prime Minister Boris Johnson Suspended Parliament Illegally, *Wash. Post* (Sept. 24, 2019, 2:00 PM), https://www.washingtonpost.com/world/europe/britains-supreme-court-set-to-rule-on-boris-johnsons-decision-to-suspend-parliament/2019/09/24/af719d70-dd9e-11e9-be7f-4cc85017c36f_story.html [<https://perma.cc/U8EH-B29V>].

⁵ See Owen Bowcott, Ben Quinn & Severin Carrell, Johnson’s Suspension of Parliament Unlawful, *Supreme Court Rules*, *Guardian* (Sept. 24, 2019), <https://www.theguardian.com/law/2019/sep/24/boris-johnsons-suspension-of-parliament-unlawful-supreme-court-rules-prorogue> [<https://perma.cc/9ED9-B9V2>].

⁶ E.g., Jonathan Ames & Chris Smyth, Supreme Court Ruling: Senior Judges Could Face US-Style Grillings, *Times* (Sept. 26, 2019), <https://www.thetimes.co.uk/article/supreme-court-ruling-senior-judges-could-face-us-style-grillings-mh22zd5j> [<https://perma.cc/G6TV-ASYF>] (quoting prominent pro-Brexit MP Jacob Rees-Mogg).

⁷ Perhaps most notable was a vehement and extensive criticism published only four days after the decision by John Finnis, a professor at Oxford and the former doctoral advisor to U.S. Supreme Court Justice Neil Gorsuch. See John Finnis, *Pol’y Exchange*, *The Unconstitutionality of the Supreme Court’s Prorogation Judgment* (Sept. 28, 2019), <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf> [<https://perma.cc/9RS4-FGFU>]. Other critics of varying degrees of vehemence abound in Anglophone academic circles. E.g., Martin Loughlin, *Pol’y Exchange*, *The Case of Prorogation* (Oct. 15, 2019), <https://policyexchange.org.uk/publication/the-case-of-prorogation/> [<https://perma.cc/9E8D-FXC9>]; Steven Spadizer, *Miller No 2: Orthodoxy as Heresy*, *Heresy as Orthodoxy*, *UK Const. L. Ass’n: Blog* (Oct. 7, 2019), <https://ukconstitutionallaw.org/2019/10/07/steven-spadizer-miller-no-2-orthodoxy-as-heresy-hersey-as-orthodoxy/> [<https://perma.cc/DQ2T-W-2RY>]; Paul Yowell, *Is Miller (No 2) the UK’s Bush v Gore?*, *UK Const. L. Ass’n: Blog* (Oct. 7, 2019), <https://ukconstitutionallaw.org/2019/10/07/paul-yowell-is-miller-no-2-the-uks-bush-v-gore/> [<https://perma.cc/A8GJ-ZZWN>].

The decision has also had its defenders. E.g., Nick Barber, *Constitutional Hardball and Justified Development of the Law*, *Jud. Power Project* (Sept. 29, 2019), <https://judicialpowerproject.org.uk/nick-barber-constitutional-hardball-and-justified-development-of-the-law/> [<https://perma.cc/Z3FH-2NV2>]; Alison Young, *Defly Guarding the Constitution*, *Jud. Power Project* (Sept. 29, 2019), <https://judicialpowerproject.org.uk/alison-young-defly-guarding-the-constitution/> [<https://perma.cc/R6JP-Z4J3>] (arguing that *Miller/Cherry* “demonstrates a delicate balance between law and politics, affirming the Supreme Court’s role as the guardian of the UK’s constitution”). For a more extensive list of pieces commenting on *Miller/Cherry*, see Paul Craig, *The Supreme Court, Prorogation*

detailed attention on this side of the Atlantic.⁸ This lack of American attention is regrettable. *Miller/Cherry* holds important lessons for the American lawyer, especially through its striking contrast with recent decisions of the U.S. Supreme Court.

Although nominally about the Prime Minister's prorogation of Parliament, *Miller/Cherry* was really about justiciability: could (or should) the Court decide the case in the first place? The UKSC's answer to this question not only took sides in a long-standing debate about the proper role for courts in reviewing government action—it also did so in a way directly contrary to the U.S. Supreme Court's decision three months prior in *Rucho v. Common Cause*. Whereas *Miller/Cherry* endorsed a robust judicial role and a correspondingly narrow political question doctrine—a perspective associated with famed mid-century academic Herbert Wechsler—*Rucho* emphasized constraint on judicial discretion and expressed a concern for institutional legitimacy, two hallmarks of the approach of Professor Alexander Bickel.

Although decided on different sides of the Atlantic, these two cases are fundamentally about the same issue.⁹ Far from merely being a curious case from a foreign jurisdiction, *Miller/Cherry* lays bare the tensions inherent in the political question doctrine and in judicial review more broadly. Especially through its juxtaposition with *Rucho v. Common Cause*, *Miller/Cherry* provides an important perspective on judicial

and Constitutional Principle, Pub. L. (forthcoming) (manuscript at 1–2 nn.4–8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477487 [<https://perma.cc/Y6ZR-PB-XD>].

⁸ One exception is Sam Shirazi, *The U.K.'s Marbury v. Madison: The Prorogation Case and How Courts Can Protect Democracy*, 2019 U. Ill. L. Rev. Online 108. Shirazi compares and contrasts *Miller/Cherry* with *Marbury v. Madison* and more generally focuses on the salutary role of judicial review in constitutional systems. *Id.* Shirazi spends little time discussing *Miller/Cherry* in the context of the political question doctrine, see *id.* at 113, and only fleetingly connects it to *Rucho v. Common Cause*, see *id.* at 118 n.79. See also Gerard N. Magliocca, *Judicial Review Comes to Britain*, *Balkinization* (Sept. 24, 2019), <https://balkin.blogspot.com/2019/09/judicial-review-comes-to-britain.html> [<https://perma.cc/5HUQ-8ZBB>] (providing brief summary of *Miller/Cherry* by an American law professor).

⁹ There are undoubtedly differences between the broader legal regimes of Britain and the United States which affect how courts in each country think about justiciability. For instance, Britain's lack of a written constitution means that British courts, unlike American courts, generally would not look to constitutional text as a constraint on judicial discretion. *Cf. infra* notes 104–08 and accompanying text (discussing this American tendency). This Comment does not—and does not need to—argue that the justiciability inquiry in the two nations is *identical*. Rather, because the political question doctrine's basic argumentative contours are shared between the two nations, see *infra* Section I.B, *Miller/Cherry* and *Rucho* can fruitfully be read together.

review and the judicial office in a time of heightened attention to the proper role of the courts.

I. BREXIT, PROROGATION, AND THE POLITICAL QUESTION DOCTRINE

A. Brexit and Prorogation

Although this Comment focuses on the legal reasoning of the UKSC's decision in *Miller/Cherry* and not on its political impact, the case was the result of a long series of political maneuvers surrounding Brexit, the U.K.'s declared intention to leave the European Union.¹⁰ To fully understand *Miller/Cherry*, then, some background is in order.

Brexit began as a popular referendum held on June 23, 2016, in which fifty-two percent of voters chose to leave the EU.¹¹ After the resignation of David Cameron, the pro-EU Prime Minister who had called the referendum, his successor Theresa May commenced negotiations with the EU to set the terms of Britain's exit.¹² This task proved nearly impossible, with particular difficulties arising from the prospect of a hard border between the Republic of Ireland (an EU member) and Northern Ireland (a

¹⁰ Britain officially exited the European Union on January 31, 2020. E.g., Colin Dwyer, *The Long, Uneasy Wait Is Over: Parties, Protests and Solemn Silence Greet Brexit*, NPR (Jan. 31, 2020), <https://www.npr.org/2020/01/31/801574310/the-long-uneasy-wait-is-over-parties-protests-and-solemn-silence-greet-brexit> [<https://perma.cc/2JFG-KGMA>]; Mark Landler et al., *At the Stroke of Brexit, Britain Steps, Guardedly, into a New Dawn*, N.Y. Times (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/world/europe/brexit-britain-leaves-EU.html?s-mid=nytcore-ios-share> [<https://perma.cc/KB5H-4BJU>]. This outcome, however, was far from certain until only a couple months before "Exit Day." It was not until pro-Brexit Prime Minister Boris Johnson's Conservative Party secured a substantial parliamentary majority in the December 12th general election that Brexit became inevitable. See *Election Results 2019: Boris Johnson Returns to Power with Big Majority*, BBC News (Dec. 13, 2019), <https://www.bbc.com/news/election-2019-50765773> [<https://perma.cc/PV9Y-3E7Q>]. And in late summer 2019, there was a sense that any new development could determine not only the terms on which the U.K. would leave, but also whether Brexit would happen at all. So although doubly moot now, it is important to remember the enormous perceived stakes in the outcome of *Miller/Cherry*.

¹¹ E.g., Steven Erlanger, *Britain Votes To Leave E.U.; Cameron Plans To Step Down*, N.Y. Times (June 23, 2016), <https://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html> [<https://perma.cc/VKF2-U5W7>].

¹² Anushka Asthana et al., *Brexit: May's Threat to Europe: 'No Deal for Britain Is Better Than a Bad Deal'*, Guardian (Jan. 18, 2017), <https://www.theguardian.com/politics/2017/jan/17/prime-minister-vows-to-put-final-brexit-deal-before-parliament> [<https://perma.cc/84C5-EZTU>].

constituent nation of the United Kingdom).¹³ Prime Minister May's proposed solution to this conundrum satisfied no one, leading first to the repeated failure of her proposed exit agreement¹⁴ and, eventually, to her resignation as Prime Minister in the spring of 2019.¹⁵

May's successor, Brexiteer Boris Johnson, took office in July 2019 facing nearly all of the same obstacles, which were then compounded by a looming October 31 deadline and an EU losing its patience.¹⁶ Johnson's response was to take a harder line, declaring that he would "rather be dead in a ditch" than ask the EU for an extension.¹⁷ He also expressed a willingness to effect a "no-deal Brexit" by leaving the EU without an exit agreement,¹⁸ which many saw as a doomsday scenario that would lead to

¹³ See generally Jen Kirby, *Brexit's Irish Border Problem, Explained*, Vox (Feb. 18, 2019), <https://www.vox.com/world/2019/2/18/18204269/brexit-irish-border-backstop-explained> [<https://perma.cc/ZX86-JACC>] (explaining the complicated history underlying Brexit's interaction with the Irish border); Richard Pérez-Peña, *What Is the Irish Backstop, and Why Is It Holding up Brexit?*, N.Y. Times (Jan. 30, 2019), <https://www.nytimes.com/2019/01/30/world/europe/irish-backstop-brexit.html> [<https://perma.cc/AEY3-LLQF>] (same).

¹⁴ Max Colchester & Jason Douglas, *U.K. Parliament Votes Down May's Brexit Deal*, Wall St. J. (Mar. 12, 2019), <https://www.wsj.com/articles/u-k-parliament-votes-down-mays-brexit-deal-11552418563> [<https://perma.cc/AVR4-Q3RR>].

¹⁵ E.g., Frank Langfitt, *U.K.'s Theresa May Resigns Acknowledging Failure To Deliver Brexit*, NPR (May 24, 2019), <https://www.npr.org/2019/05/24/726784463/british-prime-minister-theresa-may-acknowledges-defeat-announces-resignation> [<https://perma.cc/WMR6-BYNP>].

¹⁶ Emilio Casalicchio, *Boris Johnson Appeals Directly to Donald Tusk To Scrap Brexit Backstop*, Politico (Aug. 19, 2019), <https://www.politico.eu/article/boris-johnson-appeals-directly-to-donald-tusk-to-scrap-brexit-backstop/> [<https://perma.cc/QTS2-BULP>]; Paul Dallison, Maïa De La Baume & Lili Bayer, *EU Rejects Boris Johnson's Brexit Backstop Plan*, Politico (Aug. 20, 2019), <https://www.politico.eu/article/tusk-slams-lack-of-realistic-alternatives-on-brexit-backstop/> [<https://perma.cc/Z9ZD-3E6B>].

¹⁷ Kate Proctor & Peter Walker, *Boris Johnson: I'd Rather Be Dead in Ditch Than Agree Brexit Extension*, Guardian (Sept. 5, 2019), <https://www.theguardian.com/politics/2019/sep/05/boris-johnson-rather-be-dead-in-ditch-than-agree-brexit-extension> [<https://perma.cc/2ZDJ-YCHG>].

¹⁸ *Id.*; Casalicchio, *supra* note 16.

severe economic disruption and renewed unrest in Ireland.¹⁹ Indeed, the House of Commons had previously gone on record opposing no-deal.²⁰

Anticipating continued opposition in Parliament, Johnson announced on August 28, 2019, that he would “prorogue” Parliament, in effect suspending the body, for five crucial weeks in the lead-up to the Brexit deadline.²¹ Prorogation is “a totally normal thing that happens,”²² but it is usually both brief (a week or shorter) and dedicated solely to preparing the Government’s agenda for a new parliamentary session.²³ The power to prorogue Parliament is a “prerogative power” of the Queen, though it is now exercised exclusively on the advice of the Prime Minister.²⁴ Prerogative powers historically belonged to the monarch alone,²⁵ and British constitutional history is littered with battles—both figurative and literal—that have been fought over the scope and exercise of prerogative

¹⁹ See Daniel Boffey & Rowena Mason, Boris Johnson Has No Intention of Renegotiating Brexit Deal, EU Told, *Guardian* (Aug. 5, 2019), <https://www.theguardian.com/politics/-2019/aug/05/no-deal-brexit-is-boris-johnsons-central-scenario-eu-told> [<https://perma.cc/U2-W9-TFER>] (quoting Labour Party leader Jeremy Corbyn as saying: “[N]o deal will be really serious. Serious for food prices, for medical supplies, for trade, for investment . . . I’m sorry, it’s not on, it’s not acceptable. We will do everything we can to block it.”).

²⁰ Jen Kirby, The Last 24 Hours of Brexit, Explained, *Vox* (Mar. 28, 2019), <https://www.vox.com/2019/3/28/18284470/brexit-parliament-indicative-votes-theresa-may-deal> [<https://perma.cc/CY46-4T9P>].

²¹ Parliament Suspension: Queen Approves PM’s Plan, *BBC News* (Aug. 28, 2019), <https://www.bbc.com/news/uk-politics-49493632> [<https://perma.cc/VS2K-A9SY>].

²² Jen Kirby, Boris Johnson Just Suspended Parliament Over Brexit. Here’s What’s Going On., *Vox* (Aug. 28, 2019), <https://www.vox.com/2019/8/28/20836579/boris-johnson-brexit-parliament-prorogue> [<https://perma.cc/6ZAV-N286>].

²³ See *R (Miller) v. Prime Minister (Miller/Cherry)* [2019] UKSC 41, [59] (appeals taken from Eng. & Scot.) (relating former Prime Minister John Major’s testimony about the usual duration and function of prorogation); Graeme Cowie, House of Commons Library, Briefing Paper Number 8589, Prorogation of Parliament 3–4, 7–13 (2019), <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8589> [<https://perma.cc/MJY5-AJSZ>] (providing background on prorogation).

²⁴ Indeed, *Miller/Cherry* itself suggests, but does not hold, that the Queen is constitutionally required to prorogue Parliament whenever the Prime Minister asks her to. See [2019] UKSC 41 at [30].

²⁵ As Blackstone put it, the prerogative is “that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity.” 1 William Blackstone, *Commentaries* *232. Indeed, the prerogative was more than just a form of royal power—especially in the medieval and early modern periods, it was frequently described in spiritual or even miraculous terms. See Paul D. Halliday, Blackstone’s King, in *Re-Interpreting Blackstone’s Commentaries* 169, 172–74 (Wilfrid Prest ed., 2014).

powers.²⁶ As a consequence, British judges have been and remain squeamish about potentially interfering with their exercise.²⁷

Boris Johnson was not the first politician to suggest proroguing Parliament in order to bring about Brexit.²⁸ Although it was not a mainstream idea, strategic prorogation had been discussed frequently enough that, even before Johnson actually announced his prorogation, anti-Brexit members of the Scottish Parliament led by MP Joanna Cherry filed a lawsuit in the Scottish Court of Session seeking a declaratory judgment that any such prorogation would be unlawful.²⁹ Once Johnson did announce his intention to prorogue Parliament, a nearly identical lawsuit was filed in the Queen's Bench Division of the High Court of Justice of England and Wales by transparency activist and anti-Brexit campaigner Gina Miller.³⁰ These two cases—*Miller* and *Cherry*—each presented the same two questions: (1) are legal challenges to prorogation justiciable? and (2) if so, was Johnson's prorogation unlawful? The first question—and the one on which this Comment focuses—called for courts to examine the political question doctrine.³¹

²⁶ England's constitutional struggles in the seventeenth century are far too complex to delve into here, but suffice it to say that the king's prerogative was a frequent sticking point in those conflicts. See, e.g., Ruth Paley, *Modern Blackstone: The King's Two Bodies, the Supreme Court and the President*, in *Re-Interpreting Blackstone's Commentaries*, supra note 25, at 188, 195; see generally J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century, 1603–1689* (1928); *The Stuart Constitution, 1603–1688: Documents and Commentary* (J.P. Kenyon ed., 1966).

²⁷ See, e.g., *Council of Civil Serv. Unions v. Minister for the Civil Serv.* [1985] 1 AC 374 (HL) 375 (appeal taken from Eng.). Indeed, *Miller/Cherry's* departure from this norm is a common thread among critics of the decision. See, e.g., Finnis, supra note 7, at 5; Spadizer, supra note 7 (criticizing the Court for “simply ignor[ing] centuries of historical precedent”).

²⁸ See Cowie, supra note 23, at 24–26; see also, e.g., Esther McVey Defends Her Right To Prorogue Parliament, BBC News (June 9, 2019), <https://www.bbc.com/news/av/uk-politics-48575072/esther-mcvey-defends-her-right-to-prorogue-parliament> [<https://perma.cc/8AG6-DG5R>].

²⁹ See *Petition of Cherry & Others for Judicial Review* [2019] CSOH 68, [1].

³⁰ *R (Miller) v. Prime Minister* [2019] EWHC 2381 (QB). For clarification on the institutional terminology in this sentence, see *infra* note 53.

³¹ “The political question doctrine” is an American term, but, as both the substance of the doctrine and the deeper principles at issue are fundamentally the same on both sides of the Atlantic, see *infra* Section I.B, I use the term in both British and American contexts for the convenience of the reader.

B. The Political Question Doctrine and Its Difficulties

To a significant extent, the law of political question justiciability is the same in Britain and the United States. The canonical articulation of the American doctrine appears in *Baker v. Carr*, in which the U.S. Supreme Court provided six characteristics of non-justiciable political questions.³² The first two characteristics—a “textually demonstrable constitutional commitment” to another branch and a “lack of judicially discoverable and manageable standards”³³—do most of the work.³⁴ The British political question doctrine is remarkably similar.³⁵ British courts generally hold that issues which lack “judicial or legal standards by which to assess [their] legality”³⁶ are “beyond the constitutional competence assigned to the courts.”³⁷ Such questions are said to “involve matters of ‘high policy’” or to be “political.”³⁸ Put another way, British courts have stated that a non-justiciable question is one “where the court does not have the tools

³² 369 U.S. 186, 217 (1962).

³³ *Id.*

³⁴ See *Zivotofsky v. Clinton*, 566 U.S. 189, 207 (2012) (Sotomayor, J., concurring) (“[I]t will be the rare case in which *Baker’s* final factors alone render a case nonjusticiable.”); John Harrison, *The Political Question Doctrines*, 67 *Am. U. L. Rev.* 457 (2017) (arguing that all six *Baker* factors revolve around the one operational concept of non-judicial finality). Some, like Dean Erwin Chemerinsky, have gone further, arguing that the *Baker* criteria “seem useless in identifying what constitutes a political question.” Erwin Chemerinsky, *Federal Jurisdiction* 149 (5th ed. 2007); accord *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) (“[T]he category of political questions is more amenable to description by infinite itemization than by generalization.” (quoting *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 933 (D.C. Cir. 1988))).

³⁵ See, e.g., Yowell, *supra* note 7 (noting that British justiciability doctrine “tracks two key points of the US doctrine on political questions,” referring to the first two *Baker* factors).

³⁶ *R (Miller) v. Prime Minister* [2019] EWHC 2381 (QB), [47]; see also *Petition of Cherry & Others for Judicial Review* [2019] CSOH 70, [25] (referring to “political territory and decision-making which cannot be measured against legal standards, but rather only by political judgments”).

³⁷ *Shergill v. Khaira* [2014] UKSC 33, [42] (appeal taken from Eng.).

³⁸ *R (Miller)*, [2019] EWHC 2381 at [42]; accord *id.* at [51] (describing a non-reviewable exercise of prerogative power as “inherently political in nature and [for which] there are no legal standards against which to judge their legitimacy”). The first *Baker* factor—“textually demonstrable constitutional commitment”—also has a British analogue. The UKSC has referred to political questions which “trespass[] on the proper province of the executive,” *Shergill*, [2014] UKSC 33 at [40], and courts frequently cite a non-exclusive list of prerogative powers which were deemed so central to the Queen/Executive that they are not “amenable to the judicial process.” *Council of Civil Serv. Unions v. Minister for the Civil Serv.* [1985] 1 AC 374 (HL) 418B (appeal taken from Eng.). Although British courts do not frame it in these terms, this basket of non-justiciable executive actions can easily be conceived of as powers which have been “committed” to the executive, though by constitutional convention and custom rather than text.

or standards to assess the legality of a matter.”³⁹ Indeed, not only does British black-letter law mirror American doctrine—British courts sometimes also look directly to American cases for guidance.⁴⁰

More generally, however, “[t]here are fundamental questions concerning the relationship between the political question doctrine and the role of the courts in exercising judicial review.”⁴¹ The political question doctrine implicates a tension between two core principles of judicial review: on the one hand, a humility which seeks not to overstep a court’s capacity for reasoned decision-making and, on the other hand, a sense of responsibility to uphold the law and decide the case presented. Indeed, Professor Louis Michael Seidman has called the political question doctrine “the most dangerous concept in all of constitutional law” because it represents a fatal challenge to “[John] Marshall’s famous claim that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’”⁴²

This tension has been the impetus for significant debate by titans of the legal academy. Professor Alexander Bickel advocated a broad, “prudential” form of the political question doctrine in recognition of the judiciary’s “counter-majoritarian difficulty,” a phrase he coined in this very context.⁴³ Professor Bickel believed that a key motivation for the political question doctrine was “the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.”⁴⁴ Thus, the Court’s “willingness to stay its hand” was “an

³⁹ *Cherry v. Advocate Gen.* [2019] CSH 49, [83] (Scot.) (opinion of Lord Brodie).

⁴⁰ See *Buttes Gas & Oil Co. v. Hammer* (No. 3) [1982] AC 888 (HL) 936–37 (appeal taken from Eng.) (“[T]he ultimate question [of] what issues are capable, and what are incapable, of judicial determination . . . has clearly received the consideration of the United States courts. When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours, but that to which all the parties before us belong, spelt out moreover in convincing language and reasoning, we should be unwise not to take the benefit of it.”).

⁴¹ Peter W. Low, John C. Jeffries, Jr. & Curtis A. Bradley, *Federal Courts and the Law of Federal-State Relations* 470 (9th ed. 2018).

⁴² Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 *J. Marshall L. Rev.* 441, 442–43 (2004) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁴³ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (1962) [hereinafter *Bickel, Least Dangerous Branch*]; see also Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40, 74–79 (1961) (offering a similar sketch of his view of the political question doctrine).

⁴⁴ Bickel, *Least Dangerous Branch*, *supra* note 43, at 184.

important precondition to its legitimacy when it chose to act.”⁴⁵ Professor Bickel also expressed concerns about judges’ capacity to make certain decisions, either because of the problem’s “intractability to principled resolution” or because of “the sheer momentousness of it, which tends to unbalance judicial judgment.”⁴⁶ This congeries of Bickelian concerns is often framed as an argument about the separation of powers.⁴⁷ If another branch is either required or better suited to decide a given question, then, as the U.K. Supreme Court once explained, it would exceed “the constitutional competence assigned to the courts under our conception of the separation of powers” for the judiciary to weigh in.⁴⁸

The opposite attitude towards judicial review and the political question doctrine is associated with famed mid-century legal academic Herbert Wechsler, who wrote that “for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation.”⁴⁹ As Martin Redish, an adherent of the Wechslerian view, put it: “Once we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all of its manifestations.”⁵⁰ The Wechslerian view urges the judge not to be overly humble but to resolve the case before her by interpreting and then enforcing the law.⁵¹ On this view, a Bickelian

⁴⁵ Seidman, *supra* note 42, at 461 (citing Bickel, *Least Dangerous Branch*, *supra* note 43). Professor Jesse Choper has advanced a kindred proposal for the political question doctrine, in which courts would decline to decide cases implicating the separation of powers or federalism in order to preserve their institutional capital for decisions protecting individual rights. See generally Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980). Professor Choper’s theory, like Bickel’s, fundamentally relies on concerns about institutional legitimacy and the premise that judicial review is “the most antimajoritarian exercise of the national government’s power.” Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 *Duke L.J.* 1457, 1466 (2005).

⁴⁶ Bickel, *Least Dangerous Branch*, *supra* note 43, at 184. Bickel’s fourth motivation, not unrelated to the other three, was “the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be.” *Id.*

⁴⁷ E.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“[The political question doctrine is] essentially a function of the separation of powers.”).

⁴⁸ *Shergill v. Khaira* [2014] UKSC 33, [42] (appeal taken from Eng.).

⁴⁹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 6 (1959).

⁵⁰ Martin H. Redish, *Judicial Review and the “Political Question,”* 79 *Nw. U. L. Rev.* 1031, 1059–60 (1985).

⁵¹ See *id.* at 1044 (“Wechsler has recognized an unwaveringly rigid judicial obligation to interpret and enforce the Constitution, regardless of what many would consider the socially and politically disastrous consequences that would follow.”).

prudential political question doctrine is an offense against the rule of law. Warren F. Schwartz and Wayne McCormack, for instance, have argued that “[i]f the judiciary, the organ of government most fundamentally committed to the vindication of constitutional principle, decides it cannot play its accustomed role[,] . . . [then] our basic institutional alternative to lawlessness is lost.”⁵² A Wechslerian approach subordinates external concerns about legitimacy or capacity to an internal duty to decide. Whereas the Bickelian judge is humble, the Wechslerian judge is proud (some might say arrogant), committed to enforcing the law and to standing up as society’s “institutional alternative to lawlessness.”

II. THE *MILLER/CHERRY* LITIGATION

A. *Wechsler and Bickel in the Lower Courts*

In the wake of Prime Minister Boris Johnson’s prorogation of Parliament, two parallel lawsuits posing the same thorny question of justiciability came before the Inner House of the Scottish Court of Session and a Divisional Court of the High Court of Justice of England and Wales.⁵³ In decisions issued on the very same day, the two courts reached

⁵² Warren F. Schwartz & Wayne McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 *Tex. L. Rev.* 1033, 1036 (1968).

⁵³ A brief note on the structure of the British judiciary: Justice in the United Kingdom is almost entirely administered at the level of the four constituent nations, England, Wales, Scotland, and Northern Ireland. England and Wales are administered together, however, creating three judicial systems which intersect only at the U.K. Supreme Court, the inheritor of the House of Lords’s historical role as the court of last resort in the United Kingdom. E.g., Stephen J. Hammer, *Retroactivity and Restraint: An Anglo-American Comparison*, 41 *Harv. J.L. & Pub. Pol’y* 409, 434 n.200 (2018).

The Scottish Court of Session is the primary court of Scotland, and it is composed of a court with non-exclusive original jurisdiction over most lawsuits, called the Outer House, and an appellate body, called the Inner House, which serves as Scotland’s highest court. See *About the Court of Session, Scottish Courts and Tribunals*, <https://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session> (last visited Mar. 16, 2020) [<https://perma.cc/FZW3-VYF2>]. Ms. Cherry first filed suit in the Outer House, see *supra* note 29 and accompanying text, which dismissed her case on justiciability grounds. See *Petition of Cherry & Others for Judicial Review*, [2019] CSOH 70, [26]–[29]. Cherry then appealed to the Inner House, whose decision is the one discussed *infra*.

In England, the High Court of Justice is the court of first instance for most civil cases. The High Court is composed of three divisions, the most important of which (and the one concerned here) is the Queen’s Bench Division. E.g., Fiona Cownie & Anthony Bradney, *English Legal System in Context* 51–56 (2d ed. 2000). Cases in Queen’s Bench are usually heard by only one judge, but occasionally, as in the *Miller* litigation, a “divisional court” of more than one judge will be empaneled. Thus, although the English *Miller* decision was an

opposite conclusions. The Scottish *Cherry* decision focused heavily on the judiciary's necessary function of enforcing legal limits on executive power, while the English *Miller* decision was much more concerned about manageable standards and judicial restraint. The cases set out in stark terms two conflicting approaches to the justiciability of prorogation, approaches which map onto the Wechslerian and Bickelian positions outlined above and which set the stage for the U.K. Supreme Court's eventual decision.

On September 11, 2019, the Inner House of the Scottish Court of Session ruled that the challenge to Prime Minister Johnson's prorogation of Parliament was justiciable, and, on the merits, concluded that the action was "unlawful and thus null and of no effect."⁵⁴ In the court's primary opinion, Lord Carloway relied on constitutional principles which, he held, *must* limit the power to prorogue. Whether or not those principles provided "manageable standards" was a secondary consideration at best. "Since [parliamentary] scrutiny is a central pillar of the good governance principle which is enshrined in the constitution," Lord Carloway concluded that a prorogation that disrupts such scrutiny "cannot be seen as a matter of high policy or politics" that is insulated from review by the courts.⁵⁵ In essence, Lord Carloway worked backwards from the potential harm of unrestrained prorogation to reach the conclusion that courts *must* have a role in reviewing such decisions: "Because the prorogation . . . prevents Parliament from performing its central role in scrutinising Government action, *the court must have a concurrent jurisdiction . . . to prevent this occurring and to enable Parliament to sit, should it choose to do so.*"⁵⁶

act of the Court of Queen's Bench, I will refer to the opinion's author as "the Divisional Court," following English practice. See, e.g., *R (Miller) v. Prime Minister* [2019] EWHC 2381 (QB), [48]–[49] (using this terminology when discussing prior cases decided by a divisional court). Decisions of the High Court of Justice may then be appealed to the Court of Appeal, the highest court in England and Wales. See Senior Courts Act 1981, c. 54, §§ 15–16. The High Court may, however, issue a "leap-frog" order, permitting a case to skip the Court of Appeal and go directly to the U.K. Supreme Court. See Administration of Justice Act 1969, c. 58, §§ 12–13. This is what occurred in the *Miller* litigation. See *R (Miller) v. Prime Minister (Miller/Cherry)* [2019] UKSC 41, [25] (appeals taken from Eng. & Scot.).

⁵⁴ *Cherry v. Advocate Gen.* [2019] CSIH 49, [60].

⁵⁵ *Id.* at [51].

⁵⁶ *Id.* at [52] (emphasis added); accord *id.* at [91] (opinion of Lord Brodie) ("[W]hen [a procedural] manoeuvre is quite so blatantly designed 'to frustrate Parliament' at such a critical juncture in the history of the United Kingdom I consider that the court may legitimately find it to be unlawful.").

Lord Carloway’s embrace of Wechslerian judicial review was subtle, manifested in his prioritization of constitutional constraints on the executive over the need for clear and articulable standards. Lord Drummond Young’s concurrence, however, was much more blunt. Drawing on his conception of the rule of law, Lord Drummond Young railed against a prudential political question doctrine: “[I]f the expression ‘non-justiciable’ means that the courts have no jurisdiction to consider whether a power has been lawfully exercised, it is a concept that is incompatible with the rule of law and contrary to fundamental features of the constitution of the United Kingdom.”⁵⁷

On the same day that the Scottish Inner House held that the Prime Minister Johnson’s prorogation was justiciable, a Divisional Court of the English High Court of Justice held just the opposite.⁵⁸ In contrast with the Scottish court’s focus on the constitutional harms threatened by prorogation, the English court dwelt on “the absence of judicial or legal standards by which to assess the legality of the Executive’s decision or action.”⁵⁹ For instance, despite evidence that a prorogation of the proposed length was entirely unnecessary for the Government’s stated purpose,⁶⁰ the Divisional Court held that “it is impossible . . . to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure.”⁶¹

The court also emphasized the constitutional constraints on *its own* power. Whereas the plaintiff had argued that parliamentary sovereignty, “[o]ne of the fundamental principles of our constitution,” required the court to intervene,⁶² the English Divisional Court retorted with a “fundamental principle” of its own: “the separation of powers, reflecting the different constitutional areas of responsibility of the courts, the

⁵⁷ Id. at [102] (opinion of Lord Drummond Young).

⁵⁸ See *R (Miller)*, [2019] EWHC 2381 at [68]; cf. *supra* note 53 (describing the relationship between a Divisional Court and the High Court of Justice itself).

⁵⁹ *R (Miller)*, [2019] EWHC 2381 at [47].

⁶⁰ Id. at [32].

⁶¹ Id. at [54]; see also id. at [55] (“[E]ven if the prorogation under consideration in the present case was . . . designed to advance the Government’s political agenda . . . that is not territory in which a court can enter with judicial review.”); id. at [56] (“If the purpose or primary purpose of prorogation is to undertake preparations for the Queen’s Speech, it would still be impossible for the court to state whether the period of prorogation is excessive. . . . There is no legal measure by which the court could form a proper judgment on that matter. That too is purely political.”); id. at [57] (“[I]t is impossible for the court to assess by any measurable standard how much time is required ‘to hold the Government to account’ . . .”).

⁶² Id. at [58].

Executive and Parliament.”⁶³ To call the Prime Minister’s decision into question in court, the Divisional Court reasoned, would inappropriately interfere with the structures of government as they have developed over centuries. “The constitutional arrangements of the United Kingdom have evolved to achieve a balance between the three branches of the state,” the court wrote, and it deemed the interaction between Parliament and the Executive “territory into which the courts should be slow indeed to intrude.”⁶⁴ The Divisional Court’s decision thus hit many of the key points of a Bickelian philosophy of judicial review, from its concern about the issue’s “intractability to principled resolution” to its grounding in the separation of powers.

B. Constitutional Principles and the Duty To Decide: The U.K. Supreme Court’s Decision

In light of these directly conflicting decisions by courts in two of the U.K.’s three national judicial systems,⁶⁵ the lawfulness of Prime Minister Johnson’s prorogation of Parliament was primed for consideration by the U.K. Supreme Court. Indeed, although the Court usually sits in panels of five, the combined *Miller/Cherry* case was heard by eleven of the twelve Justices “[i]n view of the grave constitutional importance of the matter.”⁶⁶

⁶³ Id. at [60]; see also id. at [42] (stating that “the separation of powers between the judicial and the executive branches of government” is “a fundamental feature of our unwritten constitution”).

⁶⁴ Id. at [64]; see also Finnis, *supra* note 7, at 13 (contending that *Miller/Cherry* “replac[ed] some main elements of a constitutional settlement embodying, for hundreds of years, certain tried and tested political assessments and judgments”). This is an example of “Burkean reasoning,” which privileges the status quo as “embodying the judgments of many people operating over time.” See Cass R. Sunstein, *Burkean Minimalism*, 105 *Mich. L. Rev.* 353, 370–71 (2006). Burkean arguments against judicial review are common in American constitutional law as well. Perhaps most well-known is Justice White’s dissent in *INS v. Chadha*, in which he argued that the majority decision invalidating legislative vetoes overruled a congressional consensus that the tool was both legal and useful. 462 U.S. 919, 967–74 (1983) (White, J., dissenting).

⁶⁵ Cf. *supra* note 53 (offering a brief sketch of the British judicial system). Indeed, the “nation split,” as it were, was heightened by the fact that the primary opinions in each case below were written by the heads of each nation’s respective judicial system: the Lord Justice General of Scotland (Lord Carloway) and the Lord Chief Justice of England and Wales (Lord Burnett of Maldon).

⁶⁶ *R (Miller) v. Prime Minister (Miller/Cherry)* [2019] UKSC 41, [26] (appeals taken from Eng. & Scot.); see also Panel Numbers Criteria, The Supreme Court (last visited Feb. 5, 2020), <https://www.supremecourt.uk/procedures/panel-numbers-criteria.html> [<https://perma.cc/9PGH-5KYM>] (listing “[a] case of great public importance” as one instance in which it would be appropriate for “more than five Justices [to] sit on a panel”).

After three days of oral argument,⁶⁷ the Court issued a unanimous judgment invalidating the prorogation and embracing a robust, Wechslerian conception of judicial review of government action.⁶⁸

At the very outset of its discussion, the Supreme Court answered perhaps the most fundamental (and distinctly Bickelian) argument of the English Divisional Court: judicial interference here would violate the separation of powers. Far from *violating* the separation of powers, the Court responded, deciding the case would “giv[e] effect to the separation of powers” by “ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions.”⁶⁹ In doing so, “the court will be performing its proper function under our constitution.”⁷⁰ The Supreme Court also set aside the English court’s concern that a decision in this case would disrupt the “balance between the three branches of the state.”⁷¹ Rather, judicial review of the exercise of prerogative powers is *part* of that balance, and the Court drew on both tradition and “centuries” of precedent to justify its “supervisory jurisdiction over the decisions of the executive.”⁷²

⁶⁷ *Miller/Cherry*, [2019] UKSC 41 at [26].

⁶⁸ It is important to note that the *Miller/Cherry* decision did *not* establish “judicial review” as Americans think about it. American courts possess the much more radical power to strike down acts of a *legislature*, whereas *Miller/Cherry* involves only *executive* action. Although *Miller/Cherry*’s reasoning might resemble Marburian judicial review—measuring government action against constitutionally prescribed limitations—*Miller/Cherry* does not indicate that Acts of Parliament are now susceptible to constitutional review by British courts. Although the case has been compared to *Marbury v. Madison*, see Shirazi, *supra* note 8, such comparisons work only as shorthand and at a very high level of generality. Shirazi is certainly correct, for instance, that both cases represent courts acting confidently, see Shirazi, *supra* note 8, at 115–16, but any more aggressive comparison between the two cases oversimplifies the political and institutional contexts of the two cases and papers over their very different legal rationales.

⁶⁹ *Miller/Cherry*, [2019] UKSC 41 at [34] (emphasis added). This reasoning is very similar to John Hart Ely’s theory of representation reinforcement, which stipulates that “the courts should be in the business of reinforcing and perfecting, not second-guessing, the work of representative government.” David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 *Stan. L. Rev.* 761, 761 (2004); see generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) (developing this theory). For the UKSC’s use of this theory, see Magliocca, *supra* note 8.

⁷⁰ *Miller/Cherry*, [2019] UKSC 41 at [34].

⁷¹ *R (Miller) v. Prime Minister* [2019] EWHC 2381 (QB), [64].

⁷² *Miller/Cherry*, [2019] UKSC 41 at [31]; accord *id.* at [41] (“Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers . . .”). The strength of these “centuries”

Indeed, throughout the opinion the UKSC seemed to go out of its way to assert the necessary role for courts in marking out and enforcing constitutional constraints on other governmental actors.⁷³ “Although the United Kingdom does not have a single document entitled ‘The Constitution,’” the Court wrote, “it nevertheless possesses a Constitution . . . [that] includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles.”⁷⁴ Indeed, courts have the “particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.”⁷⁵ They cannot, the UKSC wrote, “shirk that responsibility merely on the ground that the question raised is political in tone or context.”⁷⁶ And although it conceded that ministers “are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge,” the Court nonetheless asserted that those ministers “are responsible to a court of justice for the *lawfulness* of what they do, and *of that the court is the only judge*.”⁷⁷

In keeping with this general attitude, the UKSC, like the Scottish Inner House, focused its justiciability inquiry on the necessary existence of a constitutional limit on prorogation rather than on any deficit of manageable standards. The Court started from the twin convictions (1) that a constitutional limit on the power of prorogation *must* exist and (2) that *courts* must enforce that limit: “[E]very prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie.”⁷⁸ In order to determine what limits the constitution placed

of precedent has been questioned by several critics of the decision. E.g., Spadizer, *supra* note 7 (criticizing the Court for “simply ignor[ing] centuries of historical precedent”).

⁷³ See Yowell, *supra* note 7 (noting that the UKSC’s “ambitious, far-reaching language reminds one of *Marbury*’s elevated tone regarding judicial responsibility for the constitution”).

⁷⁴ *Miller/Cherry*, [2019] UKSC 41 at [39].

⁷⁵ *Id.*; accord *id.* at [51] (“[I]t is the court’s responsibility to determine whether the Prime Minister has remained within the legal limits of the power.”).

⁷⁶ *Id.* at [39].

⁷⁷ *Id.* at [33] (quoting *R v. Sec’y of State for the Home Dep’t, Ex parte Fire Brigades Union* [1995] 2 AC 513 (HL) 573) (emphasis added).

⁷⁸ *Miller/Cherry*, [2019] UKSC 41 at [38]. Underlying this holding is a distinction between a court determining the *bounds* of a prerogative power and reviewing the “*mode of exercise*” of said power. *Id.* at [52] (emphasis added). Courts are fully able to determine the *extent* of a power, but even the UKSC acknowledged that the way in which a power is *used* is likely non-justiciable. *Id.* at [38]. Because the Court’s eventual standard for determining the extent of the prorogation power rested in part on how the power had been used in a given case, see *infra*

on prorogation, the Court looked to “the values and principles of our constitution” and emphasized its “responsibility of . . . making them effective.”⁷⁹ It highlighted two such principles in particular: parliamentary sovereignty⁸⁰ and parliamentary accountability.⁸¹ Extrapolating from these constitutional tenets and from the practical realities of prorogation, the Court framed a functional, fact-specific test designed to balance the relevant constitutional principles.⁸² A prorogation is unlawful, the Court held, “if [it] has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.”⁸³

Only *after* crafting this rule based on the “fundamental principles of our constitutional law”⁸⁴ did the Court address the manageability of its standard.⁸⁵ It was not troubled by this potential objection: applying this new test “is a question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts.”⁸⁶

In this case, it seems that the relevant question of fact was indeed quite easy. Did “the Prime Minister’s action ha[ve] the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account”?⁸⁷ The answer: “of course it did.”⁸⁸ Johnson had not just deprived Parliament of all choice about how it would conduct its

notes 82–83 and accompanying text, many commentators have criticized this distinction for being incoherent, insincere, or both. See, e.g., Finnis, *supra* note 7, at 6.

⁷⁹ *Miller/Cherry*, [2019] UKSC 41 at [39].

⁸⁰ *Id.* at [41]. According to the Court, parliamentary sovereignty is the idea that “laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply.” *Id.*

⁸¹ *Id.* at [46]. In the Court’s words, the principle that “the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy.” *Id.* (quoting *Bobb v. Manning* [2006] UKPC 22, [13] (appeal taken from Trin. & Tobago)).

⁸² See *id.* at [41]–[51] (noting that although these principles do provide judicially enforceable bounds on prorogation, neither of them are absolute, and prorogation will normally run afoul of them only in extreme circumstances).

⁸³ *Id.* at [50].

⁸⁴ *Id.* at [41].

⁸⁵ See Yowell, *supra* note 7 (arguing that the UKSC “sidestepped the articulation of a specific standard of review”).

⁸⁶ *Miller/Cherry*, [2019] UKSC 41 at [51].

⁸⁷ *Id.* at [55].

⁸⁸ *Id.* at [56].

business; he had failed to give *any* justification for the unusual duration of the prorogation.⁸⁹

Having found the action to be “unlawful,” the Court then had to decide if it was also void. In other words, it had to determine the remedy for this constitutional violation. The Prime Minister had claimed that the Court lacked jurisdiction to declare an order of prorogation void, arguing that such an order was protected by Article 9 of the 1688 English Bill of Rights, which provides that “Proceedings in Parlyament” may not be “impeached or questioned in any Court or Place out of Parlyament.”⁹⁰ The UKSC, however, held that prorogation was not a “proceeding in Parliament” to which the Article 9 privilege applied.⁹¹ As a consequence, the Court declared Johnson’s prorogation to be not only “unlawful” but also “null and of no effect.”⁹² It was, the Court said, “as if the Commissioners [carrying the order of prorogation] had walked into Parliament with a blank piece of paper. . . . It follows that Parliament has not been prorogued”⁹³

The U.K. Supreme Court’s decision in *Miller/Cherry* represents an embrace of a robust, Wechslerian view of the judicial role. Although presented with a Divisional Court decision that the case lacked properly “judicial” standards to apply, the Supreme Court set that consideration to the side and repeatedly reaffirmed the judiciary’s authority—and indeed its duty—to determine and enforce constitutional constraints on executive power. “The courts,” it wrote, “cannot shirk that responsibility [to enforce the constitution] merely on the ground that the question raised is political in tone or context.”⁹⁴ Reasoning from the “values and principles of our constitution,”⁹⁵ the UKSC confidently applied a newly crafted constitutional standard to the facts of an exceptional, and exceptionally political, case. In doing so, it rejected the Divisional Court’s Bickelian humility and staked its claim to a powerful conception of judicial review of executive action.

⁸⁹ Id. at [58]–[61]. These factual assertions have been heavily disputed by critics of the decision. See Spadijer, *supra* note 7.

⁹⁰ *Miller/Cherry*, [2019] UKSC 41 at [64].

⁹¹ The privilege, the Court held, was limited to the “core or essential business of Parliament,” and since prorogation is not a decision of Parliament itself but instead is “something which is imposed upon them from outside,” it does not fall within this definition. Id. at [68].

⁹² Id. at [69].

⁹³ Id. at [69]–[70].

⁹⁴ Id. at [39].

⁹⁵ Id.

III. A TRANSATLANTIC JUXTAPOSITION: *RUCHO* V. *COMMON CAUSE*

The U.K. Supreme Court's confident approach to a thorny question of justiciability in *Miller/Cherry* presents a striking contrast to the U.S. Supreme Court's most recent application of the political question doctrine: *Rucho v. Common Cause*.⁹⁶ Rather than audacity, *Rucho* is marked by its caution; rather than trumpeting the authority of constitutional principles and a court's duty to enforce them, the *Rucho* Court warned against amorphous standards and emphasized the need for restraint.

Decided in June 2019—only three months before *Miller/Cherry*—*Rucho* was the culmination of a string of cases wrestling with the justiciability of partisan gerrymandering.⁹⁷ After the Court dodged the question in the previous term,⁹⁸ a five-Justice majority in *Rucho* concluded that partisan gerrymandering presented a non-justiciable political question.⁹⁹ Nearly every aspect of *Rucho*—from its intent focus on manageable standards to its barely concealed concern about institutional legitimacy—marks a stark divergence from the UKSC's approach in *Miller/Cherry*.

Just like the *Miller/Cherry* litigation, *Rucho* centered on whether there were “judicially discoverable and manageable standards” by which to resolve the plaintiffs' claims.¹⁰⁰ Yet whereas the UKSC largely sidelined the manageability inquiry and instead focused on the dictates of the constitution,¹⁰¹ the *Rucho* Court was consumed by the question of whether an adequately clear and definite rule of decision could be found. The Court provided a cavalcade of adjectives describing the standard it felt was required, including “clear,” “manageable,” “politically neutral,”¹⁰²

⁹⁶ 139 S. Ct. 2484 (2019).

⁹⁷ For background on the practice of partisan gerrymandering, see Anthony J. McGann et al., *Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty* (2016). Past Supreme Court cases on the issue include *Gaffney v. Cummings*, 412 U.S. 735 (1973), *Davis v. Bandemer*, 478 U.S. 109 (1986), and *Vieth v. Jubelirer*, 541 U.S. 267 (2004). See generally Daniel Hays Lowenstein et al., *Election Law: Cases and Materials* 152–86 (6th ed. 2017) (discussing the shifting approaches to partisan gerrymandering challenges).

⁹⁸ See *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

⁹⁹ *Rucho*, 139 S. Ct. at 2506–07.

¹⁰⁰ *Id.* at 2494 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

¹⁰¹ See *supra* notes 84–85 and accompanying text.

¹⁰² *Rucho*, 139 S. Ct. at 2498 (quoting *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment)).

“principled,” “rational,” and “based upon reasoned distinctions.”¹⁰³ In particular, the *Rucho* Court sought standards “discernible in the Constitution”¹⁰⁴ or “found in the Constitution or laws.”¹⁰⁵ “Some criterion more solid and more demonstrably met,” it explained, was necessary in order to “meaningfully constrain the discretion of the courts, and to win public acceptance for the courts’ intrusion.”¹⁰⁶

Constitutional text thus served as a tool for “confining and guiding the exercise of judicial discretion,”¹⁰⁷ a function the Court deemed was necessary in order to preserve its legitimacy. The *Rucho* Court was deeply concerned with “the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.”¹⁰⁸ Bickel’s counter-majoritarian difficulty, then, necessitated keeping the Court within “a properly judicial role”¹⁰⁹ and out of the “political thicket.”¹¹⁰ Again, *Miller/Cherry* contrasts sharply. There, the UKSC affirmed not only the manageability but the *desirability* of a rule crafted from constitutional “values and principles” rather than grounded in positive law.¹¹¹ Furthermore, the extraordinary nature of *Miller/Cherry* was not a reason for the UKSC to *dismiss* the case; it was, perhaps, the most important reason for the Court to *decide* it.¹¹²

¹⁰³ Id. at 2507 (quoting *Vieth*, 541 U.S. at 278 (plurality opinion)). This is only a small sampling. See also id. at 2494 (stating that the Court’s authority to act is “grounded in and limited by the necessity of resolving [a plaintiff’s claim of right] *according to legal principles*” (quoting *Gill*, 138 S. Ct. at 1929) (emphasis added)); id. at 2498 (“[T]he Court [must] act only in accord with especially clear standards . . .”); id. at 2499 (seeking a standard that can “reliably differentiate unconstitutional from ‘constitutional political gerrymandering’” (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999))).

¹⁰⁴ Id. at 2500.

¹⁰⁵ Id. at 2507.

¹⁰⁶ Id. at 2499–500 (quoting *Vieth*, 541 U.S. at 291 (plurality opinion)).

¹⁰⁷ Id. at 2505.

¹⁰⁸ Id. at 2507.

¹⁰⁹ Id. (quoting *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017)).

¹¹⁰ *Colegrove v. Green*, 328 U.S. 549, 556 (1946). This was not the first time that Chief Justice Roberts, the author of *Rucho*, had expressed concern about partisan gerrymandering’s inherent potential to politicize the judiciary. See Transcript of Oral Argument at 38, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161) (“[T]he intelligent man on the street is going to say [that the statistical reasons for a districting decision are] a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans.”); Edward B. Foley, *Constitutional Preservation and the Judicial Review of Partisan Gerrymanders*, 52 Ga. L. Rev. 1105, 1114–35 (2018) (exploring the Chief Justice’s “squeamishness” regarding the appearance of judicial partisanship).

¹¹¹ See *supra* notes 78–85 and accompanying text.

¹¹² *R (Miller) v. Prime Minister (Miller/Cherry)* [2019] UKSC 41, [1] (appeals taken from Eng. & Scot.) (“[This case] is a ‘one off.’ But our law is used to rising to such challenges and

A particularly telling aspect of the juxtaposition between *Rucho* and *Miller/Cherry* is how closely Justice Elena Kagan's dissent in *Rucho* mirrors the UKSC's core argument in *Miller/Cherry*. Like the UKSC, Justice Kagan focused intently on the gravity of the constitutional threat posed by partisan gerrymandering,¹¹³ and she lauded the standard applied by the lower court for exhibiting the same balance between principle, practicality, and restraint which characterized the UKSC's constructed standard in *Miller/Cherry*.¹¹⁴ The rhetorical crux of the dissent is a distinctly Wechslerian indictment of the majority for "abdicat[ing]" its duty "to remedy a constitutional violation because it thinks the task beyond judicial capabilities."¹¹⁵ These similarities between Justice Kagan's dissent and the UKSC's opinion in *Miller/Cherry* only reinforce the conclusion that, although not in direct conversation, *Miller/Cherry* and *Rucho* are engaging the same fundamental questions.

Where *Miller/Cherry* brushed off concerns about manageability, *Rucho* dwelt on them at length. Where *Miller/Cherry* looked to "constitutional principles" in order to define the bounds of executive power, *Rucho* looked to text in order to impose careful constraints on judicial discretion. And where *Miller/Cherry* embraced the judiciary's duty "to determine the legal limits of the powers conferred on each branch of government," *Rucho* refrained from intervening with legislative redistricting out of concern for its institutional legitimacy. Wechsler won the day in Britain, while Bickel clearly triumphed in the United States.

* * *

supplies us with the legal tools to enable us to reason to a solution."'). Indeed, the immediate political context and the high stakes of Brexit seem to have played a role in the thinking both of the UKSC and the Scottish Inner House. See *id.* at [57] ("Such an interruption in the process of responsible government might not matter in some circumstances. But the circumstances here were, as already explained, quite exceptional."); *Cherry v. Advocate Gen.* [2019] CSIH 49, [91] (opinion of Lord Brodie) ("[W]hen the [procedural] manoeuvre is quite so blatantly designed 'to frustrate Parliament' at such a critical juncture in the history of the United Kingdom I consider that the court may legitimately find it to be unlawful." (emphasis added)); see also Spadijer, *supra* note 7 (critiquing what he called the UKSC's "Brexit-is-Different jurisprudence").

¹¹³ See *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

¹¹⁴ See *id.* at 2516 ("Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases. . . . [The lower courts' standard] invalidates the most extreme, but only the most extreme, partisan gerrymanders.").

¹¹⁵ *Id.* at 2509.

To be sure, there are real and salient differences between the legal contexts of *Miller/Cherry* and *Rucho*, most notably the absence of a constitutional text on which the UKSC could have based its standard.¹¹⁶ But for the *Rucho* Court, text was not an end in and of itself; rather, text begets restraint which begets the ultimate object of concern: legitimacy. Those concerns about restraint and legitimacy were just as implicated in *Miller/Cherry* as they were in *Rucho*—indeed, many commentators have framed their criticisms of *Miller/Cherry* in precisely those terms.¹¹⁷ Furthermore, the distinct similarities between the UKSC’s decision in *Miller/Cherry* and Justice Kagan’s dissent in *Rucho* confirm that the differences between the two cases depend not on geography but on jurisprudential values.

Professor Louis Michael Seidman has written that the political question doctrine is the natural result of judges justifying their response to “the possibility of unmediated freedom” to “do what the Constitution commands” or not.¹¹⁸ British and American attempts at that justification are shaped by a set of norms and values common to both countries. Although they sit on different sides of the Atlantic, the U.K. and U.S. Supreme Courts speak the same legal language when it comes to questions of justiciability.

Miller/Cherry, then, is much more than a curiosity from across the pond. The stark contrast between *Miller/Cherry* and *Rucho* illustrates a divergence in priorities: *Miller/Cherry*’s Wechslerian duty to decide versus *Rucho*’s Bickelian institutional humility. Both principles are valid and indeed valuable—each is implicated in every instance of judicial review, and each inevitably tugs on the judge charged with deciding how

¹¹⁶ Another salient difference is the vastly different potential of each case to spawn future litigation. There was little worry that *Miller/Cherry* would open the floodgates to challenges to prorogation, an infrequent and (usually) uncontroversial parliamentary procedure. Indeed, the UKSC itself wrote that the case “arises in circumstances which have never arisen before and are unlikely ever to arise again. It is a ‘one off.’” *Miller/Cherry*, [2019] UKSC 41 at [1]. By contrast, finding that legislative districts are challengeable under the Fourteenth Amendment would almost certainly have unleashed a barrage of time- and fact-intensive gerrymandering challenges both in the immediate wake of the decision as well as every ten years thereafter.

¹¹⁷ See, e.g., Finnis, *supra* note 7, at 18 (calling for “a change of heart, a reconsideration of what it is to exercise a truly judicial power”); Spadizer, *supra* note 7 (“[L]egalisation of political issues may be constitutionally inappropriate and become fraught with risk, not least for the judiciary. Oh, how things quickly change under our new Brexit-is-Different jurisprudence.”); Yowell, *supra* note 7 (“The path taken in *Miller (No 2)* leads not only to politicisation of the judiciary but to court-driven polarisation of politics.”).

¹¹⁸ Seidman, *supra* note 42, at 465, 472.

to proceed.¹¹⁹ Yet the fact that the dilemma is omnipresent only means that a judge must *choose* in every case which value to prioritize.¹²⁰ In two politically fraught cases decided not three months apart, the two highest courts of the Anglo-American world made different choices. The transatlantic juxtaposition of these two decisions not only illuminates the argumentative tactics and jurisprudential priorities of the respective courts—it also lays bare difficult questions about judicial review and our conceptions of the judicial role more broadly. And in a time of heightened attention to what a “properly judicial role” even is, the unique perspective offered by this juxtaposition is more valuable than ever.

¹¹⁹ Indeed, Bickelian or Wechslerian thought is not limited to the political question doctrine and can shape the resolution of other, nominally distinct justiciability questions. For instance, a divided panel of the D.C. Circuit recently sounded a distinctly Bickelian note in its decision that the House Judiciary Committee lacked standing to enforce a subpoena of former White House Counsel Don McGahn. *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331, 2020 WL 1125837 (D.C. Cir. Feb. 28, 2020), reh’g granted, *U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020). Writing for the court, Judge Griffith expressed anxiety about the counter-majoritarian difficulty, writing that “[the] rules must be made by the people’s politically accountable representatives, not by life-tenured judges,” *McGahn*, 2020 WL 1125837 at *2, and he doubted that courts possessed the institutional competence to “micromanage sprawling and evolving interbranch information disputes.” *Id.* at *6. He worried about the legitimacy of the courts, fearing that “[i]f we throw ourselves into ‘a power contest nearly at the height of its political tension,’ we risk seeming less like neutral magistrates and more like pawns on politicians’ chess boards.” *Id.* at *4 (quoting *Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring in the judgment)). And, much like the Supreme Court’s concern about unbounded judicial discretion in *Rucho*, Judge Griffith fretted about opening the floodgates to cases in which “we would have few authorities to guide us” and “sparse constitutional text,” with the upshot that the courts would “be forced to supervise the branches [and] scrutinize their asserted constitutional interests.” *Id.* at *5. This, however, is precisely the task taken up by the UKSC in *Miller/Cherry*: divining a standard from “asserted constitutional interests” and wielding it to “supervise the branches.” See *supra* notes 81–89 and accompanying text.

¹²⁰ Indeed, the same judge may prioritize different approaches in different cases. For instance, Justice Breyer, who joined Justice Kagan’s Wechslerian dissent in *Rucho*, literally quoted Alexander Bickel to argue that the Court should have declined jurisdiction in his dissent in *Bush v. Gore*. 531 U.S. 98, 156–57 (2000) (Breyer, J., dissenting).