The case of the prorogations and the political constitution

THE CASE OF PROROGATIONS AND THE POLITICAL CONSTITUTION

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ABSTRACT. *In R (Miller) v Prime Minister (No. 2), the UKSC invalidated an attempted prorogation of Parliament, ostensibly because it was as an unjustified violation of the principles of Parliamentary sovereignty and government accountability. However, this article argues that the true basis of the Court's decision was different: the court enforced what it perceived to be a constitutional convention sharply limiting the prerogative power to prorogue Parliament. This is a radical departure from the longstanding position of both courts and most scholars, which classified conventions among the rules of a political constitution that could not be enforced by the courts. Despite the Court's description of its decision as a "one-off", its reasoning may have far reaching implications. The tactic of describing real or putative conventions as instantiations of legal principles circumscribing the Crown's prerogative powers can be used in future cases. Yet while the collapse of the distinction between the legal and the political constitutions would be a major constitutional innovation, the fact that a judicial decision would result in such innovation is hardly as*

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shocking as the critics of Miller (No. 2) have suggested. In contrast with legal systems where the constitution is entrenched, United Kingdom's courts shape its constitutional law, as they always have, subject to Parliamentary supervision. If their ability to do so is a concern — and perhaps it should be, both to avoid judicial error and to limit the odds of the judiciary being dragged into damaging episodes of "constitutional hardball" — the solution may well be to codify and entrench the constitution.

KEYWORDS: *Prerogative, prorogation, conventions, judicial power, United Kingdom.*

I. INTRODUCTION

The decision of the Supreme Court of the United Kingdom (UKSC) that invalidated the prorogation of Parliament[1] during the run-up to the United Kingdom's then-looming exit from the European Union is likely to have legal consequences that will far outlast the immediate issue. Some commenters, indeed, have compared it to perhaps the most canonical decision of the Supreme Court of the United States

1 *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 (*Miller No. 2*).

and to arguably the second-most anti-canonical,[2] as well as to other crucial cases.[3]

To be sure, such comparisons can be misleading, and forecasts, hazardous.[4] As I shall explain, *Miller No. 2* itself departed quite radically from a very recent and related decision.[5] It might in turn be disregarded in the future. The UKSC itself suggested that the case was the result of "circumstances which have never arisen before and are unlikely ever to arise again. It is a 'one off'",[6] which might inspire thoughts of another American analogy: *Bush v Gore*.[7]

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[2] See respectively Simon Lee, "The Supremes' Seventh: Dominant or Diminished?" (*UK Constitutional Law Blog*, 26 September 2019) <https://ukconstitutionallaw.org/2019/09/26/simon-lee-the-supremes-seventh-dominant-or-diminished> (comparing *Miller No. 2* to *Brown v Board of Education*, 347 US 483 (1954)) and Danny Nicol, "Supreme Court Against the People" (*UK Constitutional Law Blog*, 25 September 2019) <https://ukconstitutionallaw.org/2019/09/25/danny-nicol-supreme-court-against-the-people/> (comparing *Miller No. 2* to *Lochner v New York*, 198 US 45 (1905)). On the notion of the "anticanon" in US constitutional law, see Jamal Greene, "The Anticanon" (2011) 125 Harvard L Rev 379; the most anti-canonical decision of the US Supreme Court is surely *Dred Scott v Sandford* 60 US 393 (1857).

[3] Anurag Deb, "A Constitution of Principles: From Miller to Minerva Mills" (*UK Constitutional Law Blog*, 1 October 2019) <https://ukconstitutionallaw.org/2019/10/01/anurag-deb-a-constitution-of-principles-from-miller-to-minerva-mills/> (comparing *Miller No. 2* to *Minerva Mills v Union of India*, 1981 SCR (1) 206, 1980 AIR SC 1789).

[4] See Edward Willis, "The United Kingdom Supreme Court's Judgment in *Miller No 2*" [2019] NZLJ 352, 355 (predicting that "[t]he direct impact [of *Miller No. 2*] on constitutional jurisprudence in the foreseeable future is … likely to be limited".)

[5] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 (*Miller No. 1*).

[6] *Miller No. 2* (n 1) [1].

[7] 531 US 98, 109 (2000) (asserting that the court's reasoning "is limited to the present circumstances"). See also Paul Yowell, "Is Miller (No 2) the UK's Bush v Gore?" (*UK Constitutional Law Blog*, 7 October 2019) (drawing the same analogy, but on a different basis).

Yet judicial decisions are not supposed to be "one offs". Lord Mansfield famously said that "[t]he law does not consist of particular cases but of general principles, which are illustrated and explained by these cases",[8] and *Miller No. 2* itself, although it does not refer to *Bembridge*, seems to embrace this view of the law wholeheartedly.[9] If so, then the principles that *Miller No. 2* illustrates and explains must be capable of wider application. It seems glib to predict that they will never be applied.

These principles deserve careful consideration. I shall focus on one of them: the erasure of the heretofore seemingly bright line between legal and political constitutionalism. To the chagrin and indeed the fury of some commenters, and notwithstanding the denials of others, *Miller No. 2* opens the way for courts to enforce norms that have long been thought, and judicially said to be, beyond the reach of judicial application. This may be—and has been—said to be a radical constitutional innovation, upsetting the structure of Westminster constitutionalism as it has been understood for well over a century, at a minimum. Yet, not unlike a decision of the Supreme Court of Canada (SCC) that has, or so I have argued, a similar effect,[10] it does so without acknowledging its

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[8] *R v Bembridge* (1783) 3 Doug 327, 332, 99 ER 679 (KB).

[9] Martin Loughlin, "The Case of Prorogation: The UK Constitutional Council's Ruling on Appeal from the Judgment of the Supreme Court" *Policy Exchange* (London 2019) <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf> (Arguing that the UKSC "claims that, rather than consisting of a set of rules and practices, the British constitution rests on some overarching framework of constitutional principles of which the Court acts as guardian").

[10] *Reference re Senate Reform* 2014 SCC 32, [2014] 1 SCR 704. See Léonid Sirota, "Immuring Dicey's Ghost: The Senate Reform Reference and Constitutional Conventions" (2020) 51 Ottawa L Rev 313.

unorthodox approach to the political constitution. This confuses matters, not only for those of us trying to understand the decision, but also for the UKSC itself.

My aim in this article is primarily to clear up some of the confusion about whether, and how, *Miller No. 2* enforces, and makes it possible in the future to enforce, norms of the political constitution. I also venture a response to the concerns that this has prompted. I begin by briefly describing in Part II the concept of political constitutionalism and its separation from legal constitutionalism, first in scholarship and second in the leading judicial decisions before *Miller No. 2*. Part III reviews *Miller No. 2* itself, insofar as the UKSC's reasoning is relevant to my purposes. In Part IV, I explain why this reasoning is not consistent with the orthodox understanding of the political constitution, arguing notably that the UKSC enforced a putative constitutional convention limiting the prerogative power of prorogation. Part V examines the lessons to be drawn from the UKSC's decision in relation to the future of the political constitution, the perils of judicial enforcement of constitutional conventions, and the problems of an uncodified and unentrenched constitution. Part VI concludes with the suggestion that the codification and entrenchment of the United Kingdom's constitution is the appropriate response to the problems that the UKSC's ruling in *Miller No. 2* responds to, and those which it itself reveals.

Before proceeding further, it may be useful to confess to my own heterodoxy in the matters discussed below. I have long argued that the generally accepted view about the separation of the legal and the political constitutions was misguided. More specifically, I have advocated judicial enforcement of constitutional conventions, albeit subject to considerations of justiciability and, where relevant, to constraints imposed by

constitutional text.[11] My assessment of *Miller No. 2* should be read, and—for the more orthodox readers—discounted, accordingly. As will be apparent, however, this assessment is by no means uncritical.

II. THE TWO CONSTITUTIONS

The idea that constitutions of the Westminster type consist of two types of rules, legal and political, is widely accepted, by legal scholars as well as by the courts; or at least it was until *Miller No. 2*. I briefly introduce both the academic and the judicial views below, beginning with the former, which in my view have influenced the latter rather more than the reverse.

The Separation of Legal and Political Constitutionalism

The starting point here, as on so many issues in constitutional law, is the work of A.V. Dicey. As he defines it, the constitution consists of all the "rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state".[12] In the United Kingdom's constitution—and so in others that follow its model—there must, however, be distinguished among these rules two categories "of a totally distinct character".[13] One consists of legal rules, either enacted or articulated by the courts, which can be either subject to amendment by ordinary legislation (as all the legal

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[11] See Léonid Sirota, "Towards a Jurisprudence of Constitutional Conventions" (2011) 11 OUCLJ 29; Léonid Sirota, "The Supreme Court and the Conventions of the Constitution" (2017) 78 SCLR (2d) 31; Sirota, "Dicey's Ghost" (n 10).

[12] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915).

[13] Ibid 23.

constitutional rules in the United Kingdom are, in principle) or entrenched and subject to special amending procedures (as some legal constitutional rules are in Canada, Australia, and even New Zealand[14]). This is constitutional law, or the legal constitution. The other category of constitutional rules is made up of conventions. This is the political constitution. In contrast to the legal constitution, which can and must be applied by the courts like any law, the political constitution is outside of the judicial remit.

Dicey believed that conventions "are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown)"—that is to say, powers that can be exercised "without the necessity for applying to Parliament for new statutory authority" or, in other words, the royal prerogative—"ought to be exercised".[15] This arguably is an exaggeration. For example, Geoffrey Marshall pointed out that conventions regulate "powers conferred on all major governmental persons and agencies".[16] Nevertheless, it is true and important for my argument below that some key conventions do indeed regulate the exercise of prerogative powers. This is the case, in particular, of conventions having to do the appointment of the Prime Minster and other ministers and with the Crown's duty to take ministerial advice, as well as the Crown's duty to assent to bills.

Other scholars have, for the most part, echoed Dicey's views, endorsing the separation between the legal and the political constitutions and arguing that the courts cannot and

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14 See Electoral Act 1993 (NZ) s 268.

15 Dicey (n 12) 413-14.

16 Geoffrey Marshall, "What Are Constitutional Conventions?" (1985) 38 Parliamentary Affairs 33, 33.

should not attempt to make it their business to enforce the latter. One influential treatment, relied on by both the SCC[17] and the UKSC,[18] is that of Colin Munro, who argued that there exists a firm distinction between the law of the constitution and conventions, and moreover that the differences between legal and conventional rules are such that the latter can by no means be transmuted into the former.[19] Other defenders of the orthodox position have included Marshall in the United Kingdom, and Eugene Forsey[20] and Adam Dodek[21] in Canada.

To be sure, support for the Diceyan view is not unanimous. Perhaps its best known critic has been TRS Allan,[22] but others too have questioned the rigidity of the line Dicey and his followers have drawn between law and convention, both at the level of theory and by pointing out instances of judicial enforcement of conventions.[23] However, these views are, or at least were, a minority current. (In saying so, I do not mean to

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17 *Re: Resolution to amend the Constitution* [1981] 1 SCR 753, 783.

18 *Miller No. 1* (n 5) [146].

19 Colin R Munro, "Laws and Conventions Distinguished" (1975) 91 LQR 218

20 Eugene A Forsey, "The Courts and The Conventions of The Constitution" (1984) 33 UNB LJ 11.

21 Adam M Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference" in J Cameron & B Ryder, (eds) (2011) 54 SCLR (2d) 117.

22 TRS Allan, "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case" (1986) 45 Cambridge LJ 305; TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) ch 2.

23 See Fabien Gélinas "Les conventions, le droit et la Constitution du Canada dans le renvoi sur la 'sécession' du Québec : le fantôme du rapatriement" (1997) 57 R du B du Québec 291; Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (2d edn, OUP 2014); Farrah Ahmed, Richard Albert, and Adam Perry "Judging Constitutional Conventions" (2019) 17 Int'l J Const L 787; Farrah Ahmed, Richard Albert, and Adam Perry "Enforcing Constitutional Conventions" (2020) 17 Int'l J Const L 1146.

disparage these views: as noted above, I agree with them.) The orthodox position was, and perhaps still is, the Diceyan one. It is also the one that had judicial imprimatur.

The Political Constitution and the Courts

Prior to *Miller No. 2*, the leading case expressing the orthodox position on the separation of the legal and the political constitution was the *Patriation Reference*, a set of opinions delivered by the SCC on the ability of the Houses of the Parliament of Canada to secure constitutional amendment without provincial consent. The SCC was asked to pronounce on this issue as a matter both of law and of convention, and did so, despite argument by the Canadian government that the conventional aspect of the question was not justiciable. The SCC took the view that the Houses of Parliament were free to act unilaterally as a matter of law, but that substantial provincial consent was required by convention.

The majority on the legal question rejected the argument "that a convention may crystallize into law"[24] that could be enforced by the courts. Echoing Dicey, it adhered to a sharp distinction between legal and conventional rules. Even common law rules are not analogous to conventions: they "are the product of judicial effort, based on justiciable issues which have attained legal formulation and are subject to modification and even reversal by the courts which gave them birth".[25] Conventions, meanwhile, are "political in inception" and, as a result, their "very nature" makes them incapable of "legal enforcement".[26] No "common law of constitutional law, but

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24 *Patriation Reference* (n 17), 774.

25 Ibid 775.

26 Ibid 774-75.

originating in political practice" exists, because "[w]hat is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute".[27]

The dissenting opinion on the legal question is also worth mentioning. Without directly contradicting the majority on the issue of "crystallization" of conventions into law, the dissent would have found that the federal principle imposed legal limits on the Houses' ability to unilaterally seek constitutional amendment. The dissent noted that courts, "in addition to dealing with cases involving alleged excesses of legislative jurisdiction, have had occasion to develop legal principles based on the necessity of preserving the integrity of [Canada's] federal structure".[28] The SCC had to do so here, to prevent the Houses from "perverting the recognized resolution method of obtaining constitutional amendments by the Imperial Parliament for an improper purpose".[29] If allowed to proceed, the Houses could reduce provincial powers without provincial consent, and so to "strike[] at the basis of the whole federal system".[30]

For its part, the majority on the conventional question took note of the fact that courts had previously "recognized" conventions "to provide aid for and background to constitutional or statutory construction".[31] Here, of course, no properly legal issue was involved, but the majority was undeterred, reassuring itself that it could recognize relevant

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27 Ibid 784.

28 Ibid 821.

29 Ibid 846.

30 Ibid 848.

31 Ibid 885.

conventions without enforcing them.[32] In the course of "recognizing" the conventions applicable to constitutional amendment in Canada, the majority adopted Sir W. Ivor Jennings' test for determining when a convention exists: "We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?"[33] The majority found that a convention requiring "substantial",[34] but not unanimous, provincial consent to constitutional amendment existed, being grounded in the federal principle and supported by multiple precedents.[35]

The combined effect of the two majority opinions was a statement that, so far as the legal constitution was concerned, the Houses were free to request a constitutional amendment without provincial consent, but that doing so was contrary to the requirements of the political constitution. Ostensibly, the courts would not, and could not, enforce the requirements of the political constitution. Yet merely setting them out, as the SCC did, arguably amounted to a form of enforcement.[36] After the delivery of the *Patriation Reference*, the federal government sought the agreement of the provinces to its project, which it had to modify in order to gain the support of nine of the ten.

The SCC subsequently took up idea that fundamental constitutional principles could produce legal effects, including

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32 Ibid.

33 Sir W Ivor Jennings, *The Law and the Constitution* (5th edn University of London Press 1959) 136.

34 *Patriation Reference* (n 17) 905.

35 But see John Finnis, "Patriation and Patrimony: The Path to the Charter" (2015) 28 Can J Law & Jur 51, 73 (arguing that the "Supreme Court's majority … *made up* a convention of substantial provincial concurrence to replace the actual convention of unanimous concurrence" (emphasis in the original)).

36 Heard (n 23) 223; Sirota, "Supreme Court" (n 11) 42.

by limiting the legal freedom of action of political actors, and even by serving to limit the scope of and invalidate legislation.[37] However, it has never used this argument to effectively enforce constitutional conventions.[38]

Instead, in the *Senate Reference*, the SCC resorted to novel terminology, speaking of "constitutional architecture" to obscure the fact that it was dealing with conventions. Relevantly for the *Senate Reference*, "the powers of the Senate and the method of selecting Senators" entrenched by section 42(1)(b) of the *Constitution Act, 1982* are partly defined by conventions which require the Senate to defer to the House of Commons and make senatorial appointments the Prime Minister's prerogative. Instead of explicitly saying that these conventions would be undermined by legislative change allowing for ostensibly "consultative" elections to the Senate, the SCC said that such change would interfere with the constitution's "architecture", which it defined as consisting of "[t]he assumptions that underlie the [constitutional] text and the manner in which the constitutional provisions are intended to interact with one another".[39] As I argue in detail elsewhere, in the Canadian context, the assumptions of the constitutional text's framers and their intentions as to the interaction between constitutional provisions include conventions which the framers correctly expected to arise or of which they were aware.[40]

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[37] *Reference re Manitoba Language Rights* [1985] 1 SCR 721; *Reference re Remuneration of Judges of the Provincial Court (PEI)* [1997] 3 SCR 3; *Reference re Secession of Quebec* [1998] 2 SCR 217; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [23].

[38] See Sirota, "Supreme Court" (n 11) 39-42 for a discussion of the cases.

[39] *Senate Reference* (n 10) [26].

[40] Sirota, "Dicey's Ghost" (n 10).

As for the UKSC, it endorsed the SCC majority's view of the separation between law and convention in *Miller No. 1*. The main issue there was whether the approval of the Westminster Parliament and of the devolved legislatures of Scotland, Northern Ireland, and Wales was required before the UK government could serve notice of its intention to leave the European Union. So far as the devolved legislatures, especially that of Scotland, were concerned, one of the arguments for the proposition that their approval was required relied on the so-called Sewel convention, pursuant to which the UK Parliament "would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature".[41] Although originally purely political, this convention had been codified in the Scotland Act.[42]

However, the UKSC—unanimous on this point—took the position that it was not its role to address the potential applicability of the Sewel Convention, including that of its statutory version. That was because "[i]t is well established that the courts of law cannot enforce a political convention".[43] The political and the legal are distinct realms, and the "operation or scope" of a convention, being "determined within the political world",[44] are not matters for the courts; any remedy for breach must be a political one. For these propositions, the UKSC relied in part on the majority opinions on both the legal and the conventional questions in the *Patriation Reference*, as well as the dissenting one on the conventional question.[45] It further echoed these opinions by adding that "[j]udges … are neither the

41 *Miller No. 1* (n 5) [138].

42 Scotland Act 1998 (UK), s 28(8).

43 *Miller No. 1* (n 5) [141].

44 Ibid [146].

45 Ibid [141]-[143].

parents nor the guardians of political conventions; they are merely observers".[46] But the UKSC was, in reality, more circumspect than the SCC, since it chose not to opine on the effect of the Sewel convention at all, instead of relying on the distinction, which the SCC accepted, between "recognizing" and "enforcing" a convention.

There is a further difference in the treatment of conventions between the *Patriation Reference* and *Miller No. 1*, which ostensibly underscores the distinction between the legal and the political constitutions, but may actually undermine it. In considering the effect of the "recognition" of the Sewel Convention by the Scotland Act, the UKSC concluded that, by incorporating it into statute, "the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention".[47] Recall that in the *Patriation Reference* the SCC held that the source of the rule—whether it was expressed in statutory or constitutional text—was what mattered for distinguishing law and convention. On this view, incorporation into a statutory provision would have "crystallised" the Sewel Convention into law. The UKSC in effect holds that the source of a rule—statute or convention—is less material than "the nature of the content"[48] of that rule. A convention's nature is such that it belongs to the political realm even when expressed in an ostensibly legal form.

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46 Ibid [146].

47 Ibid [148].

48 Ibid.

III. *MILLER NO. 2*

Unlike in the cases discussed in the previous Part, there is no substantive discussion of constitutional conventions in *Miller No. 2*. The central issue there was whether the Prime Minister's advice that the Queen prorogue Parliament for a five-week period was unlawful, either because it interfered with the constitutional principles of Parliamentary sovereignty and government accountability to Parliament, or because it had an improper purpose. However, in order to reach this issue at all, the courts first had to decide whether the matter was justiciable.

The Divisional Court in England and the Inner House of the Court of Session in Scotland gave contradictory answers to this question,[49] which space concerns prevent me from discussing. These decisions were appealed to the UKSC. On appeal, the arguments against justiciability were that the substantive issue was subject to political accountability rather than judicial scrutiny and that there were, in any case, no legal criteria by which the lawfulness of advice to prorogue Parliament could be determined.[50]

The UKSC rejected these contentions. The fact that the decision it was asked to review had been made by a political actor, had political resonance, and was potentially subject to political accountability did not, without more, mean that courts should refrain from reviewing its legality. Separation of powers would only be enhanced "by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper

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[49] Respectively *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB); [2019] 4 All ER 299 and *Cherry v Advocate General for Scotland*, [2019] CSIH 49; 2019 SLT 1097.

[50] *Miller No. 2* (n 1) [28].

functions".[51] Crucially, the UKSC framed the issue as being not about the legality of an exercise of the prerogative power of prorogation *within* its proper scope, for which legal criteria may by hard to come by, but as being about the *extent* of the power of prorogation. The law circumscribes all prerogative powers, and must necessarily supply criteria for demarcating their boundaries.

The question the UKSC thought it had to address was the whether the prerogative power to prorogue Parliament extended so far as to authorize a prorogation in the particular circumstances of the case. The UKSC held that it did not. The scope of the prerogative power to prorogue Parliament, like that of any prerogative power, "has to be compatible with common law principles", including "the fundamental principles of our constitutional law".[52] While the UK's constitution is not codified and consists of "common law, statutes, conventions and practice", these principles "are enforceable by the courts in the same way as other legal principles".[53] The two most relevant ones in this cases Parliamentary sovereignty and the accountability of government to Parliament.

Parliamentary sovereignty means not only "that laws enacted by the Crown in Parliament are the supreme form of law in our legal system",[54] but also that the executive cannot get in the way of Parliament "exercis[ing] its legislative authority".[55] An absence of legal limits on the executive's power to prorogue Parliament would be incompatible with

51 Ibid [34].

52 Ibid [38].

53 Ibid [39].

54 Ibid [41].

55 Ibid [42].

Parliamentary sovereignty in this sense, because Parliament could be prevented from legislating. The same goes for the accountability of the government to Parliament, "through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make".[56] Long-term or, a fortiori, unlimited prorogations would allow the executive to escape accountability.

There is no bright-line limit between what is and what is not lawful. Rather:

> a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation 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.[57]

It follows that, while a "short period [of prorogation] which is customary"[58] or consistent with "modern practice"[59] is acceptable because it does not meaningfully interfere with Parliament's legislative power or its scrutiny of the executive, the longer Parliament stands prorogued, the more these principles are put at risk. Whether a given prorogation has this effect, and whether, if so, a reasonable justification has been provided for it, are questions of fact of "no greater difficulty than many other questions of fact which are routinely decided

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56 Ibid [46].

57 Ibid [50].

58 Ibid [48].

59 Ibid [45].

by the courts".[60] The court must decide these questions "with sensitivity to the responsibilities and experience of the Prime Minister, and with a corresponding degree of caution",[61] but it can and must decide them.

The UKSC concluded that the prorogation challenged in *Miller No. 2* would "of course"[62] interfere with Parliamentary sovereignty and the accountability of government. It stressed that "[t]his was not a normal prorogation in the run-up to a Queen's Speech" but an extraordinarily long and disruptive one.[63] The justifications advanced on behalf of the Prime Minister were not persuasive, especially in light of the evidence given by a former Prime Minister, Sir John Major, who explained that "he ha[d] never known a Government to need as much as five weeks to put together its legislative agenda".[64] Absent an explanation of why things stood differently this time, the UKSC found that the prorogation was unlawful and void.

IV. THE HETERODOXY OF *MILLER NO. 2*

Two aspects of the UKSC's reasoning in *Miller No. 2* are important to highlight for my purposes. First, the UKSC took the position that the case before it was concerned with demarcating the bounds of a prerogative power rather than with the way in which the power was exercised. And second, while the UKSC said that its articulation of the limits of the prerogative power of prorogation was based on legal

60 Ibid [51].

61 Ibid.

62 Ibid [56].

63 Ibid.

64 Ibid [59].

principles, its reasoning suggests that in reality it adverted and gave effect to a (putative) constitutional convention.

Limits or Mode of Exercise?

The existence of a prerogative power to prorogue Parliament was not in question before or in *Miller No. 2*. This power was recognized in seemingly unqualified terms by the Fixed-term Parliaments Act 2011,[65] and it had not been supposed that legal limits on it existed, whatever may have been the case as a matter of political morality or even convention.[66] One might have thought that the issue in *Miller No. 2* was whether this unquestioned prerogative power had been invalidly exercised, for example for an improper purpose, as the Inner House of the Court of Session had found in one of the decisions under appeal.[67]

As explained above, however, the UKSC decided the case on a different basis, holding that the power to prorogue Parliament had previously unspecified limits, and that the issue was whether the Prime Minister had stayed within these limits. This gave the question the appearance of a legal one. In the UKSC's eyes, at least, the framing obviated the concern that legally identifiable criteria on which to review the exercise of a prerogative power such as that to prorogue Parliament were not easily to be found. Ostensibly, instead of querying the Prime Minister's motives for proroguing Parliament, the UKSC

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65 Fixed-term Parliaments Act 2011, 2011 c 14, s 6(1) (UK).

66 See Steven Spadijer, "*Miller No 2*: Orthodoxy as Heresy, Heresy as Orthodoxy" (*UK Constitutional Law Blog*, 7 October 2019): <https://ukconstitutionallaw.org/2019/10/07/steven-spadijer-miller-no-2-orthodoxy-as-hersey-hersey-as-orthodoxy/>.

67 *Cherry* (n 49).

verified his compliance with the law. The former inquiry may appear political; the latter seems more obviously legal.

Yet the critics of *Miller No. 2* have not been persuaded. Paul Yowell considers that the UKSC "elided the distinction between existence and exercise [of a prerogative power] by sleight of hand",[68] and Aileen McHarg's comment is to the same effect.[69] John Finnis points out that the standard for circumscribing the boundaries of the prerogative power of dissolution "by its own defining terms (frustrating effect, reasonable justification, sufficiently serious…) requires – or rather empowers! – the courts to examine the exercise and 'mode of exercise' while all the time protesting that they are not doing so, and are not making political judgments".[70] The distinction the UKSC attempts to draw is, indeed, unpersuasive, and will have far-reaching consequences. However, as I shall argue in the next section, this is not exactly for the reasons suggested by Professor Finnis.

Professor Finnis is right that the UKSC's approach fails on its own terms. Paul Craig's *defence* of the UKSC's judgment, in the most extensive scholarly comment on *Miller No. 2* published so far, is revealing. Professor Craig first insists that "[i]t was not a charade, nor a façade, [to suggest that the case was about limits] since articulation of the limits would perforce shape the decision as to manner of exercise".[71] Yet only a few

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[68] Yowell (n 2).

[69] Aileen McHarg, "The Supreme Court's prorogation judgment: guardian of the constitution or architect of the constitution?" (2020) 24 Edin L Rev 88, 93.

[70] John Finnis, "The Unconstitutionality of the Supreme Court's Prorogation Judgment" (2019) *Policy Exchange* <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf> [22].

[71] Paul Craig, "The Supreme Court, Prorogation and Constitutional Principle" [2020] Public L 248, 260.

pages later he explains that "[p]rorogation is a mechanism for ending one session of Parliament. The use of prorogation to silence a recalcitrant Parliament is an improper purpose. There is no normative foundation for the conclusion that a power directed towards closure should be able to be used to achieve a very different purpose".[72] The UKSC affected to avoid ruling whether the prorogation at issue was for an improper purpose.[73] Yet even a sympathetic reader is hard-pressed to see its decision as not doing just that. Another sympathetic observer and reader, Dean Knight, concedes that "the framing of the judicial task in terms of delineating the legal limits on the prerogative power, rather than an assessment of the propriety of its exercise … was … the judgment's biggest weakness: a cheeky, but perhaps understandable, attempt at smoke and mirrors", not to be taken at face value.[74]

As a matter of the general principles of judicial review, the distinction between reviewing the limits of a power and its mode of exercise is one without a difference. The exercise of a power (statutory or prerogative) for an improper purpose is just as invalid as the exercise of that power that is ultra vires in a narrow sense, no more and no less. The attempt to separate these problems is reminiscent of the futile quest for "true questions of jurisdiction" in Canadian administrative law.[75] By the same token, justiciability should be treated in the same way regardless of whether the issue is described as one concerning

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72 Ibid 262.

73 *Miller No. 2* (n 1), [53]-[54].

74 Dean R Knight, "Brexit, Prorogation and Popcorn: Implications of *Miller (No 2)* for New Zealand" (2020) 51 VUWLR 249, 258.

75 See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [65]-[66]; see also Knight (n 74) 258 ("It is almost the reinvention of the awful jurisdictional error charade that still infiltrates Australian administrative law").

the limits of a power or the mode of its exercise. As the UKSC itself recognized in *Miller No. 2*, the key question is that of the existence of a legally identifiable and judicially manageable "standard by reference to which the lawfulness of" the impugned executive action "is to be judged".[76] The question of the nature of the standard applied in *Miller No. 2* is the one to which I next turn.

Principle or Convention?

There is debate over whether *Miller No. 2* enforces a constitutional convention or some other norm of the political constitution and, if so, which one. Most commentators agree that the UKSC gave legal effect to a norm of executive accountability to Parliament,[77] while disagreeing both about whether or not that was a good thing and about the exact nature of that norm as either principle or convention. For my part, I shall argue that the UKSC enforced a more specific convention, namely the "custom" or "modern practice" of short prorogations, although this convention, in turn, gives effect to the principle of political accountability. Like the enforcement of any convention, this is a break with the orthodox view, which the UKSC endorsed as recently as in *Miller No. 1*, that the courts must not engage with conventions, not being their "parents" or "guardians".

Professor Craig argues that the UKSC enforced the principles of Parliamentary sovereignty and executive

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[76] *Miller No. 2* (n 1) [37].

[77] But see Timothy Endicott, "Making constitutional principles into laws" (2020) 136 LQR 175 (focusing on Parliamentary sovereignty, rather than executive accountability).

accountability to Parliament.[78] These principles, he insists, are legal ones: "the idea that Parliament should not be unduly precluded from exercising its legislative and scrutiny function is grounded in its status as the democratically elected voice of the people, and thus has the same normative root that denies any substantive or procedural limit to Parliament's power"[79]—that is, the orthodox, legal, understanding of Parliamentary sovereignty. Professor Craig goes on to consider the possibility that conventions are relevant to the issue, but his argument seems to be that the defenders of the prorogation ought to show that a convention making it appropriate exists, not that there is a convention limiting the executive's discretion to prorogue.[80] The limits on this discretion, in his view, exist as a matter of (legal) principle.

Many other comments on *Miller No. 2* concentrate on the role of the principle of executive accountability to Parliament alone. Mike Gordon argues that "the analysis of the legality of this specific suspension of Parliament focuses on the impact on the legislature's scrutiny and accountability functions", which he describes "an important … constitutional principle", but one "much less obviously legal" than Parliamentary sovereignty.[81] For their part, both Stephen Tierney and Steven Spadijer see *Miller No. 2* as enforcing as a matter of law the "principle" of "accountability", although both connect it to

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78 Craig (n 71).

79 Ibid 255.

80 See ibid 265 and Paul Craig, "Response to Loughlin's Note on Miller; Cherry" [2020] Public L 282, 285.

81 Mike Gordon, "The Prorogation Case and the Political Constitution" (*UK Constitutional Law Blog,* 30 September 2019) <https://ukconstitutionallaw.org/2019/09/30/mike-gordon-the-prorogation-case-and-the-political-constitution/>.

conventions—specifically, those of responsible government.[82] Mark Elliott too argues that "the [UKSC] took cognisance of the underlying constitutional reason or principle that underpins and animates the convention of accountability to Parliament" and enforce it as a legal principle.[83]

For others, *Miller No. 2* involved both principle and convention. Thus Philippe Lagassé, considers that "[i]t … transformed conventions about the executive's accountability to Parliament into a constitutional principle open to judicial enforcement".[84] Similarly, Martin Loughlin argues that *Miller No. 2* "converts political practices into constitutional principles, investing them with normative (and legal?) authority so as to assert the power to determine their meaning".[85] Meanwhile, for Adam Perry, a norm of "parliamentary accountability" (by which he means the accountability of the executive to Parliament) is a principle and a convention at once:[86] a principle

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[82] Stephen Tierney, "Turning political principles into legal rules: the unconvincing alchemy of the Miller/Cherry decision" (*Policy Exchange Judicial Power Project*, 30 September 2019) <http://judicialpowerproject.org.uk/stephen-tierney-turning-political-principles-into-legal-rules-the-unconvincing-alchemy-of-the-millercherry-decision/>; Spadijer (n 66).

[83] Mark Elliott, "Constitutional Adjudication and Constitutional Politics in the United Kingdom: The *Miller II* Case in Legal and Political Context" (2021) 16 European Constitutional L Rev 1, 8.

[84] Philippe Lagassé, "Taming the Crown in Court: Waning Executive Dominance in the United Kingdom" (*Policy Exchange Judicial Power Project*, 10 October 2019) <http://judicialpowerproject.org.uk/philippe-lagasse-taming-the-crown-in-court-waning-executive-dominance-in-the-united-kingdom/>.

[85] Martin Loughlin "A note on Craig on Miller; Cherry" [2020] Public Law 278, 280.

[86] Adam Perry, "Enforcing Principles, Enforcing Conventions" (*UK Constitutional Law Blog*, 3 December 2019) <https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/>.

because it is vague, and a convention due to its political origins. In short it is, he argues, a "conventional principle".[87]

By contrast, in their respective comments on *Miller No. 2*, Professor McHarg and Edward Willis argue that (in Professor McHarg's words) "the government's … duty to account to Parliament" is emphatically or (in Dr. Willis's) "quintessentially a matter of constitutional convention".[88] Similarly, Professor Yowell considers that in *Miller No. 2* the UKSC "legally enforced (in effect) a constitutional convention, namely accountability of the executive to Parliament".[89] However, he then uses a somewhat different formula, explaining that "executive accountability to Parliament is the subject of a cluster of long-standing constitutional conventions related to the principle of responsible government".[90] Indeed his use of the term "convention" may itself be unconventional, in that he deploys it to describe the source of the Crown's power to prorogue Parliament,[91] which is undoubtedly a matter of law. Professor Finnis, meanwhile, speaks somewhat vaguely of *Miller No. 2* as "transforming the conventions about prorogation", which he sees as an aspect of a broader principle of accountability, "into rules of law".[92] As will presently be apparent, I follow this approach, but with more precision.

Government accountability to Parliament, and especially to the House of Commons, is indeed a principle of the British and more generally of Westminster constitutions. However, as

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87 Ibid.

88 McHarg (n 69) 94 (the omitted word is "*conventional*"—emhphasized); Willis (n 4) 354.

89 Yowell (n 2).

90 Ibid.

91 Ibid.

92 Finnis, "Unconstitutionality"' (n 70) [14].

Professor Perry notes, "the act it prescribes – Parliament holding the executive to account – can be performed on a great many occasions in a great many generic ways".[93] For this reason, it is a mistake to describe government accountability as a convention. It is not a discrete constitutional rule, but a vast set of rules, operating at different times, in various settings, and connected to greater or lesser degrees to the high politics which the idea of government accountability to Parliament might intuitively evoke.

Some of the ways in which the government is accountable to Parliament are indeed governed by conventions, notably those of responsible government insofar as they dictate what must happen when a government loses the confidence of the House of Commons. Other aspects of government accountability, however, are given effect by rules that are not conventional. For example, standing orders of the House of Commons provide for questioning of the Ministers of the Crown, both by the House and by its committees.[94] Legislation (supplemented by Parliament's internal procedures) provides for Parliamentary scrutiny of delegated legislation.[95] Indeed, in the United Kingdom, the Fixed-term Parliaments Act has modified and so partly superseded the longstanding

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[93] Perry (n 86).

[94] See United Kingdom House of Commons, Standing Orders: Public Business, 2019, especially SO 22; compare House of Commons of Canada, Standing Orders, 2020, especially SO 37-39. For a discussion of the impact of Standing Orders on government accountability in another Commonwealth jurisdiction, see Phil Smith, "Shaking up the House: New rules for Parliament" (*RNZ*, 30 August 2020): <https://www.rnz.co.nz/national/programmes/the-house/audio/2018761395/shaking-up-the-house-new-rules-for-parliament>

[95] Statutory Instruments Act 1946, 1946 c 36 (UK); compare Statutory Instruments Act, RSC 1985, c S-22. For a discussion of the functioning of these statutes, see Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41 Dalhousie LJ 519, 562-69.

conventions of responsible government.[96] Besides, as Professor Craig has argued, in the United Kingdom,

> much of the case law concerning the deference/respect/weight that should be afforded to the executive or Parliament under the Human Rights Act 1998 is premised on the assumption that parliamentary accountability and responsibility warrant such restraint. … [P]arliamentary accountability when used in this manner … is central to the legal standard of review applied by the court. It is in that respect invested with legal relevance and dispositive of legal outcome.[97]

In short, it is a mistake to describe the accountability of the government to Parliament as a principle belonging solely to the political constitution—as, for example, Stephen Tierney does.[98] Conversely, however, it is also a mistake to deny that it has a conventional aspect.

More to the point, it would be a mistake to claim that the legal aspects of the accountability principle by themselves have much to say about the permissible length of prorogations. Perhaps an argument to the effect that they preclude extreme, more or less permanent, prorogations would be compelling, and indeed the UKSC raised this spectre in its reasons.[99] But, that hypothetical aside, the legal—and for that matter the conventional—aspects of the accountability principle do not dictate the acceptable length of prorogations.

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[96] For a discussion of the Act's effects on the conventions of responsible government, see Philip Norton, "The Fixed-term Parliaments Act and Votes of Confidence" (2016) 69 Parliamentary Affairs 3.

[97] Craig (n 71), 258-59.

[98] Tierney (n 82) ("Accountability is indeed central to our system of government but it is an amorphous constitutional concept with no legal source in prerogative, statute or common law").

[99] *Miller No. 2* (n 1) [42]-[43].

The Canadian example is instructive. In many ways, the Canadian rules implementing the principle of the accountability of the executive to Parliament are similar (which is not to say identical) to those applicable in the United Kingdom. Canadian governments are subject to conventions of individual and collective responsibility (which have not been modified by the Canadian parallel to the Fixed-term Parliaments Act[100]). They face questioning in Parliament (although there is no dedicated time for Prime Minister's questions). Their regulatory endeavours are scrutinized by Parliamentary committees (albeit not very effectively[101]). But there is no established practice of short prorogations in Canada.

Professor Craig cautions against reliance "on examples drawn from different Westminster-type systems" because they "cannot tell us what is regarded as an acceptable use of prorogation within a particular country, such as the UK".[102] But this objection, which is fair so far as it goes, only strengthens the point I am making here: the way in which the general principle of executive accountability is implemented in the context of prorogation, to the extent that it is at all, is highly contingent.

Thus, it is not enough to say that *Miller No. 2* simply enforces or gives effect to the principle (let alone convention) of executive accountability. What is at issue is not so much the principle, but one specific application of the principle. For this reason, Professor Craig's rejoinder to "[t]he claim that the [UKSC] illegitimately transformed a convention concerning parliamentary accountability into a legal norm"—that "[p]arliamentary accountability had legal salience within the

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100 Canada Elections Act, SC 2000, c 9, s 56.1.

101 See Neudorf (n 95).

102 Craig (n 71), 265.

fabric of judicial review prior to" *Miller No. 2*[103]—is beside the point. The general principle has both legal and conventional aspects, and the question is whether the application at issue in a given case is a matter of law or convention.

The UKSC in *Miller No. 2* presents its conclusions as deriving from the application of a standard according to which reasonable interference with principles of Parliamentary sovereignty and executive accountability is acceptable, while excessive impairment is not. However, its reasons suggest that what is really being applied is a rigid rule that limits the length of prorogations to that endorsed by the "custom" or "practice" to which it refers. This is because it is doubtful that any prorogation longer than the "customary" short ones would, or even could, ever be upheld.

Consider, first, that ordinary prorogations are simply deemed justified—the UKSC does not actually inquire into whether they are or can be. As Professor Craig observes, unlike "breaks or recesses", "prorogation is not required by representative democracy".[104] One might, therefore, wonder how resort to it could be justified at all, but the UKSC brushes such questions aside.[105] It peremptorily holds that "[t]he Prime Minister's wish to end one session of Parliament and to begin another will normally be enough in itself to justify the short period of prorogation which has been normal in modern practice. It could only be in unusual circumstances that any further justification might be necessary."[106] Indeed, it is difficult

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103 Ibid 259.

104 Ibid 267.

105 So does Professor Craig, writing that prorogation "exists for historical reasons. There is nothing wrong with historical tradition". ibid.

106 *Miller No. 2* (n 1) [51].

to imagine what these "unusual circumstances" might be, since no justification is apparently required.[107]

But consider, then, the case of an extended prorogation. Professor Craig defends the UKSC's decision to intervene and annul the prorogation against critics who argue that it simply assumed, without studying, its practical effects, by arguing that "the evidence demanded was unknowable when the court gave its judgment. … To lambast the court because it could not give detailed chapter and verse as to events that had not transpired is absurd."[108] Perhaps so—but this only suggests that rulings about the validity of a prorogation will always be made in a factual vacuum, and so result from a priori judgments about how long a prorogation can properly last.

A question raised by Professor Endicott lends further support to this conclusion. He asks: "even if the Prime Minister had submitted a witness statement, how could the court lend the binding legal force of its decision to the Justices' opinion on his manoeuvrings?"[109] Indeed, it is difficult to see a court approving, or simply giving the green light (which is bound to be perceived as approval) to what Professor Endicott himself describes as "machinations".[110] Nor should a court do so. This too suggests that a court should not and would not engage in a genuine assessment of the reasonableness of any justifications for prorogation offered by the executive.

What a court can do without implicating the sort of justiciability concerns referred to above,[111] and what the UKSC

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107 See also Craig (n 71) 268 ("the [UKSC] was clear that the normal practice of prorogation would not be subject to judicial oversight").

108 Ibid 270.

109 Endicott (n 77) 180.

110 Ibid 176.

111 See (n 76) and accompanying text.

seems to actually have done in *Miller No. 2*, is apply a bright-line rule that allows short prorogations but condemns any that are longer than usual. The application of such a rule does not require judges to engage in any difficult fact-finding or untoward political speculation. This precise rule, however, is not straightforwardly derived from the principle of executive accountability (or of Parliamentary sovereignty), as we have seen. Indeed, the UKSC does not say that it is.

Rather, the rule curtailing the permissible length of prorogation (if indeed it is a rule—a point to which I return below) is a convention. Like all conventions, it limits the discretionary power that a constitutional actor previously possessed as a matter of law, bringing the exercise of the actor's discretion into line with an important constitutional principle.[112] The legal rule, prior to *Miller No. 2*, was that the length of prorogations was at the discretion of the Prime Minister (in his or her conventional capacity as the Crown's responsible advisor). But, at least according to the UKSC, for the Prime Minister to advise a prorogation longer than usual would be inconsistent with constitutional principles, and Prime Ministers have recognised this and acted accordingly.

The UKSC's reasoning does not proceed explicitly along these lines, but it is consistent with the application of the Jennings test for establishing the existence of a convention. While the UKSC does not describe precedents in any detail, it observes that "a normal prorogation" is one that takes place "in

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[112] On conventions as rules limiting discretion, see Joseph Jaconelli, "The Nature of Constitutional Convention" (1999) 19 Legal Studies 24, 27; Sirota, "Constitutional Conventions" (n 11) 30. On conventions as bringing about a correspondence between the constitution as practised by political actors and prevailing constitutional values, see especially See WS Holdsworth, "The Conventions of the Eighteenth Century Constitution" (1932) 17 Iowa L Rev 161, 163.

the run-up to a Queen's Speech",[113] to give effect to "[t]he Prime Minister's wish to end one session of Parliament and to begin another".[114] Its consideration of the evidence of Sir John Major as to the process of preparing for a Queen's Speech and the time required to do so goes some way towards establishing that constitutional actors acknowledge the binding character of the rule. More precisely, this evidence—"unchallenged" as the UKSC makes a point of saying—shows that past constitutional actors recognized that there was no need or reason for prorogations that would be longer than usual.[115] Finally, the principles on which the UKSC purports to rely supply the reason for the conventional rule. While not a necessary corollary of the principle, the rule that prorogations must be short helps support the accountability of the executive to Parliament. It also reinforces, if not Parliamentary sovereignty in the orthodox sense, then, perhaps more accurately, the democratic principle itself. As Professor Endicott recognizes, "[t]he role of Parliament in the constitution and in the life of the country does indeed demand that Parliament can meet as appropriate".[116] A convention that limits the executive's ability to keep Parliament from meeting is a useful way of implementing this principle.

Thus, in substance, the UKSC's reasoning in *Miller No. 2* is oriented to identifying and enforcing a convention, without the judges saying this openly. Indeed, the language of *Miller No. 2* is suggestive, if not exactly transparent. The UKSC uses the same terminology to refer to the rule of short prorogations as it

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113 *Miller No. 2* (n 1) [56].

114 Ibid [51].

115 Ibid [59] ("Sir John's evidence is that he has never known a Government to need as much as five weeks to put together its legislative agenda").

116 Endicott (n 77) 178.

does to describe the fundamental convention of responsible government according to which the Crown acts on ministerial advice, speaking respectively of "modern practice" and "modern constitutional practice".[117]

As noted above, this is reminiscent of what the SCC did in the *Senate Reference*—more than of the approach taken by the dissenting opinion on the legal question in the *Patriation Reference* or the other cases in which the SCC enforced principles directly. The principles that are said to bear on the issue before the court do not speak to it directly, if indeed they speak to it at all. They are mediated by rules which would have been considered to belong to the realm of the political constitution and would have been regarded as outside of the purview of the courts on the approach that prevailed in the United Kingdom as recently as *Miller No. 1*.

V. THE LESSONS OF *MILLER NO. 2*

Miller No. 2 represented a repudiation of the orthodox understanding that the courts would not concern themselves with conventions. In this Part, I make three comments on this apostasy. First, despite the UKSC's attempt to limit its scope, it is not limited to the circumstances of *Miller No. 2*. Indeed, the UKSC's reasoning calls into question the survival of the distinction between the legal and the political constitutions. Second, *Miller No. 2* highlights the risk of judicial error when courts engage with conventions. And third, despite its heterodoxy and possibly mistaken outcome, *Miller No. 2* is not nearly as inconsistent with the United Kingdom's constitutional tradition as some of its critics would have us believe.

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117 *Miller No. 2* (n 1) [30], [51].

The End of the Political Constitution?

As noted above, the UKSC indicates that the circumstances of *Miller No. 2* are so unique that the case is a "one off".[118] Some of those who have defended the UKSC's decision have stressed its exceptional character too,[119] although others have demurred.[120] But the decisions of common law courts are not supposed to "one offs". As Jeremy Waldron argues, their not being so—their being, even when the court is confronted with a novel situation on which previously articulated law does not provide sufficient guidance, rendered "under the auspices of a general norm" that will not only be susceptible of future application but carry normative weight in future cases—is a requirement of the Rule of Law.[121] And whatever legal theory may have to say about this, as a practical matter, a judicial decision, especially that of an apex court, becomes available to prospective litigants who may find that its reasoning serves their purposes even though the court that made the decision would not have wished it to be deployed in the new circumstances.

The UKSC's reasoning in *Miller No. 2* can be used by future litigants to demand and by courts to grant judicial enforcement of conventions. As we have seen, the UKSC describes its decision as defining the limits of the prerogative

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118 Ibid [1].

119 See Gordon (n 81); Knight (n 74) 260 (arguing that "only a Supreme Court could issue a decision of this type and, then, only in remarkable circumstances. … [D]oomsayers – foretelling the floodgates opening to the judicialisation of the political and so forth – need not worry").

120 Craig (n 71) 257 (arguing that the UKSC "decided the case in accord with normal precepts of judicial reasoning").

121 Jeremy Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2011) 111 Michigan L Rev 1, 20.

power to prorogue Parliament through the application of fundamental legal principles. However, in reality, the purported delineation of the prerogative power is done by reference to and results in the enforcement of a (supposed) convention regulating the exercise of this prerogative power. A similar approach can be taken in other cases.

This is because the exercise of various other prerogative powers is also regulated by conventions. Convention requires the Crown to exercise most of its prerogative powers on ministerial advice, as indeed the UKSC recognized in *Miller No. 2*, although it purported to "express no view" on whether "Her Majesty was other than obliged by constitutional convention to accept that advice".[122] Convention also governs the Crown's exercise of its reserve powers—that is, the Crown's actions not undertaken on advice, the power to appoint a Prime Minister being probably the most significant of these. And in some cases, as in *Miller No. 2*, convention will not only require the Crown to act on Ministerial advice, but also circumscribe the advice that can be given.

In theory, future courts could follow *Miller No. 2* in enforcing the conventions channelling the exercise of the prerogative. To be sure, scenarios involving the breach of constitutional conventions, at least truly established conventions rather than dubious ones such as that which the UKSC effectively enforced in *Miller No. 2*, are quite hypothetical. But of course in *Miller No. 2* itself the UKSC was seemingly preoccupied with the quite hypothetical possibility of a prorogation of indefinite duration.[123] Perhaps the most dramatic, yet also plausible, example of an application of the

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122 *Miller No. 2* (n 1) [30].

123 Ibid [42]-[43]

Miller No. 2 reasoning would be a declaration as to the rules governing the selection, and (in consequence, or even in the alternative) the identity, of a Prime Minister following a contested transition of power, because the relevant conventions—obscure as some of them may be[124]—limit Her Majesty's prerogative power of appointing the Prime Minister. Another example would be a judicial declaration establishing limits on the Crown's power to refuse assent to a bill passed by the House of Commons and the House of Lords.

As these examples show, *Miller No. 2* calls into question the continued vitality of a political constitution "which classically emphasises political power and mechanisms of accountability".[125] Through the artifice of holding that the conventions that govern the exercise of prerogative powers reflect the principles that limit the scope of the Crown's prerogative as a matter of law, it gives the courts the power to enforce these conventions. These conventions are, or were, central to the political constitution—they feature, for example, in the SCC's description of the fundamental role of conventions in the *Patriation Reference*.[126] *Miller No. 2* subjects them to judicial control.

To be sure, not all constitutional conventions implicate the prerogative. Some govern the relationships between institutions other than the Sovereign, such as that between the

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[124] Rodney Brazier "Change of Prime Minister, anyone?" (*UK Constitutional Law Blog*, 1 July 2020) <https://ukconstitutionallaw.org/2020/07/01/rodney-brazier-change-of-prime-minister-anyone/> (explaining that in many cases where a Prime Minister is replaced otherwise than in consequence of an election "British citizens can do little more than rely on experts and commentators as the high priests of the mysteries to share their understandings").

[125] Gordon (n 81).

[126] *Patriation Reference* (n 17) 877-78.

Houses of Parliament,[127] or that between the government and the judiciary.[128] These are not directly affected by the UKSC's decision, and one might say that the distinctly political constitution lives on through them. The Sewel Convention at issue in *Miller No. 1* also belongs to this category, and thus the UKSC's decision in *Miller No. 2* is not incompatible with its actual holding, although it undermines the earlier case's orthodox rhetoric. But, while it still survives, the political constitution is much diminished as a result of *Miller No. 2*.

That said, while this development radically alters the way public lawyers should think about the constitution, it is likely to be less practically significant than some of the critics of *Miller No. 2* have supposed. Professor Finnis writes that

> there is now no category of high governmental responsibility and authority in any field, foreign or domestic, that is not open to litigious scrutiny as to every aspect of its mode of operation, on the pretext that any unreasonableness in the mode of exercise of the responsibility results—if a judge or enough judges choose to treat it thus—in crossing that authority's "legal" boundaries.[129]

If the *Miller No. 2* judgment is taken at face value and read as imposing principle-based limits on prerogative powers

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[127] See House of Lords and House of Commons Joint Committee on Conventions, *Conventions of the UK Parliament*, (HL265-I/HC1212-I) vol 1 (2006) <https://publications.parliament.uk/pa/jt200506/jtselect/jtconv/265/265.pdf>.

[128] See *The Cabinet Manual: A guide to laws, conventions and rules on the operation of government* (2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf>, 6.39-6.40.

[129] Finnis, "Unconstitutionality" (n 70) [26]. See also Yowell (n 2) (claiming that the UKSC "effectively holds that all exercises of the prerogative power are justiciable, including its highest political functions").

that must be applied case-by-case, based on justifications which the government may be unwilling to proffer and the courts are bound to have difficulty assessing, it may indeed have such an effect.

But if the interpretation I have offered here is accepted, the actual consequences of *Miller No. 2* will be nothing as far-reaching. Perhaps most importantly, both the government and the Sovereign normally comply with the conventions confining the use and preventing the abuse of prerogative powers, without any need for judicial intervention, as indeed the UKSC's decision's critics have pointed out.[130] Some conventions may be too imprecise to lend themselves to enforcement in the manner presaged by *Miller No. 2* (although at some point on the spectrum of vagueness it is no longer meaningful to speak of conventions as opposed to, at most, values and understandings). And most exercises of prerogative powers are not fettered by conventions, beyond of course the overarching convention requiring the Sovereign to follow her responsible ministers' advice.

In that sense, *Miller No. 2* may indeed prove a "one off": there may never again arise a case in which litigants would be able to make effective use of the principles on which it is based. There can, however, be no guarantee of that. Future governments may be tempted to disregard conventions, and future litigants, prompted by real or perceived government high-handedness may seek judicial remedies.

Conventions and Judicial Error

Since conventions can be the subject of future litigation following the *Miller No. 2* model, it is important to address

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130 Finnis, "Unconstitutionality" (n 70) [14]; Spadijer (n 66).

another problem with the UKSC's decision, to which I have already made repeated allusions: the possibility that it simply got things wrong by misidentifying a convention. This is because it is doubtful whether the practice of short prorogations, which the UKSC treats as tantamount to a binding convention implementing the principles of government accountability and Parliamentary sovereignty, is actually an application of these principles.

The practice may well have a less high-minded origin. As Professor Craig writes—in arguing that the motivations behind a prorogation can properly be assessed by the courts—

> [t]he government has a self-interest in ensuring the continuity of its legislative programme and will not, therefore, consciously jeopardise this by allowing Public Bills to fail as a result of prorogation. It also has a self-interest in ensuring the continuity of its busy legislative agenda into the new session, which inclines towards short prorogation, so that it can be parliamentary business as normal thereafter.[131]

In other words, short prorogations serve the government's political interests, rather than enable Parliament to exercise its sovereign legislative power or hold the government to account.

Misidentification of conventions is, indeed, a standing danger to which the courts are exposed if they engage with conventions at all. As noted above, Professor Finnis has argued that the SCC misidentified the relevant conventions in the *Patriation Reference*.[132] For some of the defenders of the separation of the law and convention, this danger that the

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131 Craig (n 71) 263.

132 Finnis, "Patriation"' (n 35).

courts will get conventions wrong is a strong reason for avoiding any judicial entanglement with conventions.[133]

It is tempting to respond by pointing out that courts are not immune to error when dealing with questions of law.[134] This might happen most often when courts confront questions of constitutional law arising in salient and politically charged cases of first impression, as *Miller No. 2* was. Yet, while this is true, there is still cause for concern if we consider that two of the most significant cases where courts, in one way or another, engage with conventions—the *Patriation Reference* and *Miller No. 2*—may well have been wrongly decided. No doubt courts are never infallible, but if they are especially error-prone in a particular type of cases, one must ask whether they ought to be deciding such cases at all.

To this legitimate concern there are a number of responses, albeit only partial ones. Perhaps most importantly, it should be acknowledged that, while judicial engagement with conventions incurs the risk of false positives when courts find conventions where none exist, judicial reticence to engage with conventions creates the certainty of false negatives in cases where the courts fail to give effect to established, and often uncontroversial, constitutional rules. Moreover, not all errors in relation to conventions are the same. Suppose that, as Professor Finnis believes, the SCC misunderstood the applicable convention requiring unanimous provincial consent to

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133 Dicey (n 12) ("As a lawyer, I find these matters too high for me. Their practical solution must be left to the profound wisdom of Members of Parliament; their speculative solution belongs to the province of political theorists.") See also Forsey (n 20); Dodek (n 21).

134 *Brown v Allen*, 344 US 443, 540 (1953) (Jackson J concurring) ("There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.").

constitutional amendment in the *Patriation Reference*. Its mistaken recognition of a weaker convention requiring substantial but not unanimous provincial support went some (considerable) way towards ensuring that the requirement of the true convention would be met. The patriation of the Canadian constitution was less unconstitutional as a result of the SCC's opinion than a unilateral patriation that may well have taken place had the SCC refused to pronounce on conventions at all would have been.

In addition, despite the possible shortcomings of the *Patriation Reference* and *Miller No. 2*, the courts' record when engaging with conventions is far from uniformly bad. In particular, as I have argued elsewhere, the SCC understood and properly accounted for the relevant conventions in the *Senate Reference*, even though its explanation of its opinion left much to be desired.[135] The SCC also properly refused to recognize alleged conventions in some cases.[136]

All that said, one cannot dismiss out of hand the possibility that allowing the courts to engage with conventions is risky. Mistakes are bound to be made, in cases that are likely to engage matters of high policy and politics, because, even with the best will in the world, the adjudication of conventions must depend on the interpretation of precedents that may be ambiguous and, in particular, on the elucidation of the motives of constitutional actors, which may not be transparent. One possible solution, on which *Miller No. 2* sheds some light, is the codification of constitutional rules—including conventional ones.

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135 Sirota, "Dicey' Ghost" (n 10).

136 *Public School Boards' Assn of Alberta v Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 SCR 409 and *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470. See also Sirota, "Supreme Court" (n 11) 41.

Miller No. 2 and Constitutional Codification

Despite its critics' charges that *Miller No. 2* was not sensitive to the UK's unique constitutional arrangements, with their emphasis on political rather than legal checks and balances, the UKSC's decision was in certain crucial ways very much the product of an uncodified and unentrenched constitution. It is important to understand why this is so, and to consider whether the lesson that should be learned from *Miller No. 2* is not that the form of these constitutional arrangements must be sacrificed in order to preserve their substance.

For critics, the UKSC was over-eager to position itself as the defender of the constitution, and especially of Parliament's powers, and ignored the political safeguards that Parliament, and indeed the Sovereign, had at their disposal. Professor Finnis captures this sentiment, writing that the UKSC "suddenly assumes supreme responsibility for the maintenance and preservation of the whole constitutional-political order, and does so without mentioning that it is replacing some main elements of a constitutional settlement embodying, for hundreds of years, certain tried and tested political assessments and judgments".[137] Critics point, in particular, to the fact that, in Professor Endicott's words, "Parliament could have reversed the prorogation" and chose not to.[138] Professor Endicott argues that the Prime Minister could not bypass Parliamentary scrutiny for much longer than he tried to "because of the force

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[137] Finnis, "Unconstitutionality" (n 70) [16].

[138] Endicott (n 77) 176. See also Stephen Laws, "The Supreme Court's unjustified lawmaking" (*Judicial Power Project,* 4 October 2019) <http://judicialpowerproject.org.uk/stephen-laws-the-supreme-courts-unjustified-lawmaking/> (speaking of a "struggle of Parliament to find useful things to do with the time that has been restored to it, not least because the invalidated prorogation had not in fact frustrated what it felt it needed to do") and Loughlin (n 85), 280-81.

in constitutional politics of the role of Parliament".[139] On this view, alarm over the abuse of prorogations, and arguably of prerogative powers more broadly, is misplaced.

Of course, not everyone agrees. For example, Stephen Tierney writes that "[t]he Government's decision to use the prorogation power for questionable political purposes was a provocation to the courts", triggering "the Supreme Court's understandable discomfort", even as he laments its "unfortunate[]" response, which was, as he sees it, "to create, a legal remedy for a political problem".[140] Professor Gordon too insists that "[w]hen a government attempts to act in a way which cuts across accepted norms of constitutional conduct and collapses parliamentary accountability, it is unsurprising that it provoked a more expansive (and more unified) judicial response than might have been expected in normal times".[141] Lord Sumption sums up this view by defending *Miller No. 2* as a justified judicial response to the Prime Minister's "constitutional vandalism".[142]

I do not intend to resolve this disagreement here. Suffice it to say that, even if the critics happen to have the better of this argument, the UKSC's decision in *Miller No. 2* is at least an

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139 Endicott (n 77) 181.

140 Tierney (n 82).

141 Gordon (n 81). See also Willis (n 4) 354.

142 Lord Sumption, "Supreme Court Ruling Is the Natural Result of Boris Johnson's Constitutional Vandalism" *The Times* (London, 24 September 2019) <https://www.thetimes.co.uk/article/supreme-court-ruling-is-the-natural-result-of-boris-johnson-s-constitutional-vandalism-kshrnrt55>. See also Nick Barber, "Constitutional Hardball and Justified Development of the Law" (*Judicial Power Project*, 29 September 2019) <http://judicialpowerproject.org.uk/nick-barber-constitutional-hardball-and-justified-development-of-the-law/> (describing *Miller No. 2* as "hardly surprising … in the face of the Prime Minister's brazen disregard for the constitution").

understandable if misguided reaction to what Nick Barber describes, borrowing a phrase coined by Mark Tushnet, as "constitutional hardball".[143] This refers to "legislative and executive initiatives … that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings".[144] The description is apt. As even defenders of *Miller No. 2* acknowledge, pre-existing doctrine did not set explicit limits on prorogations.[145] Yet as the decision's critics recognize, there is indeed tension, perhaps considerable tension, between long prorogations intended to push aside a recalcitrant Parliament and political if not legal understandings about Parliament's constitutional role.[146]

Professor Knight provides perhaps the most vivid description of *Miller No. 2* as a response to constitutional hardball. He points out that the decision was only the culmination of a "fiery battle that cultivated the ground for the prorogation saga", in which "bizarre and often constitutionally exceptional hijinks … took place or were seriously suggested".[147] The fact that "most of those constitutional horrors did not arise in reality … might be beside the point. Those exceptional suggestions helped erode any culture of constitutional fidelity and civic virtue."[148] It is also beside the

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143 Barber (n 142); Mark Tushnet, "Constitutional Hardball" (2004) 37 J Marshall L Rev 523.

144 Tushnet (n 143) 523 (emphasis in the original; footnote omitted).

145 Barber (n 142) ("The case was certainly one in which the judges developed, as opposed to merely applied, the law"); Craig (n 71) 257 ("No one claims that there was direct authority on the precise point raised in Miller; Cherry").

146 Endicott (n 77) 178 ("The role of Parliament in the constitution and in the life of the country does indeed demand that Parliament can meet as appropriate").

147 Knight (n 74) 250.

148 Ibid 251.

point, I would add, that supporters of the executive would have taken a very different view than Professor Knight on whether particular actions in the course of the "fiery battle" were permissible or justified. In any protracted conflict, one side's measured response to provocation is another's dangerous escalation. When the UKSC was dragged—or blundered—into the dispute, it felt little choice but, in Professor Knight's words, to put right "relationships which have gone out of whack".[149]

Crucially, the strong judicial response to "constitutional hardball" that *Miller No. 2* exemplifies is uniquely enabled by the United Kingdom's constitution. The decision's critics have argued that this response is illegitimate. Professor Loughlin suggests that, in *Miller No. 2*, the UKSC "is making a pitch to become the primary guardian of the British constitution" despite not being "competent to assume this role", in light of its alleged misreading of the constitutional order.[150] Professor Finnis accuses the UKSC of "plain usurpation of constitution-making responsibility and authority".[151] Yet these accusations ignore the role that the courts have long held in the development of the constitution.

As Dicey pointed out, "the English constitution" is one of those that, "far from being the result of legislation, in the ordinary sense of that term, are the fruit of contests carried on in the Courts on behalf of the rights of individuals. Our constitution, in short, is a judge-made constitution, and it bears

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149 Ibid 259.

150 Loughlin (n 85), 280.

151 Finnis, "Unconstitutionality" (n 70) [17]. See also Yowell (n 2)("What legal limits, if any, need to be placed on the power to prorogue and similar exercises of the prerogative is not a matter judges are well suited or constitutionally authorised to decide").

on its face all the features, good and bad, of judge-made law".[152] One should also note that the contests through which the "English constitution" developed were sometimes about the powers of government institutions: *Prohibitions del Roy*[153] and the *Case of Proclamations*[154] come most readily to mind. *Auckland Harbour Board v R*,[155] in which the Judicial Committee of the Privy Council arguably sotto voce enforced a convention,[156] is another example. With this addition, Dicey's point stands: as a category, judicial development of constitutional law—whether making or discovery on the basis of established principles—is unexceptional, and arguably unexceptionable, in the United Kingdom's constitutional order, however controversial individual instances may be.

In particular, it is not surprising that such development takes place in the face of "constitutional hardball". As Dr. Willis argues,

> A neat distinction between law and politics can work as a convenient heuristic when matters proceed largely as expected. However, in particularly acute circumstances the constitution may crystallise around narrow, definitive legal prescriptions in order to arrest undesirable development or restore the primacy of basic constitutional principles.[157]

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[152] Dicey (n 12) 192.

[153] (1607) 12 Co Rep 63, 77 ER 1342.

[154] Ibid.

[155] [1924] AC 318.

[156] Fabien Gélinas, "Les conventions, le droit et la Constitution du Canada dans le renvoi sur la "sécession" du Québec : le fantôme du rapatriement" (1997) 57 R du B du Québec 291, 309-11.

[157] Willis (n 4) 354; see also David Dennis, "Llewellyn, Hart and Miller 2" (*UK Constitutional Law Blog*, 29 October 2019)

Of course, this does not prove that *Miller No. 2* was a case in which the law of the constitution should have been judicially developed. To the extent that its critics are right that the constitution—including the political constitution—, as it stood before the UKSC's judgment, already possessed the internal resources to deal with the "hardball" tactics deployed by the government, the development was perhaps unnecessary, although even that is not obvious. It is at least arguable that a constitutional order is the stronger for having redundancies built into its checks and balances. Perhaps the most obvious example of this is judicial review of legislation, which acts as an extra layer of rights-protection in addition to that provided by a representative legislature, even if that legislature is, on its own, committed to upholding individual rights.[158]

But the arguments to the effect that the courts cannot exercise "constitution-making responsibility and authority" at all go beyond objections to particular deployments of that authority. And it is not clear what they are based on. It is one thing to say that, in accordance with the principle of Parliamentary sovereignty, Parliament is entitled to impose its will in constitutional as well as in other matters.[159] It is quite another to insist that—in constitutional and, presumably, only in constitutional matters—courts have no authority to develop the law at all, and any changes should come from Parliament. It

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<https://ukconstitutionallaw.org/2019/10/29/david-dennis-llewellyn-hart-and-miller-2/>.

158 This argument in defence of judicial review is made by Richard H Fallon Jr, "The Core of an Uneasy Case for Judicial Review" (2008) 121 Harvard L Rev 1693.

159 One might object to *Miller No. 2* on the ground that Parliament did in fact impose its will by preserving the prerogative power of prorogation in the Fixed-Term Parliaments Act (n 65), s 6(1). But not only does this argument play a minor, if any, role in the critics' objections; it is also, more importantly, not an argument about the courts' power to develop constitutional law *generally*.

seems more plausible to say that, under the United Kingdom's uncodified and unentrenched constitution the responsibility for the development of constitutional law, like the responsibility for the development of the law in other areas, is shared between Parliament and the judiciary, albeit with Parliament being entitled to the last word.

Now, things are different in jurisdictions such as Canada, where the constitution is, at least in part, codified and entrenched. There, the courts' "constitution-making responsibility and authority" is curtailed. The *Constitution Act, 1982* provides that "[a]mendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada".[160] This authority is not, in principle, granted to the courts, but rather, depending on the subject of a prospective amendment, to Parliament, its houses,[161] provincial legislatures, or some combination of these,[162] although in practice, as I am about to explain, things stand somewhat differently.

If a case similar to *Miller No. 2* arose in Canada—if, for example, one of the prorogations of the 40th Parliament[163] or that of the 43rd[164] had been challenged before the courts (which none

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160 *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982 c 11, s 52(3).

161 Or, in some cases, the House of Commons alone: ibid, s 47.

162 Ibid ss 38-45.

163 First from 4 December 2008 to 26 January 2009, in the face of an agreement by the opposition parties to vote no confidence in the government and replace it, and again from 30 December 2009 until 3 March 2010, ostensibly so that the government could "consult with Canadians, stakeholders and businesses about … its economic action plan". "PM shuts down Parliament until March " (*CBC News*, 30 December 2009) <https://www.cbc.ca/news/politics/pm-shuts-down-parliament-until-march-1.829800>.

164 From 18 August to 23 September 2020, ostensibly to "give Parliament a chance to give the government a mandate, and to debate the government's spending

of them was)—the outcome, in my view, should have been different than in the United Kingdom. This is due to the (partial) codification and entrenchment of the Canadian constitution. The *Canadian Charter of Rights and Freedoms* guarantees that "[t]here shall be a sitting of Parliament and of each legislature at least once every twelve months".[165] An attempt to prorogue the Canadian Parliament or a provincial legislature for more than a year would contradict this guarantee. A court ought to be able to recognize this and provide any "such remedy as the court considers appropriate and just in the circumstances".[166]

However, if the prorogation advised were for a period of less than a year, as of course was the case in both *Miller No. 2* and the controversial prorogations of the 40th Canadian Parliament and that of the 43rd, it would not be appropriate for the Canadian courts to follow *Miller No. 2*. The *Charter* sets out a bright-line rule and it would not be the courts' role to re-write the constitution that Canada actually has to improve it on a pattern suggested, decades after its enactment, in a different jurisdiction. The SCC rejected attempts to expand the *Charter*'s limited, and arguably insufficient, protections in a number of past cases,[167] and these rejections reflect an understanding of the

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plan". Kathleen Harris and Aaron Wherry, "Parliament prorogued until Sept. 23 as Trudeau government reels from WE Charity controversy" (*CBC News*, 18 August 2020) <https://www.cbc.ca/news/politics/liberal-government-trudeau-prorogue-government-1.5690515>.

165 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11, s 5.

166 Ibid s 24(1).

167 *R v Prosper*, [1994] 3 SCR 236, 287 (L'Heureux-Dubé J, dissenting but not on this point) (courts lack the authority "to transform completely a document or add a provision which was specifically rejected at the outset. It would be strange, and even dangerous, if courts could so alter the constitution of a country"); ibid 266 (Lamer J); *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473 (holding

judicial role that recognizes that the entrenched constitution should only be amended by the process that it provides for this purpose, and not as a result of adjudication.

Admittedly, the SCC has not always accepted such a modest role in constitutional development. Sometimes, it has enacted constitutional amendments, either by constructing legal doctrines on the foundation of underlying constitutional principles,[168] or by effectively adding provisions to or removing others from the constitution in the process of engaging in "living tree" constitutional interpretation.[169] One might also view reversals of important precedents in constitutional cases as de facto amendments,[170] although whether this is a fair characterization arguably depends on whether the precedent itself was a reasonable interpretation and application of the constitution.

Moreover, it is important to keep in mind that even a court with a modest conception of its role and accepting of the constraints imposed by the original meaning of a constitutional text will engage in some constitutional development. It will do so, for example, by applying the constitution to new realties

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that the *Charter*'s prohibition on retroactive criminal law cannot be supplemented with a prohibition on retroactive civil law derived from the Rule of Law principle).

[168] See especially *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 (requiring the creation of independent commissions to propose judicial salaries to legislatures).

[169] See eg Saskatchewan *Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 (giving "constitutional benediction" to a right to strike; ibid, [3]); *R v Comeau*, 2018 SCC 15, [2018] 1 SCR 342 (eviscerating the Canadian constitution's internal free trade provision).

[170] See Grégoire Weber, "Changing the constitution is easy—if you're a Supreme Court Justice" *National Post* (Toronto, 29 June 2015) < https://nationalpost.com/opinion/gregoire-webber-changing-the-constitution-is-easy-if-youre-a-supreme-court-justice> (listing the SCC's effective reversal of its position on assisted suicide as a change to the constitution).

unknown at the time of its enactment and by giving contemporary meanings to constitutional language that calls on the courts to engage in moral or practical reasoning.[171] It will also do so by engaging in constitutional construction—the development of doctrine to give practical effect to a constitutional text's sometimes sparse provisions.[172]

All that said, an entrenched constitutional text imposes limits on the courts' role in constitutional amendment. These limits may be more or less definite, depending on how the text is drafted; they may be more or less effective, depending on how the courts approach their role.[173] But even with a court sometimes, perhaps often, inclined to immodesty, such as the SCC, the limits are likely to have some bite.[174] It may be tempting to only think of constitutional entrenchment as empowering courts by making them into the arbiters of controversial social policies (typically those involving the rights of individuals or minorities).[175] And, to be sure, constitutional entrenchment can have this effect. But a well-crafted

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171 See Benjamin Oliphant and Léonid Sirota, "Has the Supreme Court of Canada Rejected "Originalism"?" (2016) 42 Queen's LJ 107, Part III.C for examples from the SCC's jurisprudence.

172 See Randy E Barnett, "Interpretation and Construction" (2011) 34 Harvard J Law & Pub Pol'y 65; Lawrence B Solum, "Originalism and Constitutional Construction" (2013) 82 Fordham L Rev 453.

173 See eg William Baude, "Originalism as a Constraint on Judges" (2017) 84 U Chicago L Rev 2213.

174 See generally Benjamin J Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms" (2015) 65 UTLJ 239.

175 See eg Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019) 80 ("The legal model [of constitutionalism] seeks to create a body of constitutional rights that is beyond the reach of democratic choice. Its advocates do not trust elective institutions to form opinions about them … They therefore favour an accretion of power to … judges".).

constitutional text not only allows the courts to constrain the "political branches" of government". It constrains the courts themselves, not least in their constitution-making endeavours.

In a constitutional system such as that of the United Kingdom, where there is no exhaustive statement of the constitutional law at any given time, and where this law has no distinctive place in a legal hierarchy, the limits on the courts' ability to develop this law are nowhere to be found. It is unfair to accuse the courts of engaging in such development, at least as a general matter, although it is of course possible to criticize their decisions in particular cases.

VI. CONCLUSION

In *Miller No. 2*, the UKSC departed from a longstanding understanding of the United Kingdom's constitution, enforcing as law a rule that would previously have been regarded, at most, as a convention belonging to the political constitution. The UKSC did so through the artifice of delineating prerogative powers, rather than reviewing the way in which they were exercised. While ostensibly modest and consistent with the judicial role, this justificatory tactic means that, in future cases, other conventions could similarly be enforced under cover of delineating the boundaries of prerogative powers.

The events that led to *Miller No. 2* and the UKSC's decision in that case show that there can be considerable uncertainty over the scope of key powers under the United Kingdom's constitution, including notably prerogative powers. This uncertainty is damaging: it tempts political actors to engage in "constitutional hardball", and the courts to respond in ways that are intended to be robust rejections of "hardball" tactics, but may in turn by interpreted as "hardball" themselves.

In the wake of *Miller No. 2*, there is talk of reform of the UKSC,[176] and the United Kingdom's government commissioned a report on judicial review that considered the desirability of curtailing the courts' powers—although it did not ultimately recommend significant changes.[177] Legislation going somewhat further than these recommendations may be introduced, but even it seems to portend no major change.[178] Of course, an attempt to implement the contrary recommendation might itself have been regarded as a further instance of hardball, and conceivably even prompted judicial retaliation presaged by some of the Law Lords in the *Fox Hunting Case*.[179]

For my part, I would venture a different reform suggestion, which may well displease the critics and the defenders of *Miller No. 2* in equal measure. It certainly has left the anonymous reviewers unimpressed. Here it is, nonetheless. The codification and entrenchment of the United Kingdom's constitution could help reduce the uncertainty that afflicts it and break the cycle of "constitutional hardball" that this

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[176] See Yuan Yi Zhu, "The Supreme Court: Options for Change" (*UK Constitutional Law Blog*, 8 June 2020) <https://ukconstitutionallaw.org/2020/06/08/yuan-yi-zhu-the-supreme-court-options-for-change/>.

[177] Edward Faulks *et al*, *Independent Report on Administrative Law*, March 2021 <https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/supporting_documents/IRALreport.pdf>; the UK government has also commissioned a parallel report on the implementation of the *Human Rights Act 1998* (which is not directly relevant to the subject of this article, but is arguably further evidence of the present government's wariness of the judiciary: Ministry of Justice, "Government launches independent review of the Human Rights Act", 7 December 2020 <https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act>.

[178] See e.g. Jonathan Jones, "The Queen's Speech Suggests a Major Overhaul of Judicial Review is Unlikely" *The Institute for Government* (11 May 2021) <https://www.instituteforgovernment.org.uk/blog/queens-speech-judicial-review>.

[179] *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262.

uncertainty feeds. On the one hand, it would empower the judiciary to intervene against high-handed "constitutional vandalism" without fear of Parliamentary retaliation. On the other, it would constrain the courts, providing certainty for political actors engaged in power struggles, for which a democratic constitution must leave room.

In response to concerns about the lack of realism, or even of seriousness, of this proposal, I should clarify that in venturing it, I make no forecast as to the likelihood of its being adopted, or the circumstances in which it may be. It is meant as a response to the problems I have identified and described in this article (and summarized in the last-bar-one paragraph), and while I make it seriously in the sense that it would, in my opinion, address these issues, I recognize that there may be other problems that it would not resolve, and others still that it may even exacerbate. Constitutional codification and entrenchment are difficult subjects not least because their implications are exceedingly far-reaching.[180] Despite this, I think it worthwhile to point to one benefit that such reforms are likely to have in a given context, as they would in addressing the issues of uncertainty and hardball in the UK.[181]

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[180] I have made this point myself in response to what I regarded as an insufficiently considered proposal of this sort in New Zealand: Leonid Sirota "Happy Sisyphus: A Review Article of G Palmer and A Butler A Constitution for Aotearoa New Zealand" (2017) 27 New Zealand Universities L Rev 789.

[181] This suggestion has at least one other supporter, who knows a thing or two about the ways in which the powerful can abuse the legal tools at their disposal: see Rebecca Jones, "Author Hilary Mantel Says UK Needs Written Constitution" *The BBC* (21 May 2021) <https://www.bbc.com/news/entertainment-arts-57157878>.