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## THE U.K.'S *MARBURY V. MADISON*: THE PROROGATION CASE AND HOW COURTS CAN PROTECT DEMOCRACY

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*It is emphatically the duty of the Judicial Department to say what the law is.*

-*Marbury v. Madison*

*But our law is used to rising to such challenges and supplies us with the legal tools to enable us to reason to a solution.*

-*R (on the application of Miller) v The Prime Minister Cherry and others v Advocate General for Scotland (The Prorogation Case)*

*Marbury v. Madison* transformed both the U.S. Supreme Court and American law when it was decided in 1803.<sup>1</sup> 216 years later, the U.K. Supreme Court decided its own version of *Marbury* when it ruled that Prime Minister Boris Johnson's decision to prorogue, or suspend, Parliament was unlawful.<sup>2</sup> Like *Marbury*, the U.K. Supreme Court was forced to grapple with difficult constitutional questions in the midst of political conflict.

The parallels between the two decisions are even more remarkable if we consider when the two decisions were decided. The prorogation ruling came only ten years after the establishment of the U.K. Supreme Court in 2009; *Marbury* was decided only fourteen years after the ratification of the Constitution in 1789. Both decisions show Supreme Courts coming into their own and asserting themselves as important players in the constitutional balance of power by not shying away from difficult political issues.

Today, as popularly elected leaders challenge long-established political norms, democracies are increasingly strained and some are drifting alarmingly close to authoritarianism. When faced with this new reality, it is tempting for courts to hide from polarized political disputes so as not to be accused of becom-

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1. *See generally*, *Marbury v. Madison*, 5 U.S. 137 (1803).

2. *R (on the application of Miller) v. The Prime Minister; Cherry and Others v Advocate General for Scotland* [2019] UKSC 41, [61].

ing “too political.” However, both *Marbury* and the Prorogation Case demonstrate that courts have a role to play and they cannot shy away from the difficult issues of the day.

To explain why this is the case, this article will first trace the background of the U.K. Supreme Court and the Prorogation Case in the midst of the Brexit debate. It will then analyze the opinion and reactions to it. Similarities and differences with *Marbury* will then be analyzed. Finally, the article will lay out lessons for American jurisprudence and look forward to how courts can use the example of the Prorogation Case to protect democracy.

Ultimately, courts must recognize the new challenges that democracies around the world face and cannot assume that the political system will take care of itself. Both *Marbury* and the Prorogation Case teach us that the judiciary is not simply a passive observer in the democratic process, but instead plays an important role in the checks and balances of government. At a time when leaders around the world are pushing the limits of their power, it is important to remember the critical role courts play in protecting democracy.

#### THE UNITED KINGDOM SUPREME COURT

Despite the long legal tradition in the United Kingdom, the U.K. Supreme Court was a modern invention and only established in 2009. Prior to that time, the primary appellate body in the United Kingdom was the Lords of Appeal in Ordinary.<sup>3</sup> This body was composed of 12 members of the House of Lords, the upper chamber of the U.K. Parliament.<sup>4</sup> As a result, part of the judiciary was actually housed in the legislative branch of government.

Due to this unusual situation, the government issued a consultation paper in July 2003 that proposed a U.K. Supreme Court that “will put the relationship between the executive, the legislature, and the judiciary on a modern footing.”<sup>5</sup> As the paper explained, “The primary objective of the new arrangements is to establish the Court as a body separate from Parliament.”<sup>6</sup> The legislation to create the Supreme Court was passed as part of the Constitutional Reform Act of 2005.<sup>7</sup>

It is important to note that the U.K. does not have a single codified constitution like the United States. However, it does have a constitution that is the result of a long history of common law, statutes, and customs, which has been described as “the most flexible polity in existence.”<sup>8</sup> In addition, the U.K. has the doctrine of parliamentary sovereignty, “that laws enacted by the Crown in

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3. DEP'T OF CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM 14 (July 2003), <https://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>.

4. *Id.*

5. *Id.* at 10.

6. *Id.* at 26.

7. See Constitutional Reform Act 2005, c. 4 (Eng.).

8. R (on the application of Miller and another) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [40].

Parliament are the supreme form of law in our legal system.”<sup>9</sup> As a result, the U.K. Supreme Court does not look to a single document to determine whether something is constitutional, but a number of different sources with statutes passed by Parliament being superior to other sources.<sup>10</sup>

#### THE UNITED KINGDOM’S ATTEMPT TO WITHDRAW FROM THE EUROPEAN UNION

The controversy that eventually led to the Prorogation Case began when the U.K. voted to leave the European Union in a referendum that divided the country held on June 23, 2016.<sup>11</sup> This referendum would lead to what became known as Brexit, the process of Britain leaving the E.U.

The U.K. Supreme Court’s first involvement in the Brexit process occurred during a case brought by a number of parties that challenged whether the government could withdraw from the E.U. without the consent of Parliament and the U.K.’s devolved governments.<sup>12</sup> The Supreme Court ruled that the U.K. Parliament must vote to trigger the withdrawal from the E.U.<sup>13</sup> However, the U.K. Supreme Court also held that the devolved governments of the U.K. in Northern Ireland, Scotland, and Wales did not have the power to formally approve or block such a move.<sup>14</sup>

After this ruling, the U.K. Parliament voted overwhelming to trigger Article 50 of the Treaty on European Union, which is the mechanism for a member state to leave the E.U.<sup>15</sup> On March 29, 2017, the U.K. formally invoked Article 50, which triggered a two-year period that would eventually lead to withdrawal from the E.U.<sup>16</sup>

During the next two years, Prime Minister Theresa May negotiated a withdrawal agreement with the E.U., but was unable to get it approved through Parliament after three separate votes.<sup>17</sup> Given her inability to pass a withdrawal bill, May decided to resign and trigger a leadership contest within the Conservative party to replace her.<sup>18</sup>

Before May’s departure, the deadline for the U.K. to leave the E.U. was extended until October 31, 2019.<sup>19</sup> Boris Johnson was elected the new leader of

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9. *Id.* at [41].

10. *See Id.*

11. *Id.* at [2].

12. *Id.* at [5].

13. *Id.* at [124].

14. *See id.* at [151].

15. *See R (on the application of Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland* [2019] UKSC 41, [9].

16. *Id.*

17. *Id.* at [12].

18. *Id.* at [14].

19. *Id.* at [13].

the Conservative party and took over as Prime Minister on July 24, 2019 with a promise to deliver Brexit on October 31.<sup>20</sup>

#### PROROGATION OF PARLIAMENT

Prorogation ends a session of Parliament. While Parliament is prorogued, it cannot engage in many of its main functions such as debating and passing legislation.<sup>21</sup> Prorogation is more than a limited recess or adjournment of Parliament.<sup>22</sup> Yet, Prorogation is also not as consequential as the dissolution of Parliament, which ends the sitting Parliament and triggers a new election.<sup>23</sup> Instead, prorogation happens so that there can be a Queen's Speech, which lays out the government's agenda for the next session of Parliament.<sup>24</sup>

Despite the doctrine of parliamentary sovereignty, Parliament itself does not have the power to decide when it should be prorogued.<sup>25</sup> The power to prorogue Parliament is a prerogative exercised by the Monarch.<sup>26</sup> In practice, the government determines when to prorogue Parliament through advice given to the Monarch by the Privy Council.<sup>27</sup>

On August 28, 2019, the Government announced that it had advised the Queen to prorogue Parliament beginning sometime between September 9-12 and ending with the opening of a new session of Parliament on October 14.<sup>28</sup> Even before the Queen made the prorogation official, there was outrage among opposition parties in Parliament, with some opposition leaders even appealing directly to the Queen to ignore the advice.<sup>29</sup> However, given the established procedure, the Queen had no choice and officially prorogued Parliament on the government's timeline.<sup>30</sup>

The prorogation became the latest flash point in the increasingly divided issue of Brexit, with opponents of Brexit accusing the Prime Minister of proroguing Parliament for political reasons.<sup>31</sup> The length of the prorogation, which was much longer than other recent prorogations, did nothing to dispel these feelings. The Prime Minister and his government countered that prorogation was a

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20. Richard Pérez-Peña, *Brexit Under Boris Johnson: Deal or No Deal?*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/world/europe/brexit-boris-johnson-explainer.html>.

21. *R (on the application of Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland* [2019] UKSC 41, [2].

22. *Id.* at [6].

23. *Id.* at [4].

24. *Id.* at [2].

25. *See id.* at [3].

26. *Id.*

27. *Id.*

28. *Id.* at [15].

29. Jessica Elgot, *Corbyn Demands Talks with Queen Over Plan to Suspend Parliament*, THE GUARDIAN (Aug. 28, 2019), <https://www.theguardian.com/politics/2019/aug/28/mps-react-with-fury-to-boris-johnsons-plan-to-suspend-parliament>.

30. *See Parliament Suspension: Queen Approves PM's Plan*, BBC (Aug. 28, 2019), <https://www.bbc.com/news/uk-politics-49493632>.

31. *Id.*

normal procedure, especially when there is a new government with a different agenda that would be laid out in a Queen's Speech.<sup>32</sup>

However, with the U.K. facing the greatest political turmoil since World War II, it seemed hard to believe that the Prime Minister decided to prorogue Parliament for that amount of time for the stated justifications. Immediately, legal challenges began in all parts of the U.K. The court in England allowed the prorogation to go ahead.<sup>33</sup> However, the High Court of Scotland ruled that the Prorogation was unlawful.<sup>34</sup> This split between the courts in the U.K. made clear that the Supreme Court would ultimately have to resolve the issue.

#### THE U.K. SUPREME COURT'S PROROGATION DECISION

In a unanimous decision, the U.K. Supreme Court found that the prorogation of Parliament was unlawful.<sup>35</sup> Before reaching the ultimate decision, the Court had to determine whether the issue was justiciable. The English court below found that the determinations to prorogue Parliament "were inherently political in nature, and there were no legal standards against which to judge their legitimacy."<sup>36</sup> This is akin to the American legal doctrine of courts refusing to hear cases because of a political question.

However, the Supreme Court made clear that "although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it."<sup>37</sup> The Supreme Court went on to write "the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries."<sup>38</sup> In this way, the Court found it "cannot shirk [its] responsibility merely on the ground that the question raised is political in tone or context."<sup>39</sup>

The Court also recognized that as a separate branch of government, the judiciary must intervene if the executive has taken actions to shut down the legislature in an unlawful manner.<sup>40</sup> This is because "the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued."<sup>41</sup> The Court explicitly concluded that "by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers."<sup>42</sup>

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32. *Id.*

33. *R (on the application of Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland* [2019] UKSC 41, [25].

34. *Id.* at [24].

35. *Id.* at [61].

36. *Id.* at [29].

37. *Id.* at [31].

38. *Id.*

39. *Id.* at [39].

40. *Id.* at [33].

41. *Id.*

42. *Id.* at [34].

Before resolving the justiciability question, the Supreme Court had to resolve the limits of the Prime Minister's power to prorogue Parliament. The Supreme Court recognized that the "courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty."<sup>43</sup> If the political question doctrine was allowed to consume judicial oversight, that would mean that there would be the unlimited power of prorogation, which would "be incompatible with the legal principle of Parliamentary sovereignty."<sup>44</sup>

At the same time, the Supreme Court recognized that there must be some ability for the Prime Minister to prorogue Parliament and had to formulate a criteria to judge prorogation. To resolve this issue, the Supreme Court came up with the following standard: "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."<sup>45</sup>

In this way, the Court formulated a standard that looks at the function of Parliament, as opposed to merely focusing on legal doctrine. The Court recognized that to do this, it needed to look at the Prime Minister's justification for proroguing Parliament.<sup>46</sup> In addition, the Court seemed to emphasize the length of the prorogation would be an important factor in determining whether it was lawful, making clear that prorogation should be only for a short period of time.<sup>47</sup> Having come to the conclusion that there was a standard to judge prorogation, the Court decided that the issue was justiciable and the Supreme Court could move on to the merits of the case.<sup>48</sup>

The Supreme Court was unusually blunt in its assessment regarding the question of "whether the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account," with the simple answer that "of course it did."<sup>49</sup> In reaching this conclusion, the Court emphasized the critical issues facing the country regarding Brexit and the upcoming October 31, 2019 deadline for leaving the E.U.<sup>50</sup>

Given this frustration of the constitutional role of Parliament, the Court next had to determine whether it was justified. The Court explained that "We are not concerned with the Prime Minister's *motive* in doing what he did."<sup>51</sup> Instead, the

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43. *Id.* at [41].

44. *Id.* at [42].

45. *Id.* at [50].

46. *Id.* at [51].

47. *Id.*

48. *Id.* at [52].

49. *Id.* at [56].

50. *Id.*

51. *Id.* at [58].

Court went on that “We are concerned with whether there was a reason for him to do it.”<sup>52</sup>

The Court determined that there was not a justifiable reason for the Prime Minister to prorogue Parliament.<sup>53</sup> In coming to this conclusion, the Court relied heavily on the testimony of former Conservative Prime Minister John Major, who stated there was no reason for such a long prorogation.<sup>54</sup> The Court also found that the government had not put any credible explanation for why such a long prorogation was necessary in the midst of a national crisis.<sup>55</sup>

In reaching the ultimate conclusion, the Court found “It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October.”<sup>56</sup> Thus, the prorogation was unlawful and it “follows that Parliament has not been prorogued,” meaning that it could begin to conduct business again.<sup>57</sup>

#### REACTION TO THE PROROGATION CASE

In this one decision, the British tradition of slow constitutional change gave way to *Marbury* style realignment. Commentators and politicians instantly understood the importance of the Prorogation Case for the U.K. political and legal system with one commentator writing, “the result showed that Britain’s Supreme Court was willing to intervene in politics when it felt it needed to and to do so forcefully.”<sup>58</sup> Mark Elliot, professor of public law at Cambridge University stated, “The various factors that are at work in this judgment paint a picture of a supreme court judiciary that is prepared to serve as a guardian of constitutional principle in a way and to an extent that previous generations of apex court judges in the UK were not.”<sup>59</sup>

However, many supporters of Brexit felt that the Supreme Court overstepped its bounds with unelected judges inserting themselves into the political process. Prime Minister Johnson pledged to respect the Supreme Court’s decision, but also stated “if judges are to pronounce on political questions in this way,

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52. *Id.*

53. *Id.* at [61].

54. *Id.* at [59].

55. *Id.* at [60].

56. *Id.* at [61].

57. *Id.* at [70].

58. Adam Taylor, *The U.K. Supreme Court is Only 10 Years Old. But It Just Showed Its Power.*, WASH. POST (Sept. 24, 2019), <https://www.washingtonpost.com/world/2019/09/24/why-uk-supreme-courts-decision-against-boris-johnson-is-remarkable/>.

59. Owen Bowcott, *After 10 Years, the Supreme Court is Confident in its Role*, THE GUARDIAN (Sept. 26, 2019), <https://www.theguardian.com/law/2019/sep/26/after-10-years-the-supreme-court-is-confident-in-its-role>.

then there is at least an argument that there should be some form of accountability.”<sup>60</sup> The government’s Attorney General, Geoffrey Cox, suggested that Parliament should confirm Supreme Court justices.<sup>61</sup> Close allies of Boris Johnson, such as Leader of the Commons Jacob Rees-Mogg, went even further and argued that the U.K. was on the path towards an American system judiciary and the Prorogation Case was a “constitutional coup.”<sup>62</sup> Some went so far as to call for the abolition of the Supreme Court, stating that it “should be a nationwide klaxon that the experiment of a ‘Supreme’ Court is a failure.”<sup>63</sup>

While the constitutional implications of the Prorogation Case were huge, its practical implications were less clear. Parliament did reconvene the day after the decision, but little was done except a shouting match between the government and the opposition.<sup>64</sup> On October 2, 2019, Prime Minister Johnson requested that Parliament be prorogued again, but this time only from October 8 until October 14.<sup>65</sup> This far shorter prorogation shows that the government understood the Supreme Court’s standard laid out in the decision, and formulated a new prorogation that conformed with that standard.

Ultimately, “The British Supreme Court’s landmark decision seems to have shaken Britain’s traditional constitution more than it has Britain’s Brexit prospects.”<sup>66</sup> But that is how it should be because the Supreme Court did not want to affect the substance of the Brexit debate, but simply to ensure the debate was allowed to happen.

#### SIMILARITIES WITH *MARBURY V. MADISON*

There are at least four main similarities between the Prorogation Case and *Marbury*. First, both Supreme Courts acted in a confident manner when confronted a difficult political question. For the U.K. Supreme Court, it would have been easy to have not reached the merits of the case, as the English court did, to

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60. James Randerson, *UK Supreme Court Ruling Should Lead to ‘Consequences,’ Says Boris Johnson*, POLITICO (Sept. 29, 2019, 10:19 AM), <https://www.politico.eu/article/uk-supreme-court-ruling-should-lead-to-consequences-says-boris-johnson/>.

61. Jack Maidment, *Geoffrey Cox Suggests UK Could Move to US-Style Political Vetting of Judge Appointments in the Wake of the Supreme Court’s Prorogation Ruling*, DAILY MAIL (Sept. 25, 2019, 12:31 PM), <https://www.dailymail.co.uk/news/article-7503939/Geoffrey-Cox-suggests-UK-style-political-vetting-judge-appointments.html>.

62. Alex Wickham, *Cabinet Ministers Are Privately Threatening a Radical Overhaul of the Courts After the Supreme Court Brexit Judgment*, BUZZFEED (Sept. 25, 2019, 8:33 AM), <https://www.buzzfeed.com/alexwickham/cabinet-ministers-supreme-court-brexit-decision>.

63. Charles Day, *The Supreme Court’s Decision is a Constitutional Outrage*, THE SPECTATOR (Sept. 24, 2019, 2:18 PM), <https://blogs.spectator.co.uk/2019/09/the-supreme-courts-decision-is-a-constitutional-outrage/>.

64. See William Booth & Karla Adam, *After Supreme Court Defeat, Boris Johnson Taunts Parliament*, WASH. POST (Sept. 25, 2019, 4:21 PM), [https://www.washingtonpost.com/world/europe/a-roiling-angry-parliament-reconvenes-after-court-rules-boris-johnson-unlawfully-suspended-it/2019/09/25/a8e5b406-defb-11e9-be7f-4cc85017c36f\\_story.html](https://www.washingtonpost.com/world/europe/a-roiling-angry-parliament-reconvenes-after-court-rules-boris-johnson-unlawfully-suspended-it/2019/09/25/a8e5b406-defb-11e9-be7f-4cc85017c36f_story.html).

65. *Parliament to Be Prorogued Next Tuesday*, BBC (Oct. 2, 2019), <https://www.bbc.com/news/uk-politics-49913130>.

66. Christopher Caldwell, *Britain Now Has a Politicized Supreme Court, Too*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/opinion/boris-johnson-supreme-court.html>.



avoid confronting the most controversial political issue in decades, Brexit.<sup>67</sup> Instead, the U.K. Supreme Court refused to take a back seat and understood that it had a role to play.

A full recitation of the *Marbury* decision is beyond the scope of this article. Suffice it to say that the U.S. Supreme Court resolved a political dispute between the Federalists and the Democratic-Republicans. The decision was unafraid to chastise the administration of Thomas Jefferson for failing to deliver William Marbury's commission after appointment by the previous President, John Adams.<sup>68</sup> At the same time, it ultimately found it could not deliver Marbury's commission because part of the law he used to bring the suit, the Judiciary Act of 1789, was unconstitutional.<sup>69</sup> In this way, the Supreme Court was willing to analyze and criticize the actions of both the executive and legislative branches, even in the midst of political conflict between the two major parties.

Second, both decisions expanded the roles of each Supreme Court relative to the other branches of government. For the U.K. Supreme Court, it established that it had an important role in arbitrating the relationship between Parliament and the Prime Minister. If the Prime Minister begins to abuse his powers to frustrate the purpose of Parliament, the U.K. Supreme Court would be willing to step in and set the course right.

*Marbury* completely revolutionized the role of the Supreme Court by enshrining the role of judicial review.<sup>70</sup> The Supreme Court greatly expanded its power by giving itself the ability to confirm that acts of Congress and actions of the President did not contradict the Constitution. As the U.S. Supreme Court stated, "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."<sup>71</sup>

Third, both Supreme Courts explained that there must be a central role for the judicial branch in the balance of power, and the courts are not simply confined to theoretical legal questions. The U.K. Supreme Court grabbed the legal bull by the horns and inserted itself into the heart of the divisive Brexit debate. It did so with the understanding that the U.K. Supreme Court had a function and a purpose. It did not merely exist as a ceremonial branch of government, but as an active participant in the government with an important role in safeguarding democracy.

For the U.S. Supreme Court, *Marbury* represented a similar watershed moment that marked the beginning of its relevance to the American political system,

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67. *R (on the application of Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland* [2019] UKSC 41, [25].

68. *Marbury v. Madison*, 5 U.S. 137, 162 (1803).

69. *Id.* at 180.

70. Nicandro Iannacci, *Marbury v. Madison: The Supreme Court Claims its Power*, NAT'L CONSTITUTION CTR.: CONSTITUTION DAILY (Feb. 24, 2019), <https://constitutioncenter.org/blog/marbury-v-madison-the-supreme-court-claims-its-power/>.

71. *Marbury*, 5 U.S. at 162.

as opposed to simply the legal system. Under the Constitution, the judicial branch had the least guidance in terms of its role as compared with the legislative and executive branches. Repeatedly, *Marbury* emphasized it was the courts that played a central role in resolving disputes, “If two laws conflict with each other, the courts must decide on the operation of each.”<sup>72</sup> In this way, the U.S. Supreme Court took the initiative and made clear that it had an important role to play.

Finally, both decisions are so similar because of when they were decided in relation to the creation of each Supreme Court. Only a few years after their creation, both Supreme Courts were confronted with a fork in the road when faced with difficult political questions. The Supreme Courts refused to avoid the difficult political questions and simply become relatively mundane courts where legalistic questions were resolved. Instead, at a crucial turning point in their history, both Supreme Courts choose to take a more central role in their respective governments and countries.

#### DIFFERENCES WITH *MARBURY V. MADISON*

While there are many parallels between the Prorogation Case and *Marbury*, it also important to note that there are three important differences. First, the U.S. Supreme Court in *Marbury* ultimately declined to rule on the merits of the underlying dispute, unlike the Prorogation Case.<sup>73</sup> However, the U.S. Supreme Court did not simply use the political question doctrine to avoid resolving the case all together. Instead, it took the bolder step of striking down part of an act of Congress, which in many ways was more radical than simply resolving the dispute before it.<sup>74</sup>

As a result, another important difference is that the Prorogation Case overturned a decision of the executive branch, while *Marbury* overturned a decision of the legislative branch.<sup>75</sup> However, in *Marbury*, the Court took the extraordinary step in *dicta* to state that the Jefferson administration acted inappropriately in withholding Marbury’s commission.<sup>76</sup> In this way, the U.S. Supreme Court made it clear that it would not shy away from striking down actions of the President that it found to be unlawful if necessary and appropriate.

This leads to the final and perhaps most important difference between the two cases, which is that the U.K. Supreme Court is limited in its ability to strike down primary acts of Parliament. That is because the U.K. has the doctrine of parliamentary sovereignty, wherein statutes passed by Parliament are supreme to other aspects of the U.K. constitution.<sup>77</sup>

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72. *Id.* at 177.

73. Compare *Marbury v. Madison*, 5 U.S. 137, 180 (1803), with *R (on the application of Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland* [2019] UKSC 41, [61].

74. See *Marbury*, 5 U.S. at 180.

75. *Id.* at 154.

76. *Id.* at 162.

77. *R (on the application of Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland* [2019] UKSC 41, [41].

In contrast, the *Marbury* decision was grounded in the principle that the U.S. Constitution was “the *supreme* law” and that everyone other law was made in “*pursuance* of the constitution.”<sup>78</sup> As a result, laws passed by Congress and the actions of the President must be in conformance with the Constitution.

Unlike the U.S. Constitution, parliamentary sovereignty means that the U.K. Supreme Court is more limited in its ability to review primary acts of law passed by Parliament. However, the Prorogation Case demonstrates that the U.K. Supreme Court is more than willing to review acts of the executive *because* of the doctrine of Parliamentary Sovereignty. Thus, the U.K. Supreme Court is perfectly placed to scrutinize the actions of the executive branch, and the Prorogation Case shows that it will be ready to do so in the years to come.

#### LESSONS FOR AMERICAN JURISPRUDENCE FROM THE PROROGATION CASE

The Prorogation Case has at least four important lessons for American jurisprudence. The first and most obvious lesson is that Courts should not obsess with the political question doctrine to the point of paralysis. The U.K. Supreme Court was confident in its belief that it had a role to play, even if the consequence was that it would be involved at least tangentially in political matters. The U.S. Supreme Court, particularly in the recent political gerrymandering case,<sup>79</sup> seems hesitant to wade into the battlefield that has become American politics. This is understandable, but as the U.K. Supreme Court recognized, it is the duty of judges to uphold the rule of law even if it would otherwise make them confront uncomfortable political issues.

The second lesson is that process is different than policy. This understanding helps to resolve the question of when courts should get involved in political issues. The U.K. Supreme Court did not rule on the merits of the Brexit debate, and went out of its way in the first line of the opinion to make that clear, “It is important to emphasise that the issue in these appeals is not when and on what terms the United Kingdom is to leave the European Union.”<sup>80</sup> Instead, its main concern was Parliament’s role in the Brexit issue, which was shut down by the Prime Minister proroguing Parliament. When questions of process and not policy need to be resolved, courts are well positioned to play a role in making sure the rules of the political system are fair for everyone.

The third lesson is that instead of focusing on intent, focus on effects. The U.K. Supreme Court did not ultimately reach a conclusion on Prime Minister Johnson’s intent in proroguing Parliament, but instead focused on its effects in preventing Parliament from meeting.<sup>81</sup> Oftentimes, courts can seem obsessed in getting inside decision makers’ heads and deciding whether they made a decision for the right reasons. This can be an almost impossible task, which causes courts

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78. *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

79. *Rucho v. Common Cause*, 588 U.S. \_\_\_\_ (2019).

80. *R (on the application of Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland* [2019] UKSC 41, [1].

81. *Id.* at [58].

to worry about second-guessing the decisions of the elected branch of government. Instead, by focusing on whether a decision is actually in effect harming the democratic foundations of a government, courts have a concrete way to measure the harm done by a questionable act.

The fourth lesson is that both the executive and legislative branch have democratic mandates, and this point is worth exploring in greater depth here. With the rise in prominence and power of the executive branch in the U.S. in the last century, there has been an increasing willingness by courts to defer to the President. At the same time, Congress has been crippled by increasing gridlock and partisanship to the point that it is difficult for it to address the critical issues of the day.

As tempting as it might be to cede all authority to the executive because it is the branch running the day to day operations of the majority of government, courts must recognize that Congress has its own democratic mandate. There are elections every two years, with the whole House of Representatives being up for election during each election cycle. As a result, it is the branch of government that arguably is most responsive to the current mood of the electorate.

The U.K. has seen a similar shift in political power from the legislature to the executive. Beginning in the 17th Century, the administrative powers of the state became consolidated in the executive branch, in the form of government ministers headed by the Prime Minister.<sup>82</sup> However, even with this increased power, it cannot be that the Prime Minister has the power to prorogue Parliament for years on end and run the country as a dictator. Similarly, it cannot be that the President has unlimited power even in the areas delegated to that office under the Constitution, especially if the President uses that power to undermine the powers delegated to the other branches of government.

Moreover, the fear that unelected judges will overturn the “will of the people” becomes less urgent when confronted with a conflict between the legislative and executive branches. It is difficult for one side to claim the mantle that they represent “the people,” when both have been elected and have powers in their respective areas. In such a situation, the unelected judiciary can play the role of an arbiter between the elected branches, particularly when there is split mandate provided by voters. Such a recognition will ensure that all three branches of government are able to check the excesses of the other, and that no one branch becomes too powerful.

#### HOW COURTS CAN PROTECT DEMOCRACY

The Prorogation Case is one example of the executive branch pushing the limits of its powers and having a court push back. This is by no means a unique circumstance, and it seems likely that courts will increasingly face such situations in the years ahead. It is worthwhile to look at what courts in the U.K., the

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82. See *R (on the application of Miller and another) v. Secretary of State for Exiting the European Union* (2017) UKSC 5, [41–45].

U.S., and around the world might face going forward, and what the Prorogation Case can teach us about protecting democracy.

While the Prorogation Case may be *sui generis*, the U.K. Supreme Court will continue to have an important role in the Brexit debate. As Brexit continues to challenge and divide the U.K., the Supreme Court may well have to once again resolve challenging legal and political disputes that arise. There is already speculation that the Supreme Court might have to intervene if Prime Minister Johnson attempts to withdraw the U.K. from the E.U. without a withdrawal deal, contrary to a law passed by Parliament.<sup>83</sup> The U.K. Supreme Court's decision in the Prorogation Case makes clear that it is ready and able to serve as an arbiter to this and other possible disputes.

On the other side of the Atlantic, it seems that the U.S. Supreme Court may also have to navigate a political minefield in the near future. It appears increasingly likely that the President and Congress are headed towards a collision course given the possible impeachment proceedings, and a potential battle over the production of documents and the assertion of executive privilege.<sup>84</sup> That is not to mention other issues involving the President ranging from the Emoluments Clause of the Constitution to attempts to access his tax returns.<sup>85</sup>

There is a temptation for the U.S. Supreme Court to retreat from politically difficult decisions because it simply does not want to get involved. However, this would ultimately lead to judicial nihilism where the Court cannot rule of anything in the political realm because everything is inherently political. An even greater danger would be legal relativism and false equivalency where the U.S. Supreme Court feels that it cannot rule in a dispute between the two other branches of government, even if one of the branches is clearly acting in bad faith.

In the even bigger picture, courts around the world are going to have to confront governments pushing the limits of their power. Democratically elected leaders have strained democracies from Jair Bolsonaro in Brazil to Viktor Orban in Hungary to Rodrigo Duterte in the Philippines. These and other leaders are pushing the boundaries of what is possible in a democracy and are moving their governments in a more authoritarian direction.

With the rise of these leaders, the previously unwritten rules and norms of democratic governance are being exploited with governments now engaging in activities that while “respecting the letter of the law, obviously violate its

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83. See Lizzy Buchan, *Boris Johnson to Face Fresh Legal Challenge if He Tries to Bypass Law Blocking No-Deal Brexit*, INDEPENDENT (Sept. 27, 2019, 8:30 AM), <https://www.independent.co.uk/news/uk/politics/boris-johnson-brexit-no-deal-benn-act-john-major-david-gauke-latest-a9122516.html>.

84. See, e.g., Garrett Epps, *Congress Should Go to the Supreme Court Right Away*, THE ATLANTIC (Oct. 1, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/executive-privilege-cant-protect-trump-for-ever/599200/>; Kate Shaw, *The White House and Congress Are Heading for a Collision. Who Will Win?*, N.Y. TIMES: OPINION (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/opinion/executive-privilege.html>.

85. See David A. Fahrenthold & Jonathan O'Connell, *What is the 'Emoluments Clause'? Does it Apply to President Trump?*, WASH. POST (Jan. 23, 2017), [https://www.washingtonpost.com/politics/what-is-the-emoluments-clause-does-it-apply-to-president-trump/2017/01/23/12aa7808-e185-11e6-a547-5fb9411d332e\\_story.html](https://www.washingtonpost.com/politics/what-is-the-emoluments-clause-does-it-apply-to-president-trump/2017/01/23/12aa7808-e185-11e6-a547-5fb9411d332e_story.html).

spirit.”<sup>86</sup> Mark Tushnet used the phrase “constitutional hardball” to describe this phenomena when “political claims and practices-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.”<sup>87</sup>

Prime Minister Johnson’s critics would argue that he attempted to play constitutional hardball when proroguing Parliament, but the Supreme Court was there to tell him he had gone too far. Indeed, his subsequent decision to only prorogue Parliament for a few days demonstrates that the Supreme Court’s ruling forced Prime Minister Johnson to conform to the existing constitutional norms. It showed the system worked: Prime Minister Johnson still got to prorogue Parliament, but not in a way that would not frustrate the ability of Parliament to debate and scrutinize the government in line with previous tradition.

Given that leaders around the world are increasingly playing this type of constitutional hardball, it is likely that at least some will overstep legal boundaries. At some point, if leaders attempt to go to the very edge of what is legal, then unsurprisingly they will eventually go into unlawful territory. Courts must be there to draw the limits because otherwise there are few other obstacles for embolden leaders from taking over governments. Strong man politics only works if the other parts of the government are too weak or unwilling to prevent the takeover of government.

The role of the judiciary is not to make policy or decide inherently political determinations best resolved by the elected branches of government, but that does not mean it has no role in the political process. Instead the role of the judiciary is to make sure the guardrails of democracy stay up and that no one actor veers too far off course. Without this important function of the judiciary, there is a risk that the political system and the rule of law ceases to function.

Courts will continue to see more difficult political cases in the years to come as countries continue on the path of increasing polarization. It is tempting for courts to retreat into the isolation of the law library and take a back seat to the great issues of the day. However, courts were created for a reason and they serve a function. It is important to remember the critical role of courts as democracy continues to be tested at home and around the world.

#### CONCLUSION

Despite very different circumstances, *Marbury v. Madison* and the Prorogation Case involve new Supreme Courts grappling with the difficult constitutional questions in the midst of intense political conflict. Ultimately, both Supreme Courts did not shirk their responsibilities and instead were willing to make the tough decisions. Courts will have to continue making tough decisions in the years ahead as democracies around the world are tested by leaders willing to push

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86. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 106–11 (2018).

87. Mark V. Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

the limits of their powers. Instead of avoiding the difficult political issues, courts should play their role in defending democracy so that the rule of law can thrive in the 21st century.