# Reframing the Constitutional Questions on the 2008 Prorogation: Debates, Dialogue, and Boundary Drawing

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*Based on past survey research exploring the views of fifty scholars, advisors, journalists, and senior parliamentary staff, this paper argues two separate and sequentially distinct debates surrounding the 2008 prorogation. The first considers the role (if any) of the Governor General when a request for prorogation is made while a confidence vote is pending. The second assumes a role for the Governor General in these rare circumstances and focuses on the use of the reserve power to refuse prime ministerial advice. I propose a new model of debate and dialogue to ensure that more Canadians can define the concepts and relevant constitutional principles that remain contested. I use this model to illuminate the four main views and assess the strengths and weaknesses of each school of thought.*

*S'appuyant sur des sondages d'opinions menés auprès de plus de cirquante chercheurs, conseillers, commentateurs et hauts fonctionnaires parlementaires, l'auteur de cet article soutient que deux discussions séparées et distinctes sur le plan séquentiel entourent la prorogation de 2008. La première examine le rôle (s'il y a lieu) du gouverneur général lorsqu'une demande de prorogation est faite au moment où un vote de confiance est en suspens. La deuxième suppose un rôle pour le gouverneur général dans ces cas rares et porte sur l'utilisation des pouvoirs discrétionnaires pour refuser les conseils du premier ministre. Dans cet article, je soutiens qu'un nouveau modèle de discussion et de dialogue est nécessaire afin de garantir que davantage de Canadiens puissent définir les concepts et les principes constitutionnels pertinents qui sont toujours contestés. J'utilise ce modèle pour donner un aperçu des quatre vues principales et évaluer les forces et les faiblesses de chaque école de pensée.*

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## Introduction

A recent edited collection by Smith & Jackson[1] presents two divergent views on the constitutional role of the Governor General during 2008 prorogation.[2] Monahan observes that by publicly challenging the legitimacy of the proposed coalition, Harper was unlikely to step aside even if he lost a vote of no confidence.[3] Monahan argues that the Governor General was wise to follow Harper's advice to prorogue Parliament, as refusing the Prime Minister in such a circumstance could set up an unprecedented political and constitutional crisis.[4] On the other hand, Andrew Heard argues that, given the availability of an alternative government that appeared to have majority support in the House, the Governor General ought to have upheld the primary role of members of Parliament to hold the government accountable. In 2008, this accountability would have required that the scheduled confidence vote take place before acceding to Prime Minister Harper's request to prorogue Parliament.[5]

The debate between these two positions is important but sequentially out of order. Based on the identification of four schools of thought on the 2008 prorogation in Canada,[6] it is necessary to first address whether the Governor General has a role when a Prime Minister makes a prorogation request while also facing a vote of no confidence in the House. Despite what appears to be widespread agreement on this question, too often the minority view on constitutional questions is mocked, maligned, or otherwise ignored by those in the majority. This limits an understanding of the underlying assumptions upon which these differences are based and undermines the potential for broader deliberation on these questions.[7] This paper reframes the constitutional questions in 2008 as two distinct debates. The first debate considers whether the

1 Jennifer Smith & D Michael Jackson, eds, *The Evolving Canadian Crown* (Kingston, Ont: McGill-Queen's University Press, 2012) [Smith & Jackson].

2 See Andrew Heard, "The Reserve Powers of the Crown: The 2008 Prorogation in Hindsight" in Jennifer Smith & D Michael Jackson, eds, *The Evolving Canadian Crown* (Kingston, Ont: McGill-Queen's University Press, 2012) 87 [Heard]; Patrick J Monahan, "The Constitutional Role of the Governor General" in Jennifer Smith & D Michael Jackson, eds, *The Evolving Canadian Crown* (Kingston, Ont: McGill-Queen's University Press, 2012) 73 [Monahan].

3 Monahan, *ibid.*

4 *Ibid* at 76-80.

5 Heard, *supra* note 2 at 93-95.

6 See Wheeldon, Johannes. "The Prorogation Project: An Empirical Assessment of the Views of Constitutional Scholars on 2008 Prorogation" (Paper delivered at the Canadian Association of Political Science Meetings, Victoria, BC, 2-4 June 2013), [unpublished] [Wheeldon].

7 Richard J Heuer Jr & Randolph H Pherson. *Structured Analytic Techniques For Intelligence Analysis* (Washington, DC: CQ Press, 2011) [Heuer & Pherson].

Governor General had discretion in 2008 to refuse Prime Ministerial advice; the second focuses on the proper role of the Governor General when a request is made to prorogue Parliament while a vote of confidence is pending.

Based on previous work,[8] this paper assesses key arguments for each position and presents a new model of debate focused on logically organized arguments of fact, value, and policy. This model requires the acknowledgement of counterevidence and the willingness among serious scholars to argue either side of a debate. Unless scholars replace the tendency to engage in self-serving promotion of their own preferred arguments, reasoned disagreements will get lost amidst the inevitable competition for constitutional certitude. By modelling a more flexible and respectful process of interaction, this approach may assist to better define essential differences within Canadian constitutional scholarship.

## Four schools of thought on the 2008 debate

In previous research, I identified credible articles published on the constitutional principles at stake during the Parliamentary crisis of 2008.[9] In subsequent research I surveyed twenty-five constitutional scholars, ten journalists, and five Advisors to the Crown; I examined this data using the *Analysis of Competing Hypotheses* (ACH) to assess support for key propositions published since the 2008 prorogation.[10] My research suggested a large majority agreed that the Governor General had discretion in 2008 to refuse the Prime Minister's request. Most of those surveyed held that the 2008 prorogation harmed principles of responsible government. A large majority favoured the development of a cabinet manual to outline roles and responsibilities in order to avoid similar crises in the future. From this research, I identified four main schools of thought on the 2008 prorogation: Executive Authority, Constitutional Peace, Political Order, and Good Government. Of specific interest in this paper are the viewpoints of fourteen scholars listed in Table 1 who chose to waive anonymity.

8 To date the project has surveyed 25 constitutional scholars, 10 national journalists, 7 advisors to the Crown, and 8 parliamentary insiders. The project has presented the empirical basis for 4 schools based on the views of 25 constitutional scholars and compared the responses of scholars and national journalists. This paper delves deeper into the 4 schools to identify the strengths and weaknesses of each position.

9 Johannes Wheeldon, "Actors, Targets, and Guardians: Using Routine Activities Theory to Explore the 2008 Decision to Prorogue Parliament in Canada" (2011) 36:1 Canadian Journal of Sociology 59 [Wheeldon, 2011].

10 Wheeldon, *supra* note 6.

**Table 1 — Constitutional scholars who waived anonymity**

| | | |
|---|---|---|
| Michael D Behiels | Robert Hawkins | Patrick Monahan |
| Henri Brun | Andrew Heard | Peter Russell |
| Hugo Cyr | Bruce M Hicks | Lorraine Weinrib |
| Don Desserud | Philippe Lagassé | Graham White |
| Adam Dodek | Bradley Miller | |

To understand the strengths and weaknesses of each school, a useful first step is to identify areas of apparent agreement. The interpretation of three general propositions divides one school from the other three. Table 2 offers one way to understand these differences, based on responses received through the survey. These concepts are: Deference, Confidence, and Practical Powers of the Governor General.

**Table 2: Deference, confidence, and practical powers of the Governor General**

| Concept | Definition | Executive Authority | All Other Views |
|---|---|---|---|
| Deference | The Governor General virtually always acts on the advice of the PM | Deference to the PM is near absolute even when that advice is bad and/or dangerous | Deference to the PM is important but subject to democratic norms/ values |
| Confidence | To rely upon Crown prerogatives, the PM must hold the confidence of the House | Confidence is presumed unless formally and explicitly lost in the House | Confidence presumed unless loss is imminent in the House |
| Practical Powers | In exceptional circumstances, the Governor General can refuse Prime Ministerial advice | Extremely limited and has the effect of withdrawing Crown confidence or forcing the PM to resign | Can refuse when advice would delay for too long a scheduled confidence vote |

## Executive Authority

Scholars associated with what I term Executive Authority hold a specific view of historical developments and practical precedents as regards the role of the Crown in Canada. They appear to favour a majoritarian view of parliamentary democracy that affords the Prime Minister supreme discretion and leaves the Governor General little to no recourse, even where advice by the Prime Minister is viewed as problematic.[11] For example, McDonald and Bowden approvingly cite Dawson's view that:

> The advice given may be bad; it may be shortsighted; it may be foolish; it may even be dangerous — these considerations may induce the Governor to remonstrate with his ministers and try to win them over to his point of view; but if they persist, his only course of action is to shrug his shoulders and acquiesce. The decision is not his, but that of his government.[12]

This position is consistent with Ted McWhinney's view of historical practice since 1867. He argues that the solution to a Prime Minister who flouts conventions and/or avoids accountability is political, exercised by an electorate who demonstrate their judgment through elections: "the ultimate constitutional test in a democratic polity."[13] Consistent with this view, one participant in my research noted that the resolution to constitutional crises in Canada:

> [S]hould be political, in all but highly exceptional circumstances … I think it is right to think of our political process (representatives in Parliament, voters, etc.) as the guarantor of responsible government and democracy rather than the Governor General[14]

On the second question, scholars in the Executive Authority school view the confidence vote in formal and technical terms and dismiss the notion that delaying a vote of no confidence is problematic. According to some scholars associated with this school, the Crown has no political discretion and it is not the Governor General's role to test whether the House has confidence in the government, before acceding to Prime Ministerial advice. One scholar in this school suggested:

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11 Henri Brun, "La monarchie réelle est morte depuis longtemps au Canada", *Le Soleil* (4 December 2008) online: LeSoleil <http://www.lapresse.ca/le-soleil/opinions/points-de-vue/200812/04/01-807282-la-monarchie-reelle-est-morte-depuis-longtemps-au-canada.php> [Brun].

12 Nicholas A MacDonald & James WJ Bowden, "No Discretion: On Prorogation and the Governor General" (2011) 34:1 Canadian Parliamentary Review 7 [MacDonald & Bowden].

13 Edward McWhinney, "The Constitutional and Political Aspects of the Office of the Governor General" (2009) 32:2 Canadian Parliamentary Review 2 [McWhinney] at 8.

14 Wheeldon, *supra* note 6.

> If the Governor General were to refuse the request of a PM who had demonstrated the confidence of the House it would call into question our democratic system. No one elected the Governor General[15]

Despite what appear to be strongly held views on the limited role of the Governor General, scholars associated with this school provided four examples in which the reserve powers of the Crown might be activated: uncertainty following an election; the refusal of the Prime Minister to meet the House after he or she loses an election; the Prime Minister's physical or mental incapacitation (e.g. stroke, drug addiction); and the use of the prorogation mechanism in a way that seriously violates overarching constitutional principles in a non-remediable way.[16]

The strengths of this view include grounding existing practice in a specific reading of history that includes constitutional precedent. Likewise, Executive Authority may suggest a more coherent view of how power ought to be exercised in Canada. However, the weaknesses of this view are numerous. The first problem is that its adherents offer different justifications for why Governors General have limited or no discretion in matters of prorogation. Based on the survey responses, some participants appeared concerned with protecting the role and reputation of the monarchy in Canada, while others disavow any role for the Queen's representative in Canadian democracy. Indeed in the name of consistency, one might need to split this school into two wings consisting of Republicans and Monarchists, each of whom favour limiting the role of the Crown, albeit for different reasons.

The second problem is that despite the suggestion that practice ought to guide how we understand the role of the Crown, not a single participant of the fifty scholars, advisors, journalists, commentators, and senior parliamentary staff referred to the 1873 prorogation as a leading precedent.[17] Indeed, few seemed to recognize that by prioritizing practice, scholars in this school must argue that the Governor General was wrong to think she had *any* discretion in 2008. This is a view that Michaëlle Jean and her advisors firmly rejected.[18] Finally, other than waiting for the next election, there appears to be no answer to what Eugene Forsey critiques as the "rubber stamp" view of the Crown. Adopting this view would make:

15 *Ibid.*
16 *Ibid.*
17 *Ibid.*
18 Eric Adams, "The Constitutionality of Prorogation" (2009) 17:1 Constitutional Forum 17 [Adams].

> [E]xisting governments irremovable except by their own consent. Such a doctrine is a travesty of democracy. It delivers every Opposition gagged and bound into the hands of any jack-in-office.... This is not democracy. It is despotism; more or less benevolent, perhaps, for the moment, but despotism none the less.[19]

While this school was the least popular view expressed through the research, supporters are adamant their view is correct. Overall, this perspective would benefit from a clear and substantiated justification, published in a peer-reviewed outlet, and that applies its unique view of historical and constitutional precedents to the circumstances of 2008.

## Constitutional Peace

A more popular view is associated with what I call Constitutional Peace. Scholars in this school acknowledge that the 2008 prorogation was problematic but argue that the alternative would have been worse. Held by the editors of the most comprehensive collection of voices and views on the 2008 prorogation[20] this view is preoccupied with the potential political dangers that might arise should a Governor General refuse the advice of a sitting Prime Minister. In such cases a Prime Minister may use this refusal to provoke a constitutional crisis, a potential danger in 2008.[21] Scholars associated with this view share the outlook that while the role of the Governor General is largely ceremonial it should also include an overarching concern for potential economic, political, and social dangers to the Canadian people. Thus, the threat that the Prime Minister would stoke a constitutional crisis in 2008 justified the prorogation and maintained peace even if it amounted to an undesirable constitutional outcome.

In this view, the exercise of Crown prerogative in Canada must balance theoretical power with the insecurity that would result should a constitutional confrontation between a duly elected government and the Crown be deliberately politicized.[22] According to one participant, "the general rule that the Governor General followed in this instance was, as far as I can tell, to let

19 See Eugene A Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1943) [Forsey, *Dissolution*]; Helen Forsey, *Eugene Forsey: Canada's Maverick Sage* (Toronto: Dundurn Press, 2012) at 318 [Helen Forsey].

20 Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) [Russell & Sossin, *Crisis*].

21 Monahan, *supra* note 2 at 76-80.

22 CES (Ned) Franks, "To Prorogue or Not to Prorogue: Did the Governor General Make the Right Decision?" in Peter H Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 33 [Franks].

politics play itself out and not to intrude."[23] On the question of deference, scholars in this school agree with the widely held proposition that "...in this democratic age, the head of state or her representative should reject a Prime Minister's advice only when doing so is necessary to protect parliamentary democracy."[24] From this perspective, while exercising power to refuse a Prime Minister would be extremely rare, the potential certainly still exists.

On the second question regarding confidence, adherents of this school accept the view that the Governor General has the constitutional right to refuse a Prime Minster who holds the confidence of the House. They argue that without this constitutional authority the Government could use prorogation to delay or even perhaps avoid the judgment of the House.[25] In such cases, there may be no constitutional solution to Forsey's aforementioned 'benevolent' despot problem, unless the Governor General at least theoretically can intervene and ensure the House can meet to do its constitutional duty.

The third question concerns the Governor General's practical powers. While those in this school do not deny their existence, when and how the Governor General might exercise these powers remains in some doubt. Russell contends that in the future the Governor General could activate these reserve powers in cases where a controversial request for a prorogation was for a "... length of time significantly longer than past prorogations of 1873 (71 days), 2008 (53 days) and 2009-10 (62 days)".[26] Thus, the Governor General could refuse advice only when the Prime Minister seeks to delay accountability in the House through prorogation that would exceed the length of time established through past practice.

The strengths of the Constitutional Peace school are that it upholds the notion that the use of the Crown's reserve powers ought to be rare while also addressing the benevolent dictator problem in a way that the Executive Authority school cannot. The Constitutional Peace school does so by observing that constitutional conventions are only effective as rules of proper con-

23 Wheeldon, *supra* note 6.

24 See Peter H Russell, "Discretion and the Reserve Powers of the Crown" (2011) 34:2 Canadian Parliamentary Review 19 [Russell, 2011]. Peter Russell's 2011 reply to MacDonald and Bowden's article is a useful overview of some of the limitations of the position they pursue. It should be noted the "past constitutional practice" argument seems to be based on prorogations that were the subject of some debate. There are examples of non-controversial prorogations that exceed the times Russell provides above.

25 *Ibid.*

26 *Ibid.*

duct when the relevant actors accept that they are bound to observe them.[27] When an elected leader refuses to be bound by past constitutional practice, he or she may open up the potential for constitutional crises to overwhelm the public, leading to political insecurity and social strife. According to one participant in the survey:

> [T]he Crown remains as the people's last safeguard of democracy in our system. While rarely called upon to make a decision regarding the validity of a sitting government or to take overt action to correct untenable issues, the Crown's ability to intervene remains an important part of ensuring that our parliamentary system does not become a benevolent dictatorship.... Why would we complain when the Crown is then called upon to ensure that process is protected?[28]

The problem, however, is that this school of thought may serve to provide a Machiavellian road map for those who seek to abrogate basic principles of parliamentary democracy for short-term political advantage. If basic notions of parliamentary supremacy can be ignored whenever leaders threaten to provoke a crisis, it appears the Crown is unable to defend basic constitutional principles for fear of the political consequences that may follow.

## Political Order

The second most popular view based on the survey responses is one articulated by Peter Hogg. Those associated with Political Order concede that the Governor General almost always defers to the Prime Minister and that the Governor General has no discretion to refuse advice to prorogue when the Government clearly has the confidence of the House. However, as in 2008 when a loss of confidence was potentially imminent, the Governor General has personal discretion via the Crown's "reserve power" to refuse advice to prorogue if he or she regards this as the best alternative.[29]

The main difference between this school and others relates to the practical powers of the Governor General. Going beyond the theoretical existence of the power to refuse unconstitutional advice, Hogg argues that the "wise" exercise of the Governor General's discretion involves a number of political calculations. Regarding the 2008 case, Hogg lists specific circumstances such as: the undesirability of another election so soon after the last, the perceived weakness of the Liberal leader, the problematic involvement of the Bloc

27 *Ibid.*

28 Wheeldon, *supra* note 6.

29 Peter Hogg, "Prorogation and the Power of the Governor General" (2009) 27 NJCL 193 [Hogg, 2009] at 197-98.

Québécois, and the fragility of a coalition organized in "haste and anger."[30] From this view, the Governor General in Canada has a robust discretionary role not only in determining whether a sitting Prime Minister has the confidence of the House but also in assessing the political viability of any alternative government.[31] This position appears reminiscent of an earlier age when the Crown exercised personal prerogative not only to protect the rights of those elected to the House of Commons but also to decide what government is best suited for Canadians.

The strength of this view is that it explicitly defines the role of the Governor General as a protector not of parliamentary democracy per se but of a certain sort of political order. The Governor General's role involves considering the specific circumstances on a case-by-case basis in order to assess the best practical outcome. This robust role for the office of the Governor General perhaps problematically constrains the powers of the Executive. In contrast to Crown acquiescence to avoid constitutional crises (as held by those in the school of Constitutional Peace), the sort of broad discretion suggested here gives more authority to Governors General than many might assume based on Canadian and Commonwealth practice. Accepting that the Governor General may assess the political appropriateness of alternative governing coalitions in Canada may allow the Crown a role far beyond that of neutral arbiter.[32]

While Hogg does not examine situations in which this personal prerogative or discretion could be hijacked, manipulated, or otherwise influenced, this view stands in stark contrast to other Commonwealth countries that recognize the need that the Crown be — and be seen as — impartial and above partisan politics.[33] This view opens the door to the misunderstanding that the Governor General has routine decision-making power in Canada.[34] Under this view the political preferences of the Governor General (or the predilec-

30 *Ibid* at 200-01.

31 Anne Twomey, "Changing the Leader — The Constitutional Conventions Concerning the Resignation of Prime Ministers and Premiers" (2011) 39:3 Federal Law Review 329 [Twomey].

32 Wheeldon, 2011, *supra* note 9.

33 Eugene A Forsey, "Constitutional Monarchy and the Provinces: The Confederation Challenge" in Eugene Forsey, ed, *Freedom and Order: Collected Essays* (Toronto: McClelland and Stewart, 1967) 21 [Forsey, "Constitutional Monarchy"].

34 The notion that Canadians are confused about the Governor General's everyday decision-making power can be surmised based on the results of a 2012 Harris/Decima poll sponsored by *Your Constitution, Your Canada*: Your Canada, Your Constitution, News Release, "Two-thirds of Canadians want changes to GG and prov governors powers and positions" (20 June 2012) online: YCYC <http://ycyc-vcvc.ca/news/press-releases/two-thirds-of-canadians-want-changes-to-gg-and-prov-governors-powers-and-positions/> [2012 Poll].

tions of their advisors) could influence constitutional outcomes in ways that are neither transparent nor accountable.

## Good Government

The last and most popular view rejects an overtly political role for the Governor General. Instead, this view argues that the Crown's reserve powers are limited to assessing whether a proposed alternative government would hold the confidence of the House. This view is based on the experience of other Commonwealth countries (Forsey, 1967; 1990). Most recently, Andrew Heard has provided the most authoritative justification for this view:

> The lessons to be learned from the events of 2008 underline the very real nature of the reserve powers of the Crown. A Canadian Governor General or lieutenant governor retains material authority, in exceptional circumstances, to form an independent judgement on whether he or she should follow the unconstitutional advice offered by the first minister or cabinet. These reserve powers are essential to the proper functioning of our parliamentary system, in which a government's legitimacy flows from the support of the elected members of the legislature.[35]

On the first and second questions concerning deference and confidence, the Good Government school agrees that the role of the Governor General is limited and based on deference to the Prime Minister, provided there is no question whether he or she holds the confidence of the House. Heard argues that, given the availability of an alternative government that appears to have the support of a majority in the House, the Governor General ought to support the primary role of members of Parliament to hold the government accountable.[36] In 2008, this position would have required that the scheduled confidence vote take place before acceding to any subsequent request to prorogue Parliament.[37] As one participant suggested:

> A PM who postpones or delays or obstructs a confidence vote undermines the principle of responsible governance and supports no other principle of which I am aware.[38]

On the question of practical powers of the Governor General, this school takes a limited view of Crown's role. Instead of arguing that the Governor General's personal discretion should decide what an appropriate alternative governing coalition might look like, Heard and the majority of those in the survey view the House as the only institution qualified to determine confi-

35 Heard, *supra* note 2 at 95.
36 *Ibid.*
37 *Ibid* at 93-95.
38 Wheeldon, *supra* note 6.

dence. If this view is correct, an essential role of the Governor General is to defend the primacy of Parliament to find the most appropriate governing arrangement. As Eugene Forsey stated in a rather prescient phrase:

> If a Prime Minister tries to turn Parliamentary responsible government into unparliamentary irresponsible government, only the Crown can stop him; only the Crown can keep government responsible to Parliament and Parliament to the people.[39]

The strengths of this view include clarity as to who holds political power in Canada, recognizing that Parliament is the only democratically elected body in Canada. While it allows for the role of the Crown to be deferential, it explicitly retains a guardianship role should the Prime Minister's seek to short circuit parliamentary accountability.[40] To rely upon Crown prerogatives, the Executive must hold, and be seen to hold, the confidence of the House. Using prorogation to avoid a vote of non-confidence in a minority government is such a grand departure from the basic logic of responsible government that it appears *sui generis* based on a review of recent practice in the Commonwealth.[41]

While this view upholds responsible government in ways that no other school can, its weaknesses are complex. The first problem is that there has been a trend within parliamentary democracies to centralize political power in the hands of the Executive.[42] This centralization is certainly the case in Canada, where some who work within Parliament appear to hold views consistent with a far more limited role for the Governor General. Another issue is that in 2008 adopting this view required accepting that the support of the Bloc Québécois was necessary to sustain the proposed coalition of Liberals and New Democrats. Few can forget the "us and them" invective of 2008[43] and media reports that focused on regional distrust and highlighted the confusion many have about the legitimacy of coalitions in Canada.[44] Until Canadians

39 Forsey, "Constitutional Monarchy", *supra* note 33 at 30.

40 Wheeldon, 2011, *supra* note 9.

41 Twomey, *supra* note 31.

42 Bertrand Russell, *The History of Western Philosophy* (New York: Simon & Schuster, 1967) [Russell, *Western Philosophy*].

43 Grace Skogstad, "Western Canada and the 'Illegitimacy' of the Liberal-NDP Coalition Government" in Peter H Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 163 [Skogstad].

44 In addition, two recent projects have offered important contributions to understanding the media's role in 2008. The first is a Master's thesis that explored the agendas and frames used by newspapers in their coverage of the 2008 prorogation: Alex P McBrien, *Prorogation 2008: A Case Study in How Media Communicate Democracy* (MA Thesis, University of Calgary Communication Studies, 2012) [unpublished], online: University of Calgary Theses Repository <http://theses.ucalgary.ca/handle/11023/319> [McBrien]. The thesis employed a content analysis of the *Toronto Star*, *National*

become more educated about their own system of government, we may be destined to attempt to manage one crisis after another with little understanding of the consequences of adopting one position over another.

## Debating constitutional principles: Fact, value, and policy

Bruce Hicks has argued that constitutional scholars lie on a continuum somewhere between seeing the Head of State as a figurehead on one hand or as a defender of the constitution on the other.[45] The contested role of the Governor General highlights a paradox of Canadian governance. In short, many in Canada assume a high level of integrity by the unaccountable agents we all rely upon to ensure our system of government works.[46] This assumption results in deference to the decision-makers even when those decisions involve opaque calculations about the proper functioning of parliamentary democracy. The problem is that it is not always clear that this deference is based on an informed discussion of competing schools of thought related to key constitutional questions in Canada.[47]

One means to educate and engage Canadians is to reframe scholarly debates in ways that downplay the competitive tendency to privilege one particular view. Instead, these questions can be presented in ways designed explicitly to engage and inform. Through a deliberate effort to explore the strengths and weaknesses of each position, this model of debate is focused on designing arguments based on fact, on value, and on policy. Figure 1 provides an example.

In this way, key arguments for and against specific views can be presented in ways that compare similar arguments. By requiring debaters to format arguments to a predefined and mutually agreed framework, constitutional debates can be better organized and play a more educative role. An important element

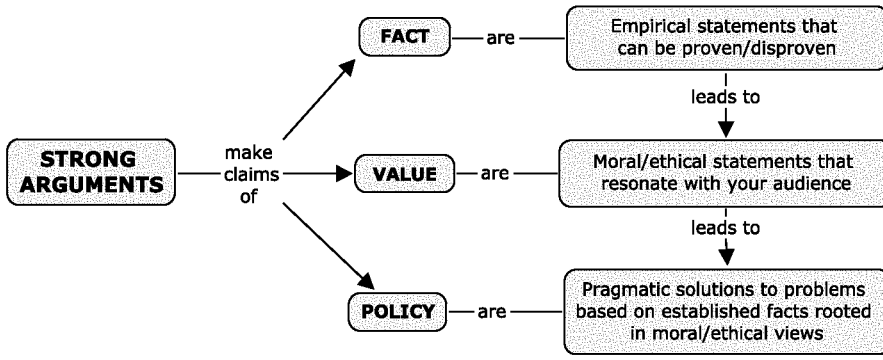
*Post*, and *Le Devoir* in which articles that appeared between November 27th, 2008 and December 7th, 2008. McBrien found newspapers focused on terms like "socialists," "separatists." The second involved an institutional analysis of how the Liberal-NDP accord was framed through national television news during the first week of December 2008: Lydia Miljan, "Television Frames of the 2008 Liberal and New Democrat Accord" (2011) 36:4 Canadian Journal of Communication 559 [Miljan]. Miljan at 573 suggests that television media emphasized Dion's leadership status, concern about the role of the BQ, and the lack of Canadian precedents in coalition governments helped legitimize Harper's unprecedented request to prorogue parliament.

45 Bruce Hicks, "Guiding the Governor General's Prerogatives: Constitutional Convention Versus an Apolitical Decision Rule" (2009) 18:2 Const Forum 55 [Hicks] at 59.

46 Charles Robert, Book Review of *The Evolving Canadian Crown* by Jennifer Smith & D Michael Jackson, eds, (2012) 35:2 Canadian Parliamentary Review 36 [Robert].

47 Wheeldon, *supra* note 6.

**Figure 1 — Arguments of Fact, Value, Policy**[48]




within this debate model is the requirement that debaters acknowledge the limitations and potential problems with their position.[49] As part of a renewed focus within reputable publications to bolster credibility through self-critical transparency, leading journals require researchers to discuss counterevidence and other possible interpretations of their findings, rather than simply presenting one's personal view as *a priori* correct.[50]

Given the approach outlined above, one way to explore the constitutional issues at play in 2008 is to present and consider two debates, and four distinct positions.[51] The first debate focuses on the existence of a Governor General's discretion to refuse a Prime Minister if he or she seeks to prorogue Parliament to avoid a non-confidence vote. Those in the Executive Authority school argue that historical developments and practical precedents on the role of the Crown in Canada afford the Prime Minister supreme deference on matters of prorogation[52] except in exceptionally rare circumstances — which was not the case in 2008. On this view, debating the wisdom of Governor General's decision is irrelevant. In 2008, the Governor General had no discretion even if the advice by the Prime Minister was potentially problematic.[53]

48 Wheeldon, Johannes, Ricardo B Chavez & Joe Cooke. *Debate and Dialogue in Correctional Settings: Maps, Models, and Materials* (New York, International Debate Education Association, 2013). [Wheeldon, Chavez & Cooke]

49 *Ibid.*

50 Johannes Wheeldon & Mauri K Ahlberg. *Visualizing Social Science Research: Maps, Methods, and Meaning* (Thousand Oaks, Cali: Sage Publications, 2012) [Wheeldon & Ahlberg].

51 Wheeldon, *supra* note 6.

52 McWhinney, *supra* note 13.

53 MacDonald & Bowden, *supra* note 12.

Those associated with Constitutional Peace challenge this interpretation of historical developments and practical precedents on the role of the Crown in Canada.[54] Instead, the Governor General has a constitutional duty uphold basic norms and values in a democratic society.[55] According to this view, the Governor General can refuse Prime Ministerial advice to prorogue Parliament to delay or avoid a confidence vote. Table 3 presents a clear proposition with strong arguments for each school.

**Table 3: Debating prorogation as a reserve power**

| **Proposition:** The Governor General cannot refuse a request for prorogation by a Prime Minister who has not been defeated by a confidence vote. | |
|---|---|
| **ARGUMENTS FOR THE PROPOSITION** | **ARGUMENTS AGAINST THE PROPOSITION** |
| FACT: Power in parliamentary systems, including Canada, has increasingly been concentrated in the hands of the Executive (McWhinney, 2009). | FACT: Virtually every constitutional scholar and advisor, and the GG herself believed that she had discretion to refuse PM's advice in 2008 (Adams, 2009). |
| VALUE: Elections are the best means to address constitutional controversies; Governors General may advise but never refuse a PM (Dawson, 1987). | VALUE: Delaying a confidence vote and then attempting to prorogue Parliament undermines democratic accountability (Russell, 2011) |
| POLICY: In this day and age it is "unfathomable" that a Governor General could refuse a Prime Minister's who held the formal confidence of the House (MacDonald & Bowden, 2011). | POLICY: GG can refuse advice when request would undermine democratic norms/values (Russell, 2011); however, retains the duty to always consider the best interests of Canadians (Franks, 2009) |

While both schools accept that the Governor General can refuse Prime Ministerial advice in rare circumstances, they disagree on what constitutes "rare." For those associated with Executive Authority, rare is extremely rare indeed associated with uncertainty following an election or a medical condition that impairs judgment.[56] For others, the Governor General's role should consider broader notions of democratic accountability. To be consistent with the debate model, those who argue for the Executive Authority and Constitutional

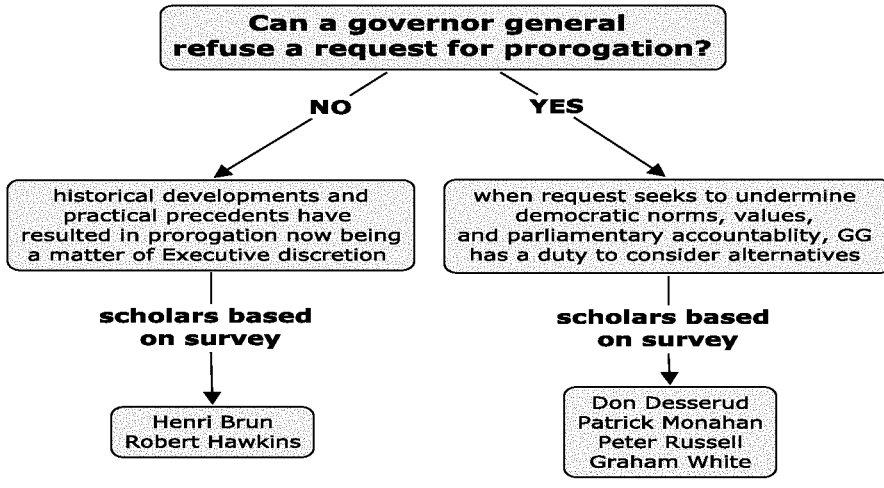
54 Adams, *supra* note 18.
55 Russell, 2011, *supra* note 24.
56 Wheeldon, *supra* note 6.

Peace schools should consider the problematic aspects of taking their positions to their logical outcome.

For example, one could imagine a situation in which Parliament was prorogued for 11 months 29 days to avoid a motion of no confidence, then summoned briefly and prorogued again. While the constitutional obligation for Parliament to meet once a year would be met, it would be difficult to argue that this constitutes true democratic practice. Were the Crown to be powerless in such a circumstance, adopting the Executive Authority school's view would seem to undermine the very purpose of a constitutional monarchy. A challenge to be acknowledged for those who prioritize Constitutional Peace would be that the Governor General is rendered powerless in all but the most rare circumstances. The general unwillingness of the Governor General to challenge unconstitutional Prime Ministerial advice would empower a Prime Minister who is willing to abrogate basic principles of parliamentary democracy for short-term political advantage. Figure 2 explores the broader debate visually and includes the names of scholars who waived anonymity and whose views could be grouped together based on their survey results.

A second debate assumes that the Governor General can in certain circumstances — such as those in 2008 — refuse a request for prorogation. This question focuses on how the Governor General ought to discharge his or her duty should such a situation arise. Based on my analysis of the survey responses, this debate places the two most popular views on the 2008

**Figure 2 — Can a Governor General refuse a request for prorogation?**



prorogation in opposition. The key question regarding 2008 for the survey participants: Is the Governor General's power based on personal discretion to assess "appropriateness" of alternative governing coalitions or limited to ensuring the House can meet on the scheduled vote of non-confidence?

Political Order, as described above, is a view ascribed to Peter Hogg. He argues that the exercise of the Governor General's discretion involves a number of political calculations in order to protect a certain sort of political order, including a robust role for the office of the Governor General that constrains the powers of the Executive. As detailed above, Hogg suggests that Governors General must consider the specific circumstances of each case in order to assess the best political outcome.[57] The Good Government school rejects an overtly political role for the Governor General. Instead, the Crown's reserve powers are limited to assessing whether a proposed alternative government could hold the confidence of the House. If this view is correct, an essential role of the Governor General is to defend the primacy of Parliament against Executive overreach. Table 4 presents a clear proposition with strong arguments for each school.

**Table 4: Debating the Role of the Governor General in 2008**

| **Proposition:** The Governor General's role in 2008 should have been limited to ensuring the House could meet on the scheduled confidence vote. | |
|---|---|
| **ARGUMENTS FOR THE PROPOSITION** | **ARGUMENTS AGAINST THE PROPOSITION** |
| FACT: An alternative governing coalition that held a majority in the House of Commons was denied the ability to vote no confidence (Heard, 2009); | FACT: There were serious questions about the popularity, stability, and potential of the alternative coalition to govern Canada effectively (Hogg, 2010); |
| VALUE: To govern the Executive requires the confidence of the House, which is the only elected representative body in Canada (Smith, 2009); | VALUE: A Governor General has the personal discretion to assess alternative governing arrangements before refusing the advice of the Prime Minister (Hogg, 2010); |
| POLICY: While rarely necessary, Governors General must be able to ensure the House can play its essential role of holding the government to account (Heard, 2012). | POLICY: GG can refuse advice when it would undermine democratic norms/values; in 2008 ensuring a vote of confidence would follow a brief prorogation was the preferred course of action (Hogg, 2010). |

57 Hogg, 2009, *supra* note 29 at 200-01.

While both schools accept that a Governor General can refuse Prime Ministerial advice in some circumstances, they disagree on how to understand the function of the Governor General in these circumstances. Those associated with Political Order should acknowledge the problems that might arise when an appointed Governor General uses his or her personal discretion to intervene in ways that undermine the stated views of a majority in the House of Commons. On the other hand, adherents to Good Government must consider the political consequences of adopting this view in 2008. The governing coalition of Liberals and New Democrats in 2008 would have required the support of the Bloc Québécois, and thus faced sustained attacks based on potentially dangerous "us and them" invective.[58] While the views of those associated with Good Government are consistent with traditional notions of responsible government, the results of this position could have become a political powder keg given the regular and longstanding misrepresentations surrounding basic constitutional principles.[59]

To assess the support for propositions associated with this debate, we may look to the responses of those who waived anonymity through the survey. To validate and verify my own assumptions, the scholars who waived anonymity were re-contacted in February and March 2013 and asked which of the top two views best represented their view based on Figure 3.[60]

## Discussion and limitations: Boundary drawing in Canadian constitutional studies

When properly organized and framed, debate assists in constructive reflection and more robust intellectual exchange. Karl Popper's (1963) adversarial project recognizes the importance of the social construction of knowledge and the value of conflict in promoting consensus.[61] Despite the natural aversion to social discord, *integrative dissent* through debate can promote deeper

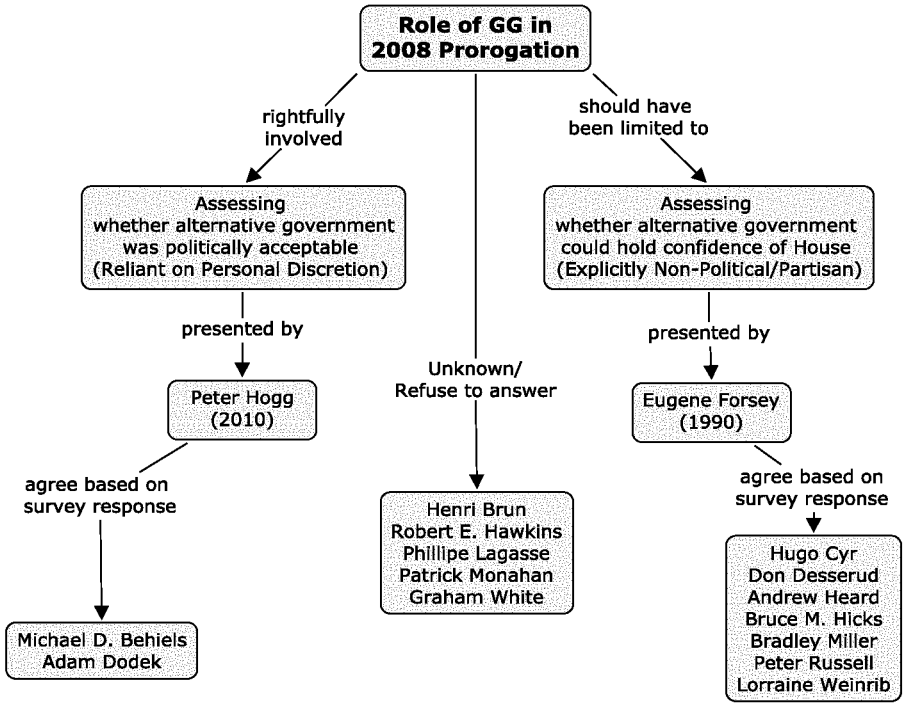
58 Skogstad, *supra* note 44.

59 These include the notion that Canadians directly elect a government as opposed to a Parliament from which a government is selected; the idea that a coalition government would have represented a "coup d'etat"; the divisive use of terms like "socialist" and "separatist" seemingly designed to stoke nationalistic sentiments; and the perverse notion that Parliament serves at the pleasure of the Prime Minister and not the other way round. See Wheeldon, *supra* note 9.

60 Forsey, "Constitutional Monarchy", *supra* note 33; Hogg, 2009, *supra* note 29.

61 Karl R Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (New York: Harper & Row, 1963) [Popper]; Thomas S Kuhn, *The Structure of Scientific Revolutions,* 2nd ed (Chicago, IL, University of Chicago Press, 1970) [Kuhn]; Karl Mannheim, Edward A Shils & Louis Wirth, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* (London: K Paul, Trench, Trubner & Co, 1936) [Mannheim et al].

**Figure 3 — Debating the role of the Governor General in the 2008 Prorogation**




intellectual consideration and deliberation.[62] Gieryn describes boundary-work as the process of:

> [I]nclusion and exclusion, which are a step toward a cultural interpretation of historically changing allocations of power, authority, control, credibility, expertise, prestige, and material resources among groups and occupations.[63]

The process of putting forward the best case possible for a particular proposition can serve to create alliances within intellectual communities. It becomes possible to draw boundaries within scholarship by ensuring that all arguments, however well-justified, include counterevidence and relevant challenges to their implementation. Forgoing the tendency to teach a particular constitutional view as self-evidently correct, this approach explicitly acknowl-

62 Randall Collins, *The Sociology of Philosophies: A Global Theory of Intellectual Change* (Cambridge, Mass : Belknap Press of Harvard University Press, 1998) [Collins].

63 Thomas F Gieryn, "Boundaries of Science" in Shield Jasanoff, Gerald E Markle, James C Petersen & Trevor Pinch, eds, *Handbook of Science and Technology Studies* (Thousand Oaks, Cali: Sage Publications, 1995) 393 [Gieryn, *Handbook*] at 406.

edges the role of acknowledging disagreements.[64] Debate can then be used to present or contest the accumulation of empirical and theoretical work, as well as add a performative function to what can be a stultifying area of scholarship.

To overcome the potential for such interactions to become just another means for established academics simply to present (and re-present) their own views, both junior and senior scholars could agree to the random formation of debate teams. Annual academic conferences could be reimagined and reanimated. By first identifying issues of significance, scholars would arrive at conferences prepared to argue both sides of a constitutional question. Debate, of course, cannot solve all outstanding disagreements or problems in Canadian constitutional studies. It can, however, serve as a means to allow scholars to explore differences in ways that prioritize and model respectful disagreement and intellectual flexibility.[65]

Based on the results of my research, the proper role of Governor General remains contested. This conflict is perhaps best seen as the latest incarnation of the Hogg/Forsey debate. Based on the events of the King-Byng affair, the debate centres on the proposition that upholding the primacy of Parliament, as occurred in 1926, can undermine the stability of government and perhaps undercut respect for the Crown. King-Byng, however, is not a close analogy for the events of 2008, as the earlier debate focused on the nature of the reserve powers specifically as they pertain to the dissolution of Parliament.[66] However, the fault line between those who prioritize stability through deference rather than accountability via guardianship remains relevant to understanding key differences among Canadian constitutional scholars.

By presenting the best case for each view, scholars can deliberately and publicly address the arguments of those who understand the role and power of the Crown in Canada in differing ways. This methodology allows the means for an objective epistemic authority to emerge and counters the danger that internal rivalries or external actors will dominate disciplinary discourses.[67] By unambiguously building counterevidence into debate, this approach could further assist academic communities to consider boundaries within their dis-

64 Johannes Wheeldon, Johnathon Heidt & Brendan Dooley, "The Trouble(s) with Unification: Debating Assumptions, Methods, and Expertise in Criminology" (2014) 6:2 Journal of Theoretical & Philosophical Criminology 111 [Wheeldon, Heidt & Dooley].

65 Wheeldon, Chavez & Cooke, *supra* note 48.

66 Forsey, *Dissolution, supra* note 19; Peter Hogg, *Constitutional Law of Canada,* 5th ed sup (Scarborough, Ont: Thompson Carswell, 2007) [Hogg, *Constitutional Law*].

67 Thomas F Gieryn, *Cultural Boundaries of Science: Credibility on the Line* (Chicago, IL: University of Chicago Press, 1999) [Gieryn, *Boundaries*] at 16-17.

ciplines by determining where scholars agree and where credible fault lines remain.[68]

Whatever the value of this proposal, a variety of factors limit my analysis. While the focus in this paper is identifying and demonstrating two debates designed to identify key differences between scholars, one issue surrounds the similarities between the Constitutional Peace and Political Order schools of thought. For example, a member of the Political Order may very well recognize that "constitutional peace" is an essential consideration among the appropriate political calculations that might guide a Governor General. On this view, there may be only three clearly distinct schools of thought on the issue of the 2008 prorogation. One tentative reply here is based on my additional analysis through the project. When asked which view they most agreed with in Figure 3, some scholars initially associated with Constitutional Peace chose Good Government instead of Political Order. However, the categorical differences I imply through my analysis may simply be a matter of emphasis. Future research might test my findings by applying these schools of thought to other constitutional controversies beyond the specific questions that arose in 2008.

Another challenge is based on my call for increased intellectual humility and the deliberate inclusion of counterevidence within scholarly constitutional analysis. One challenge is that many constitutional scholars have legal backgrounds and tend to view constitutional principles not as arguments that animate various debates but as clear and unequivocal points of law. As such, my critique may fail to consider the structural constraints that are a function of the discipline itself. One possible reply is that this issue is generational. During my own legal training in the United Kingdom, students participated in obligatory moot trials in which they could not pre-select their position. Law students were required to prepare arguments for both sides and present for either based on the flip of a coin. I do not accept that disciplinary aversion to robust exchange through debate ought to be forgiven on the grounds that scholars of a certain era may be uncomfortable presenting what they see as certitudes in more modest terms.

Indeed, this lack of deliberative debate is the very problem I seek to highlight. To counter constitutional misrepresentations that serve as fact and underline the flexibility of our system of government, scholars must find more accessible ways to present the issues at stake. Presenting an issue as settled necessarily shuts down debate rather than encouraging greater participation,

68 Wheeldon, Heidt & Dooley, *supra* note 64.

creating an artificial boundary instead of fostering a more inclusive intellectual stance. Some will balk at such efforts. However, the willingness to participate in research on these questions and engage in good-faith debate is itself an indicator of who has the scholarly flexibility to present a detailed and coherent view of the strengths and weaknesses of various positions. These are the scholars who can best educate Canadians on these questions.

A final and related challenge concerns how best to engage Canadians. This article has argued that new debate models offer a means to overcome those who would co-opt these informational interactions for partisan purposes. Requiring that constitutional analyses acknowledge counterevidence ensures a measure of humility and replaces competition to assert correctness with a renewed focus on careful academic exploration. However, there are limited vehicles to combat constitutional illiteracy in Canada. The capacity through op-ed articles or during interviews to convey appropriate nuance is severely limited. While the Internet opens up new possibilities of finding effective ways to educate the general public, balancing the need for precision on these questions with ensuring the expanded accessibility of the information will be a complex process.[69]

To understand the differences between the positions taken by scholars, a greater focus on the underlying assumptions and the consequences is required. More creative forms of engagement are also necessary. An online resource detailing the schools of thought, allowing visitors to take surveys, and comparing arguments for and against various positions might assist this effort. Diversity in engagement is especially important given role that the media plays in building expectations for who will govern[70] and particularly during constitutional crises.[71] It is essential to find ways to engage journalists, commentators, and others who shape opinions in Canada in a variety of ways. This remains a challenge in Canada despite recent useful and important efforts.[72]

69 This is an essential point and beyond the purview of this paper. In future work I consider how to conceive of a longer-term project designed to engage and educate. For example, there are scholars whose academic work extends to micro-blogging sites like Twitter who have shaped this work in myriad ways. Some of these scholars include Bruce Hicks, Phillipe Lagassé, Mark Jarvis, and Hugo Cyr

70 Hugo Cyr, "De La Formation du Gouvernement" (2013) 43:2 Revue Générale De Droit 381 [Cyr].

71 Miljan, *supra* note 45.

72 For example, Samara Canada uses research and educational programming to improve political participation in Canada by identifying key issues and engaging Canadians through its explicitly non-partisan research agenda. See generally <http://www.samaracanada.com/>.

## Conclusion

The UK House of Lord's Constitution Committee reviewed the 2008 prorogation in Canada, referring to it as an abuse.[73] They concluded that the circumstances in Canada were so unusual that the event should be seen neither as a precedent nor as a concern for future UK Parliaments. Professor Bogdanor suggested that a "wise constitutional monarch" would not prorogue at the request of a Prime Minister who no longer had the confidence of the House.[74] When asked of the possibility of such an event occurring in the UK, Professor Anthony Bradley replied:

> If you are thinking of a world in which anything can happen, however unthinkable, then prorogation could theoretically be used to avoid a no confidence debate, as possibly in Canada, but it would be very unsatisfactory and British politics would have sunk to a new low.[75]

My research suggests constitutional misrepresentations are more than mere political power grabs. They are the result of widespread confusion among the public and underlying disagreements among scholars about basic principles underlying Canadian governance.

This paper may offer a means to rethink constitutional studies not as a set of ironclad laws, but rather as a series of debates about which principles matter and why. Reframing the constitutional issues that emerged in 2008 as two distinct questions could offer a detailed primer on key constitutional concepts. The first question is about the nature of the Governor General's reserve powers; the second concerns the role of the Crown when a request to prorogue delays parliamentary accountability. Scholars can assist efforts to educate and engage Canadians by presenting the best arguments for and against each of these views, rather than stubbornly presenting one's own view as self-evidently correct.[76] Such an approach mocks academic integrity and fails to recognize

73 See UK, House of Lords, Select Committee on the Constitution, *8th Report of Session 2010: Fixed-Term Parliaments Bill* (HL Paper 69) (London: Her Majesty's Stationery Office, 2010). Specific questions and answers are listed as Q107-108 of the Minutes of Evidence, taken before the select committee on the constitution on Wednesday, October 27, 2010.

74 *Ibid.*

75 *Ibid.* The specific question and answer is listed as Q30 of the Minutes of Evidence, taken before the select committee on the constitution on Wednesday, October 6, 2010.

76 In future work, I extend this model to examine the view of 65 scholars on the role of the Governor General in the formation of government in Canada. See Wheeldon, Johannes. "An Empirical Assessment of the Views of Constitutional Scholars on the Role of the Governor General in the Formation of Government" (Paper delivered at the Canadian Association of Political Science Meetings, St. Catherine's, ON, 3-6 June 2014), [Wheeldon, 2014].)

that such scholarship amounts to simply cherry-picking evidence that validate one's own position. Two specific propositions that might usefully be debated through future analysis:

1. The appointment process of the Governor General should be revisited if the Crown's representative can substitute his or her own judgment for that of the elected House of Commons.

2. Civic education based on inclusive debate models must be encouraged to ensure that Canadians understand why the Governor General would never prorogue Parliament when confidence is in doubt.

Organizing debates through arguments of fact, value, and policy can assist to separate normative assumptions from empirical statements, thus requiring scholars take a clear position on what ought to occur when constitutional crises arise. Focusing on propositions in peer-reviewed sources and providing counterevidence as a part of the presentation of an argument treats minority views as worthy of inclusion, discussion, and debate. This model can better identify what ought to be the providence of credible scholarly analysis and may assist to define essential differences within Canadian constitutional scholarship. It cannot succeed, however, without a greater commitment to constitutional humility. If scholars cannot move beyond the hubris of their own self-serving certitude, then why should anyone else try?